Maine Municipal Association

Manual for Local Land Use Appeals Board

February 2017 revised edition | MMA Legal Services

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Introduction

Serving on a municipal board of appeals is one of the most difficult jobs that a citizen can volunteer to do. The appeals board must decide legal questions in accordance with local ordinances, State laws, and court cases. Often those decisions will seem harsh and contrary to "common sense," both to board members and to the general public. This is particularly true when the board is asked to decide a request for a variance. However, the board is bound to follow the law until the law is changed. Explaining this to citizens seeking help from the board probably is one of the board's most unpleasant tasks.

This manual has been prepared in an effort to lay out some of the basic legal information which every appeals board member should know in order to feel confident in performing the board's duties. We want to stress that it is a general discussion, however. While it will apply in most municipalities, a particular town or city may have an ordinance or charter provision which imposes different or additional rules or requirements for the board to follow. This manual is not intended to be a substitute for seeking legal advice from the municipality's private attorney or from the attorneys in MMA's Legal Services Department about how a specific State law, court decision or local ordinance applies to the facts of a particular case which the board must decide.

Any person using this manual should always check the exact section numbers and provisions of any statutes, ordinances, or codes mentioned in the manual's text, sample forms or other material. The references included in the manual are intended to provide general guidance to the reader rather than to serve as a substitute for reading the actual law. In this way, a person using these materials can be sure that an applicable law or regulation has not been amended.

The primary author of the various editions of this manual is Rebecca Warren Seel, Esq. Many thanks to Patti Soule and Carol Weigelt for their patience, hard work, and dedication in typing, proofing, and formatting this edition.

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Terms and Abbreviations Used in This Manual

M.R.S.A. means the Maine Revised Statutes Annotated. An example of a reference to the Maine Statutes would be 30-A M.R.S.A. § 2691. The number "30-A" refers to Title 30-A. The number "§ 2691" refers to section 2691 of Title 30-A.

A.2d or **Me.** refers to the series of Maine Supreme Judicial Court or Law Court cases reported for this State and court region. "A.2d" means the Atlantic region reports, 2nd series. "Me." means the Maine reports. An example of a case cite is "111 Me. 119, 88 A.398 (1913)." The numbers "111" and "88" refer to the volumes of the Maine and Atlantic region court reports. The numbers "119" and "398" refer to the pages of those volumes on which the case begins. The number "1913" indicates the date of the court's decision.

Maine Rules of Civil Procedure means the rules governing non-criminal cases brought before the Superior Court. The rules cover such matters as who may be named as parties to a court action, the information which must be contained in a complaint, the issues which must be raised, time limits for filing certain court documents, and others.

Et seq. means "and following sections."

Legislative body means the town meeting or the town or city council.

Municipal officers means the selectpeople or the town or city councilors.

Tort means an injury to a person or a person's property which is the result of an action which is not a criminal act and which is not based on a contractual relationship.

Damages means money which must be paid to a person as compensation for personal injury or property loss.

Note: Copies of the Maine statutes may be available at the town office or city hall. The statutes, court cases, and court rules of procedure also are available at the State Law Library, University of Maine law school library and possibly at the county courthouse. They are also available on the Internet. The website address for the Maine statutes is: www.mainelegislature.org/legis/statutes. To access Maine Supreme Court cases from 1997 to the present, go to: www.courts.state.me.us. Some Superior Court cases are available at: http://webapp.usm.maine.edu/SuperiorCourt/.

CHAPTER 1 – Creation, Appointment, Liability

The powers and duties of local boards of appeal are governed by the provisions of State statutes, local ordinances and, in some cases, town or city charters. (See the discussion which follows in Chapter 2.) A board of appeals cannot take any legally enforceable actions unless it has been formally created and unless the action which the board wants to take is specifically or implicitly authorized by a statute, ordinance, or charter provision. *Cf., Clark v. State Employees Appeals Board*, 363 A.2d 735 (Me. 1976*). Compare, Fisher v. Dame*, 433 A.2d 366 (Me. 1981). Therefore, board members should be sure that the board was created properly and should be familiar with the ordinances and statutes they will be using before trying to take any official action.

Creation of a Zoning Board of Appeals

The laws pertaining to the establishment of a board of appeals have been modified several times over the years. Consequently, in order to determine whether a board of appeals was created legally, it is important to know when it was created and how the law read at that time.

Boards Created Between 1957 and 1971

Between 1957 and September 23, 1971, 30 M.R.S.A. § 4954 (Chapter 405 of the 1957 Public Laws) governed how a city or town created its zoning board of appeals, who could serve on the board, and the board's various powers and duties. According to § 4954(1), once the legislative body of the municipality (i.e., the town meeting or town or city council, depending on the form of government) enacted a zoning ordinance, the municipal officers (i.e., selectpeople or council) were authorized to make appointments to the board. The board consisted of three members and one associate member serving three-year staggered terms. The regular members elected a chairperson and secretary from the membership of the board. Associate members could vote only if designated to do so by the chairperson because a voting member was absent, ill, or had a conflict of interest. The municipal officers could appoint someone to fill a permanent vacancy for the remainder of the term. A municipal officer could not serve on the board either as a member or an associate. A municipality with a population of 5,000 or more could adopt an ordinance creating a board of appeals with five or seven members and one associate member serving terms no greater than five years. The terms of no more than two members could expire in a single year. The municipality was required to adopt an ordinance through its legislative body to accomplish this. A copy of whatever ordinance was enacted should be contained in the record books of the municipal clerk.

Boards Created after September 23, 1971

In 1971 and 1972 the Legislature repealed and revised the planning and zoning sections of Title 30, some of which took effect on September 23, 1971 and some on March 15, 1972. According to 30-A M.R.S.A. § 2691 and § 4353, if a board was created pursuant to the repealed provisions of 30 M.R.S.A. § 4954, it can continue to function as a legally constituted appeals board under that section until the municipality decides to adopt a new ordinance or charter provision changing the composition or terms of the board. (Title 30-A is the successor to Title 30 of the Maine statutes. It became effective on February 28, 1989.)

If an appeals board is established after September 23, 1971, 30-A M.R.S.A. §§ 2691 and 4353 (formerly 30 M.R.S.A. § 2411 and § 4963 respectively) require a municipality to adopt an ordinance or charter provision before the board may legally exercise any of the zoning appeals functions delegated to it by State law. Neither of these State laws fixes the number of members or their terms. Section 2691 states that a board may have five or seven members serving terms of at least three years and no more than five years. This language requires the ordinance to specify the number of members and the length of their terms, at a minimum. In 1972 former § 2411 was amended to allow towns of less than 1,000 residents to create appeals boards consisting of three members. Section 2411 originally authorized municipalities of 5,000 or more residents to provide for up to three associate board members. In 1975 this provision of the law was revised to allow communities of any size to have a maximum of three associate appeals board members.

A new appeals board also may be created in municipalities which have a charter by amending the charter using the home rule charter procedures contained in Title 30-A of the statutes and Article VIII, part 2, section 1 of the Maine Constitution. Generally, the charter provision would be supplemented by a more detailed ordinance.

Boards Created Before 1957

Boards established prior to 1957 should review one of the following laws to determine whether the board was properly created in accordance with the law in effect in the year in which the board was formed: (1) Chapter 5, § 137 et seq. of the 1930 Revised Statutes; (2) Chapter 80, § 88 of the 1944 Revised Statutes; or (3) Chapter 91, § 97 et seq. of the 1954 Revised Statutes.

Ordinance or Article Wording

The important point to remember is that a board of appeals has no authority to act as an official arm of municipal government unless it has been legally established by one of the

methods described above. After September 23, 1971, a simple article in the warrant, such as "To see if the town will vote to establish a board of appeals," is not a sufficient procedure by itself to create a board because it leaves unanswered such questions as the number of board members and their terms of office. Nor is a provision in the town's shoreland zoning or other ordinance which simply states that a board is established "as provided in state law" sufficient to create a legal board. Also, any ordinance or charter provision establishing an appeals board after September 23, 1971 must be consistent with the provisions of 30-A M.R.S.A. § 2691, even if the ordinance or charter provision was enacted prior to February 28, 1989 (the effective date of § 2691). Sample ordinances and sample article wording appear in Appendix 1.

Any board which has doubts as to whether it has been legally established should contact the municipality's private attorney or MMA Legal Services for advice on how to reestablish the board. (See Appendix 1 for sample ordinance language.)

Creation of Other Types of Appeals Boards/Home Rule Authority

As was previously noted, before an appeals board can legally take any type of official action on an appeal or otherwise, it must be legally established in accordance with the law in effect at that time. There are a number of different State laws dealing with various types of local appeals boards.

Prior to the enactment of home rule ordinance authority by the Legislature in 1970 (30 M.R.S.A. § 1917) and home rule charter authority through an amendment to the Maine Constitution in 1969 (Article VIII, part 2, section 1), municipalities could not legally create an appeals board for any purpose other than zoning and property tax assessment appeals. 30 M.R.S.A. § 4954 and Public Laws 1963, c. 299. (See the MMA *Municipal Assessment Manual* for a discussion of assessment review boards.)

With the advent of home rule, municipalities could legally establish more general appeals boards for other purposes such as subdivision appeals, housing code appeals, site plan review appeals, and so on, or could delegate additional duties to the board of appeals and thereby increase its jurisdiction, provided the ordinance or charter provision creating the board or delegating duties was consistent with 30 M.R.S.A. § 2411 (now 30-A M.R.S.A. § 2691). At least one statute (30-A M.R.S.A. § 4103) expressly authorizes the municipality to delegate building code appeals to boards of appeal created pursuant to 30-A M.R.S.A. § 2691. In contrast, 28-A M.R.S.A. § 1054, relating to special amusement permits for licensed liquor establishments, automatically empowers appeals boards to hear special

amusement appeals without the need for action by the municipality. Another example of power to hear an appeal which is automatically conferred on the board by statute is a provision in Title 7, § 51 et seq. (Farmland Registration Law), which requires zoning boards of appeal to hear appeals regarding the eligibility of a particular piece of farmland for registration to entitle it to protection from "inconsistent development" on adjoining property and to entertain requests for variances to allow inconsistent development.

Elected Board Members

If a municipality already has an appointed appeals board and wants to change to an elected board pursuant to 30-A M.R.S.A. § 2691, it must enact an ordinance or charter provision which provides that the appointed board will be phased out by replacing the appointed members with elected members as the terms of the appointed members expire. See generally, *McQuillin, Municipal Corporations* (3rd ed. rev.), §§ 12.117–12.119, 12.121. If the positions are to be filled by written ballot election from the floor at open town meeting, the ordinance or charter provision should be adopted at least 90 days prior to the annual meeting at which the first election will occur. 30-A M.R.S.A. § 2525. If election will be by secret (pre-printed) ballot, then the ordinance or charter provision also must be approved at least 90 days prior to the annual election at which it will take effect. 30-A M.R.S.A. § 2528. The enactment of any charter provision also must conform to 30-A M.R.S.A. §§ 2101–2109. It should be noted that elected appeals boards were not clearly authorized prior to 1988 except by charter. The "90 day" rules described above also apply where an elected board is being changed to an appointed one.

In communities establishing an appeals board for the first time, the board members may be elected or appointed. The method of selection must be stated in the ordinance or charter provision creating the board. The adoption of the ordinance or charter provision creating an elected board must occur at least 90 days before the annual meeting at which the first board members will be elected. 30-A M.R.S.A. § 2525 and § 2528. In 2017, the Legislature extended the filing deadline for nomination papers from 45 days prior to the date of the election to 60 days prior to the date of the election, which means nomination papers now must be made available 100 days prior to the election (P.L. 2017, ch. 249, § 9). Municipalities should consider holding a vote on an ordinance or charter provision establishing a board of appeals or changing from an appointed to elected board, or vice versa, at least 100 days prior to the annual town meeting at which it will take effect to ensure compliance with the new nomination paper timeframe.

Qualifications for Office

Age, Residency, Citizenship

Title 30-A § 2526 states that, generally, a person must be 18 years old, a resident of the State, and a U.S. citizen in order to hold a municipal office. Most municipal officials, including appeals board members, do not have to be registered voters or legal residents of the municipality in order to serve in an elected or appointed position, unless required by local charter; the selectpeople and school board members are the exceptions to this rule under State law.

Oath

Whether a board member is elected or appointed, he or she must be sworn into office by someone with authority to administer oaths, such as the clerk, the moderator (if during open town meeting), a notary public, or a dedimus justice, before performing any official duties as a board member. 30-A M.R.S.A. § 2526. The oath should be taken at the beginning of each new term; it does not need to be administered each year if a member is serving a multi-year term.

Incompatible Positions

A person serving on an appeals board may not hold another office which is "incompatible" with the appeals board position. Two offices are "incompatible" if the duties of each are so inconsistent or conflicting that one person holding both would not be able to perform the duties of each with undivided loyalty. *Howard v. Harrington*, 114 Me. 443, 446 (1916); *McQuillin, Municipal Corporations* (3rd ed. rev.) § 12.67. An example of incompatible offices would be if one person served on both the planning board and zoning board of appeals under an ordinance scheme which authorized planning board decisions to be appealed to the board of appeals, since the same person would be involved in making the initial decision and then deciding whether that decision was correct on appeal. The positions of local building inspector and code enforcement officer also would be incompatible with the position of appeals board member if the appeals board has been authorized to hear appeals from decisions made by either one of those other officials. It also is incompatible for one person to serve as a selectperson or councilor and an appeals board member because 30-A M.R.S.A. § 2691 expressly prohibits it. That same law also prohibits the spouse of a selectperson or councilor from serving on the appeals board.

The courts have ruled that, in accepting and taking an oath for an office which is incompatible with one already held the person automatically vacates the first office as

though he or she had actually resigned it. *Stubbs v. Lee,* 64 Me. 195 (1914); *Howard v. Harrington, supra.*

The question of what constitutes a "conflict of interest" for voting purposes is often confused with the legal doctrine of "incompatibility of office." Conflict of interest is discussed in Chapter 3.

Vacancy

As a general rule, when a permanent vacancy occurs in an appointed appeals board position, the municipal officers have the authority to fill the vacancy by appointment for the remainder of the term. 30-A M.R.S.A. § 2602. The ordinance or charter provision creating the board should define what constitutes a "permanent vacancy." If a vacancy occurs on an elected board, the municipal officers may either appoint someone to fill the vacancy for the remainder of the term or leave the position unfilled, if there is no ordinance or charter provision to the contrary, but they do not have the authority to fill the position by calling an election. 30-A M.R.S.A. § 2602; *Googins v. Gilpatrick,* 131 Me. 23 (1932).

If the term of office of a board member expires and neither the person holding the office nor another person has been appointed or elected to fill the position, it is arguable that the person who was serving in that position (i.e., the incumbent) may continue to hold office under the previous term until he or she has been reelected or reappointed or until another person has been chosen and sworn in. An incumbent board member who continues to serve under those circumstances would be what is called a "de facto" member of the board. *McQuillin*, *Municipal Corporations* (3rd ed. rev.), §§ 12.102, 12.105, 12.106. However, the legal basis for this **"**holdover**"** theory is stronger where an elected board is involved. To be safe, it is advisable to have an ordinance or charter provision clearly authorizing such an elected or appointed official to continue to serve.

If board members are elected and the municipal officers fail to make a provision in the annual town meeting warrant and on the ballot for the election of a board member whose term was due to be filled at that election, the result would be a "failure to elect" a person for that position, creating a vacancy in that position under 30-A M.R.S.A. § 2602. The municipal officers have the authority to appoint someone to the position in that situation for the balance of the term. *Googins v. Gilpatrick, supra.*

Removal

If an appeals board position is one which is filled by an appointment made by the municipal officers for a definite term, then the municipal officers may remove that person before the end of the term only for just cause, after notice and hearing. 30-A M.R.S.A. § 2601 and § 2691(2)(D). "Just cause" means a legally justifiable reason, such as a blatant disregard for the law. "Just cause" probably does not include a philosophical disagreement with decisions made by the board or personality conflicts. An elected board member cannot be removed from office either by the municipal officers or the voters prior to the expiration of his or her term unless the municipality has adopted a recall provision by charter or by ordinance or unless authorized under the recall provision in state law, which provides a recall process for removal of municipal officials in certain limited circumstances. 30-A M.R.S.A. § 2602 and 2505.

Liability of Board Members

Nonperformance of Duty

Title 30-A § 2607 states that a municipal official can be personally liable for a $100 fine for neglecting or refusing to perform a duty of office. An example of neglect or refusal is where a person files an application with the board and the board refuses to call a meeting or continually tables action without a valid reason in the hope of discouraging the applicant.

Maine Tort Claims Act

- ***Individual Board Members Generally Immune.*** The exceptions to liability found in 14 M.R.S.A. § 8111 generally protect a board of appeals member from personal liability and having to pay monetary damages to an injured party. The statute provides immunity from liability for an action or failure to act which falls into one of the following categories: "quasi-legislative" (for example, adoption of bylaws or procedures); "quasi-judicial" (for example, granting or denying a variance); "discretionary" (for example, an ordinance provision which gives the board discretion whether to conduct a site visit or whether to conduct a public hearing); or intentional, as long as the board members acted in good faith and within the scope of their authority (for example, where a board member comments at a board meeting about the quality of work submitted by one of the applicant's experts). The statute also provides immunity from claims based on the performance or failure to perform an administrative enforcement function.
- ***Individual Liability for Negligence.*** Under 14 M.R.S.A § 8104-D, an individual board member may be personally liable for his/her negligent or intentional act or failure to act if the act is ministerial (not involving any discretion), is an intentional act not undertaken in

good faith, or is outside the scope of his/her authority. A possible example of a negligent act is where the board approves a variance from a road frontage requirement where the ordinance says only lot size and setback requirements may be reduced by variance. An example of an action outside the authority of a board member is where a board member is consulted by a member of the public about whether a certain permit or variance is needed for a project, the board member provides advice which is wrong, and the person relies to his detriment on that advice. In order to recover damages as compensation for negligence, the person would have to show that he or she was injured and that the board member's negligence was the cause of the injury and not something else, such as the applicant's own negligence.

- ***Municipal Liability and Immunity; Defense/Indemnification of Board Members.*** Generally, the municipality will be immune from liability under the Tort Claims Act when a suit is brought against the board based on a decision by the board, since the municipality's liability must be tied to one of the categories in § 8104-A of the statute, all of which relate to negligence in connection with municipal equipment, buildings, pollution, or public works projects. However, § 8112 of the Act generally requires the municipality to provide insurance or to pay attorney fees and damages on behalf of each of the board members in an amount up to $10,000 (the statutory limit on personal liability) in cases where a board member is found liable for negligence. Where the members of the board are criminally liable, where they act in bad faith, or where they act outside the scope of their authority, they may be required to pay their own attorney fees and damages; these damages may exceed the $10,000 cap under the Tort Claims Act and may be beyond the coverage of the town's public officials liability insurance. Generally, a municipality will stand behind its board members and pay such costs either by providing insurance or by appropriating money for that purpose, except where a board member is guilty of conduct in bad faith which is outside his or her authority and which the municipality does not want to condone. Examples of such conduct are physical assault of an audience member or repeated unilateral acts by a board member without majority approval of the board.
- ***Notice of Suit.*** Board members who are sued under the Tort Claims Act should notify the town or city manager (if any) or the municipal officers immediately, since an insurer may deny defense and coverage for lack of timely notice. Members also should refrain from commenting publicly about the suit.

Maine Civil Rights Act

The Maine Civil Rights Act (5 M.R.S.A. § 4681-§ 4683) prohibits a person from "intentionally interfer(ing) by threat, intimidation or coercion" with another person's exercise or enjoyment of rights secured by the U.S. Constitution or the laws of the United

States or rights secured by the Maine Constitution or laws of the State. Unlike federal law (see discussion below), the State Civil Rights Act does not apply only to actions done "under color of law." This means that a board member could be sued under this law whether or not he or she was acting in an official capacity if a violation of this law results from that board member's action. The Maine Attorney General is authorized to seek an injunction or other corrective action on behalf of the injured person in order to protect that person in exercising his or her rights. The injured person also may pursue a civil action on his or her own behalf seeking appropriate monetary or corrective relief. The law also authorizes the successful party (other than the State) to recover its reasonable attorney fees and costs. For a case interpreting this law, see *Duchaine v. Town of Gorham*, CV-99-573 (Me. Super. Ct., Cum. Cty., June 15, 2001).

Federal Civil Rights Act of 1871

The federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983) prohibits any violation of any individual right which is guaranteed by either the United States Constitution or a federal statute.

- ***Individual Liability.*** Individual board members would be immune from personal liability under federal law for damages resulting from a board decision if the board acted in "good faith". "Good faith" means that the board did not know and should not have known that its decision would deprive the injured person of a federal or constitutional right. *Owen v. City of Independence,* 445 U.S. 622 (1980). For example, if the appeals board denies an application, the applicant might try to sue the board and ask a court to order the board to approve the application and to pay damages to him as compensation for the loss of use of his property. As long as the board acted in good faith in interpreting the ordinance and denying the application, the court would not award damages against the members even if the court found that the application should have been approved. However, if, for example, the court found that the only reason that the board had for denying the application was that it wanted to prevent a family with a particular ethnic background from moving into the neighborhood, it probably would award damages against the board members personally.
- ***Municipal Liability.*** Even if the board members are not personally liable for damages, the municipality will be liable if the court finds that the person bringing the suit actually was deprived of a federal or constitutional right by the board's decision and the decision was made pursuant to a "policy, practice, or custom" of the municipality. The municipality cannot rely on the board's good faith in defending a suit against the municipality.

- ***Damages; Attorney Fees; Defense and Indemnification.*** A person who wins a case under the Civil Rights Act of 1871, whether against the municipality or the members of the board, can recover attorney fees as well as damages. (42 U.S.C.A. § 1988). There is no statutory limit on damages under the federal law as there is under the Maine Tort Claims Act. Title 14 § 8112 (2-A) (Maine Tort Claims Act) states essentially that if board members are sued for violating someone's rights under a federal law, the municipality must pay their defense costs and may pay any damages awarded against them for a violation of federal law, if they consent. This is not true if they are found criminally liable or if it is proven that they acted in bad faith.
- ***Notice of Suit.*** If sued under federal law, the board should notify the town or city manager (if any) or the municipal officers immediately, since an insurer may deny coverage and defense if notice is not provided in time.

Maine Freedom of Access Act

The Maine Freedom of Access Act (FOAA) (1 M.R.S.A. § 401 et seq.) (Also known as the "Right to Know Law") requires the appeals board to allow the general public to attend board meetings and workshops, to open its records for public inspection, and to give prior public notice of its meetings. A more detailed discussion of how it affects the appeals board appears in Chapter 3 of this manual. If the board willfully violates the FOAA, the municipality or the board members could be liable to pay a $500 fine for the first violation, $1,000 for a second violation within four years and $2,000 for a third violation within four years. 1 M.R.S.A. §§ 409, 410. Also, section 409 states that certain decisions made in violation of the FOAA are void.

Records Retention and Preservation and Public Access

Title 5 M.R.S.A. § 95-B requires municipal boards and officials to comply with regulations adopted by the State Archives Advisory Board when destroying or disposing of public records. Those regulations set out specific retention periods for many public records and establish a general rule of indefinite retention for records not expressly covered. Those rules are available on the State of Maine's website at http://www.maine.gov/sos/arc/records/local/localschedules.html. Any person who violates those rules is guilty of a Class D crime. Section 95-B also requires boards and officials to protect the public records in their custody from damage or destruction. An official who leaves public office has an obligation under this statute to turn over any public records in his or her possession to his or her successor.

Records in the custody and control of the board of appeals are public records under Maine's Freedom of Access Act, with rare exceptions. Any member of the general public has a right to inspect public records at a time that is mutually convenient for the custodian and the person wanting to inspect them. Inspection should be done with supervision of the custodian or someone designated by the custodian; a member of the public should never be allowed to remove public records and take them somewhere else to review and copy. If the person wants a copy of a public record, the municipality may charge a reasonable fee and may charge for research and retrieval time to the extent authorized by 1 M.R.S.A. § 408-A. When a person wants to inspect or obtain a copy of a record which might be confidential, the custodian has five working days to determine whether the record is public and to issue a written denial if it is not. 1 M.R.S.A. § 408-A. Written, audio- or video-recorded and electronic materials all generally fall within the definition of "public record" for the purposes of the Freedom of Access Act if they are received or made by the board in connection with the transaction of public business. Application materials, board minutes, email communications, electronic records, audio recordings and personal notes taken by board members at board meetings are all examples of "public records" for the purposes of the FOAA.

The custodian of the record or other designated local official must acknowledge a request to inspect and/or copy public records within 5 working days of receiving the request and may request clarification concerning which public record or records are being requested. 30-A M.R.S.A. § 408-A(3). The record itself must be provided to the requestor for inspection or copying within a reasonable time of receiving the request, which may be longer than the 5 working days timeframe for providing the acknowledgement. Although a request need not be made in writing, the custodian should acknowledge the request in writing if possible. The acknowledgment must include a good faith, non-binding estimate of the time within which the appropriate official will comply with the request.

If an elected appeals board member receives an email from a constituent that contains the following personal information, that information is confidential under 1 M.R.S.A. § 402(3)(C-1): personal medical information; credit or financial information; information pertaining to the personal history, general character or conduct of the constituent or member of his/her family; material related to charges or complaints of misconduct or disciplinary action; the person's Social Security number. Information which would be confidential in the possession of another public agency or official is also confidential if contained in a communication between an elected board member and a constituent.

CHAPTER 2 – Jurisdiction of the Appeals Board

In the absence of a State statute, local ordinance, or charter provision expressly stating that a decision may be appealed to a local board of appeals, the board of appeals has no "jurisdiction" (legal authority) to hear such an appeal. *Fisher v. Dame*, 433 A.2d 366 (Me. 1981); *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91, 95 (Me. 1984). Where no local appeal is authorized, a person's only appeal (if any) is to the Superior Court under Civil Rule of Procedure 80B. 30-A M.R.S.A. § 2691; *Lyons v. Board of Directors of SAD No. 43*, 503 A.2d 233 (Me.1986); *Levesque v. Inhabitants of Town of Eliot*, 448 A.2d 876 (Me. 1982).

Statutory Appeals Jurisdiction

There are four statutory provisions which give jurisdiction to the appeals board over certain types of appeals.

Zoning

Title 30-A § 4353 authorizes the appeals board to hear and decide administrative appeals, interpretation appeals, and requests for variances filed in connection with decisions made under a zoning or shoreland zoning ordinance. That section also authorizes the board to grant special exception or conditional use permits in strict compliance with the ordinance, except where the planning board has been authorized by ordinance to act; in that case, the board of appeals is authorized to hear appeals from such decisions unless the ordinance requires appeals to go directly to Superior Court. (A copy of § 4353 appears in Appendix 4.)

Enforcement Decisions

Title 30-A § 2691 authorizes an appeals board to hear and decide appeals from enforcement decisions (i.e. notices of violation or enforcement orders) issued by a code enforcement officer under a land use ordinance, unless a municipality has expressly provided by charter or ordinance that certain decisions from its CEO are only advisory and may not be appealed. The Maine Supreme Court has held that a notice of "no violation" is also appealable, unless a municipality expressly provides otherwise. *Raposa v. Town of York*, 2019 ME 29, 204 A.3d 129.

Special Amusement Permits

Title 30-A § 2691(4) grants jurisdiction to appeals boards over appeals filed under the State law relating to special amusement permits (28-A M.R.S.A. § 1054). A special amusement

permit is required from the municipal officers before any licensed liquor establishment can offer "entertainment" as defined in that law. Municipalities are required to have ordinances or regulations spelling out the conditions which an applicant must meet in order to obtain such a permit.

Farmland Registration Law

Title 7 M.R.S.A. sections 51-59 establish a process that allows a landowner to register "farmland" as defined with the Department of Agriculture, Conservation, and Forestry. Abutting landowners are prohibited under section 56 from undertaking or allowing "inconsistent development" or "incompatible uses" as defined on their land within 100 feet and 50 feet respectively of properly registered farmland. Municipalities are prohibited from issuing building or use permits for "inconsistent development" or "incompatible uses." Certain abutting lands are exempt from the prohibition. Section 57 authorizes the board of appeals to grant a variance in limited situations.

Jurisdiction by Ordinance or Charter

Unless an appeal falls within one of the statutory categories previously discussed, the appeals board must look for a local ordinance or charter provision providing the legal basis for any other type of appeal filed with the board before the board may legally act. *Sanborn v. Town of Sebago,* 2007 ME 60, 924 A.2d 1061 (and cases cited therein). Title 30-A § 2691(4) provides: "No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board." In *Sanborn*, the court held that the board could hear both a shoreland zoning appeal and an appeal of a decision to issue a permit under the Building Ordinance, even though the Building Ordinance only expressly authorized appeals from the denial of a permit. The court found that, as a matter of public policy, it was appropriate for the board to take jurisdiction over Building Ordinance issues when a shoreland zoning ordinance issue has been appealed to it.

A number of State laws indicate subject areas in which the appeals board may be authorized to act, such as building codes (30-A M.R.S.A. § 4103) and tax assessment appeals (30-A M.R.S.A. § 2526). These laws do not automatically give the board jurisdiction. They require an ordinance or charter provision to implement them. Likewise, if a municipality wants to provide a local appeal under any type of "home rule" ordinance other than zoning (e.g., site plan review, subdivision, building code), it must be sure to include an express appeal provision giving authority to the appeals board which complies with 30-A M.R.S.A.

§ 2691(4). Sample ordinance provisions are included in Appendix 1 of this manual. Where no ordinance authorizes a board of appeals to hear an appeal from a building inspector's decision pursuant to Title 25, chapter 313 (fire prevention statutes) or Title 10, chapter 1103 (model building and energy code), an appeal may be heard and decided by the municipal officers. 30-A M.R.S.A. § 4103; 25 M.R.S.A. §§ 2356, 2357-A; 10M.R.S.A. § 9724(5)."

Specifically as to building codes, 25 M.R.S.A. §§ 2356 and 2357-A, 10 M.R.S.A. § 9724(5), and 30-A M.R.S.A. § 4103(5) all indicate that a municipality that is enforcing the Maine Uniform Building and Energy Code, the Maine Uniform Building Code, or the Maine Uniform Energy Code may adopt an ordinance provision establishing a right to file a local appeal from a decision of a local building official and an appeal process. The ordinance may give the board of appeals jurisdiction over such appeals. If no local ordinance provision is adopted giving the board of appeals jurisdiction, the appeals provision in 30-A M.R.S.A. § 4103(5) gives the municipal officers authority to hear those appeals and governs the process. Even if an ordinance grants jurisdiction to the board of appeals, the procedures in section 4103(5) will control the board of appeals, in the absence of procedures in a local ordinance to the contrary. Section 4103(5) requires a decision to be made at the next meeting following receipt of a written appeal. It also provides that if no written decision is issued to the person who filed the appeal within 30 days after the appeal was filed, the appeal is deemed denied.

Regarding subdivision appeals, whether a municipality is reviewing a subdivision solely under the Municipal Subdivision Law (30-A M.R.S.A. § 4401 et seq.) or under a local subdivision ordinance or regulation, the board of appeals has no authority to hear subdivision appeals unless expressly authorized by municipal ordinance. Although a planning board is authorized by 30-A M.R.S.A. § 4403 to adopt subdivision regulations, it does not have the authority to include an appeal provision in its regulations; that must be done by an ordinance adopted by the legislative body (town meeting or town or city council).

The board of appeals does not have jurisdiction over appeals from a decision by the local plumbing inspector made pursuant to the Maine Subsurface Wastewater Disposal Rules, unless expressly authorized to hear those appeals by local ordinance. 30-A M.R.S.A. § 2691. The Rules provide that "appeals of decisions made by local authorities must be made to the relevant municipal officials." 10-144 CMR ch. 241, section 12(A)(1). It isn't clear what "the relevant municipal officials" means. The municipality probably should adopt an ordinance expressly authorizing the board of appeals, the municipal officers or some other local official or board to hear these appeals to be safe.

Other Assignments

In some municipalities, a board of appeals may be asked by the municipal officers or town or city manager to assist with a project such as drafting a new ordinance or revisions to an existing ordinance. While such a task may not be one which the board is legally required to perform, if the members have the time and willingness to help, then they may do so.

CHAPTER 3 – The Decision-Making Process

The discussion which follows should be used by the appeals board as a general guide in dealing with applications in which it is the original decision-maker (e.g., variance applications) or appeal applications in which the ordinance requires the board to conduct a "de novo" review. There may be provisions in a local ordinance which conflict with these general rules and which may control the board's decision. If the board is faced with such a conflict, it should consult with the board's attorney to resolve it. For additional discussion regarding variances, the board also should refer to Chapters 4 and 5 of this manual.

Forms

An important first step in establishing good decision-making procedures is the development of good application forms. The forms should let the applicant know what information the board wants and should require the applicant to sign the form once completed. Sample forms are included in Appendix 3. Others may be available from the regional planning agency serving the area or from neighboring communities who have developed good systems of their own. Before using sample or borrowed forms, however, the board must review them carefully to be sure that they will fit the board's needs and are consistent with the town or city ordinance which governs the application. The form cannot require an applicant to do something not expressly or implicitly required by the ordinance. Application forms do not normally require the approval of the legislative body. The board generally has implicit authority to develop forms.

Appeals Board Bylaws

In the absence of a local ordinance or charter provision to the contrary, any administrative board, like an appeals board, can (and should) adopt written bylaws to govern nonsubstantive "housekeeping" matters. Such bylaws generally do not need to be approved by the legislative body. *In Re Maine Clean Fuels, Inc*., 310 A.2d 736 (Me. 1973); *Jackson v. Town of Kennebunk,* 530 A.2d 717 (Me. 1987).

This is because bylaws of this type are not the same as an ordinance. Examples of the kinds of things covered in bylaws are the election of officers, the time and place of meetings, how meetings are called and advertised, agenda items, and the rules of procedure which the board will use to run its regular meetings and public hearings, where not otherwise addressed in a State law or a local ordinance or charter. Issues such as the number of board members needed to constitute a quorum, the number of votes needed to approve a motion, the number

of absences allowed before a position can be declared vacant, and the deadline for filing an appeal generally must be established by ordinance or charter adopted by the legislative body rather than merely in bylaws approved by the board, unless the board's bylaws are simply stating a rule that already exists by virtue of a local or State law. 1 M.R.S.A. § 71; 30-A M.R.S.A. § 2691. Sample bylaws and hearing procedures are included in Appendix 2. In adopting bylaws, the board should be careful to avoid conflicts with a local ordinance or charter or a State or federal law. A board created prior to 1971 also should avoid conflicts in its bylaws with 30 M.R.S.A. § 4954. Even though bylaws do not need the approval of the legislative body in most cases, the board may want to submit them for approval to avoid arguments that any portion of the bylaws exceeds the board's authority. In the absence of written bylaws, or where written bylaws do not address an issue, the board is free to fashion its own procedure and the courts will defer to the board's procedure so long as that procedure is fair and does not conflict with State, federal or local law. *Jackson v. Town of Kennebunk,* 530 A.2d 717 (Me. 1987).

Standing to Apply for a Permit

If the ordinance or statute under which an application for a permit or other approval is being submitted does not state who has a sufficient legal interest in the property in question (i.e., "standing") to apply for approval to conduct a project, the Maine Supreme Court has ruled that the applicant must be a person who has some "right, title or interest" in the property. *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974); *Murray v. Inhabitants of the Town of Lincolnville,* 462 A.2d 40 (Me. 1983). This could include a written option or contract to purchase the property or a leasehold or easement interest. However, whether these documents/interests are sufficient for the purposes of conferring standing to apply for a permit to conduct a particular use will depend on the language of the document/deeded interest. The document/deed must give the applicant a "legally cognizable expectation" of having the power to use the property in the ways that would be authorized by the permit if approved. *Murray v. Town of Lincolnville, supra*. For example, where a person who had an easement for ingress and egress to a lake did not have a right to build and use a dock by virtue of the language of that easement, that person lacked standing to apply for a permit. *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). See also, *Badger v. Hill*, 404 A.2d 222 (Me. 1979), and *Picker v. State of Maine Department of Environmental Protection*, AP-01-75 (Me. Super. Ct., Kenn. Cty., April 6, 2002) (restrictive covenant didn't deprive landowner of standing to apply for a permit and prove that he could conduct the proposed use within the restricted area without violating the deed covenant). A title dispute will not automatically deprive a person of standing to apply for a permit. *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995.) Where property is jointly owned, all owners need not be parties to the application in order for the "standing" test to be met.

Losick v. Binda, 130 A.537 (NJ 1925). If an applicant relies on a written option to purchase as the basis for standing to apply and then allows the option to lapse, such a lapse would allow the board to find that the applicant no longer has standing. *Madore v. Maine Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157. The board should reject an application if it determines that the applicant does not have standing to apply. The burden is on the applicant to present evidence sufficient to satisfy the board, such as a copy of the property deed, written lease, or written option agreement. If the person filing the application is acting as the authorized agent of the owner, that person should give the board a written letter of authorization signed by the owner. This "standing" test governs people who are seeking approval of an application for a permit, conditional use, or variance from the board or official who has the initial authority to grant such a request. The courts have established a different "standing" test for people who want to *appeal* such a decision. That test is discussed in Chapter 4 of this manual.

Freedom of Access Act ("Right to Know Law")

General

Under the Freedom of Access Act (FOAA) (also known as the "Right to Know Law") (1 M.R.S.A. § 401 et seq.), the public has a right to be present any time the board or a subcommittee of the board meets, even if the meeting is just a "workshop" or a "strategy meeting." Any meeting of a majority of the full board at which the members will discuss official business or vote must be preceded by public notice. The same is true for subcommittees of the board comprised of three or more members; some attorneys are of the opinion that a subcommittee of any size is governed by the public notice requirements if the body which has designated the subcommittee is itself comprised of three or more members. *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). This law also gives the public the right to tape, film and take notes of the meeting, as long as it is done in a non-disruptive manner. It does not guarantee the public a right to speak. The right to speak is guaranteed only where a meeting has been advertised as a public hearing, absent a local ordinance or bylaw to the contrary.

Notice of Meetings

The FOAA itself does not require that a meeting agenda be posted and does not specify the form or amount of the notice which must be used to publicize the meeting. The law does require notice of non-emergency meetings to be given in a manner reasonably calculated to inform the public far enough in advance of the meeting to allow the public to make plans to attend. In some communities, this may mean newspaper notice of some sort and in others posting notice around town may be enough. Giving notice about a week before the meeting

is advisable for both regular and special meetings. If the meeting is an emergency meeting, the FOAA requires the board to notify a media representative using the same or faster means as are used to notify board members, rather than giving notice to the public as described above. If no media representative attends, that doesn't make the meeting illegal. Be sure to document how, when and who from the media was notified. If the meeting in question is a regular board meeting and notice of the board's regular meeting schedule was given in the annual town report, such notice might be enough for the purposes of the FOAA in some towns. However, it probably would be safer to post a standing notice of regular meetings in a readily-accessible public place, such as the town office public bulletin board or the Post Office or a local store, and leave it up indefinitely. Local ordinance or charter provisions may impose more specific and more stringent notice requirements.

Board Member Discussions/Email

To avoid violations of the FOAA and the constitutional right to due process, board members should not have discussions with other board members regarding an application or other board business outside an advertised board meeting. The FOAA requires discussion, deliberation and voting by the board to be done at a public meeting so that the public can hear and observe what is said and done by the board. Discussion between board members about board business outside a public meeting should not occur, whether or not a majority of the board is involved, and whether or not the discussion occurs by phone, by email, at a sports event or grocery store or after the board meeting was adjourned. Any such communications should be limited to nonsubstantive issues; for example, calling or emailing board members to set a meeting date or agenda items. Delivery of substantive information between meetings by email may be permissible as long as no discussion of the information occurs outside the meeting by email or otherwise. The email should expressly state that the attached information is for discussion at the next board meeting, should invite board members to review and think about it, and should caution board members not to discuss it before the public meeting. The email and attachments should be noted in the record of the next board meeting and all parties should be given access to the information and provided a reasonable opportunity to review it and offer comments. See *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148, for a case involving these issues.

Title 1 M.R.S.A. § 401 states that the FOAA "does not prohibit communications outside of public proceedings between members of the public body unless those communications are used to defeat the purposes" of the FOAA. Best practice is to avoid any substantive discussions of matters presently before the board or anticipated, whether the discussion relates to an application review, ordinance drafting or other substantive board work.

Executive Sessions

One exception to the rule that meetings are open to the public is where the board wants to consult with its lawyer "concerning the legal rights and duties of the (board), pending or contemplated litigation, settlement offers, and matters where the attorney/client privilege between the board and its lawyer would be jeopardized or where premature public knowledge would clearly place the municipality at a substantial disadvantage." To fall within this exception, the board's attorney should be at the meeting either in person or by conference telephone call. Section 405 of the FOAA only allows the board to conduct a discussion with its attorney in an "executive session" if the board (1) takes the vote to go into executive session in a public meeting, (2) follows the requirements related to the motion and the vote in § 405, and (3) does not make any final decisions in executive session. In *Underwood v. City of Presque Isle*, 1998 ME 166, 715 A.2d 148, the court found that the planning board had conducted impermissible discussions about the merits of the land use proposal which it was reviewing while in executive session with its attorney to receive advice regarding the board's legal rights and duties. The court noted that "it may be difficult at times for a board convening in executive session (with its attorney) to determine when its permissible consultation with counsel has ended and impermissible deliberations on the merits of a matter have begun. We cannot offer any bright line to eliminate that difficulty. We can, however, remind public boards and agencies of the Legislature's declaration in the (Freedom of Access Law) that 'their deliberations be conducted openly,' and that the (law) 'be liberally construed…to promote its underlying purposes.' Consistent with these declarations, any statutory exceptions to the requirement of public deliberations must be narrowly construed. The mere presence of an attorney cannot be used to circumvent the (Freedom of Access Law's) open meeting requirement." Section 405 authorizes other subject matter to be discussed in an executive session, but those other subjects generally are not relevant to boards of appeal.

Common Violations

Practices which violate the Freedom of Access Act include the following:

a. polling board members by telephone to vote on an application or to discuss it;

b. taking an application house to house to have it approved or leaving it at the town office for board members to review and sign individually rather than by a public vote of the board;

c. chance meetings between board members and/or with private citizens at the grocery store or a private party at which they discuss an application, especially where a majority of the board is involved in the discussion;

d. making decisions in a "closed door" meeting or excluding the public when not authorized by law;

e. conducting discussions or making decisions by e-mail.

Site Visits

If a majority of the board is going to visit the site of a proposed project or appeal, the board should be aware that such on-site meetings are meetings which must be preceded by public notice and at which the public has a right to be present under the FOAA. Site visits conducted by individual board members or by a subcommittee comprised of less than a majority of the full board arguably are legal and would not be subject to the public notice requirements of the law. However, site visits by individual members or by subcommittees of less than a majority of the full board can raise due process problems which the board may wish to avoid, especially where the site visit occurs after the board has closed its record to additional public comment and has begun to make its decision. *Compare*, *City of Biddeford v. Adams*, 1999 ME 49, 727 A.2d 346 (Me. 1999), and *Fitanides v. Lambert*, CV-92-662 (Me. Super. Ct., York Cty., July 30, 1992), with *Armstrong v. Town of Cape Elizabeth*, AP-00-023 (Me. Super. Ct., Cum. Cty., Dec. 21, 2000). Many private municipal attorneys advise the municipal boards that they represent that site visits conducted by less than a majority of the board should never occur and insist that the board only conduct site visits as a public meeting of a majority of the board. See generally, *Fitanides v. City of Saco,* 684 A.2d 421 (Me. 1996).

During a site visit which is conducted by less than a majority of the board and not as part of a public meeting recorded in board minutes, the individual board members have an obligation not to discuss substantive issues about the site or the application with each other, the applicant, or anyone else. Nor should the applicant or anyone else be conducting demonstrations to prove a point which might be in controversy about the application. Such discussions or demonstrations would constitute illegal *"ex parte"* communications and would cause due process problems for the parties not present. The individual board members also need to be sure to note for the written record at the next board meeting the fact that a site visit was conducted and what information the visit generated that might affect the visiting board member's vote on the application. It is crucial that a site visit conducted by less than a majority of the full board occur before the board closed the record to any further

public comment. Otherwise, the board must reopen the record and allow public comment on the information generated by the site visit. *Adams, supra.* See generally, *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148. It is also crucial that the ultimate findings and conclusions prepared by the board in making its decision address the evidence from the site visit and that the findings in general are sufficiently detailed to allow a court to determine how the board evaluated all the evidence. *In Re Villeneuve*, 709 A.2d 1067 (Vt. 1998).

Even if the board members do all of this, an applicant or someone opposing the project still could try to challenge a site visit not conducted as a board as a violation of his/her due process rights if he/she was not at the site to observe whether there were any improper "ex parte" communications. To avoid these due process challenges, the board may want to require that all site visits be done as a board with public notice under the Right to Know Law. If a board member is unable to attend a site visit, the board doesn't need to reschedule it. The board can publicly advise an absent member of what was observed during the site visit at the next board meeting.

Sometimes a board decides to conduct a site visit and sets a date for the site visit while it is at a public meeting on the application which will be the subject of the site visit. It arguably is enough for the purpose of giving notice under the FOAA for the board to announce the date, time and place of the site visit without also providing additional public notice by some other means, if the announcement is made at a meeting which itself complied with FOAA notice requirements. However, to be safe, the board also should provide notice to the public in the manner usually followed, for the benefit of the people who were not at the meeting where the site visit is announced.

When the board conducts a site visit as a board with a majority of members present, the board chair should attempt to keep people together during the site visit (both board members and anyone else attending) and should caution board members against talking privately amongst themselves, with the applicant, or with others. The secretary should attempt to take notes of the visit, including any questions asked and responses given. Questions may be asked during the site visit, but it is best for the board to conduct any discussions and deliberations once the board has returned to the meeting room.

Site visits conducted as a board meeting by a majority of the board essentially are using private property as a public meeting space. As such, the protections afforded by the Maine Tort Claims Act (14 M.R.S.A. § 8101 *et seq.*) should protect the municipality as well as the landowner, provided the owner has not deliberately or negligently created a hazardous situation. If a site visit will occur on certain types of commercial or industrial property that

present greater hazards to visitors, it may be wise for the owner and/or board to assign staff to serve as safety monitors and steer board members and members of the public away from dangerous situations.

Additional Information

For more information about the FOAA, see MMA's "Right to Know Law" information packet online at www.memun.org.

Board Records

Title 30-A, § 2961(3)(B) requires the secretary of the board to maintain a permanent record of all board meetings and all correspondence of the board. All records maintained or prepared by the secretary must be filed in the municipal clerk's office.

All board records are public records under the FOAA, unless a particular record is made confidential by a specific statute or is governed by a court order protecting it from public inspection. 1 M.R.S.A. § 401 et seq.; 30-A M.R.S.A. § 2961(3)(B). This is true regardless of the form in which they are maintained (paper records, audio or video recordings, computer disks or files, email) and regardless of whether they are still in "draft" form. Any member of the general public has a right to inspect and copy public records of the board at a time which is mutually convenient. If a person requests a copy of a public record, the municipality may charge a reasonable fee. The law also establishes guidelines under which a municipality may charge for the time involved in researching and retrieving records. 1 M.R.S.A. § 408-A. For more information regarding new requirements governing how to respond to requests for public information, see 1 M.R.S.A. §§ 408-A and 413 and MMA's "Right to Know Law" information packet (available online at www.memun.org).

When a request for a copy of a record is received, the request must be acknowledged within 5 working days. Within a reasonable time of receiving the request, a good faith, nonbinding estimate of the time it will take to comply with the request must be provided, as well as a cost estimate; a good faith effort must be made to fully respond within the estimated time. If a requested record cannot be provided, a written denial of the request that states the reason for the denial must be provided within 5 working days of the receipt of the request for the record. There is no requirement to create a record that does not exist. 1 M.R.S.A. § 408-A. If the board has a list of email addresses that it uses to send non-interactive meeting notices, updates and cancellations, those email addresses are not public records. 1 M.R.S.A. § 402(3). The board should refer any record requests to the municipality's designated Public Access Officer for a response.

Board records must be protected from damage or destruction. 5 M.R.S.A. § 95-B. Retention periods and legal destruction methods are governed by the rules of the State Archives Advisory Board, which are available in hard copy or on the State's website at http://www.maine.gov/sos/arc/records/local/localschedules.html. A record which doesn't appear to be covered by one of the categories in the State rules must be retained forever, unless written permission is received from the State to destroy it sooner.

Title 1 M.R.S.A. § 403 requires that boards like the board of appeals make a record of each public meeting of the board within a reasonable time after the meeting and that the record be open to public inspection. At a minimum, the record must include (1) the time, date and place of the meeting, (2) the members of the body recorded as either present or absent, and (3) all motions and votes taken, by individual member if by roll call. A more detailed record is recommended, especially for a meeting at which the board received information about an application. An audio, video or other electronic recording of a public proceeding is deemed to satisfy this requirement.

Conflict of Interest; Bias; Family Relationships

Financial Conflict of Interest

This section discusses what is legally called a "conflict of interest." It is a different type of "conflict" from the "incompatibility of office" rule discussed earlier in Chapter 1 of this manual. This type of conflict involves a direct or indirect financial interest.

- ***Statutory Test.*** There are several tests of what constitutes a conflict of interest. One is established by statute in Title 30-A § 2605. The statutory test applies to a board member who 1) is an "officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity" which is making the application to the board or which will be affected by the Board's decisions and 2) is "directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity." If a board member falls into one of the relationships listed in category 1 but does not have the 10% interest covered by category 2, then that board member does not have a legal financial conflict of interest.
- ***Case Law Test.*** For a board member whose conflict of interest is not governed by Title 30-A (because that board member does not fall within category 1 as discussed in the preceding paragraph), there is a common law (case law) standard defining activity which may constitute a conflict of interest. That standard is "whether the town official by reason of his interest, is placed in a situation of temptation to serve his own personal interest to the prejudice of the interests of those for whom the law authorized and required him to

act…" *Lesieur v. Inhabitants of Rumford,* 113 Me. 317 (1915), as cited in *Tuscan v. Smith,* 130 Me. 36 (1931).

- ***Examples.*** Under the statutory test, if a board member were an employee of a company which had an appeal application before the board, there would be no legal conflict of interest requiring that board member to abstain unless he or she also had a 10% stock or ownership interest in that company. An example of an indirect conflict of interest controlled by the statute is where a board member owns a company which owns 10% of the stock of a private corporation which is making an application to the board. Under the case law test, a board member who is also the applicant would have a conflict of interest. A court probably also would find that a board member had a conflict of interest under that test where the board member was a real estate agent trying to sell the property which was the subject of the application and his or her commission on the sale hinged on whether the board granted approval of the appeal. Likewise, if a board member was a secured creditor of the applicant whose security interest would be affected by the board's decision on the application or an abutting property owner whose property value would be affected by the board's action, a court might find that the board member had a common law conflict of interest. (Regarding a board member who is an abutter and whether he/she must abstain, see two articles from the May 2007 and June 2007 issues of the *Maine Townsman* in Appendix 2.) If someone from a board member's family who lives with that board member and contributes to household expenses is employed by the person applying to the board for a permit, a court might find that a common law conflict of interest exists if approval or denial of the application will directly affect that family member's job. See *Hughes v. Black,* 156 Me. 69, 160 A.2d 113 (1960).
- ***Failure to Abstain.*** If a board member who has a legal conflict of interest fails to abstain from the discussion and from the vote and fails to note the nature of his or her interest in the record of the meeting, a court could declare the board's vote void if someone challenged it. (This abstention and reason must be permanently recorded with the town or city clerk.) But see *Nestle Waters North America, Inc. v. Town of Fryeburg*, 2009 ME 30, 967 A.2d 702 (court refused to invalidate a 4-1 vote in 2005 in which the board chair had participated, even though the board later forced the recusal of the chair in connection with a 2007 vote).
- ***Appearance of Impropriety.*** Even if no legal conflict of interest exists, a board member would be well advised to avoid even the appearance of a conflict by abstaining in order to avoid the appearance of impropriety and maintain the public's confidence in the board's work. *Aldom v. Roseland,* 42 NJ Super.495, 127 A.2d 190 (1956); 30-A M.R.S.A § 2605. However, if abstaining where not legally required would deprive the board of a quorum, then abstaining is not recommended.
- ***Defined by Ordinance or Charter; Authority of Board to Determine.*** A municipality may define what constitutes a conflict of interest by charter or ordinance. Even without

such a provision, a board of appeals has authority under 30-A M.R.S.A. § 2691 to decide whether one of its members has a legal conflict of interest based on the facts presented. Such a decision can be made either at the request of the affected board member or on the initiative of the rest of the board.

- ***Former Board Member Representing Clients Before the Board.*** Another conflict issue addressed by § 2605 arises in the situation where a board member who leaves the board attempts to represent a private client before the board. If the board member is trying to represent the client on a matter in which he or she had prior involvement as a board member, the statute establishes certain waiting periods before this representation would be legal. If the matter was completed at least one year before the board member left office, then there is a one-year waiting period from the time the board member left. If the matter was still pending at the time the board member left and within one year of leaving, then the board member is absolutely prohibited from representing a client on that matter.
- ***Current Board Member Representing Clients Before the Board.*** Title 30-A M.R.S.A. § 2605 requires that a member of a board refrain from "otherwise attempting to influence a decision in which that official has an interest." While it would not be reasonable to interpret this law as prohibiting a board member from abstaining and stepping down as a board member to present his/her own application to the board, it probably does prohibit a board member (including alternate members) from representing another applicant who is seeking the board's approval or some other party to the proceeding.

Bias

- ***Bias Based on Blood/Marital Relation to Appellant or Other Party.*** Title 1, § 71(6) of the Maine statutes states that a board member must disqualify himself or herself if a situation requires that board member to be disinterested or indifferent and the board member must make a decision which involves a person to whom the board member is related by blood or marriage within the 6th degree (parents, grandparents, great-grandparents, great-great grandparents, brothers, sisters, children, grandchildren, great-grandchildren, aunts, uncles, great aunts/uncles, great-grand aunts/uncles, first cousins, first cousins once removed, first cousins twice removed, second cousins, nephews, nieces, grand-nephews/nieces, great grandnephews/nieces). (See chart in Appendix 2). If a board of appeals member is hearing an appeal from a decision by the planning board under a zoning ordinance and the appeals board member is related to a planning board member within the 6th degree, he or she should abstain. This is because under 30-A M.R.S.A. § 4353, the planning board is a "party" to zoning appeals. See also *Inhabitants of the Town of West Bath v. Zoning Board of the Town of West Bath*, CV-91-19 (Me. Super. Ct., Sag. Cty., May 7, 1991). The same would not necessarily be true if the board member were related to the code enforcement officer (CEO) and the decision

being appealed was the CEO's, because the CEO is not a statutory party to board of appeals proceedings. However, it would be advisable for a board of appeals member related to the CEO within the 6th degree to abstain when a zoning appeal involves the CEO's decision in order to avoid the appearance of bias and a challenge on due process grounds.

- ***Bias Based on State of Mind.*** Various court decisions also have established a rule requiring a board member to abstain from the discussion and the vote if that board member is so biased against the applicant or the project that he or she could not make an impartial decision, thereby depriving the applicant of his or her due process right to a fair and objective hearing. *Gashgai v. The Board of Registration in Medicine,* 390 A.2d 1080 (Me. 1978); *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990); *Moore, Inc. v. City of Westbrook,* AP-09-11 (Me. Super Ct., Cum. Cty., March 23, 2010). [See discussion in *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799, 801, ftn. 1 (Me. 1989) where the developer alleged that proceedings were tainted by the board's predisposition against development of the site, but the court found that there was an ample record to support the board's decision to deny approval. *See also, Widewaters Stillwater Co. LLC v. City of Bangor*, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001), where the court refused to find that a letter written in support of a zone change constituted evidence of a board member's bias regarding the application which was being reviewed by the board.] See also *Walsh v. Town of Millinocket,* 2011 ME 99, 28 A.3d 610, where the Maine Supreme Court held that the discriminatory state of mind of one board member tainted the entire proceedings because it was the motivating factor for the board's decision.
- ***Burden of Proof; Examples.*** The burden of proving bias is on the applicant. *In Re Maine Clean Fuels, Inc.,* 310 A.2d 736 (Me. 1973). If a board member reaches a conclusion based on the application and expresses that opinion to the press before the board has voted, a court probably would not find that the board member was biased against the project. This also would be true where a board member had expressed an opinion regarding the proper interpretation of the applicable ordinance or statute. *Cf*., *New England Telephone and Telegraph Co. v. P.U.C*., 448 A.2d 272, 280 (Me. 1982) and *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410 (Me. 1984). However, if, for example, the applicant could show (1) that the board member had a personal grudge against him because they were involved in a lawsuit relating to another matter or (2) that the board member in question had repeatedly stated in public that he personally found all projects of that type to be offensive and had stated further that there was no way that he (the board member) would ever vote to approve any project of that type, or (3) that prior to becoming a board member, the member in question had testified against the application in earlier board proceedings, a court probably would view the board member as biased. *Pelkey, supra*.

- ***Investigations Conducted by Board Members; Preparation of Memo for Board's Consideration.*** Sometimes board members want to collect information to help the board make its decision rather than relying solely on information presented by the applicant or other parties. Such a practice could be viewed as evidence of bias on the part of that board member, so probably should be avoided except where publicly authorized by a vote of the board. See, *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202. If a board member does engage in such conduct, he or she should be sure that it is done in an objective way and that any information collected is entered into the board's record. The board should provide an opportunity for the applicant and other members of the public to respond. 18 A.L.R.2d 562. See, *City of Biddeford v. Adams*, 1999 ME 49, 727 A.2d 346, *In Re: Villeneuve*, 709 A.2d 1067 (Vt. 1998), and *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148.

  The Maine Supreme Court has held that it is legally permissible and not evidence of bias for a board member to review materials submitted by the parties in advance of the board's meeting and prepare a memo or an outline of issues and potential findings in order to assist the board in consideration of matters that might arise at the board's meeting. *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.
- ***Local Ordinance Definitions of Bias; Authority of Board to Decide.*** As with conflict of interest, a municipality may attempt to define what constitutes bias through a provision in a local ordinance. In the absence of an ordinance, the board arguably has the authority to decide.

How the Affected Board Member Should Handle a Conflict or Bias

What does a board member do if a conflict or bias arises? If a process is spelled out in board bylaws or rules of procedure, the board member should follow that. If none, the member should make full disclosure for the record of his/her financial interest in the matter or any bias which might prevent him/her from being impartial in the matter before the board. The board member must abstain from any further discussion and voting as a board member on that matter. *Burns v. Town of Harpswell* CV-90-1083 (Me. Super. Ct., Cum. Cty., July 10, 1991.) After making these disclosures, if the board member wants to participate as a member of the public, he/she should leave his/her place at the decision-making table and take a seat in the audience.

If a board member does not believe that he/she has a conflict or bias but other members of the board disagree, the board may vote on that issue; the member with the alleged conflict or bias must abstain. 30-A M.R.S.A. § 2691; *State Taxpayers Opposed to Pollution*

v. Bucksport Zoning Board of Appeals (and *AES-Harriman Cove, Inc. v. Town of Bucksport)*, CV-91-217 and 92-41 (Me. Super. Ct., Han. Cty., January 21, 1993). If the board finds that a conflict or bias does exist based on the facts, then the board may order the conflicted or biased board member not to participate. If a board member thinks that he/she may have a conflict or bias which would legally disqualify him/her but is not sure, that board member may ask the rest of the board to consider the facts and vote on the matter. *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577.

Participation by a board member with a legal conflict of interest or bias may taint the board's decision and cause a reviewing court to remand for a new hearing. A board should address issues of conflict and bias early on in any appeal or application review.

Conducting the Meeting

Scheduling a Meeting; Notice Requirements; Agenda

When the board receives an application, the board chairperson should set up a public meeting at which the applicant can present his or her application and discuss it with the board. If the board does not meet on a regular basis or if the board's next regular meeting will not fall within a specific decision-making deadline established in the ordinance or statute which requires the board to review the application, then the chairperson should arrange a special meeting within a reasonable time. Notice of the meeting time and place should be given to the applicant and to any other people (such as abutters) whom the board may be required to notify by the relevant statute, ordinance or bylaws of the board. The board also should give reasonable notice to the public and press, as required by the Freedom of Access Act or other relevant ordinance or State law. For zoning appeals and variance applications, 30-A M.R.S.A. § 4353 requires the board to give notice of the appeal to the municipal officers, the planning board, and the person filing the appeal; although the statute does not expressly require it, if the appeal is filed by someone other than the original applicant, the original applicant should be notified also. There is no statutory requirement of notice to abutters for zoning appeals, although this may be required by a local ordinance. Nor is there a statute requiring that notice be given to the municipal code enforcement officer. Public drinking water suppliers must receive notice that an application has been filed in the following situations: (1) a junkyard, automobile graveyard, or auto recycling business which is located within a source water protection area of a particular public drinking water supplier as shown on maps prepared by the Department of Health and Human Services (DHHS) (30-A M.R.S.A. § 3754); (2) an expansion of a structure using subsurface wastewater disposal where the lot is within a mapped source water protection area (30-A M.R.S.A. § 4211(3)(B)); (3) a proposed land use project which is within a mapped source

water protection area, is reviewed by the planning board, and notice to abutters is required as part of that review (30-A M.R.S.A. § 4358-A); and (4) a subdivision which is within a mapped source water protection area (30-A M.R.S.A. § 4403(3)(A)). A sample notice form is included in Appendix 2 of this manual. Contact the Public Drinking Water Program at DHHS for more information about their mapping program and what constitutes a public drinking water supply (287-2070) or go to www.medwp.com. Although the statutes do not expressly mention appeals involving those projects, it would be wise for the board of appeals to give notice of the appeal to affected public drinking water suppliers to be safe, especially where the board will be conducting a "de novo" review of the appeal (see discussion of "de novo" review in Chapter 4).

There are a number of Maine statutes which require that notice of a public hearing be given by publication in a newspaper of general circulation. The Municipal Subdivision Law (30-A M.R.S.A. § 4403), the Junkyard and Automobile Graveyards Law (30-A M.R.S.A. § 3754), and the statute governing zoning ordinance amendments (30-A M.R.S.A. § 4352) are examples. Title 1 M.R.S.A. § 601 governs notices that must be published in the newspaper and establishes the following requirements, unless ordered otherwise by a court;

- The newspaper must be printed in the English language;
- It must be entered as second class postal matter in the United States and mailed at a post office; and
- It must have general circulation in the vicinity where the notice is to be published.

Any legal notice, legal advertising or other matter required by law to be published in a newspaper must appear in all editions of that newspaper.

Even if the chairperson believes that the board has no jurisdiction to hear the requested appeal or that the appeal was not filed within the required deadline, the chairperson still must schedule an initial board meeting on the appeal in order for the board to make that decision by majority vote. The chair cannot simply refuse to call the meeting or require the applicant to withdraw the appeal.

No State law requires that an agenda be part of any posted or published notice. Whether the agenda must be included in the notice will depend on any applicable local requirements. In any case, it is recommended that a board use a printed agenda to govern its meetings and that a category called "other business" be included. Where a local ordinance required published notice of a meeting to include an agenda, one judge has held that the agenda and notice cannot be misleading and therefore the board could not legally entertain an

application that was not listed with others on the agenda. *Reardon v. Inhabitants of Town of Machias*, AP-99-014 (Me. Sup. Ct., Wash. Cty., July 25, 2000).

In order to ensure compliance with the Americans with Disabilities Act (ADA) and to avoid discrimination based on national origin under Title VI of the Civil Rights Act, the meeting notice should invite people with disabilities or who have difficulty with the English language and who plan to attend the meeting to contact the town in advance of the meeting if they need a reasonable accommodation in order to participate, such as an interpreter or a person skilled in American Sign Language. The town will then request the information needed to determine exactly what kind of accommodation is necessary and reasonable for a particular individual and a particular meeting location.

Attendance by Applicant/Appellant

As long as the applicant/appellant has received reasonable notice of the meeting at which his or her application will be discussed, it is not legally required that the applicant/appellant or his/her authorized representative be present. A board which does not believe that it can make a decision without asking questions of the applicant or his/her agent should table further action until a future meeting and request that the applicant or a representative either attend the meeting or provide written answers to specific questions. If the applicant fails to do this or does not provide satisfactory answers, the board then can deny the application for lack of sufficient information relating to specific provisions of the relevant ordinance. The board has no legal authority to force an applicant/appellant to attend its meeting or to be represented by someone else.

A municipality should include a provision in its application materials that invites an applicant to notify the board or municipal staff regarding the applicant's needs for reasonable accommodations by the municipality based on a disability or language barriers. The municipality must then determine what is legally and reasonably necessary and reasonably possible after consulting with its attorney.

Preliminary Business

The chairperson presides over all meetings of the board. He or she first calls the meeting to order. After doing so, the chair should follow the checklist below:

- ***Quorum; Rule of Necessity.*** The chair determines whether a quorum is present to do business. Generally, a majority of the total number of regular members of the board constitutes a quorum, unless a local ordinance establishes a different quorum

requirement. 1 M.R.S.A. § 71(3). A member who must abstain due to a legal conflict of interest in a particular case may not be counted in determining whether a quorum is present for that issue, absent ordinance language to the contrary. *Fitandides v. City of Saco*, 684 A.2d 421 (Me. 1996). *Corpus Juris Secundum, "Parliamentary* Law*"*, § 6. However, if so many members are disqualified due to a conflict of interest, bias, or other legal reason that the board will not be able to meet its quorum requirement, and there is no other body legally authorized to act, those members may be able to participate under a legal theory called "the rule of necessity." *New England Telephone and Telegraph Co. v. P.U.C.*, 448 A.2d 272, 280 (Me. 1982); *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410-411 (Me. 1984). The board should consult with its attorney before applying the "rule of necessity" in order to determine whether some other alternative is possible, such as the creation of a special board to hear that particular case. See *Cyr v. Town of Wallagrass*, AP-00-14 (Me. Super. Ct., Aroost. Cty., March 1, 2001 and April 26, 2001), and *Dunnells v. Town of Parsonfield*, CV-95-515 (Me. Super. Ct., York City. February 7, 1997).

In order for a board member to participate in the board's discussion and voting, he/she must be physically present. A board member should not be allowed to participate or vote at a meeting by webcam, conference call, email, text message or similar written or electronic method. Proxy voting also is not legal and should not be permitted. For some legislative history on this issue, see the June 2016 *Maine Townsman* Legal Note "Update: Remote Participation in Board Meetings Not OK'd."

- ***Use of Alternate Members.*** If alternate board member positions were created by the legislative body, and if those positions have been filled, then the chairperson may designate an alternate to take the place of a regular voting member at a particular meeting when a regular member is absent or disqualified due to a conflict of interest or otherwise. (See related discussion later in this chapter entitled "Participation by Board Members Who Miss Meetings.") An alternate who has not been designated to take the place of a regular member at a particular meeting is not legally a board member for the purposes of that meeting and has no right to make motions, second them, or vote. It is safest from a due process standpoint to allow alternate members to make comments or ask questions only to the extent that members of the public are allowed to do this. Neither alternates nor members of the public should be allowed to make comments once the board has closed its record and begun its deliberations and decision-making process, unless the board is prepared to reopen its record and allow both comments and rebuttal. By treating alternates as members of the public for the purposes of their ability to participate in the board's discussion, it will ensure that only voting board members are involved in making the findings and conclusions that are legally required for a decision on an application and

will also make it easier for a judge to determine which board members' comments and votes were legally relevant for the purposes of the final decision if it is appealed.

- ***Timeliness of Appeal; Required Notices Given.*** If a quorum exists and the application involves an appeal, the chairperson then should indicate whether the appellant has filed the application within the required deadline. The chairperson also should indicate whether required notices of the meeting have been given (see Chapter 4).
- ***Summarize Appeal.*** If the application was filed on time and if required notice has been given, then the chairperson should summarize for those present the nature of the appeal and any documents submitted in support of or in opposition to the application.
- ***Jurisdiction; Type of Review to be Conducted.*** He or she also should indicate to the board which provisions of the applicable ordinance or statute appear to give the board jurisdiction over the permit application or appeal and whether the ordinance requires the board to conduct an appellate or a de novo review.
- ***Conflict of Interest or Bias.*** The chairperson should advise the board members that if any of them has a direct or indirect pecuniary interest in the subject matter of the application, that member must make his or her interest known in the minutes of the meeting and must abstain from participating in any discussion and the vote taken in relation to that application. Otherwise, if someone challenged the board's decision in court, the court could void the decision. 30-A M.R.S.A. § 2605. The same is true regarding bias. (See earlier discussion in this chapter.) If alternate or associate board member positions have been established by the legislative body and have been filled, the chair should designate an alternate/associate to sit in place of a disqualified member.
- ***Standing.*** If the board decides that it does have authority to review the application, it also must decide whether the applicant has "standing" to apply or to appeal (depending on the type of application). (See related discussion in this chapter and in Chapter 4.)
- ***Complete Application Submitted; Fees.*** The board must also determine as a preliminary matter whether the basic application form has been completed properly or whether there is information missing. This is not a substantive review of the information provided to determine whether the applicant has satisfied all the ordinance requirements. As part of this process, the board should determine whether required application fees have been paid. *Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., Apr. 8, 1998). A board cannot impose additional fees to cover its costs after an application is filed, absent clear ordinance authority to the contrary. *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202.

If the board decides that the applicant has met these preliminary requirements, then it can proceed with its substantive review. Should the board determine that it does not have jurisdiction, that a complete application (including required fees) was not submitted by the

required deadline or that the applicant lacks standing, the board should deny the application, expressly stating the reasons.

Procedure

At this point the chairperson should explain the rules of procedure which the board must follow during its meeting and the extent to which public comments and questions will be allowed. The chairperson, using the procedures adopted by the board, regulates the conduct of the meeting—recognizing members of the board and audience who want to speak, entertaining motions, ruling on the relevance of questions asked, and otherwise keeping the meeting in order if tempers start to flare, even to the extent of having an unruly person removed by a law enforcement officer. The Maine Supreme Court has recognized that boards generally have the inherent authority to adopt their own rules of procedure, e.g., *Jackson v. Town of Kennebunk,* 530 A.2d 717 (Me. 1987). Board procedures do not need to provide an applicant with a full adjudicatory hearing complete with cross-examination and rebuttal in order to satisfy due process requirements. *Fichter v. Board of Environmental Protection*, 604 A.2d 433 (Me. 1992). Sample procedures and introductory remarks by the chairperson are included in Appendix 2. One issue which the board should be sure to address in its rules of procedure is the effect of a tie vote. *Stevenson v. Town of Kennebunk,* 2007 ME 55, 930 A.2d 1046. The rules also should address participation by the chairperson in votes taken by the board; unless the rules provide otherwise, the chairperson may participate in all votes of the board, not just when necessary to break a tie.

The Maine Supreme Court has upheld decisions made by boards following a vote to reconsider an earlier decision even though the board had not adopted rules of procedure governing reconsideration previously. The key is for the board to be fair and to act quickly before an applicant acquires "vested rights" under the original decision. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987); *Anderson v. New England Herald Development Group*, 525 A.2d 1045 (Me. 1987); *Cardinali v. Town of Berwick*, 550 A.2d 921 (Me. 1988). However, the board must be careful to protect the due process rights of the applicant and other affected parties by giving them advance notice of the meeting at which the board will be discussing whether to change its earlier decision. The board should schedule a separate hearing on the merits with notice to all parties if reconsideration does not occur at the same meeting when the original decision was made.

Public Participation

- ***General.*** Unless a meeting has been advertised as a "public hearing," members of the general public may attend and listen but have no right to ask questions or offer comments under the Freedom of Access Act. If the board advertises a meeting as a public hearing,

the general public must be given a right to speak. This means residents and non-residents, taxpayers and non-taxpayers. The board may adopt rules that give preference to residents and non-resident property owners, both in the order of presentations and the amount of time allotted. The Freedom of Access Act also allows the public to take notes, make audio and video recordings, or make similar records of the meeting as long as it is not disruptive of the proceedings. No permission is needed from the board or other audience members for a person to do those things. The board may have bylaws which require that the public be given at least a limited opportunity to speak at all board meetings. If the bylaws contain no express provision requiring public comment, it still may be to the board's benefit to allow a reasonable amount of relevant comment and questions from the public, despite the fact that a particular meeting has not been advertised as a "public hearing." Besides being a good public relations strategy, it will help ensure that the board has the information it needs to make a sound decision, provided there is an adequate opportunity for the applicant and others to address this information. Applications involving an appeal or variance must be the subject of a public hearing before a decision is made on the substance of the appeal or variance, either because of an express requirement in a local ordinance or by inference from the language of 30-A M.R.S.A. § 2691. When an application involves a request for a conditional use or special exception, many ordinances leave it to the board to decide whether to call a public hearing. Where a zoning appeal or variance is involved, 30-A M.R.S.A. § 4353 requires the board to give direct notice of the hearing date to the appellant, municipal officers, and planning board. Local ordinances often require special notice to abutters and sometimes indicate how notice to the general public must be given. Several State laws may require notice to public drinking water suppliers. (See the earlier discussion in this chapter.)

- ***Sequence of Presentations*.** If the board's bylaws do not indicate the sequence in which the chairperson should recognize speakers, the chairperson could use the following as a guide:

  a. presentation by applicant and his/her attorney and witnesses, without interruption;

  b. questions through the chairperson to the applicant by board members and people who will be directly affected by the project (e.g., abutters) and requests for more detailed information on the evidence presented by the applicant;

  c. presentations by abutters or others who will be directly affected by the project and their attorneys and witnesses;

d. questions by the applicant and board members through the chairperson to the people directly affected and the witnesses who made presentations;

e. rebuttal statements by any people who testified previously;

f. comments or questions by other interested people in the audience.

Once everyone has had an opportunity to be heard to the extent allowed by the board's procedures, the chairperson should close the hearing. If more time is needed, the board may vote to continue the hearing to a later date.

Taking Adequate Time to Make a Decision; Seeking Technical and Legal Advice

Although the board should avoid unreasonable delays in making a decision and should not "string the applicant along," the board should not feel pressured into making a decision at the first meeting. This is especially true where the meeting has been very emotional because of a controversial proposal. The board should take time to visit the site of the proposed project where that would be helpful. (See discussion of site visits earlier in this chapter.) The board should consider seeking technical advice from its regional planning commission or from a State agency or from other experts which the board is authorized to consult and legal advice from Maine Municipal Association's Legal Services Department or from the municipality's private attorney, particularly if the applicant or another party is represented by a lawyer. If the municipality is unwilling to budget money for the board to use to hire its own advisors, it may be willing to adopt an ordinance provision which requires an applicant to set aside an amount of money in escrow which can be used by the board to hire consultants of its own to help the board review the application. A sample ordinance provision appears in Appendix 3. See *Nestle Waters North America, Inc. v. Town of Fryeburg,* 2009 ME 30, 967 A.2d 702, for a case in which the court acknowledged reliance by the planning board on a vehicle traffic peer review study paid for by the town. See *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148 for a case involving peer review related to air emissions paid for by the applicant and issues related to the selection of the company performing the review. If the board anticipates that an application will be controversial and that the board's decision ultimately will be challenged in court, it should consider having its professional technical and legal advisors present at some or all of the meetings at which the application is discussed. The board must be careful to introduce into the record any information provided by its advisors, whether the information is provided orally or in writing; this is especially true if the information is provided through consultation outside the

public board meeting. See *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, and *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200, for a discussion of the utilization by a board of legal advice provided by its attorney.

At least one Maine Supreme Court case has addressed the issue of comments provided by paid staff. In *Philric Associates v. City of South Portland*, 595 A.2d 1061 (Me. 1991), a board found that an application was complete and then circulated it to paid staff for comments while it began its substantive review. The staff identified problems with the application and after a year of repeated attempts to get more information from the applicant, the staff sent a letter saying the application was incomplete, spelling out in detail why and what was needed to make it complete. The developer appealed and the court found that his appeal was premature and that there was nothing wrong per se with the staff's and board's process.

Municipal Attorney Advising More Than One Municipal Board or Official on Same Matter

In cases where the municipality's regular attorney has been advising the CEO or planning board in the matter which is the subject of the appeal, that attorney may be unable to advise the board of appeals on that matter because of due process considerations. The attorney will make that judgment call. Some attorneys believe that it is legally and perhaps ethically necessary to use a different attorney for the appeal process and others do not, focusing on the fact that it is the municipality that is the attorney's client and not any single board or official. For further discussion of this issue, see *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489, and *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735; see also material on this issue prepared by James Katsiaficas, Esq. entitled "Multiple Representation by Municipal Attorneys," which appears in the seminar text for a Maine Bar Association seminar entitled "Land Use and Environmental Regulation: Recent Developments and Practice Pointers (November 1, 2002)."

Minutes and Record of the Meeting

Title 1 M.R.S.A. § 403(2) require the board to create a record that includes specific information for all board meetings. The record may be written or may be an audio, video or other electronic recording. At a minimum it must include: date, time and place of the meeting; a list of the board members who are present or absent; and all motions and votes taken, including a list of who voted for or against the motion if the vote is taken by roll call.

It is very important that the board's secretary take reasonably complete and accurate minutes of meetings at which the board is reviewing and discussing an application, including the subject of the application, what was said and by whom and any agreements made regarding procedures or other issues. 30-A M.R.S.A. § 2691. The minutes, any documents submitted by the applicant or others (such as the application, a report from a professional engineer, a letter from an abutter, plans, maps, photographs, or diagrams), and the board's findings of fact and conclusions regarding whether the applicant has complied with the statute or ordinance in question will comprise the "record" for that case. Any information, in whatever form it is presented to the board as a basis for the board's decision, must be entered into the official record. Judges find it easier to determine the nature and order of documents entered into the board's record when the board has marked those documents (for example, Applicant's Exhibit #1). Electronic recording of the meeting is not legally required. In recording a meeting (either audio or video), it is important to use high quality equipment and to make sure that anyone speaking is close enough to a microphone to pick up his/her statements on the recording. A recording which is full of inaudible statements is of no use to the board or a reviewing court. *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916. There is no law requiring that board minutes contain a verbatim account of the entire meeting. The amount of detail included in the minutes by the board's secretary will be dictated in part by the desires of a majority of the board and in part by the complexity of the application being reviewed and how likely it is that the board's decision will be appealed to court. It may be advisable to seek guidance from the attorney who will be defending the board's decision in court if an appeal seems probable. See Appendix 3 for sample minutes.

Making the Decision

Checklist for Reviewing Evidence

Before the board decides whether to approve or deny the application, it should ask itself the following questions:

a. Does the board still believe that it has jurisdiction to make a decision on the application under the ordinance or statute?

b. What does the ordinance/statute require the applicant to prove?

c. Does the ordinance/statute prohibit or limit the type of use being proposed?

d. What factors must the board consider under the ordinance/statute in deciding whether to approve the application?

e. Has the applicant met his or her burden of proof, i.e., has the applicant presented all the evidence which the board needs to determine whether the project will comply with every applicable requirement of the ordinance/statute? Is that evidence substantial? Is it credible? Is it outweighed by conflicting evidence?

f. To what extent does the ordinance/statute authorize the board to impose conditions on its approval?

Basis for the Board's Decision in the Context of an Original Application or De Novo Appeal

- ***General Rule.*** Once the board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute. The board should not base its decision on the amount of public opposition or support displayed for the project. Nor should its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met his or her burden of proof and complied with the provisions of the statute/ordinance. *Bruk v. Town of Georgetown*, 436 A.2d 894 (Me. 1981); *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768; *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. If the board does not believe that the applicant's project meets each of the requirements of the ordinance/statute based on the evidence in the record, the board must deny the application. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). Where a proposed project complies with all of the relevant ordinance requirements, the board must approve the application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994). At least one court has expressly warned board members that they must not "abdicate (their) responsibility, ignore the ordinance and approve an application regardless of whether it meets the conditions of the ordinance or not" and that board members who are philosophically hostile to zoning should address their concerns to the local and State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance. *Fraser v. Town of Stockton Springs*, CV-88-97 (Me. Super. Ct., Waldo Cty., August 10, 1989).
- ***"Ex Parte Communications"*** The board's decision, whether it approves, denies, or conditionally approves an application, must be supported by substantial evidence in the

record. Individual board members should not allow themselves to be influenced by information provided to them outside an official board meeting (i.e., an *"ex parte"* communication) unless they enter that information into the board's record and all parties to the proceeding receive notice of the additional information and are given an opportunity to respond to it. The Maine Supreme Court has observed that if the parties are given a full opportunity to respond to such information, the *ex parte* communication may not be egregious enough to cause a court to overturn the board's decision on due process grounds. *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148. See also, *Passadumkeag Mountain Friends v. Board of Environmental Protection*, 2014 ME 116, 102 A. 3d 1181. A board member who is approached by an individual wanting to provide him or her with information outside a public meeting setting should actively discourage the person from doing so and encourage the person to submit the information to the board in writing or through oral testimony at a board meeting. The board member should explain that, by providing information outside the public meeting, the person may be causing due process problems with the board's process and that the board may not legally be able to consider the information the person is trying to present. Under no circumstances should board members meet with someone representing just one side of an issue outside a public meeting setting. *Mutton Hill Estates, Inc. v. Inhabitants of Town of Oakland*, 468 A.2d 989 (Me. 1983). Board members should not discuss an application with the code enforcement officer outside a public board meeting in order to avoid due process problems. *White v. Town of Hollis*, 589 A.2d 46 (Me.1991). (But see *Maddocks v. Unemployment Insurance Commission*, 2001 ME 60, 768 A.2d 1023, where the court held that a party who was aware of the ex parte communication and failed to object during the Commission hearing waived the due process issue on appeal to court.) For additional discussion of this issue, see "Site Visits," "Board Member Discussions/Email," "Investigations Conducted by Board Members; Preparation of Memo for Board's Consideration," and "Taking Adequate Time to Make a Decision; Seeking Technical and Legal Advice" earlier in this chapter.

- ***"Substantial Evidence" Test.*** "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The fact that two inconsistent conclusions can be drawn from the recorded evidence related to a specific performance standard does not mean that the board's conclusion regarding that standard is not supported by "substantial evidence." *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1296 (Me. 1985). Where the board denies an application on the basis that the record shows that the "proposed project would have specific adverse consequences in violation of the criteria…for approval," a court will uphold the decision unless the applicant can demonstrate both that the board's findings are unsupported by record evidence and that the record compels contrary findings.

Grant's Farm, *supra*. (See additional discussion of the standard of review on appeal in Chapter 4 of this manual.)

- ***Relevance of Deed Restrictions, Title Disputes, Constitutional Issues, Other Code Violations and Related Lawsuits.*** The board cannot deny an application because the proposed use would violate a privately-imposed deed restriction if the use otherwise would be in compliance with the applicable ordinance/statute. *Whiting v. Seavey*, 188 A.2d 276 (Me. 1963); *Our Way Enterprises, Inc. v. Town of Wells*, 535 A.2d 442 (Me. 1988). *Cf*., *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). (But see the discussion of "**Standing to Apply**" earlier in this chapter.) The board also has no legal authority to resolve boundary or title disputes as part of its decision on an application. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises*, 531 A.2d 1272 (Me. 1987). (See sample language in Appendix 3 which the board can insert into its decision in a case where a title or boundary issue has been raised to make clear that the board's granting of approval in no way resolves the title or boundary problem.) If the board is presented with credible written expert evidence by both the applicant and an opponent which is in direct conflict and which involves a title/boundary issue, the board probably has three options: (1) tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order); (2) approving the application on the basis that the applicant has provided substantial, relevant and credible evidence and letting the parties pursue the matter further in court; or (3) denying approval on the basis that the board is unable to find that the applicant has met the required burden of proof. The board also cannot resolve constitutional problems with an ordinance in deciding an application. *Cf*., *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). But see, *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. The fact that the property involved is already the subject of other code violations also would not constitute a basis for denial, absent language in the ordinance to that effect. *Bauer v. Town of Gorham*, CV-89-278 (Me. Super. Ct., Cum. Cty., Nov. 21, 1989). Nor may the board refuse to act on an application or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*, 663 A.2d 41 (Me. 1995). (See Chapter 4 of this manual for additional discussion of constitutional issues.) Even if the board cannot legally resolve some of these problems, a party may need to raise them for the record in order to preserve the issues for appeal to court. The board should note the challenge and its response in the record.
- ***Overlap with State and Federal Law***: The board may be required by a local ordinance or State law to determine whether any State or federal laws apply to an applicant's project before the board may grant its approval. The board can draw on the expertise of the applicable State or federal agency to help it make this determination. Approval of a State or federal permit does not eliminate the need for the landowner to obtain local approval

for his or her project, if required. Where a question exists about whether a project complies with State or federal law, one option for the board is to adopt a condition of approval requiring the applicant to obtain either approval from the State or federal agency or a letter from the agency stating that it has no jurisdiction before commencing work under the local permit/approval. The board's condition should require that proof of the State/federal approval or letter be filed with the municipality.

- ***Expert vs. Non-Expert Testimony; Personal Knowledge of Board Members.*** The board may base its decision on non-expert testimony in the record if it finds that testimony more credible than expert testimony presented on the same issue. *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717 (Me. 1983) (flooding issue); *DeMille v. Town of Cape Elizabeth,* AP-99-45 (Me. Super. Ct., Cum. Cty, December 21, 1999) (traffic safety issue); *Gott and Sons, Inc. v. Town of Lamoine*, CV-11-04 (Me. Super. Ct., Han. Cty., December 5, 2012), citing *Hutz v. Alden*, 2011 ME 27, 12 A.3d 1174, and *Gorham v. Town of Cape Elizabeth*, 625 A. 2d 898 (Me. 1992)(impact on property values). If two conflicting expert opinions are offered for the record, the board has the option of making its own independent finding of fact. *Cf*., *Gulick v. Board of Environmental Protection*, 452 A.2d 1202, 1208 (Me. 1982). In the absence of expert testimony, the board may rely on the testimony in the record of anyone personally familiar with the site and conditions surrounding the application. *American Legion v. Town of Windham*, 502 A.2d 484 (Me. 1985); *Grant's Farm Associates v. Town of Kittery*, 554 A.2d 799 (Me. 1989); *Goldman v. Town of Lovell*, 592 A.2d 165 (Me. 1991). Board members may rely on their own expertise and experience and that of their professional staff as well, provided that information is formally entered into the record. *Pine Tree Telephone and Telegraph Co. v. Town of Gray*, 631 A.2d 55 (Me. 1993); *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577. See the discussion of investigations by board members appearing earlier in this chapter.
- ***Testimony by Witnesses Who Are Not Physically Present at the Meeting.*** It probably is legal to allow a person to give testimony by speaker phone. However, the board probably could adopt a rule of procedure that does not permit such testimony except where all parties to the proceeding have consented. Depending on the nature of the issue on which the hearing is being conducted, it could be important to observe the demeanor of a witness in order to gauge whether he/she is being truthful; obviously that would not be possible with testimony offered by speaker phone. There also could be times where the board might not be certain as to the identity of the person presenting the information. Testimony offered by speaker phone could be challenged on those grounds in a particular case, even if it is allowed and goes unchallenged in most cases. Probably the best approach is for the board to adopt a rule of procedure which prohibits testimony unless it is offered in person at the meeting or in writing and signed by the witness, but allow an

exception to this rule where all parties have agreed for the record to permit testimony by some other method (e.g., speaker phone, webcam, etc.).

- ***Staff Interpretations; Role of the Code Enforcement Officer.*** Where a municipal official or staff person whose principal job is to interpret an ordinance offers statements about the proper interpretation of the ordinance and whether the applicant's evidence was sufficient to comply with the ordinance, the court has said that the opinion of that staff person or official is entitled to some deference. *Warwick Development Co. Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990). (*See Philric Associates v. City of South Portland*, *supra* (discussed earlier in this chapter) on the issue of staff involvement in a board determination regarding completeness of an application.)

  Absent a local charter provision, ordinance or job description to the contrary, the code enforcement officer is not a member of the board and has no official role regarding the board's proceedings or the custody and care of board records. While the code enforcement officer often has valuable information and insights to share with the board, he/she should offer that information for the board's official record either in written form or through public testimony offered during a public board meeting at the invitation of the board. This will help ensure that no illegal *ex parte* communications occur. *E.g., White v. Town of Hollis*, 589 A.2d 46 (Me. 1991). For more about the duties of the code enforcement officer, see MMA's *Code Enforcement Officer Manual*.
- ***Participation by Board Members Who Miss Meetings.*** If a board member has not been able to attend every meeting at which the board conducted a public hearing or received and discussed substantive evidence regarding a particular application, it is arguable that such a board member cannot participate in making the decision on the application because it would violate due process. *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990); *Fitanides v. City of Saco*, 684 A.2d 421 (Me. 1996). One Maine Supreme Court decision, *Green v. Commissioner of Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 2001 ME 86, 776 A.2d 612, is being interpreted by many municipal attorneys as a modification of the "perfect attendance" requirement for board members established in *Pelkey*. The court in *Green* found that "as long as a decision-making officer both familiarizes himself with the evidence sufficient to assure himself that all statutory criteria have been satisfied and retains the ultimate authority to render the decision, he can properly utilize subordinate officers to gather evidence and make preliminary reports." On the basis of *Green*, *Lemont v. Town of Eliot*, CV-91-577 (Me. Super. Ct., York Cty, November 11, 1992, and In *Re Villeneuve*, 709 A.2d 1067 (Vt., 1998), many municipal attorneys are advising board members who miss a public hearing or other board meeting at which substantive discussions of an application occur that they may continue to participate in the decision-making process without violating due process if they take the following steps: (1) read hearing and meeting minutes,

review any documents or other evidence submitted at those meetings, and listen to/watch any audio or video recordings of those meetings, (2) prepare a written statement describing what the board member did to educate himself/herself about what occurred at the missed meeting, (3) sign the statement (preferably in notarized form), and (4) enter it into the record at the next meeting. (See Appendix 2 for sample affidavit form.) If the applicant and other parties to the proceeding agree that this is adequate, then this should be noted in the record too. Some municipal attorneys advise board members who have missed a substantive meeting that they may not participate without the consent of all parties in order to avoid a due process challenge. If an alternate member sits in place of a regular member at a particular board meeting, it may be advisable to let the alternate continue to sit in connection with that particular application and avoid a challenge to the regular member's participation.

If a board member senses when an application is first submitted that it will take many months to review and decide and that he/she will have to miss many of the meetings due to family needs or job-related reasons, it would be advisable for that member to step aside and allow an alternate member to be designated to serve in his/her place in connection with that application, assuming that alternate positions on the board have already been created and filled. If there are no alternate positions and there is not time to have them legally established, then the board member will have to attend when possible and follow the guidelines above for dealing with missed meetings.

In rare cases, there may be such a turnover on a board that it may be advisable for the board to begin its review process again. This is particularly true where a court orders a remand of an appeal back to the local board and a majority of the seats on the board have turned over. (This was apparently what happened in connection with a remand to the board of appeals in *Carroll v. Town of Rockport*, 2005 ME 135, 837 A.2d 148.) The board should consult its private attorney for advice on how to proceed in the event of a large turnover on the board.

- ***Reopening the Hearing Process*.** In at least one case, the court has upheld a board's right to reopen its hearing process to allow an applicant to submit new evidence to clarify a technical issue and modify its plan without allowing additional public comment. The court found that there had been prior extensive hearings that were more than adequate to afford due process. *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202.
- ***Preserving Objections for Appeal***. If a party to the proceedings has any objections to procedures or proposed findings by the board, he or she should raise them at the meeting

so that the board has a chance to consider them and address them in its decision. Failure to raise objections before the board will prevent that person or any other party from making those objections in an appeal to the Superior Court. *Pearson v. Town of Kennebunk*, 590 A.2d 535, 537 (Me. 1991); *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371; *Oliver v. City of Rockland*, 1998 ME 88, 710 A.2d 905; *Rioux v. Blagojevic*, AP-02-24 (Me. Super. Ct., Pen. Cty., June 24, 2003).

Approval and Form of Decision

Majority Vote Rule

It is the opinion of the attorneys on the MMA Legal Services staff that, in determining whether a motion has been approved by a majority of the board, State law requires that calculation to be based on the total number of regular voting members on the board (not including the number of alternate or associate members), whether or not there are vacancies on the board. However, an ordinance provision authorizing "a majority of those present and voting" to approve a motion would be legal and would supersede the statutory rule. 1 M.R.S.A. § 71(3); *Warren v. Waterville Urban Renewal Authority,* 161 Me. 160 (1965). While many private municipal attorneys agree with this opinion, there are some who do not. To avoid controversy over what rule legally applies, it is advisable to spell out in the local ordinance which governs a particular decision the "majority vote" rule that the municipality wants to use.

Abstention

In the absence of a State law, local ordinance or local rules of procedure to the contrary, an abstention is not counted as either a vote in favor of a motion or against it. *Gerrity v. Ballich*, CV-84-646 (Me. Sup. Ct., York. Cty, June 27, 1985).

Tie Votes

If a motion results in a tie vote, the board has failed to act and another vote should be taken to try to get a definitive decision. *Quinney v. Lambert,* CV-84-435 (Me. Super. Ct., Yor. Cty., July 8, 1985); see also concurring opinion in *Stevenson v. Town of Kennebunk,* 2007 ME 55, 930 A.2d 1046. If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). *See generally*, *Marchi v. Town* of *Scarborough,* 411 A.2d 1071 (Me. 1986); *see*, *Silsby v. Allen's Blueberry Freezer, Inc.,* 501 A.2d 1290 (Me. 1985). As previously noted, the effect of a tie vote should be spelled out in the board's rules of procedure to avoid confusion.

Findings and Conclusions

When taking a final vote, the board must prepare written "findings of fact" and "conclusions of law" as to whether the facts show that the project complies with the applicable ordinance/statute. The Maine Supreme Court has held that it is not enough simply to prepare detailed minutes. *Comeau v. Town of Kittery*, 2007 ME 76, 926 A.2d 189.

- ***"Findings of fact"*** are statements by the board summarizing the basic facts involved in a particular application. Such a summary of facts would include the name of the applicant and his/her relationship to the property, location of the property, basic description of the project, key elements of the proposal (lot size, setback, frontage, and other items which relate directly to the dimensional requirements or performance standards in the ordinance), evidence submitted by the applicant beyond what is shown on the plan, evidence submitted by people other than the applicant either for or against the project, and evidence which the board enters into the record based on the personal knowledge of its members or experts which the board has retained on its own behalf.
- ***"Conclusions of law"*** are statements linking the specific facts covered in the findings of fact to the performance standards/review criteria in the ordinance or statute which the applicant must meet in order to receive the board's approval. For example, a conclusion of law pertaining to the "undue hardship" test for a variance would be: "We conclude that the applicant will not be able to realize a reasonable return on his investment without a variance from the required side and front setbacks. Testimony from his appraiser and from a local realtor indicates that a house of only 10 feet x 20 feet could be built on the lot without a variance. Based on their experience, such a house would not sell in that neighborhood. The lot had been for sale for 10 years before the applicant purchased it. Only single-family residences are allowed in this district under § 105 of the Zoning Ordinance." Simply stating that "the applicant will not be able to obtain a reasonable return without a variance" is not enough, since this fails to explain why the board decided that the applicant met that standard**.**

Reasons for Preparing Written and Detailed Findings and Conclusions

The Maine Freedom of Access Act requires findings to be prepared in cases where an application is being denied or approved on condition (1 M.R.S.A. § 407). Title 30-A, § 2691(3)(E) requires board of appeals decisions to "include a statement of findings and conclusions, upon all the material issues of fact, law, or discretion presented and the appropriate order, relief or denial of relief." Local ordinances also often require all decisions to be prepared in a findings and conclusions form. (See also 30-A M.R.S.A. § 2526(6) regarding assessment review boards hearing property tax appeals.) Rule 80B(E) of the Maine Rules of Civil Procedure, which governs appeals from a local board's decision filed

in Superior Court, indicates that as part of the record which the court will be reviewing, the court wants to see the board summarize its findings of fact and conclusions of law. The practical purpose behind preparing findings and conclusions is that it helps the board ensure that it has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another purpose is to provide a written statement of the reason for the board's decision which is detailed enough to enable the applicant or anyone else who is interested (1) to judge whether they agree or disagree with the board and (2) to decide whether there are sufficient grounds on which to appeal the decision. Probably the most important purpose is to provide a clear statement for the Superior Court of the facts which were submitted for the board's consideration and the facts on which the board relied in concluding that the review standards were/were not met by the applicant. This is particularly important where the board must choose between conflicting evidence which has been introduced to prove that a particular standard has/has not been met. If the board fails to make written findings of fact and conclusions, it appears now that the court will remand the case to the board for the preparation of findings and conclusions before reaching a decision, rather than reading through the board's minutes and other records to determine the basis for the decision. *E.g., Peaker v. City of Biddeford*, 2007 ME 105, 927 A.2d 1169; *Carroll v. Town of Rockport*, 2003 ME 135, 837 A.2d 148; *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916; *McGhie v. Town of Cutler*, 2002 ME 62, 793 A.2d 504; *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834; *Widewaters Stillwater Co., LLC v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597; *Harrington v. Town of Kennebunk,* 459 A.2d 557 (Me.1983); *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660; *compare, Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991.) (See Appendix 3 for excerpts from some of these cases.) In a case where the board of appeals has heard an appeal application "de novo," the "standard of review" which governs the Superior Court in deciding whether to uphold the board's decision is the "substantial evidence in the record" test, i.e., is there sufficient credible evidence in the record of the case created by the board of appeals to support the board's decision? The court also will determine whether the board applied the proper law and whether the board applied that law correctly or acted arbitrarily or capriciously. *Curtis v. Main,* 482 A.2d 1253 (Me. 1984); *Thacker v. Konover Development Corp*., 2003 ME 30, 818 A.2d 1013.

Address Each Review Standard

It is important for the board to address each standard of review in reaching its decision in case the decision is appealed and the court disagrees with some of the board's conclusions. *See generally*, *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989),

Tompkins v. City of Presque Isle, 571 A.2d 235 (Me. 1990), and *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988).

Recommended Procedure for Preparing Findings and Conclusions

There are a number of ways to handle the process of making findings and voting on an application. Probably the method used by most boards and recommended by most municipal attorneys in connection with a de novo review of an application is as follows: The board should use the ordinance or statute which governs the proposal and the application form itself as a checklist. The board's chairperson should focus the board's attention on each performance standard/review criteria in the ordinance, ask the board to vote whether it is applicable, and if they find that it is, ask whether it has been satisfied by the evidence in the record. The board must cite evidence which supports a finding either in favor of the applicant or against the applicant. If there is conflicting evidence, the board should indicate why it favors one piece of evidence over another. If a review standard has multiple parts, the board's findings must address each part. *Chapel Road Associates v. Town of Wells*, 2001 ME 178, 787 A.2d 137. As the board addresses the ordinance requirements, it should make a motion and vote on one before moving to the next, and that vote and the facts supporting the vote should be recorded in detail by the secretary in the minutes. The statement of facts in support of the motion must be part of the motion on which the board votes, so that it is clear what facts the board found in support of its conclusion. It is not enough simply to let each board member say what he or she thinks are the pertinent facts, record those individual statements in the minutes and then ask each board member to say "yes" or "no" as to whether the applicant has met a particular criterion. *Carroll v. Rockport, supra*. If the board finds that a condition of approval is necessary in order to find in favor of the applicant, the condition should be addressed at that time and supported by findings also. After taking these separate board votes on the individual review criteria, the board should then take a "bottom line" vote to approve or deny the application or approve it with conditions. This vote must be consistent with the votes taken on the individual review criteria. Unless the votes on each review criterion found that each was satisfied, a motion to approve the application would have to be defeated. It appears from the case law that the same members don't have to vote in favor of or against the motions made on each standard and on the overall motion to approve or deny the application; as long as there is a majority of members voting one way or the other on each motion, it doesn't have to be the same board members comprising the majority on each vote. *Widewaters, supra*. In a case where one or more of the votes on individual review criteria was subject to conditions of approval, the board should reiterate these conditions in the final vote so that there will be no confusion regarding what conditions are applicable; only those conditions which were adopted by a majority vote on an individual review criterion and by the majority of the board in the final vote would apply.

The final vote and any conditions need to be recorded in detail by the secretary in the board's minutes. The chairperson should explain during the course of discussing and approving findings and conclusions that, if any board member thinks the applicant has not met his or her burden of proof and that some information is missing or not convincing, that board member should state those concerns during the findings and conclusion phase. The final vote on whether to approve/reject the application is really a formality; the important, binding decisions are those regarding the individual findings and conclusions. If the board members do not cite problems with the evidence at that stage, the board will have no legal basis for denying the application, unless it revisits and modifies its earlier votes on the individual standards.

If the board wants time to think about the evidence submitted in connection with a particular application and wants to wait until another meeting to go through the formal process for voting on each criterion as outlined above, it may do so as long as the members bear in mind any deadline for making a final decision which must be met under the relevant ordinance. This may necessitate calling a special meeting to take a final vote in time to meet the deadline. In the meantime, the individual board members can be thinking about what findings of fact and conclusions the board should vote to approve. Board members must not discuss these issues outside the board meeting, however, in order to avoid problems under the Freedom of Access Act. Once the board has reconvened and has discussed each review standard, it can then either take time to prepare formal written findings and conclusions and approve a final decision at that meeting or it can conduct a general discussion of each ordinance criterion and the evidence presented and then delegate to one person (i.e., a member of the board, a paid secretary, the board's attorney or similar person) the task of sorting through the individual statements and preparing a set of draft findings and conclusions for the board to discuss in detail and approve at a subsequent meeting held within any required deadline. It is crucial that the board carefully discuss the draft decision in detail in order to make that decision its own before voting whether to approve it. Another approach used by some boards is to invite the parties to submit proposed findings and conclusions for review, discussion and possible adoption by the board. (See *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489, where the court found that it was legal for a board member to bring a list of issues and draft findings to the meeting for the board's consideration.)

In the case of a board decision on an application for an appeal or variance, the board must keep in mind that 30-A M.R.S.A. § 2691(3) requires the board to issue a written decision to the applicant and others within seven days of taking a final vote to approve or deny the application. If the board takes what it considers a "preliminary" or "tentative" vote to be finalized at a subsequent meeting following the preparation and review of a final draft of its

findings, then the board should label it as such and make this clear for the record in order to avoid problems meeting the seven day deadline. See generally, *Beckford v. Town of Clifton*, 2014 ME 156, 107 A. 3d 1124. Several sample written decisions appear in Appendix 3.

Several problems can result if the board delegates the responsibility of developing a tentative draft of findings and conclusions before it has gone through the list of criteria and developed its own. The board runs the risk of "rubber-stamping" a decision that could have been formulated by less than a majority of the board or by a non-board member. *Brown v. Inhabitants of the Town of Bar Harbor,* CV-83-56 (Me. Super. Ct., Han. Cty., Jan. 19, 1984). If a subcommittee of the board comprised of three or more members is asked to develop tentative findings and conclusions, there is the risk that the subcommittee members may not realize that they must comply with the public notice requirements of the Maine Freedom of Access Act (1 M.R.S.A. § 406). *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). They also run the risk that someone may try to introduce new information which was not presented at the full board meeting and to which the applicant and other parties may not have had an opportunity to respond, thereby depriving the applicant and those parties of their right to due process under the Constitution. *Mutton Hill Estates, Inc. v. Inhabitants of the Town of Oakland,* 468 A.2d 989 (Me. 1983). Whatever procedure is used by a board to prepare and approve findings and conclusions, it is crucial to their validity that the board carefully review them to make sure that each review standard and subpart of each standard is addressed and that the board clearly adopts all of the findings and conclusions as part of its own decision. *Chapel Road Associates, supra*.

After Making the Decision; Notice of Decision; Variance Certificate to be Recorded

Once the board has made its decision, the secretary should incorporate the findings and legal conclusions and the number of votes for and against the application into the minutes. A copy of the decision should be sent to the applicant (and anyone else required by statute or ordinance) promptly after the decision is made. The board should check the applicable statute or ordinance to see if it states a deadline. For example, 30-A M.R.S.A. § 2691 requires the board to send or hand deliver a copy of its written decision to the applicant, the applicant's representative, the municipal officers, and the planning board within seven days of making the decision in the case of an appeal. The date on which this is done should be included in the record. A copy of the record should be maintained in the official files of the board. The record is a public record under the Freedom of Access Act and can be inspected and copied by any member of the general public, whether or not a resident of the municipality.

In the case of a variance decision, the board is required to provide a certificate to the applicant which must be recorded at the Registry of Deeds in order for the variance to be valid. This is discussed more fully in Chapter 5 and Appendix 4 of this manual. (See Chapter 4 of this manual for a discussion of reconsideration of appeals decisions.)

Conditions of Approval

A board has inherent authority to attach conditions to its approval of an application. See generally, *In re: Belgrade Shores, Inc*., 371 A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). There must be a "nexus" and "rough proportionality" between a condition of approval and the impact of the proposed development. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). A conditional approval "which has the practical effect of a denial…must be treated as a denial." *Warwick Development Co., Inc. v. City of Portland,* CV-89-206 (Me. Super. Ct., Cum. Cty., Jan. 12, 1990). Any conditions which the board wants to impose on the applicant's project must be clearly stated in its decision and on the face of any plan to be recorded to ensure their enforceability. Even if all the board wants to do is ensure that the plan is developed as shown and as approved and that changes of any type must be approved by the board, this must be clearly stated in the board's decision. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). If it is the municipality's intention to render a permit void if the permit holder fails to comply with conditions of approval within a certain timeframe, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., July 1, 1994). If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick,* 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield,* 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter, the board should be certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the municipality may find itself later on with a situation where the applicant has not met the conditions, forcing the municipality to go to court to convince a judge to enforce the conditions of approval. Unless the board and applicant can reach an agreement on reasonable conditions to impose which are both technically and financially feasible for the applicant and adequate to satisfy the ordinance/statute, the board should not

approve the application. *Cf*., *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty, January 12, 1990).

In a case where an applicant had to prove that his project would not generate unreasonable odors detectable at the lot lines, the court upheld a board's condition of approval requiring that an independent consultant review the design and construction of a biofilter as it progressed and to report back to the board regarding problems. The court found that it was not an unguided delegation of the board's power to the consultant and also found that it was not necessary for the board to require the applicant to provide it with a final filter design before granting approval. *Jacques v. City of Auburn*, 622 A.2d 1174 (Me. 1993).

In *Bushey v. Town of China*, 645 A.2d 615 (Me. 1994), the planning board granted conditional use approval for a kennel subject to a number of conditions, including the installation of a buffer for noise control and the installation of a mechanical dog silencer device; the owners had to fulfill these conditions by a stated deadline. The planning board later found that the conditions were satisfied and a neighbor appealed to the board of appeals, claiming that the conditions had not been effectively satisfied. The board of appeals agreed based on the evidence presented and voted that the permit conditions had not been met and revoked the permit.

The Maine Supreme Court has upheld a condition of approval imposed by a planning board that authorized the City planner to approve minor changes to an approved project plan. *Fitanides v. City of Saco*, 2015 ME 32, 113 A. 3d 1088. The court found that the condition did not constitute an improper delegation of legislative authority in violation of the Constitution. The court also found that the condition did not violate any express or implied prohibition against a delegation of administrative authority in the City's zoning ordinance. (For a discussion of the appeal of plan revisions approved by the City planner, see *Desfosses v. City of Saco*, 2015 ME 151, 128 A. 3d 648.)

Prior Mistakes by the Board

The fact that a current board of appeals or its predecessor made mistakes in approving a permit or variance does not have any legally binding, precedent-setting effect. "Past mistakes do not give any administrative board the right to act illegally." *Rushford v. Inhabitants of Town of York*, CV-89-331 (Me. Super. Ct., Yor. Cty., December 13, 1989).

Time Limit on the Use of the Permit

The holder of a permit has an unlimited amount of time within which to complete the work covered by the permit, unless the applicable ordinance or statute provides otherwise. Some ordinances provide that a permit expires if work is not begun within a certain period of time. This sort of time limit has been upheld by the Maine Supreme Court. *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993) (interpretation of "significant progress of construction" within six months of obtaining a permit); *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930 (interpreting meaning of "the work authorized…is suspended or abandoned at any time after the work is commenced…"). See also *DeSomma v. Town of Casco*, 2000 ME 113, 755 A.2d 485. The issue of whether an approved project is subject to a newly-enacted State or local law is discussed in Chapter 6 of this manual.

Sorting Out Which Board or Official Has Jurisdiction Over Which Part of a Project and at What Point in the Process

The board should look carefully at the administrative procedures and appeals procedures found in the ordinance and statute (if any) governing its review. Often, the steps which an applicant must follow to obtain the necessary planning board approval, building permit from the code enforcement officer (CEO), and variances from the board of appeals before a project can be constructed are not what the board may think. The initial decision as to whether an applicant needs planning board approval or not is sometimes delegated by the ordinance to the code enforcement officer, who may be authorized to make many substantive decisions regarding completeness of the application, the type of use actually being proposed, and the specific performance standards which must be satisfied. *E.g., Ray v. Town of Camden*, 533 A.2d 912 (Me. 1987). Many planning boards incorrectly assume that the ordinance gives them the authority to make those judgments, resulting in an illegal decision and confusion on the part of the board members and the applicant when this is later brought to their attention.

The same is true with regard to projects which need a variance from one or more of the dimensional requirements of the ordinance. Many ordinances require a variance to be sought from the board of appeals as part of an appeal from a denial of an application by the CEO or planning board rather than as a direct request to the appeals board. Those same ordinances often authorize only the CEO to judge an applicant's compliance with specific dimensional requirements; the planning board's review of an application is often limited to a more

general list of criteria (e.g., "will not unreasonably pollute water," "will not adversely affect traffic congestion," etc.). Many boards incorrectly assume that they are supposed to review an application for conformance with all the requirements of the ordinance and also incorrectly assume that an applicant may seek and obtain a variance before requesting either the CEO's or planning board's approval. To avoid confusion, ill will and an illegal decision, the planning board, board of appeals and code enforcement officer should take the time to review and understand the procedures outlined in the ordinance before taking action or advising the applicant.

Reviewing Conditional Use/Special Exception Applications

General

If a general zoning or shoreland-zoning ordinance authorizes the appeals board to decide whether to issue conditional use or special exception permits, the board should be guided by the standards of review that the ordinance provides. In passing the ordinance and designating certain uses as "conditional uses" or "special exceptions," the legislative body has made a decision that those uses are ordinarily not injurious to the public health, safety, and welfare or detrimental to the neighborhood, but that they may be detrimental under certain circumstances if restrictions are not placed on how those uses are conducted. *Cope v. Inhabitants of the Town of Brunswick*, 464 A.2d 223 (Me. 1983). It is the board's job to review the application, decide whether the ordinance allows the proposed use on a conditional basis in that zone, and determine whether the application complies with each of the standards of review and whether to approve or deny the application.

Denials

Denials of conditional use and special exception applications have been upheld by the Maine courts**.** *American Legion, Field Allen Post #148 v. Town of Windham,* 502 A.2d 484 (Me. 1985); *Mack v. Municipal Officers of Town of Cape Elizabeth,* 463 A.2d 717 (Me. 1983); *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1992). The courts also have overturned denials issued under ordinances that failed to guide the board and the applicant as to the requirements which an application must satisfy. (See discussion below regarding "delegation of legislative authority.")

Even if the board finds that it can deny an application because it does not comply with one of the standards of review, the board should complete its review to determine whether there are any other standards that the application doesn't meet. That way, if the denial is appealed, it is possible that a court could uphold it even if the court disagrees with some of the board's conclusions. *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988); *Tompkins v. City of*

Presque Isle, 571 A.2d 235 (Me. 1990); *Grant's Farm Associates Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989).

Second Request for Approval of Same Project

Once an application for a conditional use or special exception permit has been denied, the board is not legally required to entertain subsequent applications for the same project, unless the board finds that "a substantial change of conditions ha(s) occurred or other considerations materially affecting the merits of the subject matter had intervened between the first application and the (second)." *Silsby v. Allen's Blueberry Freezer, Inc*., 501 A.2d 1290, 1295 (Me. 1985). If an ordinance provides a different rule regarding subsequent applications, then the ordinance would govern the board's authority.

Transfer of Ownership after Approval

It is commonly assumed that a subsequent purchaser of land for which a special exception approval was granted previously does not need to return to the board for a new review and approval simply because of the change in ownership. However, at least one Maine Superior Court case has held otherwise. *Inland Golf Properties, Inc. v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000), citing a discussion in K. Young, *Anderson's American Law of Zoning*, § 20.02, pages 416-417. Until the Maine Supreme Court rules on this issue, where an original approval was based on the financial or technical capacity of the original applicant, the board probably should require the new owner to offer similar proof to the board before proceeding to complete the project under the original approval. It is advisable to include language in the applicable ordinance which expressly addresses this issue to avoid any confusion. (Regarding variance approval and a new owner, see Chapter 5.)

Vague Ordinance Standards/Delegation of Legislative Authority

It is very important for an ordinance, especially a zoning ordinance, to contain fairly specific standards of review if it requires the issuance of a permit or the approval of a plan. The standards must be something more than "as the Board deems to be in the best interest of the public" or "as the Board deems necessary to protect the public health, safety and welfare." *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It also is very important to have language in the ordinance instructing the board as to the action which the board must take. It is not enough merely to say that the board must "consider" or "evaluate" certain information. *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985).

If an ordinance gives the board basically unlimited discretion in approving or denying an application, it creates two constitutional problems. It violates the applicant's constitutional rights of equal protection and due process because (1) it does not give the applicant sufficient notice of what requirements he or she will have to meet and (2) it does not guarantee that every applicant will be subject to the same requirements. It amounts to substituting the board's determination of what is desirable land use regulation for that of the legislative body (town meeting or town or city council), where it legally belongs. The courts call this an "improper delegation of legislative authority." Legally, only the legislative body can adopt ordinances, unless a statute or charter gives that authority to some other local official or board.

It is not legally permissible to include a review standard in the ordinance which requires a board to find that a project will be "compatible with the neighborhood" or "harmonious with the surrounding environment." *Compare, Wakelin v. Town of Yarmouth,* 523 A.2d 575 (Me. 1987) *with American Legion, Field Allen Post #148 v. Town of Windham*, 502 A.2d 484 (Me. 1985), *In Re: Spring Valley Development*, 300 A.2d 736, 751-752 (Me. 1973), and *Secure Environments, Inc. v. Town of Norridgewock*, 544 A.2d 319 (Me. 1988). A standard that requires a board or official to determine whether a development "will conserve natural beauty" has also been declared unconstitutional. *Kosalka v. Town of Georgetown*, 2000 ME 106, 752 A.2d 183. *Compare, Conservation Law Foundation, Inc. v. Town of Lincolnville*, 2001 ME 175, 786 A.2d 616. The court has upheld an ordinance review standard that requires a determination that "the proposed use will not adversely affect the value of adjacent properties." *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1992). A shoreland zoning ordinance provision requiring a board to find that a proposed pier, dock or wharf would be "no larger than necessary to carry on the activity" has also been upheld, *Stewart v. Town of Sedgwick*, 2002 ME 81, 797 A.2d 27, as has ordinance language requiring a finding that a pier, dock or wharf would not "interfere with developed areas." *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996).

If a court finds that an ordinance does not satisfy the tests outlined in the cases cited above, it generally will hold that a denial of an application by the board based on the deficient portions of the ordinance is invalid. The result is that the applicant will be able to do what he or she applied to do in the first place, absent some other law or ordinance which controls the application and provides a separate basis for review and possible denial. *Bragdon v. Town of Vassalboro*, 2001 ME 137, 780 A.2d 299. It is important to have local ordinances reviewed by an attorney or some other professional familiar with court decisions and State law to determine whether those local ordinances are enforceable.

CHAPTER 4 – Administrative Appeals

In addition to reading the discussion below, appeals board members should also refer to the material in Chapter 3 in order to fully understand the process which they should follow when hearing and deciding an appeal. Where a person is seeking a variance or ordinance interpretation, the board should read the material in Chapters 5 and 6 also.

Jurisdiction

General Rule

The issue of jurisdiction to hear an appeal was discussed previously in Chapter 2. If an ordinance or statute does not expressly authorize an appeal to the board of appeals, then the person wishing to challenge a planning board or code enforcement officer decision must appeal directly to the Superior Court under Civil Rule of Procedure 80B. 30-A M.R.S.A. § 2691; *Lyons v. Board of Directors of SAD No. 43,* 503 A.2d 233 (Me. 1986); *Levesque v. Inhabitants of Town of Eliot,* 448 A.2d 876 (Me. 1982). When an appeal is from a permit decision made under a zoning or shoreland zoning ordinance, the board of appeals has exclusive authority to hear and decide the appeal, even if the ordinance doesn't expressly grant jurisdiction to the board. 30-A M.R.S.A. § 4353. When a non-zoning ordinance grants jurisdiction to the board of appeals, it must specify the precise subject matter that may be appealed to the board and the official(s) whose action or non-action may be appealed to the board. 30-A M.R.S.A. § 2691.

Enforcement Decisions

When an appeal involves an enforcement decision by a code enforcement officer or planning board rather than a decision regarding a permit application, the board of appeals will have to study the ordinance provisions and state law carefully to determine whether it has jurisdiction. Until recently, enforcement actions (i.e. notices of violation) were generally advisory and not appealable, unless expressly authorized by local ordinance. Now, state law expressly provides that enforcement decisions may be appealed to a board of appeals and in turn to Superior Court, unless a local ordinance or charter provides otherwise. 30-A M.R.S.A. § 2691(4).

Some ordinances say that "any decision of the code enforcement officer or planning board" may be appealed to the board of appeals. Others say that "decisions in the administration of this ordinance" may be appealed. Some ordinances authorize appeals from "decisions made in the administration and enforcement" of the ordinance. The first and third examples above

authorize appeals from decisions regarding the enforcement of the ordinance, while the language of the second example is intended to authorize only appeals from decisions regarding the approval or denial of a permit ("administration"). The following cases illustrate how the court has interpreted specific ordinance provisions: *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991); *Town of Freeport v. Greenlaw*, 602 A.2d 1156 (Me. 1992) (where ordinance language authorized an appeal from any decision by the CEO); *Town of Boothbay v. Jenness*, 2003 ME 50, 822 A.2d 1169 (where the court found that ordinance language authorized an appeal from an enforcement order issued by the CEO and that failure to appeal limited issues that could be raised as a defense in a land use violation prosecution); *Inhabitants of Levant v. Seymour*, AP-02-26 (Me. Super. Ct., Pen. Cty., June 9, 2003) (where the court interpreted the phrase "administration of this ordinance" to include both decisions on permit applications and enforcement orders/stop work orders); *Seacoast Club Adventure Land v. Town of Trenton*, AP-03-04 (Me. Super. Ct., Han. Cty., June 10, 2003); *Pepperman v. Town of Rangeley*, 659 A.2d 280 (Me. 1995) (where it was held that the appeals board decision was advisory because the enforcement section of the ordinance did not provide for an administrative appeal of an enforcement order and because the administrative appeal section limited the board's authority to recommending that the CEO reconsider the decision being appealed if the board disagreed with the CEO's decision); *Herrle v. Town of Waterboro*, 2001 ME 1, 763 A.2d 1159 (where the court concluded that, under the language of the ordinance, the board of appeals' decision was purely advisory regarding violation determinations of the CEO and therefore was not subject to judicial review); *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598 (holding that a decision to issue or deny a certificate of occupancy was appealable); *Farrell v. City of Auburn*, 2010 ME 88, 3 A.3d 385, and *Eliot Shores, LLC v. Town of Eliot*, 2010 ME 129, 9 A.3d 806 (holding that the appeals board's decision related to the appeal of an enforcement order was advisory and not appealable based on the language of the ordinance).

In 2013, the Legislature amended the law governing appeals to a board of appeals to provide that notices of violation and enforcement orders by a CEO under a land use ordinance are appealable to the board of appeals and in turn to Superior Court, unless the ordinance expressly provides that these decisions are advisory or may not be appealed (30-A M.R.S.A. § 2691(4)). This amendment was intended to address the issues in *Eliot Shores* and*Farrell* and to allow appeals of decisions that affect the property interest of landowners [L.D. 1204, Summary (126th Legis. 2013)]. The Maine Supreme Court decision in *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, 103 A.3d 556, discusses section 2691(4). *Dubois* acknowledges that section 2691(4) was amended and that it expressly authorizes appeals to Superior Court from a board of appeals decision on an appeal of a notice of violation issued by a code enforcement officer. See also, *Paradis v. Town of Peru*, 2015 ME 54, 115 A.3d 610; *Raposa v. Town of York*, 2019 ME 29; 204 A.3d 129. In *Raposa*, the Court held that a

CEO's written decision interpreting a land use ordinance is appealable to the board of appeals, even when the CEO finds that there is no violation of the ordinance. The Court noted a decision that an ordinance has not been violated is a legal determination (and not merely advisory), which often determines the use and value of property. Until recently, landowners with property interests affected by these decisions had no remedy. A court will now probably find that these landowners may appeal a notice of no violation to a board of appeals, unless a local ordinance or charter provides otherwise. To the extent that *Herrle* and other cases cited above hold otherwise, they are overturned. See also, *Richert v. City of South Portland*, 1999 ME 179, 740 A.2d 1000; *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063. A municipality should be as explicit as possible in its ordinance regarding the extent to which it wants a CEO's notice of violation, stop work order, cease and desist order or similar type of enforcement notice to be appealable in order to eliminate any confusion.

Where a landowner appealed a stop work order by the CEO and the town simultaneously filed a Rule 80K enforcement action in District Court, the Maine Supreme Court has held that the two proceedings were separate and distinct and the District Court was not required to wait until the administrative appeal was finally concluded. *Town of Levant v. Seymour*, 2004 ME 115, 855 A.2d 1159, citing *Town of Boothbay v. Jenness*, 2003 ME 50, 822 A.2d 1169.

Appeal of Failure to Act

Where the basis for an appeal is the alleged failure of the CEO or planning board to act on a zoning permit application by a required deadline, at least one court has held that the board of appeals has jurisdiction over such an appeal based on language in 30-A M.R.S.A. § 4353(1), which states that "the board of appeals shall hear appeals from any failure to act." *Shure v. Town of Rockport*, AP-98-005 (Me. Super. Ct., Knox Cty., May 11, 1999).

Deadline for Filing Appeal

Appeals to Board of Appeals

If an ordinance or statute does not provide a time limit within which an appeal to the board of appeals must be filed, the court has held that a period of 60 days constitutes a reasonable appeal period. *Keating v. Zoning Board of Appeals of City of Saco,* 326 A.2d 521 (Me. 1974); *Gagne v. Cianbro Corp.,* 431 A.2d 1313 (Me. 1981); *Boisvert v. Reed*, 1997 ME 72, 692 A.2d 921 (Me. 1997). The Maine Supreme Court has held that in the case of the issuance of a building permit, the appeals period begins to run from the date of issuance of the permit, even though there is no formal public decision comparable to the decision-

making process used by a board. *Boisvert v. King*, 618 A.2d 211 (Me. 1992); *Otis v. Town of Sebago*, 645 A.2d 3 (Me. 1994); *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162; *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545 (CEO's issuance of stop work order nearly two years after permit issued by former CEO was deemed an untimely appeal of the original permit decision); *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598. An abutter's request for a cease and desist order related to permits that were issued and never appealed has been deemed an untimely appeal of those permits and denied. *Fryeburg Water Company v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618. In *Ream v. City of Lewiston*, CV-91-209 (Me. Sup). Ct., Andro. Cty, July 24, 1991), the court found that the language of the ordinance appeal provision was broad enough to allow an appeal of a code enforcement officer's decision not to revoke a permit, so the deadline for filing an appeal ran from that decision and not the original permit decision.

The deadline for filing an appeal from a planning board decision on a subdivision application is governed by local ordinance, if the appeals board has been authorized to hear such an appeal; it runs from the date of the planning board's written order. *Hyler v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990).

Appeal to Court

An appeal to the Superior Court from a decision of the appeals board must be filed within 45 days of the date of the board's original decision on an application. 30-A M.R.S.A. § 2691. This means within 45 days of the meeting at which the board actually voted on the application, even though the applicant may not have received written notice of the decision. *Beckford v. Town of Clifton*, 2014 ME 156, 107 A.3d 1124; *Vachon v. Town of Kennebunk,* 499 A.2d 140 (Me. 1985); *Carroll v. Town of Rockport*, 2003 ME 135, 837 A.2d 148. It is possible that a court might allow these time periods to be extended under Rule 80B if the person filing the appeal can show "good cause." *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422; *Viles v. Town of Embden*, 2006 ME 107, 905 A.2d 298. But see, *Reed v. Halprin,* 393 A.2d 160 (Me. 1978). For an appeal which must go directly to Superior Court, the appeal deadline is governed by Rule 80B and is 30 days from the date of the local vote, except in the case of a subdivision decision, where the court has ruled that the deadline runs from the date of the planning board's written order. *Hyler v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990). The 30 day deadline applies even to an appeal of an allegedly illegal condition of subdivision approval. *Sold, Inc. v. Town of Gorham*, 2005 ME 24, 868 A.2d 172. If the applicable local ordinance establishes a deadline for appealing a zoning decision made by a planning board directly to Superior Court, then that deadline will control. *Woodward v. Town of Newfield*, 634 A.2d 1315, 1317 (Me. 1993). Where the board of

appeals has voted to reconsider a decision, an appeal of the reconsidered decision must be filed with the court within 15 days. 30-A M.R.S.A. § 2691.

The Maine Supreme Court addressed the issue of what constitutes a "final decision" that may be appealed to court in *Bryant v. Town of Camden*, 2016 ME 27, 132 A.3d 1183. In this decision, the Court expressed frustration with an ordinance provision that authorized an appeal of "any" municipal land use decision (noting that this results in a process that is "inefficient, time-consuming and expensive") and held that municipalities do not have any home rule authority to override judicial authority to decide when a decision is appealable. In response to this decision, the Legislature amended the laws governing appeals of municipal land use decisions to clarify what constitutes a "final decision" that may be appealed to court. P.L. 2017, ch. 241, § 3. A final decision is now defined as "when a project for which approval is requested has received all required municipal administrative approvals by the [local appeals] board, planning board, or municipal reviewing authority, a site plan or design review board, a historic preservation review board an any other review board created by municipal charter or ordinance." 30-A M.R.S.A. § 2691(H). Any denial of a request for approval by the board of appeals is also considered a final decision even if other municipal administrative approvals are required for the project and remain pending.

Local land use decisions that satisfy the definition of "significant municipal land use decision" found in 30-A M.R.S.A. § 4481 may be appealed either by filing a complaint in the general Superior Court docket or in the "Business Court" docket pursuant to 30-A M.R.S.A. § 4482. A party may not file an appeal of a significant municipal land use decision, if the decision is by a board of appeals, until the decision is a final decision pursuant to § 2691, as discussed above. 30-A M.R.S.A. § 4482(3).

Untimely Appeal; Incomplete Appeal Application

In the absence of language in an ordinance to the contrary, the board of appeals has no authority to change an appeal period. When an appeal is filed late, the board of appeals must take a vote as a board at a public meeting of the board finding that the appellant missed the deadline and denying the application on that basis. The person who filed the appeal may then appeal to Superior Court. If the court finds that a flagrant miscarriage of justice would occur if the appeal were not heard, the court may remand the case to the board of appeals. *Wright*, *Keating*, *Gagne*, *Brackett*, and *Viles, supra*. As a general rule, the court will dismiss an appeal which was not filed within the applicable time limits.

An appeal to the board of appeals is not timely if it is not filed in accordance with the municipality's required procedures, including the completion of whatever appeal application

form is required by the municipality and payment of any required fee. *Washburn v. Town of York*, CV-92-11 (Me. Super. Ct., York Cty., November 10, 1992); *Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., April 8, 1998). The fact that a permit was void when issued does not have any bearing on the deadline for appealing the issuance of the permit or the board's jurisdiction. *Wright, supra*. But see, *Brackett v. Rangeley, supra.*

Indirect Attempts to Challenge an Appeals Board Decision without Appealing; Refusal of Other Town Official(s) to Comply with Appeals Board Order

If a decision is not appealed, it cannot be challenged indirectly at a later date by way of another appeal on a related matter. Nor can one town official or board challenge a decision by another official or board by refusing to issue a permit or approval on the basis that the other board's or official's decision was wrong. For example, if a board of appeals grants a setback variance which the planning board believes is illegal, the planning board cannot refuse to grant its approval for the structure that was the subject of the variance solely on the basis that the variance should not have been granted. The planning board must live with the decision of the appeals board unless the planning board, municipal officers, or other aggrieved party successfully challenges the variance in Superior Court. *Fryeburg Water Co. v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618; *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545; *Milos v. Northport Village Corporation,* 453 A.2d 1178 (Me. 1983); *Fisher v. Dame,* 433 A.2d 366 (Me. 1981). See also *Town of North Berwick v. Jones,* 534 A.2d 667 (Me. 1987), *Fitanides v. Perry,* 537 A.2d 1139 (Me. 1988), *Crosby v. Town of Belgrade,* 562 A.2d 1228 *(*Me. 1989), *Wright v. Town of Kennebunkport*, *supra*, *DeSomma v. Town of Casco*, 2000 ME 113, 755 A.2d 485, *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644, and *Peterson v. Town of Rangeley,* 1998 ME 192, 715 A.2d 930 (dealing with collateral estoppel/res judicata).

Appeal Involving Exempt Gift Lots in a 'Family' Subdivision; Appeal Involving Existence of Illegal Subdivision

For a case ruling on the timing of an appeal challenging a code enforcement officer's decision to issue building permits based on a conclusion that the lots were exempt gift lots under 30-A M.R.S.A. § 4401(4) (Subdivision Law), see *Mills v. Town of Eliot,* 2008 ME 134, 955 A.2d 258. For a case involving whether the existence of a subdivision violation was ripe for appeal, see *Marquis v. Town of Kennebunk*, 2011 ME 128, 36 A.3d 861.

Exhaustion of Remedies

If a statute or ordinance requires appeals to be heard first by the board of appeals, a court generally will refuse to decide an appeal which has been filed directly with the court and will remand the case (send it back) to the board of appeals to hold a hearing, create a record, prepare findings and conclusions, and make a decision. If a board has been legally established by the municipality but no members have been appointed or if the board does not have enough members serving to take legal action, the court will order the municipality to make the necessary appointments. The same is true where a municipality is legally required to have a local appeals board by State law to hear certain kinds of appeals (e.g., zoning appeals), but has failed to establish one; the court will order the municipality to take the necessary legislative action to create the board and then appoint the necessary people to fill the positions on the board. The legal concept involved here is called "exhaustion of administrative remedies." *Fletcher v. Feeney,* 400 A.2d 1084 *(*Me. 1979); *Noyes v. City of Bangor,* 540 A.2d 1110 *(*Me. 1988); *Freeman v. Town of Southport*, 568 A.2d 826 (Me. 1990); *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991). A planning board decision made under a local zoning ordinance must be appealed first to the local board of appeals, unless the ordinance expressly authorizes a direct appeal to court. This is also true for a site plan review decision where the site plan review is part of a zoning ordinance and not a separate ordinance. *Hodson v. Town of Hermon*, 2000 ME 181, 760 A.2d 221; *Thomas v. City of South Portland*, 2001 ME 50, 768 A.2d 595.

Standing

The test for standing to appeal as established by the courts is a two-part test, described below. It applies both to local appeals and to appeals filed with a court. A municipality probably has home rule ordinance authority under 30-A M.R.S.A. § 3001 to modify this test.

"Particularized Injury" Test

When a person can demonstrate that he or she has suffered or will suffer a "particularized injury" as a result of a decision by the planning board or CEO, he/she has met one part of the general test for "standing" to file an appeal with the board of appeals, if the board has jurisdiction to hear the appeal by ordinance or statute. To meet the "particularized injury" test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. *Brooks v. Cumberland Farms, Inc*., 1997 ME 203, 703 A.2d 844; *Christy's Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d

535 (Me. 1991); *Anderson v. Swanson,* 534 A.2d 1286 (Me. 1987); *New England Herald Development Group v. Town of Falmouth,* 521 A.2d 693 (Me. 1987); *Leadbetter v. Ferris,* 485 A.2d 225 *(*Me. 1984); *Lakes Environmental Association v. Town of Naples,* 486 A.2d 91 (Me. 1984); *Harrington v. Town of Kennebunk,* 459 A.2d 557 (Me. 1983). The court has held that "particularized injury for abutting landowners can be satisfied by a showing of 'the proximate location of the abutter's property, together with a relatively minor adverse consequence if the requested variance were granted'." *Fryeburg Water Co. v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618; *Norris Family Associates, LLC v. Town of Phippsburg*, 2005 ME 102, 879 A.2d 1007; *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673. See also, *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266 (defining "abutter" to include "close proximity"); and *Drinkwater v. Town of Milford*, AP-02-08 (Me. Super. Ct., Pen. Cty., April 18, 2003) (son of landowners whose property abutted the applicants' and who worked on his parents' land failed to document that he had a future interest in his parents' land sufficient to give him standing to appeal as an abutter). A person who can show that he/she owns property in the same neighborhood as the applicant's property, even if not an abutter, generally will be deemed to have a particularized injury. *Singal v. City of Bangor*, 440 A.2d 1048 (Me. 1982). Where a person claims that a project will cause him potential harm because he drives by the site daily and will be exposed to greater safety risks due to traffic generated by the project, the court has held that such harm is not distinct from that which will be experienced by many other members of the driving public and therefore was not sufficient for the purposes of the "particularized injury" test. *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735. See also *Nelson v. Bayroot, LLC,* 2008 ME 91, 953 A.2d 378 for a case involving the lessee of a lot in an approved subdivision and standing to appeal a subdivision plan amendment related to an undeveloped area of the subdivision.

If an appeal is brought by a citizens' group or some other organization, the test for the organization's standing to appeal is whether it can show that "any one of its members would have standing in his/her own right and that the interests at stake are germane to the organization's purpose." *Pride's Corner Concerned Citizens Assn. v. Westbrook Board of Zoning Appeals*, 398 A.2d 415 (Me. 1979); *Widewaters Stillwater Co., LLC v. City of Bangor*, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001; *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978); *Penobscot Area Housing Development Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981); *Conservation Law Foundation Inc. v. Town of Lincolnville*, AP-00-3 (Me. Super. Ct., Waldo Cty., February 26, 2001); *Friends of Lincoln Lakes v. Board of Environmental Protection*, 2010 ME 18, 989 A.2d 1128.

Actual Participation in Proceedings Required

Anyone wishing to appeal from a planning board decision to the board of appeals or a board of appeals decision to Superior Court under Rule 80B must also be able to show actual participation for the record in the applicable local hearing process. It is not enough for a person to express his/her concerns to board members or other officials outside the setting of the public hearing or to speak at a preliminary meeting of the board regarding the appeal. Participation must be at the official hearing in person or through someone there acting as the person's official agent or by submitting written comments for the official hearing record. *Jaeger v. Sheehy,* 551 A.2d 841 (Me. 1989); *Lucarelli v. City of South Portland*, 1998 ME 239, 719 A.2d 534; *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371. Under 30-A M.R.S.A. § 4353, the municipal officers and the planning board are automatically made "parties" to the appeals board proceedings, so they would not have to meet the test outlined above in order to file an appeal in Superior Court from an appeals board decision. *Crosby v. Town of Belgrade,* 562 A.2d 1228 (Me. 1989). The same is not true for other officials, like the code enforcement officer, who want to appeal the board of appeals' decision; since those other officials are not statutory parties, they would have to satisfy the two-part test for standing. *Tremblay v. Inhabitants of Town of York*, CV-84-859 (Me. Super. Ct., York Cty., Oct. 3, 1985); *Department of Environmental Protection v. Town of Otis*, 1998 ME 214, 716 A.2d 1023.

Appeal by Permit Holder

If the person wishing to appeal is the person who applied for approval from the planning board, that person has automatic standing to appeal, whether or not he/she attended or otherwise participated in the proceedings of the planning board or the appeals board; the written application for the permit or the appeal is sufficient participation. *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). However, where applicants had allowed their purchase and sale agreement to lapse before filing an appeal, the court held that they had no standing to appeal a denial of their permit application. *Madore v. Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157.

Appeal by Municipality

See *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517, and *Town of Minot v. Starbird*, 2012 ME 25, 39 A.3d 897, for an example of a case where the municipality challenged a board of appeals decision in Superior Court.

Nature of Review–*De Novo* vs. Appellate

The Maine Supreme Court has held that 30-A M.R.S.A. § 2691 requires a board of appeals to conduct a *de novo* review of an appeal, unless the municipal ordinance explicitly directs otherwise. *Stewart v. Town of Sedgwick*, 2000 ME 157, 757 A.2d 773; *Yates v. Town of Southwest Harbor*, 2001 ME 2, 763 A.2d 1168; *Gensheimer v. Town of Phippsburg*, 2005 ME 22, 868 A.2d 161. In 2017, the Legislature amended § 2691 to codify these decisions. P.L 2017, ch. 241, § 1. The law now specifically provides that a board of appeals must conduct a *de novo* review of any matter before it, unless the municipality provides otherwise by charter or ordinance. If a charter or ordinance establishes an appellate review process, the board of appeals must limit its review to the record established by the board or official whose decision is the subject of the appeal and to the arguments of the parties. No new evidence may be accepted.

In a *de novo* review proceeding the board of appeals steps into the shoes of the original decision-maker and starts the review process from scratch, holding its own hearings, creating its own record, and making its own independent judgment of whether a project should be approved based on the evidence in the record which the board of appeals created. The record created by the planning board or code enforcement officer is relevant only to the extent that it is offered as evidence for the record of the board of appeals hearing. The board of appeals will weigh that evidence along with any other that it receives. The board of appeals does not use its record to judge the validity of the decision made by the planning board or code enforcement officer. The board of appeals, in effect, must pretend that the planning board or code enforcement officer decision was never made. In a "de novo" proceeding, the board of appeals is <u>not</u> deciding whether the planning board or code enforcement officer decision was in conformance with the ordinance, whether it was supported by the evidence in the record, or whether it had procedural problems. The board of appeals is deciding only whether the new record which the board of appeals has created supports a finding by the board of appeals that the permit application should be approved or denied. It does this by following the procedures and using the performance standards/review criteria that governed the CEO or planning board in making the original decision. Check the ordinance to see what it says regarding who has the burden of proof. Many ordinances, including the DEP Minimum Shoreland Zoning Guidelines, expressly state that the person filing the appeal has the burden of proof; no distinction is made between *de novo* and appellate review. If the ordinance is unclear, consult with the board's attorney for help interpreting the appeals provision. See generally, *Dunlop v. Town of Westport Island*, 2012 ME 22, 37 A.3d 300, *Osprey Family Trust v. Town of Owls Head*, 2016 ME 89, 141 A. 3d 1114, and *Fitanides v. City of Saco*, 2015 ME 32, 113 A. 3d 64 for a discussion of this issue.

When a local ordinance provides that the board of appeals' role is strictly an "appellate review," the board's job is to review the record created by the official or board whose decision is being appealed and decide whether that record supports the original decision and whether the original decision is consistent with the ordinance. The role of the board of appeals is like that of an appeals court. The board is not conducting a hearing to solicit new evidence in order to create its own record. It is not starting from scratch and is not making its own independent decision. Its decision would not be in the form of "findings of fact" and "conclusions of law." That format is used only when the board conducts a de novo review of an appeal or is the original decision-maker, according to the court in *Yates, supra*. The board may hear presentations by each of the parties and members of the public, but only for the purpose of summarizing the case or trying to clarify certain points. New evidence, issues and arguments may not be introduced and may not be considered by the board. The board may consult the municipality's attorney or MMA Legal Services or other experts for guidance in interpreting evidence in the existing record or may ask the parties to submit briefs to assist the board in interpreting the record. If authorized by the applicable ordinance, the board of appeals may remand a case to the original decision-maker to hear new evidence or new issues. See *Davis v. SBA Towers II, LLC,* 2009 ME 82, 979 A.2d 86 for a case involving multiple remands by the board of appeals to the planning board to correct procedural problems and clarify its earlier findings and conclusions.

To determine whether the ordinance under which a decision is being appealed creates an appellate review role or a de novo review role for the board of appeals, the board should seek advice from the municipality's private attorney or from the Maine Municipal Association's Legal Services Department. In the *Stewart, Yates* and *Gensheimer* cases cited above, the court interpreted virtually identical appeal provisions from the Sedgwick, Southwest Harbor and Phippsburg ordinances; the language was basically the same as the language in an earlier version of the DEP model shoreland zoning guidelines. In *Stewart*, the court found that the language required a de novo review, but in *Yates* and *Gensheimer*, the court found that essentially the same ordinance language required an appellate review. There was no explicit reference to appellate review in any of the ordinances; the court reached this conclusion based on its interpretation of the ordinance language. See also *Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258, where the court interpreted language as requiring appellate review.

To eliminate any doubt about the type of review required for an appeal application by a particular ordinance, a municipality should decide whether it wants the appeals board to conduct an appellate or a de novo review and then amend its ordinance accordingly. For sample language directing the board to conduct a de novo or an appellate review of an appeal, see Appendix 1.

At least one Superior Court case has suggested that there may be times when a board of appeals must entertain testimony during its review of an appeal if the person seeking to offer evidence is entitled to due process, even though the board is conducting an appellate review. The example given by the court involved a permit decision by a code enforcement officer where there was no hearing process at which an abutter could testify. The court suggested that an abutter who wanted to challenge the granting of a permit by the code enforcement officer would be deprived of due process if the board of appeals could not hear testimony from the abutter and was required to make its decision based solely on the record created by the code enforcement officer. *Salisbury v. Town of Bar Harbor*, AP-99-35 (Me. Super. Ct., Han. Cty., January 23, 2001).

A zoning variance application is always reviewed de novo by the board. The board of appeals is always the original decision-maker for zoning variances.

Authority of Appeals Board Regarding Decision Appealed

As a general rule, in deciding an appeal, whether de novo or in an appellate review capacity, the board of appeals does not have the power to issue a permit. If the board of appeals decides that a permit or approval should be granted, then part of its decision would include an instruction to issue the permit or approval directed to the code enforcement officer, planning board, or whoever had initial jurisdiction over the permit application. However, a different approach may be authorized or required by local ordinance.

Consolidation of Pending Appeals

It is possible that a decision made by the CEO or planning board will be appealed to the board of appeals by different parties at different times within the appeal period citing the same or different grounds for appeal. Absent language in an applicable statute or ordinance to the contrary, the board of appeals probably could either hear the appeals separately or consolidate them. If the board wants to consolidate them in order to minimize the time and expense and confusion of dealing with each one separately, it would be advisable to get the written consent of the parties before doing so. If written consent is refused, then the board should handle each appeal independently to avoid any risk of jeopardizing an appellant's appeal deadlines or other rights.

Court Review of Appeals Board Decision

If the board of appeals conducted a *de novo* review of an appeal and the board of appeals decision is appealed to Superior Court, the Superior Court will review the board of appeals decision and board of appeals record in determining whether to uphold or reverse the decision. If the board of appeals acted in an "appellate review" capacity, then the Superior Court will review the original decision made by the planning board or code enforcement officer and the related record, not that of the board of appeals. *Stewart, supra*. The court must decide whether the decision-maker "abused its discretion, committed error of law, or made findings not supported by substantial evidence in the record." *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102, 104 (Me. 1984); *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545; *Thacker v. Konover Development Corp*., 2003 ME 30, 818 A.2d 1013; *Hannum v. Board of Environmental Protection*, 2003 ME 123, 832 A.2d 765. It will uphold the decision being appealed unless it was "unlawful, arbitrary, capricious, or unreasonable." *Senders v. Town of Columbia Falls*, 647 A.2d 93 (Me. 1994); *Kelly & Picerne v. Wal-Mart Stores*, 658 A.2d 1077 (Me. 1995); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 1998 ME 153, 712 A.2d 1061. The court will uphold the board's decision even if conflicting evidence in the record would support a contrary decision, as long as the record does not compel a contrary conclusion. *Herrick v. Town of Mechanic Falls*, 673 A.2d 1348 (Me. 1996); *Two Lights Lobster Shack, supra; Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). The court will vacate the decision only if there is no competent evidence in the record to support the decision. *Friends of Lincoln Lakes v. Board of Environmental Protection,* 2010 ME 18, 989 A.2d 1128; *Concerned Citizens to Save Roxbury v. Board of Environmental Protection*, 2011 ME 39, 15 A.3d 1263. If the official or board whose decision is reviewed by the court failed to make required findings and conclusions, the court generally will "remand" (send back) the case to that decision-maker with instructions to make written findings sufficient to allow the parties and the court to know whether or not the applicant satisfied each relevant ordinance standard and why. *E.g., Chapel Road Associates v. Town of Wells*, 2001 ME 178, 787 A.2d 137; *Widewaters Stillwater v. BAACORD*, 2002 ME 27, 790 A.2d 597; and *Ram's Head Partners LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916. Detailed minutes are not an adequate substitute for written findings and conclusions. *Comeau v. Town of Kittery,* 2007 ME 76, 926 A.2d 189. Compare those cases with *Bragdon v. Town of Vassalboro*, 2001 ME 137, 780 A.2d 299, and *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371.

Preserving Objections for a Court Appeal

If a party to the proceedings has any objections to procedures or proposed findings by the board, he or she must raise them at the meeting so that the board has a chance to consider

them and address them in its decision. Failure to raise these objections before the board will prevent that person or any other party from making those objections in an appeal to the Superior Court. *Pearson v. Town of Kennebunk*, 590 A.2d 535, 537 (Me. 1991); *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371; *Oliver v. City of Rockland*, 1998 ME 88, 710 A.2d 905; *Rioux v. Blagojevic*, AP-02-24 (Me. Super. Ct., Pen. Cty., June 24, 2003).

Status of Original Permit or Approval During Appeal Period or During Period When Appeal Being Reviewed

In the absence of a statute or ordinance provision or a court order to the contrary, the right of the person who received the initial permit or approval to proceed with the approved project is not "stayed" (prohibited temporarily). That person is free to proceed with the project, but does so at his/her peril. If an appeal is filed and decided in favor of the person challenging the permit/approval, the permit holder will have to comply with any final order by a court or appeals board to discontinue the work, remove what was done and restore the area. To avoid this additional expense, it would be in the permit holder's best interest to wait and see if an appeal is filed and its outcome before proceeding with approved work. *Cayer v. Town of Madawaska*, 2009 ME 122, 984 A.2d 207.

Decision-Making Process

The discussion of the decision-making process applicable to permit applications and variance applications in Chapter 3 is relevant in many respects to the process and rules that the board should follow in hearing and deciding an appeal application, especially where the board hears the appeal "de novo." The board's decision must be based only on evidence entered into the official written record of the proceedings. The board should discourage attempts to provide information or influence members outside public meetings. The requirements of the Maine Freedom of Access Act governing meeting notices must be followed, as well as any other statutory or local notice requirements.

Deadlines; Notice Requirements

Generally, deadlines for holding a public hearing on an appeal, rules governing who must be notified of the hearing, deadlines for making the decision on the appeal, and deadlines for providing a written decision and to whom are covered in the applicable local ordinance. State law governing appeals boards generally requires that the board provide written notice of its decision within seven days of making the decision to the municipal officers, the planning board, and the person who filed the appeal. 30-A M.R.S.A. § 2691. For zoning

appeals, 30-A M.R.S.A. § 4353 requires the board to give notice of the hearing date to the person appealing, the municipal officers and the planning board. Otherwise, the board must look to the applicable local ordinance to determine when, where, and to whom notice must be given and what deadlines govern their decision-making process. If the original applicant is not the person who filed the appeal, the board should also provide direct notice of the hearing date and of the board's decision to the original applicant to ensure due process.

Attending Planning Board Meetings

Whether a board of appeals hears an appeal "de novo" or in an "appellate capacity" (see discussion earlier in this chapter), it probably is not a good practice for board members to attend planning board meetings on applications which are likely to be appealed to the board of appeals. The board of appeals should be making its decisions based on evidence presented to it as part of its own proceedings. By not attending the planning board's meetings, the appeals board will minimize bias and due process problems with its own proceedings by ensuring that the only information which will affect its decision on an appeal is what is presented directly to it and of which all participants will be aware. Board members who do learn information outside the board of appeals meetings have an obligation to note that information for the record. (See earlier discussion in Chapter 3 of "ex parte" communications and related issues.)

Consideration of Constitutional Issues

A board of appeals is without authority to decide whether an ordinance has constitutional problems. *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). Such issues must be resolved as part of an appeal to Superior Court. However, the applicant is legally obligated to raise constitutional concerns during the board of appeals proceedings in order to preserve those issues on appeal to the Superior Court. *New England Whitewater Center, Inc. v. Department of Inland Fisheries and Wildlife,* 550 A.2d 56 (Me. 1988). But see, *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. There may be some constitutional issues related to procedures, such as those involving lack of notice, bias or conflict of interest, or lack of due process, that the board of appeals probably can address, though not all attorneys agree. Again, even if a board is unable to resolve these constitutional issues, the applicant must raise them before the board in order to raise them again in an appeal to Superior Court.

Conflict Between Ordinance and Federal Fair Housing Act Amendments or the Americans with Disabilities Act

Sometimes boards are asked to approve land use appeals on the basis that the municipal ordinance is in violation of the Federal Fair Housing Act Amendments (FFHA) relating to group homes for individuals with disabilities or that the ordinance violates the Americans with Disabilities Act (ADA). Often these claims are valid, but they put the appeals board in a position of having to approve something which is contrary to the express language of a local ordinance adopted by the town meeting or council. Since the municipality could be faced with civil rights liability under federal law if its ordinances do deprive citizens of federally-protected rights, the board of appeals should consult with the municipality's private attorney when one of these issues is raised as part of an appeal.

This same dilemma will also arise under 30-A M.R.S.A. § 4357-A with regard to group homes. The law makes it clear that group homes which are operated essentially as single family homes must be treated the same as single family homes for non-disabled people. Again, if the local ordinance is in conflict with this statute, consult with the municipality's private attorney before making a decision.

Authority of Municipal Officers

The municipal officers do not have the authority to hear appeals and override a decision of the board of appeals unless an ordinance provision, statute, or agency rule expressly gives them that authority. However, they do have the authority to appeal a zoning decision of the board of appeals to court and some boards of selectpeople and councils have done so. E.g., *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517. Such appeals should be reserved for cases of extremely poor decisions, since suing a board of appeals is a sure way to eliminate interest in serving on the board. As was noted earlier in this manual, if the board of appeals is appointed by the municipal officers, the municipal officers may remove board members for cause after notice and a hearing if they feel that board members are ignoring the requirements of an ordinance or State law when making decisions.

Second Appeal of Same Decision

Unless an ordinance provides otherwise, the Maine Supreme Court has held that an applicant whose appeal or request for a variance was denied has no legal right to request another hearing on the same appeal or variance unless he or she can show a substantial change in the circumstances which provided the basis for the first appeal or variance.

Driscoll v. Gheewalla, 441 A.2d 1023 (Me. 1982); *Silsby v. Allen's Blueberry Freezer, Inc.,* 501 A.2d 1290 (Me. 1985). See also, *Twomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563.

Reconsideration by the Board of Appeals

Title 30-A M.R.S.A. § 2691 authorizes a board of appeals to reconsider a decision within 45 days of its original decision. Whether the board agrees to reconsider and rehear an earlier decision is entirely discretionary, absent language to the contrary in a local ordinance. *Tarason v. Town of South Berwick*, 2005 ME 30, 868 A.2d 230. A request to the board to reconsider a decision must be filed within 10 days of the decision that is to be reconsidered and the action taken on that reconsideration must occur and be completed within 45 days of the date of the vote on the original decision; the board is not governed by the 10-day deadline if it decides to initiate a reconsideration. *Toomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563. The board may conduct additional hearings and receive additional evidence and testimony. An appeal of a reconsidered decision must be made within 15 days after the decision on reconsideration.

Before beginning a reconsideration process, the board must give direct notice to the original appellant and/or applicant, *Doggett v. Town of Gouldsboro*, 2002 ME 175, 812 A.2d 256, and to anyone else required by the ordinance or State law to receive special notice of the original proceedings. Notice also must be given to the public in the manner required for the original proceedings. If specific individuals actively participated in the original hearing, the board should also notify them directly of the reconsideration hearing. *Anderson v. New England Herald Development Group*, 525 A.2d 1045 (Me. 1987). If someone has already filed a Rule 80B appeal from the board's original decision, the board should not attempt to reconsider its original decision on its own initiative or at the request of someone else without consulting the attorney who will handle the case for the municipality in court. If a request for reconsideration is received, the board must vote at a meeting preceded by public notice as to whether it will entertain the request or deny it. Even if the chair knows that the board always rejects requests filed too close to the end of the deadline, the chair must schedule it for action at a board meeting if the person will not withdraw the request. For other cases involving reconsideration issues, see *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987); *Cardinali v. Town of Berwick*, 550 A.2d 921 (Me. 1988), and *Gagnon v. Lewiston Crushed Stone*, 367 A.2d 613 (Me. 1976). (*Forbes v. Town of Southwest Harbor*, 2001 ME 9, 763 A.2d 1183 is another case involving reconsideration, but addresses a prior version of section 2691.)

Authority of the Board to Modify/Revise an Appeal Application

If a person submits an application to the planning board or code enforcement officer for a permit and is denied, there may be several bases on which that person can or should appeal to the board of appeals (where a local appeal is authorized). The person may file an administrative appeal seeking to challenge the way the ordinance was administered, the way an ordinance provision was interpreted, or the way the evidence was analyzed in deciding whether the application met the ordinance requirements. Sometimes, as the board is reviewing the appeal, it may conclude that the applicant hasn't requested exactly what he/she needs in order to get the approval that he/she wants for the proposed activity. For example, a person's application may have been denied because the planning board thought his structure needed to satisfy a setback requirement, so he appealed to the board of appeals for a variance. In reviewing the appeal, the board may conclude that the planning board misinterpreted the ordinance and that no variance is needed because the ordinance allows the proposed construction under a nonconforming structure provision. The Maine Supreme Court has held that, in a case such as this, it is not necessary for the board of appeals to deny the appeal and make the person submit a new administrative appeal seeking an interpretation of the ordinance. *Cushing v. Smith,* 457 A.2d 816, 823 (Me. 1983). According to the court, the board of appeals has the authority to "address all issues raised and to correct plain error." It is not as clear from *Cushing* how the board should handle a situation where the person has filed an administrative appeal but really needs a variance. Since a variance has a totally different set of criteria which the person must satisfy and since abutters may be more interested in an appeal if a variance is being sought, it probably is safest for the board to require that the applicant fill out a separate variance appeal application and then advertise a new hearing on the variance request.

Role of Code Enforcement Officer or Planning Board at Appeals Board Meeting

Some ordinances actually require the code enforcement officer or planning board members to attend board of appeals hearings. Whether or not it is a local requirement, it is a recommended practice and should not be viewed by the appeals board as a threat to its authority. In most cases the appeals board members will find it helpful to have the CEO or a planning board member present to answer questions relating to a particular decision being appealed or the town's ordinances. This will also avoid possible "ex parte" communications problems, since the board members might otherwise be tempted to consult the planning board or code officer outside the public meeting. Finally, this practice may also improve communications among various boards and officials. Each will gain a better understanding

of what the other does under the town's ordinances and relevant State laws and will learn what the legal limits are in their respective areas of authority.

Although the code enforcement officer (CEO) can be a very valuable resource for the board, the code enforcement officer has no special legal standing to actively participate at board meetings under general law. In the absence of a local ordinance or policy that requires the board to solicit input from the code officer on appeal or other applications that the board is reviewing, the board has the discretion whether or not to seek input from the CEO. The CEO may request to be recognized by the board if he/she wishes to offer advice or comment about what the board is considering, but the board has no legal obligation to allow the CEO to speak at that point. The exception to this general rule is where the application is an appeal from a decision that the CEO made. In that context, the CEO should be given the same right to present his/her case that the applicant has.

In some communities the code enforcement officer acts as staff to the board of appeals and actively conducts research for the board, prepares summaries of appeals which they will be hearing, drafts board minutes, and prepares draft findings and conclusions for the board to adopt when deciding an appeal. While this role for the code enforcement officer may not cause legal problems when the appeal involves a planning board decision, it does present some due process concerns if the appeal is from a decision of the code enforcement officer and therefore should be avoided in those cases.

The planning board should request that a copy of its record and decision in the original proceeding be entered into the record of the appeals board proceeding related to that decision. This must be done if the board of appeals will be reviewing the appeal in an appellate capacity, as the board of appeals decision on the appeal must be based on its analysis of the original planning board record and decision. If the board of appeals is conducting a *de novo* review, it is not reviewing the planning board's record and is not limited to that record, so the only way the appeals board can consider it is if the planning board or someone else offers it into evidence.

CHAPTER 5 – Variances and Waivers

Variance/Waiver vs. Special Exception/Conditional Use

There often is confusion between variances/waivers and special exceptions/conditional uses. When the board of appeals grants a zoning variance or other authorized waiver, it is waiving or reducing some requirement of the ordinance which would otherwise prevent a proposed structure or project from being approved. Depending on the wording of the local ordinance, variances may be authorized both for dimensional requirements (such as lot size, setback, and frontage) and to allow uses which are otherwise prohibited by the ordinance ("use variances"). The exact language of the ordinance governs what variances or waivers may be granted in a particular municipality. Most ordinances do not allow use variances.

Special exception and conditional use provisions in a zoning ordinance deal with uses which the legislative body generally has decided to permit in a particular area of the community. The purpose of the special exception or conditional use review procedure is to allow the board to determine whether conditions should be imposed on the way the use is conducted or constructed in order to ensure that the use is consistent with and has no adverse impact upon the surrounding neighborhood. (See the discussion of procedure and required ordinance language in Chapter 3 of this manual.)

Zoning Variances in General; Statutory "Undue Hardship" Test

There are five different tests for granting a zoning variance outlined in 30-A M.R.S.A. § 4353 (see Appendix 4). Two of those tests apply to all municipal zoning and shoreland zoning ordinances whether or not the municipality has adopted the statutory provisions: the "undue hardship" test in § 4353(4), governing dimensional and use variances generally, and the basic disability variance test in section 4353(4-A), governing variances to permit construction or alterations needed to accommodate a person with a disability who lives in the subject dwelling or who is a regular user. The other three tests are outlined in § 4353(4-A), § 4353(4-B) and § 4353(4-C) and apply to certain dimensional variances, but only in municipalities which have adopted them by ordinance. One involves garages housing personal vehicles registered with disability plates, one addresses certain setback requirements applicable to single family dwellings, and the other authorizes a "practical difficulty" test. (See Appendix 4 for a detailed discussion.)

The most common variance test is the "undue hardship" test and is outlined in 30-A M.R.S.A. § 4353(4). It authorizes the board of appeals to grant zoning variances (including

shoreland zoning variances) "only when strict application of the ordinance to (the person seeking the variance and his or her) property would cause undue hardship." The "undue hardship" test applies to use variances and dimensional variances to the extent each type is allowed under a particular zoning ordinance. The statutory four part "undue hardship" test appears below. Each of these statutory standards must be met as well as any additional requirements imposed locally. The board of appeals may not grant a zoning variance which is governed by the "undue hardship" test unless it finds that:

a. The land in question cannot yield a reasonable return unless a variance is granted;

b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

c. The granting of a variance will not alter the essential character of the locality; AND

d. The hardship is not the result of action taken by the applicant or a prior owner.

Other Limitations by Ordinance

The municipality may adopt ordinance language which imposes additional limits on the granting of a variance, such as prohibiting variances to allow a use which is otherwise prohibited. Typical zoning provisions limit the granting of a variance to dimensional requirements, such as lot size, frontage or setbacks. Shoreland zoning ordinances generally impose standards which an applicant must meet in addition to the four statutory criteria cited above relating to things such as preservation of vegetation, erosion control, protection of fish and wildlife habitat and effect on water quality. The board of appeals must look carefully at the ordinance provisions relating to variances, including the definitions of "variance" and "undue hardship," to know for sure what type of variances it may grant and what requirements the applicant must satisfy.

Strictly Construed

The Maine Supreme Court has stated in numerous cases that a board of appeals must grant zoning variances sparingly—they are the exception rather than the rule. The test for "undue hardship" outlined above is a very strict one and very difficult to meet. No matter how harmless the variance request may seem and regardless of whether there is no opposition from neighbors, the board must remember that its decision is governed by the legal requirements for "undue hardship" in § 4353 for zoning variances and any other

requirements imposed by the applicable local ordinance and only those requirements. If the board is presented with repeated requests for the same type of variance, particularly in the same neighborhood, this may indicate that the ordinance requirements are too restrictive or unrealistic for that area of town and that the legislative body needs to consider amending the ordinance. The appeals board should refer this problem to the planning board or comprehensive planning committee for further study and a recommendation to the municipal officers. Generally, the landowner also will have the option of petitioning for an ordinance amendment, especially in municipalities which still have town meeting and operate under the general laws of the State. For a summary of Maine court cases analyzing the undue hardship test for zoning variances, see Appendix 4.

Personal Hardship

The court in Maine has made it clear that "undue hardship" relates to a problem created by some feature of the property itself. *Lippoth v. ZBA of City of South Portland,* 331 A.2d 552 (Me. 1973) The fact that the landowner has a personal problem which prompted the request for the variance is not legally relevant to the standard "undue hardship" test, no matter how sympathetic the board may be. It is relevant where the need for the variance stems from a physical or mental disability and the landowner is seeking a disability variance under 30-A M.R.S.A. § 4353(4-A). (See discussion later in this chapter).

The "Reasonable Return" Standard

Most court cases in Maine pertaining to zoning variances and the "undue hardship" test have focused on whether the applicant can realize a "reasonable return" on the property without the variance. The court has made it clear that "reasonable return" does not equal "maximum return." *Barnard v. Town of Yarmouth,* 313 A.2d 741 (Me. 1974); *Grand Beach Assoc., Inc. v. Town of Old Orchard Beach,* 516 A.2d 551 (Me. 1986). It is extremely difficult for an applicant to prove that he or she cannot realize a reasonable return and that no other permitted use could be conducted legally to realize such a return. *Leadbetter v. Ferris,* 485 A.2d 225 (Me. 1984); *Curtis v. Main,* 482 A.2d 1253 (Me. 1984); *Anderson v. Swanson,* 534 A.2d 1286 (Me. 1987); *Marchi v. Town of Scarborough,* 511 A.2d 1071 (Me. 1986); *Goldstein v. City of South Portland*, 1999 ME 66, 728 A.2d 164 ; *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673 ; *Brooks v. Cumberland Farms, Inc.,* 1997 ME 203, 703 A.2d 844; *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995); *Lewis v. Town of Rockport*, 2005 ME 44, 870 A.2d 107. A landowner cannot be forced to sell his land to an abutter as a way to realize a "reasonable return." *Marchi, supra.* However, where an applicant for a variance owns adjoining land which he or she could use to avoid the need for a variance, the court has held that a variance should not be granted. *Sibley v. Town of Wells,*

462 A.2d 27 (Me. 1983); but see, *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. The typical request for a setback variance to allow a deck, porch, garage, storage building or addition to an existing structure will have to be denied on the basis of the "reasonable return" standard, absent proof that the person has tried to sell that property "as is" and no one will buy it unless the proposed construction can occur or that the property cannot be used for any other legal purpose under the zoning ordinance without a variance. *Brooks v. Cumberland Farms, supra*. The Maine court has held in some cases that a "reasonable return" can be realized by recreational uses and lake access. *Toomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563. See also, *Drake v. Inhabitants of Town of Sanford*, CV-88-679 (Me. Super. Ct, Yor. Cty, Nov. 15, 1990) and *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). But see, *Summerwind Cottage, LLC v. Town of Scarborough*, 2013 ME 26, 61 A.3d 698 (no viable recreational use of lot that bordered on a marsh rather than open water).

The "Unique Circumstances" Standard

The court has also addressed "undue hardship" as it relates to the unique circumstances of the property and general conditions in the neighborhood. A landowner seeking a variance from a required lot size in a case where other lots in the neighborhood are all of a similar substandard size generally cannot meet the "uniqueness" test. The same is true where all the lots in the neighborhood are subject to deed restrictions limiting the size of the structure which can be built on the lot. *Greenberg v. Dibiase*, 637 A.2d 1177 (Me. 1994); *Camp v. Town of Shapleigh*, 2008 ME 53, 943 A.2d 595. Compare *Sibley v. Town of Wells,* 462 A.2d 27 (Me. 1983) with *Driscoll v. Gheewalla,* 441 A.2d 1023 (Me. 1982). Likewise, if all of the lots in the area are swampy or steeply sloped, or if they all have rock outcropping, or if they all have utility easements running through them, an application for a variance related to any of these problems probably would have to be denied. Such common neighborhood problems must be addressed through the town's comprehensive plan and appropriate ordinance provisions, not case by case through the granting of a variance. The fact that the lot for which a variance is sought has no structure while neighboring lots do have structures does not make the subject lot "unique." *Camp*, *supra*.

The "Essential Character of the Locality" Standard

The third "undue hardship" criterion focuses on the "essential character of the locality" and generally appears to be almost the flip side of the coin from criterion number two (discussed above). For example, if a landowner requests a setback variance to build an addition bringing his home closer than the required road setback, but no closer than all of the neighboring homes, the requested variance would not alter the "character of the locality."

Driscoll v. Gheewalla, supra. However, it probably would not meet the "uniqueness" criterion or the "reasonable return" criterion. The "essential character" standard may have been intended to relate to use variances when originally drafted, but it applies to both use and dimensional variances.

The "Self-Created Hardship" Standard

The question of whether the applicant for an "undue hardship" variance or a prior owner of the land created the hardship which is the basis for the variance request is not as simple to answer as it may appear. If a person seeking a variance was the owner of the lot when the ordinance requirement in question took effect, that person generally would not have a "self-created" hardship and could satisfy criterion number four. At one time the Maine court cases held that a board must deny a variance application from someone who bought the lot after the ordinance took effect, since he or she was presumed to have had knowledge of the restrictions on the use of the lot which the ordinance imposed and was deemed to have created his/her own hardship. *Bishop v. Town of Eliot,* 529 A.2d 798 (Me. 1987). However, the Maine Supreme Court in *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995), and in *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660, held that knowledge of zoning restrictions by a purchaser of a nonconforming lot, without more, will hardly ever constitute a self-created hardship. A classic example of self-created hardship is where a landowner conveys a lot from a larger parcel and either doesn't include enough area or frontage in the new lot to make it buildable or leaves a remaining piece which doesn't meet ordinance requirements. The court in *Phaiah v. Town of Fayette*, 2005 ME 20, 866 A.2d 863, held that the failure of the applicant or a predecessor in the chain of title to act on a building permit, resulting in its expiration, did not constitute a self-created hardship.

Request for Variance "After the Fact"

A person who commits a violation of an ordinance requirement, such as a zoning setback, sometimes will seek a variance after-the-fact as a way to correct the violation. Normally an ordinance violation must be resolved through regular code enforcement channels rather than through a variance granted by the board of appeals. If a landowner does apply for a variance after-the-fact, the board should review the request without taking into account that the structure has been built. The board should determine whether the applicant would have been entitled to a variance if he/she had come to the board before the fact and only grant a variance if the applicant satisfies all prongs of the undue hardship test and only to the extent needed. Usually an after-the-fact application is the result of a builder's error where the building could have conformed to the ordinance requirements but someone mismeasured. In that case the hardship is self-created and the variance should be denied. It then becomes

an enforcement issue to get the building moved or altered so that it conforms. *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673.

Authority to Grant Variances

Zoning Variances

As a general rule, any ordinance provision which attempts to authorize the planning board, code enforcement officer, or municipal officers to grant variances from zoning requirements violates 30-A M.R.S.A. § 4353, since that statute gives the board of appeals the sole authority to grant a zoning variance. *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106; *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172. A municipality's home rule authority under 30-A M.R.S.A. § 3001 has been preempted by 30-A M.R.S.A. § 4353 regarding delegation of authority to grant zoning variances.

The Maine Supreme Court in *Hartwell v. Town of Ogunquit*, 2015 ME 51, 115 A. 3d 81, found that the planning board's decision to grant a project approval without requiring the applicant to satisfy a building elevation requirement was tantamount to the unauthorized granting of a waiver. The court remanded the case with instructions that the board require the missing building elevation information. (Note: Since the site plan review provisions in this case were part of a zoning ordinance and not a stand-alone ordinance, the town arguably could not grant waiver authority to the planning board; such an ordinance provision might constitute the granting of illegal variance powers to the planning board. See, *Perkins v. Town of Ogunquit, supra*.)

In 2005 section 4353 (4-C), last paragraph was amended to allow a zoning ordinance to explicitly authorize the planning board to approve applications that don't meet required zoning dimensional standards in order to promote cluster development, accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by a zoning ordinance. An approval which falls within these guidelines does not constitute a zoning variance. This authority does not include shoreland zoning dimensional standards. The amendment was enacted in response to the Maine Supreme Court decision in *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58. See also, *Wyman v. Town of Phippsburg,* 2009 ME 77, 976 A.2d 985 (construing two different buffer provisions in a zoning ordinance and concluding that the planning board decision regarding buffer width wasn't tantamount to the granting of a variance).

Non-Zoning Variances

Often a subdivision or site plan review ordinance or other non-zoning ordinance gives the planning board the authority to "waive" certain requirements of the ordinance if they would cause "hardship" to the applicant. The definition of "hardship" in that context is not necessarily the same as the definition of "undue hardship" in § 4353, unless the ordinance expressly refers to that statute. Although the municipality may give the authority to grant these waivers to the board of appeals, there is no conflict with § 4353 if a non-zoning ordinance empowers the planning board to grant waivers. In any case, a non-zoning ordinance which authorizes a board or official to waive certain requirements should set out the standards to use in determining whether an applicant will suffer a hardship without a waiver. However, if the waiver authority granted under a non-zoning ordinance attempts to authorize a board or official to waive dimensional requirements established under a zoning ordinance, such a waiver provision is beyond the municipality's home rule authority, unless it falls within the 2005 guidelines set out in section 4353 described above. *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58. See also, *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172.

Effect of Variance Decision

When the board of appeals grants a zoning variance, the effect is to waive or modify some requirement(s) of the ordinance that the applicant is unable to meet. Without the variance from the board of appeals, the planning board or CEO would have no legal authority under the ordinance to approve that application. The variance itself does not constitute a "permit," however. The granting of the variance removes an obstacle to the issuance of the permit or other approval by the planning board or the code enforcement officer.

Once granted, a variance "runs with the land," meaning that the variance is transferred automatically to a new owner if the property subsequently changes hands. It has an indefinite life unless the municipality has set a time limit by ordinance after which the variance will expire if not used. Young, *Anderson's American Law of Zoning*, § 20.02, pages 412-416; *Inland Golf Properties v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000).

After a variance is granted and a building is constructed or activity conducted based on that variance, the building or activity thereafter should be treated as a legally conforming structure or use for the purposes of deciding which ordinance provisions govern it in the future. *Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. This is probably true even if the variance was granted illegally, if it is not

appealed. *Wescott Medical Center v. City of South Portland,* CV-94-198 (Me. Super. Ct., Cum. Cty., July 15, 1994). The granting of a lot size variance brings the lot into "dimensional conformity" regarding minimum lot size. *Campbell v. City of South Portland*, 2015 ME 125, 123 A. 3d 994. A building or activity that is conforming because of the granting of a variance may later become legally nonconforming as a result of an ordinance amendment. (See also the discussion about the need to record variances appearing later in this chapter.)

Procedure for Obtaining a Variance

Some ordinances allow an applicant to seek a variance from the appeals board before applying to the code enforcement officer or planning board for a permit or approval. Others require that the applicant apply for the permit or approval first and then seek a variance as an appeal from the denial of the original application. Study the ordinance governing the project to determine the appropriate sequence in your municipality.

Appeal of Board of Appeals Decision by Other Municipal Officials

If the municipal officers or the planning board believe that the board of appeals has wrongfully granted a zoning variance where the applicant has not met all of the criteria for "undue hardship" set out in § 4353, as a board they have "standing" to challenge the board of appeals' decision in Superior Court pursuant to 30-A M.R.S.A. § 4353(4). *Crosby v. Town of Belgrade,* 562 A.2d 1228 (Me. 1989). However, in the case of an appeal by the planning board, the municipal officers may not be willing to use public money to pay for such an appeal, so the planning board members should consult with the municipal officers before retaining a lawyer to avoid having to pay from their own pockets. (See additional discussion of "standing" in Chapter 4.) See *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517 for a case where a municipality successfully appealed a decision of its board of appeals to grant a zoning variance.

Recording Variances; Abandonment of an Approved Variance

Recording Requirement

State law (30-A M.R.S.A. § 4353 and § 4406) requires the board of appeals and the planning board to prepare a certificate which can be recorded in the Registry of Deeds and provide it to the applicant for recording whenever they grant a zoning variance or a subdivision variance or waiver. A sample zoning variance certificate and a copy of the law are included in Appendix 4. To be valid, zoning variance certificates must be recorded within 90 days of

the decision. Subdivision variances or waivers must be recorded within two years of final approval of the plan. If the certificate is not recorded within the stated deadline, the variance/waiver becomes void. The only way to "reactivate" the variance or waiver in that case is for the person wishing to rely on the variance or waiver to submit a new application on which the board may act. The board's review would be governed by the ordinance in effect at the time of the new application. The board is not obligated to grant the variance/waiver automatically the second time around; if it determines that it made a mistake the first time, it should deny the new request. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. If the board is only authorized to hear a variance request as an appeal from a decision by another board or official, then the person who wants the variance would need to reapply for the permit/approval and be denied again in order for the board of appeals to hear the new variance request, absent language in the ordinance to the contrary.

Abandonment

If a person has received approval of a variance, but later decides that he/she wants to abandon the variance and give up his/her legal rights in relation to it, it probably can be done, but there is no process spelled out in State law. Absent a procedure provided by ordinance, the person should make a written request to the board of appeals. The board should take a formal vote acknowledging that the owner wants to abandon the variance and issue a "certificate of abandonment" which can be recorded at the Registry. A sample certificate appears in Appendix 4 of this manual. It must be in notarized form and should include: the landowner's name; property address; a Registry of Deeds Book and Page description of the property; a reference to the Book and Page where a variance approval certificate was recorded, if any; the date on which the variance was approved; the date on which the request for abandonment was granted; the reason for the abandonment request; and a statement that the board's approval of the abandonment makes the original variance void and of no effect and that the variance cannot be relied upon for any future construction activity. Before approving and issuing a certificate, the board of appeals should require proof that neither the applicant, the landowner (if a different person), nor any third party has taken action in reliance on the original granting of the variance which might be jeopardized by its abandonment.

Second Request for Same Variance

This issue was previously discussed in Chapter 4.

Shoreland Zoning Variances

Title 38 M.R.S.A. § 438-A(6-A) requires the board of appeals to send copies of all shoreland zoning variance applications (and any supporting material) to the Department of Environmental Protection for review and comment at least 20 days before taking action on the application. If the DEP submits comments to the board, they must be entered into the record and considered by the board in making its decision. Shoreland zoning ordinances require that variance decisions be filed with the DEP within 14 days from the date of the decision.

If DEP staff believes that the board has incorrectly interpreted the undue hardship test or otherwise erred in granting a variance, they may ask the board to voluntarily reconsider its decision. However, unless the DEP actually participated in the board of appeals proceedings on the variance application, either by having a staff person attend or by sending written comments for the record, the court has held that DEP cannot appeal the granting of the variance in court. *Department of Environmental Protection v. Town of Otis,* 1998 ME 214, 716 A.2d 1023. The State does have another option, since it has the authority under 38 M.R.S.A. § 443-A to take enforcement action against a municipality which is not administering and enforcing its shoreland zoning ordinance as required by State law.

The Maine Supreme Court has interpreted 30-A M.R.S.A. § 4353 and 38 M.R.S.A. § 439-A(4) as allowing a municipal board of appeals to grant a dimensional variance to permit an expansion within the shoreland zone as long as the applicant proves undue hardship and the dimensional variance and expansion are not otherwise prohibited by the ordinance. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. Section 439-A now includes express language to that effect.

Disability Variances

Most zoning variances may not be granted unless the applicant has satisfied all elements of the "undue hardship" test in Title 30-A § 4353(4) of the Maine statutes. State law [30-A M.R.S.A. § 4353(4-A)] provides a separate variance test for applicants who want to construct or alter a structure needed for access to or egress from a dwelling by a person with a disability who resides there or who regularly uses the dwelling. (See Appendix 4 for a copy of this law.) This includes variances needed for access to interior areas as well as to enter and exit the building. As was noted earlier in this chapter, this variance test applies to all municipalities with zoning ordinances, whether or not this test has been adopted as part of the ordinance by the municipality. Typical requests include a variance for the construction of a wheelchair ramp which would otherwise violate a setback requirement or a

variance for an expansion of a portion of the dwelling which would otherwise violate a setback requirement where the expansion is necessary to allow adequate turning area inside the dwelling for a wheelchair. An application for a disability variance from a setback requirement to allow a deck to be constructed for use by a disabled individual generally would not fit this test. An applicant for a disability variance does not need to satisfy the "undue hardship" test applicable to other zoning variances in order to be entitled to approval. If the applicant can prove that he or she or someone regularly using the dwelling has a disability as defined in the statute, that the variance is really necessary to enable the disabled individual to enter or leave the dwelling or some interior portion of the dwelling, and that the variance requested is the minimum necessary to meet this need, the board should grant the variance. The board may condition its approval on the removal of the structural component which was the subject of the variance either when the disability ceases or when the person with the disability no longer resides there or regularly uses the dwelling; the board is not required to do so, however. Even though disability variances are not usually sought in order to comply with the Americans with Disabilities Act, the board may use ADA guidelines to help it decide how much of a reduction to grant. For several court decisions dealing with disability variances, see *Corson v. Town of Lovell*, Civil No. 92-394-P-H, U.S. Dist. Ct., Dist. of Maine, August 3, 1993; *McGinnis v. Inhabitants of Town of Peru*, CV-94-62 (Me. Super. Ct., Oxf. Cty, Oct. 5, 1994).

In 2015 the Legislature amended 30-A M.R.S.A. § 4353 (4-A) to expressly provide that all medical records submitted to describe or verify a person's disability are confidential. The board of appeals must only discuss that information in executive session and must keep it in a confidential file.

In 2013 the Legislature enacted 30-A M.R.S.A. § 4353-A. That statute allows a municipality to enact a zoning ordinance provision which authorizes the code enforcement officer to grant a disability variance as part of a permit to make a dwelling accessible for a person with a disability who resides in or regularly uses the dwelling. Normally, such a variance would be granted by the board of appeals pursuant to 30-A M.R.S.A. § 4353(4-A)(A) without the need for an ordinance provision. The code enforcement officer has an obligation to keep in a confidential file any medical information submitted to describe or verify a person's disability.

A 2009 amendment to 30-A M.R.S.A. § 4353(4-A) establishes rules governing the granting of a disability variance for the purpose of constructing a garage to store and park a personal vehicle owned by a person with a disability. Such a variance may only be granted under the conditions outlined in the statute and only if the legislative body has adopted this particular disability variance test as part of the zoning ordinance.

Practical Difficulty and Single Family Dwelling Setback Variances

Title 30-A, sections 4353 (4-B) and (4-C) establish special variance tests that may be adopted by municipal ordinance. (See Appendix 4 for a copy of the statute). These tests do not apply unless the municipality has adopted them. Subsection (4-B) outlines special rules for granting a setback variance for a single family dwelling outside the shoreland zone. Subsection (4-C) defines the test for finding that there is a "practical difficulty" which necessitates a variance. Neither of these tests applies to property that is wholly or partially within the shoreland zone. Both of these tests include some standards that are similar to parts of the traditional "undue hardship" test. Some of the standards in these two tests differ from the undue hardship test but are similar to each other. There has been very little litigation in Maine involving either of these types of variances, so there isn't much guidance as to how some parts of these tests should be interpreted. See *O'Toole v. City of Portland*, 2004 ME 130, 865 A.2d 555, for a Maine Supreme Court case involving the "practical difficulty" test and *Wiper v. City of South Portland*, AP-05-10 (Me. Super. Ct., Cum. Cty., Oct. 31, 2005) for a Superior Court decision analyzing the "practical difficulty" test. See *Stillings v. Town of North Berwick*, AP-03-019 (Me. Sup. Ct, Yor. Cty, Oct. 10, 2003) for a case involving a single family dwelling setback variance.

Sample Forms and Decisions

For sample forms which the board may give to an applicant seeking a variance and which the board may use in preparing a written decision, see Appendix 3.

CHAPTER 6 – Vested Rights, Equitable Estoppel, Pending Applications, and Permit Revocation

Revocation of Permit or Approval

Situations may arise in which a property owner obtained municipal approval before doing work, but the official or board who issued the approval believes that it should be revoked. Generally, the issuing official or board should not attempt to revoke the permit or approval on the ground that the property owner is violating certain conditions of the approval, unless authorized by a court order. However, where the issuing authority discovers that it granted approval without authority or that the applicant made false statements on the application which were material to the decision, it may have authority to revoke its approval after providing notice and an opportunity for a hearing, without being authorized to do so by a court order or by ordinance. 83 Am. Jur.2d Zoning and Planning § 645; 13 Am. Jur.2d Buildings §§ 16, 18; *McQuillin Municipal Corporations* (3rd ed. rev.), §§ 26.212a, 26.213, 26.214. The Maine Supreme Court in *Juliano v. Town of Poland,* 1999 ME 42, 725 A.2d 545, held that a new code enforcement officer's attempt to revoke a permit which was improperly granted by the prior code enforcement officer constituted an untimely appeal of the former code enforcement officer's decision and allowed the permit to stand. Before attempting to revoke any permit or approval, the board or official should consult with its municipal attorney to determine whether the permit holder may have acquired vested rights in the permit or approval.

The issue of whether someone has established vested rights is generally one for the courts to decide, not the board of appeals. Parties may raise these issues as part of an appeal to the board of appeals in order to preserve them for argument before a court later on, however. See the discussion of vested rights later in this chapter.

A person aggrieved by the issuance of a permit or an approval cannot bypass an applicable appeal deadline simply by requesting that the official or board in question revoke it and then appealing a decision not to revoke. *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162. However, a court may waive an appeal deadline to prevent a "flagrant miscarriage of justice." *Brackett v. Town of Rangeley,* 2003 ME 109, 831 A.2d 422; *Viles v. Town of Embden*, 2006 ME 107, 905 A.2d 298.

Equitable Estoppel

Based on the facts of a particular situation, a municipality may be equitably estopped (prevented on grounds of fairness) from revoking a permit because a person has changed his or her position in reasonable and detrimental reliance upon the issuance of the permit or other approval or by the conduct or statement of a public official. *City of Auburn v. Desgrossilliers*, 578 A.2d 712 (Me. 1990); *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992); *H. E. Sargent v. Town of Wells*, 676 A.2d 920 (Me. 1996); *Turbat Creek Preservation LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489; *Tarason v. Town of South Berwick*, 2005 ME 30, 868 A.2d 230; *Burton v. Merrill*, 612 A.2d 862 (Me. 1992). A finding of estoppel against a municipality is rare, however. The courts have not found a municipality estopped by oral representations of a code enforcement officer where the ordinance clearly required any official decision or ruling made by the CEO to be in writing. *Shackford and Gooch v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984); *Courbron v. Town of Greene*, AP-01-019 (Me. Super. Ct., Andro. Cty., November 19, 2002). In deciding whether a municipality should be estopped, a court will consider the "totality of the circumstances, including the nature of the particular governmental function being discharged, and any considerations of public policy arising from the application of estoppel to the governmental function." *Town of Union v. Strong,* 681 A.2d 14 (Me. 1996). See also, *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598. Where a code enforcement officer provided a copy of what he thought was the ordinance in effect and a landowner did everything he was asked by the code officer to comply, the town was estopped from enforcing the amended, unpublished version of the ordinance that had been adopted by the town many years before. *Bouchard v. Town of Orrington*, CV-90-88 (Me. Super. Ct., Pen. Cty. April 3, 1992).

Applicability of New Laws to "Pending" Applications or Approved Projects; Expiration and Retroactivity Clauses

"Pending" Applications

Sometimes a municipality amends an applicable ordinance provision either while an application is being reviewed by the board or after the board has granted its approval but before the landowner has begun any of the work authorized by the board. If an application is "pending" when the ordinance is amended, 1 M.R.S.A. § 302 requires the board to complete its review under the original ordinance, unless the new ordinance contains a retroactivity clause. (Such clauses have been upheld by the Maine Supreme Court. *City of Portland v. Fisherman's Wharf Associates II,* 541 A.2d 160 (Me. 1988).) Pending means that the application has already undergone some substantive review, absent language in an ordinance

to the contrary. 1 M.R.S.A. § 302. Other court cases addressing this issue include: *Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231 (Me. 1982*); Maine Isle Corp., Inc. v. Town of St. George*, 499 A.2d 149 (Me. 1985); *Brown v. Town of Kennebunkport*, 565 A.2d 324 (Me. 1989); *Walsh v. Town of Orono*, 585 A.2d 829 (Me. 1991); *Lane Construction Corp. v. Town of Washington*, 2007 ME 31, 916 A.2d 973. Section 302 defines "substantive review" as a "review of that application to determine whether it complies with the review criteria and other applicable requirements of law." Preliminary review of an application for completeness generally does not constitute a substantive review. *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779 (Me. 1989). The fact that an application was delivered to the town office or received and receipted by the town office staff does not make an application "pending," unless a local ordinance establishes a different rule. *P.W. Associates v. Town of Kennebunkport,* CV-88-716 and CV-89-29 (Me. Super. Ct., York Cty., November 20, 1989).

Where a project is governed by more than one ordinance, the fact that an application is "pending" under one ordinance, does not mean that it is "pending" for all purposes. Changes enacted in other relevant ordinances would apply. *Larrivee v. Timmons,* 549 A.2d 744 (Me. 1988); *Perrin v. Town of Kittery*, 591 A.2d 861 (Me. 1991).

Approved Projects; Expiration Clause

Generally, once the board has granted project approval, a property owner has an unlimited amount of time within which to complete the work covered by the approval. However, some ordinances provide that a decision granting project approval expires if work is not begun or completed to a certain degree within a certain period of time. This type of provision has been upheld by the court in Maine. *George D. Ballard, Builder v. City of Westbrook,* 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993); *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930; *Nelson v. Bayroot, LLC*, 2008 ME 91, 953 A.3d 378. See 30-A M.R.S.A. § 4408, which establishes a limit on ordinance deadlines related to the recording of an approved subdivision plan.

Where a permit or variance expires and becomes void based on the provisions of an expiration clause in a statute or ordinance, that fact does not preclude the board from hearing and deciding a new variance application. The court has held that a legal concept called *res judicata* does not apply in that situation. *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995); *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

Even in the absence of such an expiration clause, it may be possible to apply new ordinances to previously approved projects in certain cases, depending on the facts. For example, where a subdivision plan has been recorded for a number of years and the landowner has not sold the lots or made any substantial expenditures to develop the plan, it may be possible to require the owner to merge some of the lots shown on the plan to bring them into compliance with new lot size and frontage requirements which were adopted after the approval of the plan. *F.S. Plummer, Inc. v. Town of Cape Elizabeth,* 612 A.2d 856 (Me. 1992). This is an issue which has not been directly addressed by the Maine courts, so it is advisable for the board to consult with an attorney before deciding what to do in such situations. See, *Thomas, supra.; Fisherman's Wharf, supra; Larrivee*, *supra*; and *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth,* 612 A.2d 856 (Me. 1992). Compare those cases with *Littlefield v. Town of Lyman, supra*, *Cardinali v. Planning Board of Town of Lebanon,* 373 A.2d 251 (Me. 1978), and *Henry and Murphy Inc. v. Town of Allenstown*, 424 A.2d 1132 (NH 1980).

Retroactivity Clause

It is arguable that a new ordinance can be made applicable to an approved but uncompleted project by incorporating appropriate language in a retroactivity clause. *Fisherman's Wharf, supra.* However, it is questionable whether 1 M.R.S.A. § 302 permits a municipality to make an ordinance retroactive to a date before the date on which the public first had notice of the proposed ordinance.

Title 30-A M.R.S.A. § 3007(6), enacted during the 2011 legislative session, prohibits a municipality from attempting to "nullify or amend a municipal land use permit by a subsequent enactment, amendment or repeal of a local ordinance after a period of 45 days has passed after (A) the permit has received its lawful final approval and (B) if required, a public hearing was held on the permit." The validity of a permit expiration clause is not affected by section 3007(6). (This statute apparently was intended to modify the Maine Supreme Court decision in *Kittery Retail Ventures*, *LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183).

Vested Rights

Vested Rights in Valid Permit

The Maine Supreme Court has suggested that a person who begins substantial work (more than site preparation) in good faith reliance on a validly issued permit may obtain vested rights in that permit. *Thomas v. Bangor Zoning Board of Appeals*, 381 A.2d 643 (Me. 1978).

Vested Rights to Proceed with Approved Construction Under Existing Ordinance

The Maine Supreme Court in *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266, stated that "in order for a right to proceed with construction under the existing ordinance to vest, three requirements must be met: (1) there must be the actual physical commencement of some significant and visible construction; (2) the commencement must be undertaken in good faith…with the intention to continue with the construction and to carry it through to completion; and (3) the commencement of construction must be pursuant to a validly issued permit" (citing a number of cases from Maine and other states). The court went on to note that "rights may not vest solely because a property owner: (1) filed an application for a building permit; (2) was issued a building permit; (3) relied on the language of the existing ordinance; or (4) incurred preliminary expenses in preparing and submitting the application for a permit" (citing a number of Maine cases). In *Sahl* the court found that the landowner had acquired vested rights based on the facts and also found that an expiration clause applicable on its face to permits approved before a certain date did not apply to the project in question.

Vested Rights in Erroneously Approved Permit

In a concurring opinion in the Maine Supreme Court's decision in *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422, one of the justices observed that a permit approved and issued in error is totally invalid and cannot serve as a basis for a claim of vested rights; however, that position has not been clearly adopted by a majority of the court. A vested rights test adopted by the Pennsylvania court in relation to an erroneously approved permit in *Department of Environmental Resources v. Flynn*, 344 A.2d 720 (PA Cmwlth. 1975) is as follows:

- Did the applicant exercise due diligence in attempting to comply with the law?
- Did the applicant demonstrate good faith throughout the proceedings?
- Did the applicant expend substantial unrecoverable funds in reliance on the board's approval?
- Has the period during which an appeal could have been taken from the approval of the application expired?
- Is there insufficient evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the project as approved?

If a person receives approval for a project, but the board later determines that it has granted the approval in error (such as for a use which is prohibited by the pertinent ordinance or which requires the approval of another board or official), before attempting to treat the

approval as invalid or revoke it, the board should seek legal advice regarding whether the person has acquired vested rights in the approval under the facts of that particular situation.

CHAPTER 7 – Ordinance Interpretation

General Ordinance Interpretation Rules

General

If the board is confronted with an ambiguous provision in a zoning ordinance as part of an administrative appeal or special exception/conditional use application and is unsure about how to apply the provision to a particular project, it should keep the following court-made rules of ordinance interpretation in mind. The board may find it necessary to seek advice from an attorney in many instances in order to determine how these general rules apply to the ordinance involved. When an ordinance authorizes another board or official to decide an application, neither that board or official nor the applicant may bring a request for an ordinance interpretation directly to the board of appeals, unless authorized by ordinance; the board's authority to interpret an ordinance normally will arise only through the filing of an appeal from some application decision by the code enforcement officer or planning board.

Consistency

To determine the purpose of an ordinance provision, interpret each section to be in harmony with the overall scheme envisioned by the municipality when it enacted the ordinance. The assumption is that the drafter would not have included a provision that clearly was inconsistent with the rest of the ordinance. *Natale v. Kennebunkport Board of Zoning Appeals,* 363 A.2d 1372 (Me. 1976); *Cumberland Farms, Inc. v. Town of Scarborough*, 1997 ME 11, 688 A.2d 914.

Object; Context; Common Meaning

A zoning ordinance must be construed reasonably with regard to the objects sought to be attained and to the general structure of the ordinance as a whole. All parts of the ordinance must be taken into consideration to determine legislative intent. *Moyer v. Board of Zoning Appeals,* 233 A.2d 311 (Me. 1967); *George D. Ballard, Builder v. City of Westbrook,* 502 A.2d 476 (Me. 1985); *Nyczepir v. Town of Naples*, 586 A.2d 1254 (Me. 1991); *Dyer v. Town of Cumberland*, 632 A.2d 145 (Me. 1993); *C. N. Brown, Inc. v. Town of Kennebunk*, 644 A.2d 1050 (Me. 1994); *Buker v. Town of Sweden*, 644 A.2d 1042 (Me. 1994); *Christy's Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930; *Oliver v. City of Rockland*, 1998 ME 88, 710 A.2d 905; *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996); *Springborn v. Town of Falmouth*, 2001 ME 57, 769 A.2d 852; *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768; *Priestly v. Town of Hermon*, 2003 ME 9, 814 A.2d 995; *Isis Development*, *LLC v. Town of Wells*, 2003 ME 149,

836 A.2d 1285; *Peregrine Developers, LLC v. Town of Orono*, 2004 ME 95, 854 A.2d 216; *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86; *Aydelott v. City of Portland,* 2010 ME 25, 990 A.2d 1024; *Bizier v. Town of Turner*, 2011 ME 116, 32 A.3d 1048.

Ambiguity Construed in Favor of Landowner

The restrictions of a zoning ordinance run counter to the common law, which allowed a person to do virtually whatever he or she wanted with his or her land. The ordinance must be strictly interpreted. Where exemptions appear to be in favor of a property owner, the board should interpret them in the owner's favor. *Forest City, Inc. v. Payson,* 239 A.2d 167 (Me. 1968). (But see the discussion of legally nonconforming uses, structures and lots appearing later in this chapter, where the courts have held that ambiguities should be construed against the landowner in that context.)

Natural Meaning of Undefined Terms

Zoning ordinances must be given a strict interpretation and may not be extended by implication. However, they should be read according to the common and generally accepted meaning of the language used when there is no express legislative intent to the contrary, where the context doesn't clearly indicate otherwise, and where the ordinance does not define the words in question. *Jade Realty Corp. v. Town of Eliot*, 2008 ME 80, 946 A.2d 408; *DeSomma v. Town of Casco*, 2000 ME 113, 755 A.2d 485; *Silsby v. Belch*, 2008 ME 104, 952 A.2d 218; *Moyer v. Board of Zoning Appeals, supra; George D. Ballard, Builder, Inc. v. City of Westbrook,* 502 A.2d 476 (Me. 1985); *Putnam v. Town of Hampden,* 495 A.2d 785 (Me. 1985); *Camplin v. Town of York,* 471 A.2d 1035(Me. 1984); *Lewis v. Town of Rockport*, 1998 ME 144, 712 A.2d 1047;*Underwood v. City of Presque Isle*, 1998 ME 166, 715 A.2d 148; *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996); *Town of Freeport v. Brickyard Cove Assoc.,* 594 A.2d 556 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). *Compare with*, *C.N. Brown* and *Buker, supra*. Ordinances must be interpreted reasonably to avoid an absurd result. *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842; *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768. If the words in an ordinance are clear, there is no need to look beyond the words themselves. Common sense should not be disregarded when interpreting an ordinance. *Fryeburg Trust v. Town of Fryeburg*, 2016 ME 174, ___A. 3d ___; *Estate of Merrill P. Robbins v. Town of Cumberland*, 2017 ME 16, ___ A.3d ___.

Similar Uses

The board of appeals has the ultimate authority at the local level to interpret the provisions of a zoning ordinance under 30-A M.R.S.A. § 4353. Even in the absence of a provision in a

zoning ordinance authorizing "uses similar to permitted uses" or words to that effect, the court has held that a zoning appeals board has the inherent authority under 30-A M.R.S.A. § 4353 to interpret whether a proposed use which is not expressly authorized is "similar to" a use which is expressly addressed in the ordinance. In doing so, the board must act reasonably and base its decision on the facts in the record and the provisions of the ordinance. *Your Home*, *Inc. v. City of Portland,* 432 A.2d 1250 (Me. 1981).

Legally Nonconforming ("Grandfathered") Uses, Structures, and Lots

Provisions dealing with nonconforming lots, structures, and uses legally must be included in a zoning ordinance in order to avoid constitutional problems with the ordinance. Such provisions commonly are called "grandfather clauses." They typically define a "nonconforming use or structure" as a use or structure which was legally in existence when the ordinance took effect but which does not conform to one or more requirements of the new ordinance. The mere issuance of a permit under a prior ordinance generally does not confer "grandfathered" status by itself. *Cf.*, *Thomas v. Board of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978). The use or structure must be in actual existence (or at least substantially completed) when the new ordinance takes effect in order to be "grandfathered." *Town of Levant v. Seymour*, 2004 ME 115, 855 A.2d 1159; *Town of Orono v. LaPointe*, 1997 ME 185, 698 A.2d 1059; *cf., Nyczepir v. Town of Naples*, 586 A.2d 1254, 1256 (Me. 1991); *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489. Where a permit is issued before a new ordinance takes effect and a deadline stated in the existing ordinance for beginning construction or substantially completing construction has not expired, the approved use or structure can legally be completed under the existing ordinance if done within the stated deadline. To be "grandfathered," a use must "reflect the nature and purpose of the use prevailing when (the ordinance) took effect and not be different in quality or character, as well as in degree, from the original use, or different in kind in its effect on the neighborhood." *Turbat, supra*. Nonconforming uses and structures generally are allowed to continue and be maintained, repaired and improved. However, the ordinance usually contains language limiting expansion, reconstruction or replacement. "Nonconforming lots" generally are defined in an ordinance to mean lots which were legal when the ordinance took effect and for which a deed or plan was on record in the Registry of Deeds. Such lots generally don't meet the lot size or frontage requirements or both of the new ordinance, but the new ordinance generally allows them to be used for certain purposes as long as other requirements can be met.

The court in Maine has established the following rules relating to nonconforming uses, structures, and lots. These court-made rules must be read in light of the specific language of the nonconforming use, structure, and lot provisions of a given ordinance in order to determine whether the court decisions cited below have any bearing on a nonconforming use, structure or lot in a specific municipality.

See Appendix 3 for a number of DEP "Shoreland Zoning News" articles related to a number of nonconforming use and structure issues.

Gradual Elimination

"The spirit of zoning ordinances is to restrict rather than to increase any non-conforming uses and to secure their gradual elimination. Accordingly, provisions of a zoning regulation for the continuation of such uses should be strictly construed and provisions limiting nonconforming uses should be liberally construed. The right to continue a nonconforming use is not a perpetual easement to make a use of one's property detrimental to his neighbors and forbidden to them, and nonconforming uses will not be permitted to multiply when they are harmful or improper." *Lovely v. Zoning Board of Appeals of City of Presque Isle,* 259 A.2d 666 (Me. 1969); *Shackford and Gooch, Inc. v. Town of Kennebunk,* 486 A.2d 102 (Me. 1984); *Total Quality Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *Chase v. Town of Wells*, 574 A.2d 893 (Me. 1990); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 1998 ME 153, 712 A.2d 1061.

Phased Out Within Legislative Standards

"Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. Nevertheless, the rights of the parties necessitate that this policy be carried out within legislative standards and municipal regulations." *Lovely, supra; Frost v. Lucey,* 231 A.2d 441 (Me. 1967); *Oliver v. City of Rockland*, 1998 ME 88, 710 A.2d 905.

Expansion of Nonconforming Use

"Where the original nature and purpose of an existing nonconforming use remain the same, and the nonconforming use is not changed in character, mere increase in the amount or intensity of the nonconforming use within the same area does not constitute an improper expansion or enlargement of a nonconforming use," where the language of the ordinance prohibits the extension or enlargement of a nonconforming use or the change of that use to a dissimilar use. *Frost v. Lucey,* 231 A.2d 441 (Me. 1967)*; Boivin v. Town of Sanford,* 588 A.2d 1197 (Me. 1991*); Total Quality Inc. v. Town of Scarborough,* 588 A.2d 283 (Me. 1991); *W.L.H. Management Corp. v. Town of Kittery*, 639 A.2d 108 (Me. 1994);

Turbat Creek Preservation, LLC v. Town of Kennebunkport, 2000 ME 109, 753 A.2d 489. An increase in the amount of time that a nonconforming use is conducted does not constitute the expansion or extension of the nonconforming use, in the absence of language in the ordinance to the contrary. *Frost v. Lucey*, *supra*; *Trudo v. Town of Kennebunkport,* 2008 ME 30, 942 A.2d 689.

Expansion of Nonconforming Structure

"Any significant alteration of a nonconforming structure is an extension or expansion. When an ordinance prohibits enlargement of a nonconforming building, a landowner cannot as a matter of right alter the structure, even if the alteration does not increase the nonconformity." *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984). Where a portion of a structure is nonconforming as to setback or height, expanding another portion of the structure to "line it up" or "square it off" constitutes an expansion which increases the nonconformity, absent language in the ordinance to the contrary. *Lewis v. Town of Rockport*, 1998 ME 144, 712 A.2d 1047; *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644.

In 2013 the Maine Legislature repealed the longstanding "30% expansion rule" governing the expansion of nonconforming structures in the shoreland zone and replaced it with the provisions of 38 M.R.S.A. § 439-A(4). The new statutory rule applies to shoreland zoning ordinances regardless of whether the new rule has been incorporated by the municipality into its local shoreland zoning ordinance by the adoption of an appropriate amendment. The text of section 439-A(4) can be accessed using the following website address: http://legislature.maine.gov/statutes/38/title38sec439-A.html.

For a Maine Supreme Court case reciting the evidence on which a planning board relied to establish the size of an existing nonconforming deck for the purposes of making calculations under the 30% expansion rule, see *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368. For a Maine Supreme Court case involving the enclosure of a screened-in porch and whether the work performed constituted either the expansion of a nonconforming use or the expansion of a nonconforming structure under the town's ordinance, see *Trudo v. Town of Kennebunkport*, 2008 ME 30, 942 A.2d 689.

Ordinances generally prohibit the expansion toward the water of a legal nonconforming structure which is nonconforming as to the required water setback. The court has held that this doesn't prevent a board of appeals from granting a water setback variance if the applicant proves "undue hardship." *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. The current language of 38 M.R.S.A. § 439-A(4) is consistent with that holding.

When the expansion of a nonconforming structure is approved by a local board or official, 38 M.R.S.A. § 439-A(4) requires that the approved plan be recorded in the Registry of Deeds within 90 days of approval. The municipality should keep the original as a public record and provide a notarized copy to the applicant for recording by the applicant.

Replacement/Relocation

There is no inherent right on the part of a landowner to replace an existing nonconforming structure with a newer one of the same or larger dimensions. That right hinges on whether the ordinance expressly allows it. This is true even where the original building was destroyed by fire or natural disaster. *Inhabitants of Town of Windham v. Sprague,* 219 A.2d 548 (Me. 1966). The court also has held that when a unit is moved from an existing mobile home park, the park owner doesn't automatically have a right to bring in a replacement unit without a permit, absent clear language in the ordinance to the contrary. *LaBay v. Town of Paris*, 659 A.2d 263 (Me. 1995).

For a discussion of the nonconforming structure "replacement" and "relocation" provisions in a shoreland zoning ordinance and how to coordinate review by the planning board when a project involves both replacement and relocation, see *Osprey Family Trust v. Town of Owls Head*, 2016 ME 89, 141 A. 3d 1114.

Discontinuance/Abandonment

Zoning ordinances generally attempt to prohibit a person from reactivating a nonconforming use if it has been "abandoned" or "discontinued" for a certain period of time. Absent language in an ordinance to the contrary, the word "abandonment" generally is interpreted by the courts on the basis of whether the *intent* of the landowner was to give up his or her legal right to continue the existing nonconforming use. The owner's intent is generally judged on the basis of "some overt act, or some failure to act, which carries the implication that (the) owner neither claims nor retains any interest in the subject matter of the abandonment." Young, *Anderson's American Law of Zoning,* (4th ed.), § 6.65. Although "discontinuance" or cessation of the use for the period stated in the ordinance does not automatically constitute abandonment, it may be evidence of an intent to abandon if accompanied by other circumstances relating to the use or non-use of the property, such as the removal of advertising signs or allowing the building formerly occupied by the use to become dilapidated.

If the ordinance regulates the reactivation of a "discontinued" nonconforming use rather than an "abandonment" of such a use, an analysis of the owner's intent is not necessary. Cessation of the use for the period of time stated in the ordinance is enough. *Mayberry*

v. Town of Old Orchard Beach, 599 A.2d 1153 (Me. 1991). *Cf., Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.

Where the voluntary removal of a nonconforming structure has the effect of returning the use of the property to a permitted use, some ordinances will not allow a replacement structure because the nonconforming use has been superseded by a permitted use. See *Chase v. Town of Wells*, 574 A.2d 893 (Me. 1990).

Approval of a second permit for essentially the same project doesn't automatically constitute an abandonment of the first permit obtained for the project, absent language in the ordinance or permit conditions to the contrary. *Lewis v. Maine Coast Artists,* 2001 ME 75, 770 A.2d 644.

Where a house burned and no livable structure thereafter existed on the property and the property had not been used since the fire (for six years), the existence of a foundation and septic system were not enough to defeat a legal conclusion that the nonconforming use of the property for a residence had been discontinued. *Lessard v. City of Gardiner Board of Appeals*, AP-02-27 (Me. Super. Ct., Kenn. Cty., January 14, 2003).

Constitutionality

Nonconforming use provisions are included in zoning ordinances "because of hardship and the doubtful constitutionality of compelling immediate cessation" of a nonconforming use. *Inhabitants of the Town of Windham v. Sprague,* 219 A.2d 548 (Me. 1966).

Merger of Lots

Where two or more unimproved, recorded legally nonconforming lots are adjacent and owned by the same person, the State Minimum Lot Size Law (12 M.R.S.A. § 4807-D) and many zoning and other local ordinances require that those lots be merged and considered as one for the purposes of development to the extent necessary to eliminate the nonconformity. In order to require the merger of a developed and undeveloped nonconforming lot of record or two developed nonconforming lots of record which are contiguous and in the same ownership, the Maine courts have said that the ordinance must expressly require such a merger. *Moody v. Town of Wells,* 490 A.2d 1196 (Me. 1985); *Powers v. Town of Shapleigh*, 606 A.2d 1048 (Me. 1992) (where the court interpreted the phrase "not contiguous to any other lot in the same ownership" to mean either built or vacant in the context of the rest of the nonconforming lot section, since that section used the words "vacant" and "built" where it wanted to make that distinction). For other nonconforming lot cases, see *Farley v. Town of*

Lyman, 557 A.2d 197 (Me. 1989) and *Robertson v. Town of York,* 553 A.2d 1259 (Me. 1989). If a zoning ordinance establishes a local minimum lot size which is different from and more restrictive than the State's, the question of merger will be controlled by the ordinance. Where an ordinance requires the merger of lots in the same ownership which have "contiguous frontage" with each other, the court in Maine has held that such a provision does not apply to corner lots. *Lapointe v. City of Saco,* 419 A.2d 1013 (Me. 1980). The court also has held that a merger clause which refers to lots with "continuous frontage" does not require the merger of a back lot which is landlocked with an adjoining lot or the merger of adjoining lots which "front" on different streets. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. See also, *John B. DiSanto and Sons, Inc. v. City of Portland,* 2004 ME 60, 848 A.2d 618, where the court upheld the board of appeals' interpretation of the phrase "separate and distinct ownership" as meaning continuously held under separate and distinct ownership from the adjacent lots. For a case interpreting conflicting lot merger clauses in a town wide and shoreland zoning ordinances, see *Logan v. City of Biddeford*, 2006 ME 102, 905 A.2d 293.

The fact that a single deed describes multiple contiguous lots by their external perimeter does not automatically destroy their independent status. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391; *Logan v. City of Biddeford*, 2001 ME 84, 772 A.2d 1183.

Adding Acreage to a Legally Nonconforming Lot; Dividing a Legally Nonconforming Lot

An issue which doesn't appear to have been expressly addressed by the Maine courts is whether a legally existing nonconforming lot loses its grandfathered status if land is added to it, with a resulting change in the lot boundaries. It would seem, as a policy matter, that if acreage is added to a nonconforming lot, but not enough to make it a conforming lot, such an increase shouldn't cause the lot to lose its grandfathered status. However, a particular definition of "lot" or "nonconforming lot" in an ordinance might dictate a different result. The legal status of an adjoining lot from which the acreage was transferred may be affected by the transfer. Ideally, this issue should be addressed by including appropriate language in the ordinance. For a discussion of the meaning of "lot of record," see *Camplin v. Town of York,* 471 A.2d 1035 (Me. 1984).

The authority to divide an existing legally nonconforming lot is more likely to be addressed in the applicable ordinance. As a general rule, ordinances prohibit an action that makes an existing legally nonconforming situation more nonconforming. A person who has an existing "grandfathered" lot might cause that lot to lose its grandfathered status and become an illegal lot if he/she attempts to convey any portion of it, particularly if it is a developed

lot. *Viles v. Town of Embden*, 2006 ME 107, 905 A.2d 298. In *Day v. Town of Phippsburg*, 2015 ME 13, 110 A. 3d 645, a merger clause in the town's shoreland zoning ordinance required two contiguous nonconforming lots to merge. The landowner illegally conveyed one of the original nonconforming lots and then offered to recombine them to restore the grandfathered status of the merged lots. The Maine Supreme Court held that the two lots lost their individual grandfathered status when originally merged and lost their collective grandfathered status when illegally separated. The right to develop the lots would hinge on the owner's ability to obtain a variance.

Often a minimum lot size requirement is triggered by a proposal to build on a lot rather than by the creation of a lot. A lot which is vacant might be legal at any size under the terms of the applicable town ordinance. If the owner divides and conveys part of the lot and then seeks a permit to build on the portion of the lot that he retained, that portion would not qualify as a grandfathered, legally nonconforming lot because it was not a lot of record when the town's ordinance took effect. Therefore if the retained lot doesn't meet the minimum lot size requirement for the building that he plans to construct, he probably will be unable to get approval. Since the lot is undersized because of his action, he probably will not qualify for a variance either. A person proposing such a division should consider not only whether the division itself is legal but whether the division will limit the legal right to develop the lots at a later date.

Functional Division

Where a single parcel of land had been developed with a number of buildings prior to the effective date of the regulation and the buildings had all been used for distinct and separate uses prior to that date, the Maine Supreme Court held that the buildings could be sold separately on nonconforming lots, finding that the land had already been functionally divided. *Keith v. Saco River Corridor Commission*, 464 A.2d 150 (Me. 1983). The court's holding was based on the specific facts related to the land and buildings in question and the language of the Saco River Corridor Commission Act. While the court found a functional division in *Keith,* it acknowledged that the landowner also needed to comply with other applicable State, federal and local laws, including the subdivision law. If the Saco River Corridor Commission Act had the kind of detailed nonconforming lot provisions that many zoning ordinances have today, the court might have reached a different conclusion in *Keith.* The *Keith* decision was based on a nonconforming use provision in the Act and whether the creation and conveyance of lots with existing buildings constituted an expansion or enlargement of a nonconforming use. The court concluded that it did not. It may be advisable for the board to seek legal advice regarding the interpretation of the specific

language in its municipality's ordinance before deciding to apply *Keith* to the division of a developed nonconforming lot.

Change of Use

The test to be applied in determining whether a proposed use fits within the scope of an existing nonconforming use or whether it constitutes a change of use is: "(1) whether the use reflects the 'nature and purpose' of the use prevailing when the zoning ordinance took effect; (2) whether there is created a use different in quality or character, as well as in degree, from the original use; or (3) whether the current use is different in kind in its effect on the neighborhood." *Total Quality Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *Boivin v. Town of Sanford*, 588 A.2d 1197 (Me. 1991); *Keith v. Saco River Corridor Commission*, *supra*; *Turbat Creek, supra*.

Illegality of Use; Effect on "Grandfathered" Status

"As a general rule…the illegality of a prior use will result in a denial of protected status for that use under a nonconforming use exception to a zoning plan. But violations of ordinances unrelated to land use planning do not render the type of use unlawful." *Town of Gorham v. Bauer*, CV-89-278 (Me. Super. Ct., Cum. Cty, November 21, 1989). In *Baue*r the court held that the failure of a landowner to obtain a State daycare license did not deprive an existing daycare of nonconforming use status, but the fact that the owner had not obtained the necessary local site plan approval and certificate of occupancy did prevent his use from becoming a legal nonconforming use.

Lots and Structures Divided by Zone Boundary

In some cases, one lot is divided between two or more zones. Absent a provision in a zoning ordinance to the contrary, the requirements of the ordinance for a particular zone apply only to that part of the lot which is located in that zone. *Town of Kittery v. White*, 435 A.2d 405 (Me. 1981). For a Maine Supreme Court decision interpreting an ordinance which extended the provisions relating to one zoning district into an adjoining district in the case of a split lot, see *Marton v. Town of Ogunquit*, 2000 ME 166, 759 A.2d 704. See *Gagne v. Inhabitants of City of Lewiston*, 281 A.2d 579 (Me. 1971) for a case involving a structure divided by a zone boundary.

Section 11 of the DEP model shoreland zoning guidelines states: "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 and no new lot shall be created except in conformity with all of the regulations

herein specified for the district in which it is located, unless a variance is granted." In 2013 MMA Legal Services discussed this language with the DEP shoreland zoning unit staff to learn how DEP interprets this provision. DEP staff indicated that where part of a lot is located within the shoreland zone, the lot must meet the dimensional requirements of the shoreland zoning ordinance even if the activity involved will be conducted on a part of the lot that is outside the shoreland zone. The entire lot does not need to be within the shoreland zone in order to satisfy lot size requirements; the total area of the lot should be considered, absent language in an ordinance to the contrary.

Definition of Dwelling Unit

The conversion of seasonal cabins rented on a nightly basis, each with separate heating and electrical systems, bathroom, and kitchen, to condominium ownership has been held by the court as constituting the creation of individual dwelling units which must satisfy the applicable minimum lot size. *Oman v. Town of Lincolnville*, 567 A.2d 1347 (Me. 1990). The court also has upheld a determination by a local code enforcement officer and board of appeals that a detached garage with its own water, heat, septic system, full bathroom, kitchen sink, and refrigerator constituted a "dwelling unit" for the purposes of the town's lot size requirement. *Goldman v. Town of Lovell*, 592 A.2d 165 (Me. 1991). See also *Wickenden v. Luboshutz*, 401 A.2d 995 (Me. 1979), *Moyer v. Board of Zoning Appeals*, 233 A.2d 311 (Me. 1967), *Hopkinson v. Town of China*, 615 A.2d 1166 (Me. 1992), and *Your Home, Inc. v. City of Portland*, 432 A.2d 1250 (Me. 1981). For a case analyzing whether a guest house addition to a garage constituted a dwelling unit or an accessory structure, see *Adler v. Town of Cumberland*, 623 A.2d 178 (Me. 1993). Whether a living arrangement legally constitutes a "dwelling unit" ultimately depends on the specific definition of that term in the applicable ordinance. *21 Seabran, LLC v. Town of Naples*, 2017 ME 3, __ A. 3d __. Other cases interpreting the meaning of "dwelling" include: *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768 (interpreting whether a proposed structure was a "hotel," "apartment," or "multiple dwelling"); *Fitanides v. City of Saco*, 2004 ME 32, 843 A.2d 8 (construing the meaning of "multi-family complex"); *Peregrine Developers, LLC v. Town of Orono*, 2004 ME 95, 854 A.2d 216 (determining whether a proposed project was a "dormitory" or a "multi-family dwelling"); *Malonson v. Town of Berwick*, 2004 ME 96, 853 A.2d 224 (interpreting the definition of "boarding home"); and *Adams v. Town of Brunswick,* 2010 ME 7, 987 A.2d 502 (analysis of terms "household," "dwelling unit," and "boarding house").

Definition of Structure in the Shoreland Zone

Title 38, section 436-A(12) of the Maine statutes was amended in 2014 to revise the definition of "structure" for shoreland zoning purposes. That definition now excludes subsurface wastewater disposal systems, geothermal heat exchange wells, and water wells. This definition is expressly applicable to the calculation of the permissible expansion of a nonconforming structure.

Camper Trailers

In the case of *State v. Town of Damariscotta*, CV-98-84 (Me. Super. Ct., Kenn. Cty., June 12, 2001), the court found that a wood frame structure placed on skids to allow it to be moved to various sites within a campground did not qualify as a "camper trailer" and was not within the scope of the grandfathered campground use.

Definition of Lot

In the absence of an ordinance definition of "lot" to the contrary, a parcel which is divided by a public road or a private road serving multiple properties is effectively two lots even though described as a single parcel in the deed. *Fogg v. Town of Eddington,* AP-02-9 (Me. Super. Ct., Pen. Cty., January 3, 2003); *Bankers Trust Co. v. Zoning Board of Appeals*, 345 A.2d 544, 548-549 (Ct. 1974). Absent language to the contrary in an ordinance, the land area underlying a road or easement is not included in calculating whether a lot meets the minimum lot area requirements. *E.g.*, *Sommers v. Mayor and City Council of Baltimore*, 135 A.2d 625 (Md. 1957); *Loveladies Property Owners Assoc. v. Barnegat City Service Co*., 159 A.2d 417 (NJ Super. 1960). For a case analyzing whether a lease may be used to create a new lot in the context of a wind energy project, see *Horton v. Town of Casco*, 2013 ME 111, 82 A.3d 1217.

Conflict Between Zoning Map and Ordinance; Clarifying Zone Boundaries

The courts in Maine have held on several occasions that, absent a rule of construction in the ordinance to the contrary, where a depiction of a zoning district boundary on a map conflicts with the ordinance text description of the type of land which should be included in a particular district, the map depiction is controlling until amended by the legislative body. *Summerwind Cottage, LLC v. Town of Scarborough*, 2013 ME 26, 61 A.3d 698; *Veerman v. Town of China*, CV-93-353 (Me. Super. Ct., Kenn. Cty., April 13, 1994); *Coastal*

Property Associates, Inc. v. Town of St. George, 601 A.2d 89 (Me. 1992). See generally *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842. See also *Nardi v. Town of Kennebunkport*, AP-00-001 (Me. Super. Ct., York Cty., Feb. 12, 2001).

Where confronted with the kind of conflict described above or where a boundary as depicted on a map is ambiguous due to the manner in which the map was prepared, communities look for a solution which allows a board or official to rule on the boundary location and have that ruling be binding on all parties, without revising the map and submitting it to the legislative body for adoption. Unfortunately, under general law, such a resolution would constitute an improper delegation of legislative authority and would not result in a legally enforceable map. It probably would be possible to delegate such authority through a municipal charter provision, but not by ordinance or administrative policy.

Conflict Between Ordinances

Where a town wide zoning ordinance prohibited a particular expansion of a nonconforming use but a separate shoreland zoning ordinance permitted it, the court applied the section of the ordinance which governed conflicts between ordinances and ruled that the expansion was prohibited. The court found that a conflict exists when there will be a different result from the application of two separate ordinances. *Two Lights Lobster Shack v. Town of Cape Elizabeth,* 1998 ME 153, 712 A.2d 1061. See *Logan v. City of Biddeford*, 2006 ME 102, 905 A.2d 293, for a case involving four contiguous nonconforming lots, one with a principal structure, one with an accessory structure, and two vacant; the town-wide and shoreland zoning ordinances had different merger language and the court held that the more restrictive one controlled and required merger. Where a town-approved shoreland zoning ordinance contained a side line setback requirement and a shoreland zoning ordinance imposed on the town by the Maine Board of Environmental Protection (BEP) did not, the Maine Supreme Court held that the State-imposed ordinance served as a supplement to the town ordinance and did not effectively repeal it. *Bartlett v. Town of Stonington*, 1998 ME 50, 707 A.2d 389.

Road Frontage; Back Lots

Where a town ordinance defined "frontage" as the horizontal distance between the side lot lines as measured along the front lot line, the court held that an interior road which passes through the center of the lot cannot be used to satisfy "road frontage" requirements. *Morton v. Schneider*, 612 A.2d 1285 (Me. 1992). See also *Morse v. City of Biddeford*, AP-01-061 (Me. Super. Ct., York Cty., May 10, 2002) (case involving disputed right to use the road in question) and *Fitanides v. City of Saco*, 2004 ME 32, 843 A.2d 8. For cases interpreting the requirements of a back lot development ordinance, see *Merrill v. Town of Durham*, 2007

ME 50, 918 A.2d 1203, *Bizier v. Town of Turner*, 2011 ME 116, 32 A.3d 1048, and *Town of Minot v. Starbird*, 2012 ME 25, 39 A.3d 897.

Setbacks Within the Shoreland Zone; New Structures and Expansions; Functionally Water-Dependent Uses

Title 38, section 439-A(4) requires new structures and expansions of existing structures in the shoreland zone to meet the setbacks established in the minimum shoreland zoning guidelines or as provided in section 439-A(4), other than functionally water-dependent uses. The definition of "functionally water-dependent use" in 38 M.R.S.A. § 436-A(6) no longer includes recreational boat storage buildings. For a discussion of shoreland zoning setbacks as they apply to docks, see *Santomenna v. Town of Sweden*, AP-14-01 (Me. Super. Ct., Oxf. Cty., February 4, 2015). Certain walkways and trails are exempt from shoreland zoning setbacks under 38 M.R.S.A. § 439-A(4-C).

Water Setback Measurement; Measurements Related to Slope of Land, Calculation of Building Expansion, Percentage of Lot Coverage, and Building Height

"The general objectives of the shoreland zoning ordinance, the specific objectives of shoreland setbacks, and the customary methods of surveying boundaries all counsel in favor of the use of the horizontal methodology" to measure setback, rather than an "over-the-ground" method of measurement. *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). For cases interpreting the location of the normal high watermark, see *Armstrong v. Town of Cape Elizabeth*, AP-00-023 (Me. Super. Ct., Cum. Cty., Dec. 21, 2000) and *Nardi v. Town of Kennebunkport*, AP-00-001 (Me. Super. Ct., York Cty., Feb. 12, 2001). See also, *Griffin v. Town of Dedham*, 2002 ME 105, 799 A.2d 1239, and *Mack v. Town of Cape Elizabeth*, 463 A.2d 717 (Me. 1983).

For a case involving measurement of the slope of the land within the shoreland zone, see *Griffin v. Town of Dedham*, 2002 ME 105, 799 A.2d 1239. *Rockland Plaza Realty v. City of Rockland*, 2001 ME 81, 772 A.2d 256, is a case in which the Maine Supreme Court analyzed ordinance provisions related to building height and percentage of lot covered by structures. *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644, provides some guidance regarding taking measurements in connection with the expansion of a nonconforming structure. Regarding expansions toward the water and the point at which the measurement of "toward the water" begins, see *Fielder v. Town of Raymond*, AP-01-16

(Me. Super. Ct., Cum. Cty., October 4, 2001), where the court found that it starts from "the linear setback boundary, not from the structure itself."

Decks

A deck which is attached to a home becomes "an extension and integral part of the principal structure" and therefore must comply with any setback requirements applicable to principal structures. *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). The court also has held that a detached deck constitutes a structure which is subject to applicable setback requirements. *Inhabitants of Town of Boothbay Harbor v. Russell*, 410 A.2d 554 (Me. 1980). In the case of *Town of Poland v. Brown*, CV-97-227 (Me. Super. Ct., Andro. Cty., Feb. 11, 1999), a landowner attempted to claim that an illegal deck was not a structure by putting wheels under it and registering it as a trailer while it was still in place on the ground with lattice skirting and outdoor furniture. The court found that "a deck by any other name is still a deck." Municipalities have the authority to adopt an amendment to a shoreland zoning ordinance that exempts decks from otherwise applicable water and wetland setbacks if the ordinance complies with the specific requirements of 38 M.R.S.A. § 439-A(4-B).

Essential Services; Communications Towers; Satellite Dishes; Public Utilities; Wind Energy Projects

Neither a communications tower nor a radio station qualifies as an "essential service" as typically defined in a local zoning ordinance. *Priestly v. Town of Hermon*, 2003 ME 9, 814 A.2d 995. In *Brophy v. Town of Castine*, 534 A.2d 663 (Me. 1987), the Maine Supreme Court held that a satellite dish was a "structure" for the purposes of the shoreland zoning setback requirements. A Maine Superior Court judge found that a telecommunications tower constituted a "public utility" for the purposes of a particular town's zoning ordinance. *Means v. Town of Standish*, CV-92-1365 (Me. Super. Ct., Cum. Cty., Oct. 8, 1993). See 30-A M.R.S.A. § 4352(4) and a related Public Utilities Commission (PUC) rule found in 65-407 CMR ch. 885 regarding the applicability of a municipal zoning ordinance to public utilities and ocean wind energy projects. In order for a public utility to be exempt from compliance with the municipal ordinance, the utility must first apply for local permit approval and go through the local review process before seeking an exemption certificate from the PUC. For a case analyzing the evidence provided by a tower applicant related to the issues of height and visibility, see *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86.

Accessory Use or Structure

"The essence of an accessory use or structure by definition admits to a use or structure which is dependent on or pertains to a principal use or main structure, having a reasonable relationship with the primary use or structure and by custom being commonly, habitually and by long practice established as reasonably associated with the primary use or structure…. (F)actors which will determine whether a use or structure is accessory within the terms of a zoning ordinance will include the size of the land area involved, the nature of the primary use, the use made of the adjacent lots by neighbors, the economic structure of the area and whether similar uses or structures exist in the neighborhood on an accessory basis." *Town of Shapleigh v. Shikles*, 427 A.2d 460, 465 (Me. 1981). As is always true with ordinance interpretation, the court's test must be read in light of the exact language of the applicable ordinance and the facts in a particular case. See *Flint v. Town of York*, CV-95-675 (Me. Super. Ct., York Cty., Sept. 4, 1996) for a case where the court found that the addition of a redemption center to an existing fruit and vegetable stand did not qualify as an accessory use. See *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, for an analysis of what uses are accessory to a mineral extraction operation.

Home Occupations

A number of Maine court decisions have interpreted local ordinance definitions of "home occupation." In *Town of Kittery v. Hoyt*, 291 A.2d 512, 514 (Me. 1972), the Maine Supreme Court concluded that a commercial lobster storage and sales business was not a home occupation under a local ordinance which defined the term as a "business customarily conducted from the home." Similarly, the court held that an auto body shop and used car rental and sales business wasn't a home occupation under an ordinance requiring such businesses to be "operated from the home." *Baker v. Town of Woolwich*, 517 A.2d 64, 68 (Me. 1987). In *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063, the court found that a commercial dog kennel with 11 indoor-outdoor runs and boarding capacity for 15 dogs qualified as a home occupation under an ordinance permitting home occupations if "customarily conducted on or in residential property." The court found this definition broader and more lenient than the ones in *Hoyt* and *Baker*. A Maine Superior Court judge found that a mail order pharmacy business did not qualify as a home occupation, based on language in the town's ordinance which referred to "stock-in-trade." *Simonds v. Town of Sanford*, CV-91-710 (Me. Super. Ct., York Cty., July 14, 1992).

Commercial and Industrial Uses

For several Maine Supreme Court cases analyzing whether a use or structure was "commercial," see *Beckley v. Town of Windham*, 683 A.2d 774 (Me. 1996) (holding that an office/maintenance building which was proposed as part of a boat rental facility was a commercial structure), *Bushey v. Town of China*, 645 A.2d 615 (Me. 1994) (dog kennel as commercial use), and *Silsby v. Belch*, 2008 ME 104, 452 A.2d 218 (holding that an apartment building was a residential use rather than a commercial use). See also, *Your Home, Inc. v. City of Portland*, 432 A.2d 1250 (Me. 1981). See, *C.N. Brown Co., Inc. v. Town of Kennebunk*, 644 A.2d 1050 (Me. 1994), for a case interpreting whether a gasoline filling station constituted a "retail store" as defined in the ordinance. See *Isis Development, LLC v. Town of Wells*, 2003 ME 149, 836 A.2d 1285, for an analysis of whether a self-storage business constituted "warehousing" or a "service" business. See *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, for a discussion of what constitutes "light industrial" and "manufacturing." See *Rudolph v. Golick*, 2010 ME 106, 8 A.3d 684, for an analysis of whether a horse barn/riding arena qualified as "animal husbandry" or a "commercial" use. See *Lakeside at Pleasant Mountain Condominium Association v. Town of Bridgton*, 2009 ME 64, 974 A.2d 893 for a case analyzing whether an easement to a pond retained by a ski resort company and associated use of a dock and float for recreation constituted a "commercial use" or an "accessory use."

Docks; Related Easements

When a project involves a dock or easement where a number of people hold shared rights to use the area and are not in agreement, the board may find some of the following court decisions helpful. The cases involve the right to apply for construction of a dock, the right to use a dock, the standards of review applicable to dock applications, and the excessive use ("overburdening") of easement rights: *Stewart v. Town of Sedgwick*, 2002 ME 81, 797 A.2d 27; *Britton v. Department of Conservation*, 2009 ME 60, 974 A.2d 303; *Lentine v. Town of St. George*, 599 A.2d 76 (Me. 1991); *Uliano v. Board of Environmental Protection*, 2009 ME 89, 977 A.2d 400; *Toomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563; *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91 (Me. 1995); *Lamson v. Cote*, 2001 ME 109, 775 A.2d 1134; *Uliano v. Board of Environmental Protection*, 2005 ME 88, 876 A.2d 16; *Lakeside at Pleasant Mountain Condominium Association v. Town of Bridgton,* 2009 ME 64, 974 A.2d 893; *Murch v. Nash*, 2004 ME 139, 861 A.2d 645; *Chase v. Eastman*, 563 A.2d 1099 (Me. 1989); *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996); *Kroeger v. Department of Environmental Protection*, 2005 ME 50, 870 A.2d 566; *Farrington's Owners' Association v. Conway Lake Resorts, Inc*., 2005 ME 93, 878 A.2d 504; *Hannum v. Board of Environmental Protection*, 2006 ME 51, 898 A.2d 392; *Badger*

v. Hill, 404 A.2d 222 (Me. 1979); *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). For a case involving the rights of lot owners in a subdivision regarding the use of common roads, see *D'Allessandro v. Town of Harpswell*, 2012 ME 89, 48 A.3d 786. For easements or rights-of-way leading up to or touching a water body established after January 1, 2018, the owner of the easement or right-of-way does not have the right by implication to construct a dock on the easement or use the easement to facilitate the construction of a dock on a water body, unless the easement expressly includes those rights. 33 M.R.S.A. § 459.

Pond

For a case interpreting whether a quarry constitutes a "pond" for the purposes of applicable water setbacks, see *Hollenberg v. Town of Union*, 2007 ME 47, 918 A.2d 1214.

Quarrying; Rock Crushing; Mineral Extraction; Gravel Pits

See *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, for a case upholding a board's finding that rock crushing was an integral part of the process of mineral extraction and not an accessory use or a distinct process; the case also addresses the status of a bituminous hot mix plant and a concrete batch plant in relation to mineral extraction. For a case discussing whether a gravel pit existed on both sides of a road and that the land on both sides constituted a grandfathered pit under the doctrine of diminishing assets, see *Town of Levant v. Seymour*, 2004 ME 115. 855 A.2d 1159.

Meaning of "Permitted Use" or "Allowed Use" in the Context of Nonconforming Uses

In *Gensheimer v. Town of Phippsburg*, 2007 ME 85, 926 A.2d 1168, the court held that a "legally existing nonconforming use" was not the same thing as a "permitted use." Each was subject to separate standards, with those applicable to nonconforming uses being more stringent. The court found that the construction of a road to an existing home was not part of the normal upkeep and maintenance of a nonconforming use and therefore needed its own review and approval as a separate type of permitted use.

Clearing Vegetation in the Shoreland Zone

Title 38, sections 439-A(6) and 439-A(6-A) impose requirements applicable to vegetative clearing in the shoreland zone that apply notwithstanding language to the contrary in an existing shoreland zoning ordinance. These new requirements took effect in 2013.

Appendices

Appendix 1 – Board of Appeals Ordinances and Statute

Sample Warrant Article Wording to Adopt Board of Appeals Ordinance and *Sample* Ordinance

Art. _____. Shall an ordinance entitled "Board of Appeals Ordinance" for the town of _____ be enacted?

Board of Appeals Ordinance

Section 1. Establishment

There is hereby established a board of appeals pursuant to 30-A M.R.S.A. §§ 2691 and 3001.

Section 2. Appointment

2.1. Members of the board of appeals shall be appointed by the municipal officers, who shall determine their compensation, and shall be sworn by the municipal clerk or other person authorized to administer oaths.

2.2. The board shall consist of five (5) regular members and two (2) alternate members.

2.3. Regular members shall serve three (3) year staggered terms, except that the initial appointments shall be (state number of members) for one year, (state number of members) for two years, and (state number of members) for three years. Alternate board members shall be appointed for three year terms.

2.4. When there is a permanent vacancy, the municipal officers shall appoint a person to serve for the unexpired term. A vacancy shall occur upon the resignation or death of any member or when a member fails to attend four (4) consecutive regular meetings without a reasonable excuse. The municipal officers may remove members of the board of appeals by majority vote, after providing notice and an opportunity for a hearing.

2.5. Neither a municipal officer nor his or her spouse may serve as a member or alternate member of the board of appeals.

Section 3. Organization, Rules, and Procedures

3.1. The board shall elect a chairperson and a secretary from among its full voting members and create and fill such other offices as it may determine. The term of all offices shall be one (1) year with eligibility for reelection.

3.2. When a member is unable to act because of interest, physical incapacity, absence or any other reason satisfactory to the chairperson, the chairperson shall designate an alternate member to sit in his or her place.

3.3. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting thereon shall be decided by a majority vote of the members, except the member who is being challenged.

3.4. An alternate member may attend all meetings of the board. He/she may ask questions or offer comments only when members of the public are allowed to do so, and may make and second motions and vote only when he or she has been designated by the chairperson to sit for a member.

3.5. The chairperson shall call one regular meeting each month, provided there is business to conduct. Special meetings can be called at any time by the chairperson or by a majority of the members. Notice of regular, special and emergency meetings shall be given in accordance with the Maine Freedom of Access Act.

3.6. No meeting of the board shall be held without a quorum consisting of three (3) members or alternate members authorized to vote. No action shall be taken by the board without at least three (3) concurring votes on the issue before the board.

Section 4. Duties and Powers

4.1. The board of appeals shall adopt bylaws governing board functions.

4.2. The board of appeals may adopt rules and procedures for transaction of business, and the secretary shall keep a record of its resolutions, transactions, correspondence, findings, and determinations.

4.3. The board of appeals shall file all bylaws, rules and procedures and subsequent revisions, and decisions with the municipal clerk.

4.4. The board of appeals shall perform such duties and exercise such powers as are provided by ordinance and the laws of the State of Maine.

4.5. The board of appeals may obtain goods and services necessary to its proper function within the limits of appropriations made for the purpose by the legislative body of the municipality.

Section 5. Severability Clause

Should any section or provision of this ordinance be declared by the courts to be invalid, such decision shall not invalidate any other section or provision of this ordinance.

Suggested Provision to Reestablish an Improperly Created Board of Appeals

1. Establishment; Reestablishment. The Town of _____ hereby establishes a board of appeals. The board which has been acting as a board of appeals is hereby reestablished as the board of appeals. The members currently serving may continue to do so until the end of the term for which they were (elected / appointed) without the need to be (reelected / reappointed) or to take a new oath of office. The actions which it has taken prior to the adoption of this ordinance are hereby declared to be the acts of the legally constituted board of appeals of the Town of _____.

   (This language would be adopted as an amendment to an existing ordinance or as part of a new ordinance.)

Board of Appeals Ordinance for the Town of Southwest Harbor

Approved 05/1990
Amended 05/1992
Amended 05/1994
Amended 05/1996
Amended 11/2005
Amended 05/2009

Attest a True Copy

_____
Town Clerk

INDEX

SECTION I: GENERAL PROVISIONS

A. Business of the Board shall be conducted in accord with Maine Statutes, Town Ordinances, and the procedures adopted by the Board in its Bylaws.

B. It shall be the responsibility of the Board to become familiar with all the duly enacted ordinances of the Town which it may be expected to act upon as well as with the applicable State statutes.

C. It shall be the responsibility of the Board to become familiar with the community goals, desires and policies as expressed in the Southwest Harbor Comprehensive Plan, and grant the minimum relief which will insure that the goals and policies of the plan are preserved and substantial justice is done.

D. The person filing the appeal has the burden of proof.

E. Application fees shall be set by recommendation of the Board of Appeals and approval of the Southwest Harbor Board of Selectmen.

SECTION II: APPOINTMENTS

A. The Board shall consist of five (5) regular members and (2) two alternate members, appointed by the Selectmen of the Town of Southwest Harbor for terms of three (3) years. These terms shall be staggered so as to preserve continuity on the Board and shall expire on June 30th.

B. Neither a Selectman nor his/her spouse may be a member of the Board.

C. Any member of the Board may be removed from the Board, for cause, by the Selectmen before expiration of his/her term, but only after notice and an opportunity for a hearing at which time the member in question has an opportunity to refute specific charges against him/her. The term "for cause" shall include failure to attend three (3) consecutive Board meetings or hearings without prior notification, or failure to attend at least 50% of all meetings during the preceding twelve (12) month period, or voting when the member has a "conflict of interest."

SECTION III: OFFICERS AND DUTIES

A. The officers of the Board shall consist of a Chairperson, Acting Chairperson and Secretary, who shall be elected annually by a majority of the Board, and shall serve until their successors are elected.

B. CHAIRPERSON. The Chairperson shall perform all duties required by law and the Bylaws and preside at all meetings of the Board. The Chairperson shall rule on issues of evidence, order and procedure, and shall take such other actions as necessary for the efficient and orderly conduct of hearings, unless directed otherwise by a majority of the Board. The Chairperson shall appoint any committees found necessary to carry out the business of the Board.

C. ACTING CHAIRPERSON. The Acting Chairperson shall serve in the absence of the Chairperson and shall have all the powers of the Chairperson during the Chairperson's absence, disability or disqualification.

D. SECRETARY. The Secretary, subject to the direction of the Board and the Chairperson, shall keep minutes of all Board proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such a fact. The Chairperson and/or Secretary shall also arrange for proper and legal notice of hearings, attend to correspondence of the Board, and to other duties as are normally carried out by a Secretary. All records are public and may be inspected at reasonable times.

SECTION IV: CONFLICT OF INTEREST

Any question whether a particular issue involves a "conflict of interest" sufficient to disqualify a member from voting thereon shall be decided by a majority vote of the members, except the member whose potential conflict is under consideration.

The term "conflict of interest" shall be construed to mean direct or indirect pecuniary interest, which shall include pecuniary benefit to any member of the person's immediate family (e.g., grandfather, father, wife, son, grandson) or to his employer or the employer of any member of the person's immediate family.

SECTION V: POWERS AND LIMITATIONS

The Board shall have the following powers to be exercised only upon receipt of a written appeal by an aggrieved party:

A. The Board may interpret the provisions of any applicable Town Ordinance which are called into question.

B. The Board may approve the issuance of a special exception permit or conditional use permit in strict compliance with any applicable Town Ordinance.

C. Except as provided in sub-section D below, the Board may grant a variance only where strict application of any applicable Town ordinance, or a provision thereof, to the petitioner and his property would cause undue hardship. The words "undue hardship" as used in this subsection mean:

1. That the land in question cannot yield a reasonable return unless a variance is granted;
2. That the need for a variance is due to the unique circumstances of the property and not the general conditions in the neighborhood;
3. That the granting of a variance will not alter the essential character of the locality; and
4. The hardship is not a result of action taken by the applicant or prior owner.

D. Variance

1. Disability Variance

The Board may grant a variance to an owner of a residential dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The Board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The Board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this subsection, a disability has the same meaning as a physical or mental handicap under 5 M.R.S.A. § 4553. The term "structures necessary for access to or egress from the dwelling" shall include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

2. Setback Variance

The Board may grant a setback variance to a property owner of a single family dwelling where the Board finds that strict application of the zoning ordinance would cause "undue hardship" as defined in M.R.S.A. 30-A § 4353(4-B):

a. the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
b. the granting of a variance will not alter the essential character of the locality;
c. the hardship is not the result of action taken by the applicant or a prior owner.
d. the granting of the variance will not substantially reduce or impair the use of the abutting property; and
e. that the granting of the variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

f. Additional limitations upon this variance request are:

1. The dwelling for which the variance is sought must be the primary year-round residence of the applicant.
2. The variance may not exceed 20% of the required setback.
3. The variance shall not allow a reduction in the shoreline setback, and
4. The variance may not cause the area of the dwelling to exceed the maximum permissible lot coverage.

E. The Board shall have the power to hear and decide, using an appellate review standard, and not using the *de novo* review standard, all appeals by any person directly or indirectly affected by any decision, action or failure to act with respect to any license, permit variance or other required approval, or any application therefore, including, the grant, conditional grant, denial, suspension, or revocation of any such license, permit variance or other approval (hereinafter a "Decision") where it is alleged that there is an error in any order, requirement, decision, or determination made by or failure to act by:

a. the Planning Board pursuant to the Land Use Ordinance;
b. the Selectmen pursuant to the Special Amusement Permit Ordinance or Title 28-A M.R.S.A. Section 1054 (also relating thereto);
c. the Selectmen or the Road Commissioner pursuant to the Road Ordinance;
d. the Planning Board pursuant to the Floodplain Management Ordinance;
e. the Harbor Committee or the Harbormaster pursuant to the Coastal Waters and Harbor Ordinance.
f. the Selectmen pursuant to the Policy on Warning Sign Requests;
g. the Selectmen pursuant to the Road Opening Permit Ordinance;
h. the Town Manager (or other designated Hearing Officer) or the Selectmen pursuant to Section 14 of the Town Personnel Rules and Regulations relating to grievances with respect to Town employees and officers.

F. The Board shall have the power to hear and decide, using a *de novo* standard, and not using an appellate standard, all appeals by any person where it is alleged that there is an error in any decision or determination made by or failure to act by:

a. the Selectmen or the Assessor pursuant to 36 M.R.S.A. § 841 *et seq*. (relating to the abatement of taxes);
b. the Code Enforcement Officer pursuant to the Land Use Ordinance;
c. the Code Enforcement Officer pursuant to the Flood Plain Management Ordinance.;
d. Plumbing Inspector pursuant to the Maine State Plumbing Code.

G. The Board shall have the power to hear and decide, using a *de novo* review standard, and not using an appellate review standard:

a. the issuance of a special exception permit or of a conditional use permit, as provided in sub-section B above;
b. the granting of an extension to the life of a building permit, as contemplated by SECTION VIII. (H)(3) of the Southwest Harbor Land Use Ordinance, and other similar situations described in other ordinances of the Town of Southwest Harbor where the Board of Appeals is required to make independent factual findings.

SECTION VI: MEETINGS

1. The regular meeting of the Board shall be held each month if there is business to conduct.
2. The annual organizational meeting of the Board shall be the first regular meeting after the Annual Town Meeting.
3. Special meetings of the Board may be called by the Chairperson. At least forty-eight (48) hours written notice of the time, place and business of the meeting shall be given each member of the Board and to the Town Manager.
4. The Chairperson shall call a special meeting within ten (10) days of receipt of a written request from any three members of the Board which request shall specify the matters to be considered at such special meeting.
5. Subject to the discretion of the Chairperson, the order of business at regular meetings of the Board shall be as follows:

   a. Roll Call
   b. Reading and approval of the minutes of the preceding meeting
   c. Action on held cases
   d. Public hearing (when scheduled)
   e. Other business
   f. Adjournment

6. All meetings of the Board shall be open to the public, except executive sessions. No votes may be taken by the Board except in public meeting. Deliberations may be conducted in executive session on the following matters and not others (as defined by 1 M.R.S.A. § 405):

   a. consultation between the Board and its legal counsel concerning litigation or other legal matters where premature general public knowledge would clearly place the Town or Board at a substantial disadvantage; and
   b. discussion or consideration of the appointment, duties, disciplining, resignation or dismissal of a Board member.

SECTION VII: VOTING

1. A majority of the full voting membership of the Board shall constitute a Quorum for the purpose of deciding an appeal.
2. No hearing or meeting of the Board shall be held, nor any action taken, in the absence of a quorum; however, those members present shall be entitled to request the chairperson to call a special meeting for a subsequent date.
3. All matters shall be decided by a roll call vote. Decisions on any matter before the Board shall require the affirmative vote of a majority of the members present and no less than three (3) affirmative votes. In the absence of three (3) affirmative votes, the meeting shall be continued.
4. If a member has a conflict of interest, said member shall not be counted by the Board in establishing the quorum for such matter.
5. No member shall vote on the determination of any matter requiring public hearing unless he/she has attended the public hearing thereon or unless he/she has familiarized him/herself with such matter by studying the record.

SECTION VIII: APPEAL PROCEDURE

1. Any person aggrieved by an action which comes under the jurisdiction of the Board pursuant to Section V of this Ordinance must file such application for appeal in writing on forms provided, within thirty (30) days of the granting or denial of a permit. The applicant shall file this appeal at the office of the Town Clerk, setting forth the ground for his/her appeal. Upon receiving the application for appeal, the Town Clerk shall notify the Chairperson of the Board.
2. The fee to accompany applications for appeal shall be listed on the application. Checks are to be made payable to the Town of Southwest Harbor.

SECTION IX: HEARING

A. The Board shall hold a hearing within a responsible time and shall schedule said Public Hearing on all completed appeal applications within forty-five (45) days of the filing of a completed appeal application. The Chairman shall determine completeness.

B. The Board shall cause notice of the date, time and place of such hearings, the location of the building or lot, and the general nature of the question involved, to be given to the person making the application and to be published once in a newspaper of general circulation in the Town, the date of the publication to be at least ten (10) days prior to the Hearing. The Board shall also cause notice of the hearing to be given to the Town. Except for appeals related to the abatement of taxes, the Board shall cause notice of the hearing to be given to the owners of property abutting that for which the appeal is taken at least ten (10) days prior to the hearing. A copy of each variance request, including the application and all supporting

information supplied by the applicant, shall be forwarded by the municipal officials to the Commissioner of the Department of Environmental Protection at least twenty (20) days prior to action by the Board of Appeals. Any comments received from the Commissioner prior to the action by the Board of Appeals shall be made part of the record and shall be taken into consideration by the Board of Appeals.

C. The Board shall provide as a matter of policy for exclusion of irrelevant, immaterial, or unduly repetitious evidence.

D. The order of business at a public hearing shall consist of the following rules:

1. The Chairperson calls the Hearing to order.
2. The Chairperson determines whether there is a quorum.
3. The Chairperson gives a statement of the case and reads all correspondence and reports received.
4. The Board determines whether it has jurisdiction over the Appeal.
5. The Board decides whether the applicant has "standing" before the Board.
6. The Board determines which individuals attending the Hearing are "interested parties". "Interested parties" are those persons who request to offer testimony and evidence and to participate in oral cross-examination. They would include but are not limited to abutting property owners and those who might be adversely affected by the Board's decision. Parties may be required by the Board to consolidate or join their appearances in part or in whole if their interests or contentions are substantially similar and such consolidation would expedite the Hearing. Municipal officers, the Planning Board and the Code Enforcement Officer shall automatically be made parties to the proceeding.
7. Other persons attending the hearing and Federal, State, Town and other governmental agencies shall be permitted to make oral or written statements and to submit oral and written questions through the Chairperson.
8. The appellant is given the opportunity to present his or her case without interruption.
9. The Board and "interested parties" may ask questions of the appellant through the Chairperson.
10. The "interested parties" are given the opportunity to present their case. The Board may call its own witnesses, such as the Code Enforcement Officer.
11. The appellant may ask questions of the "interested parties" and Board witnesses through the Chairperson, or directly, with the permission of the Chairperson.
12. All parties are given the opportunity to refute or rebut statements made throughout the Hearing.
13. The chairperson shall receive comments and questions from all observers and interested citizens who wish to express their views.
14. The hearing is closed after all parties have been heard. If additional time is needed, the Hearing may be continued to a later date. All participants shall be notified of the date, time and place of the continued Hearing.

15. Written testimony may be accepted by the Board for seven days after the close of the Hearing.

E. The Board may waive any of the above rules or change the order of business if good cause is shown.

SECTION X: DECISIONS

A. The Board shall decide all administrative appeals and variance appeals within thirty (30) days from the date of the final Hearing and shall issue a written decision on all appeals.

B. The final decision on any matter before the Board shall be made by written order signed by the Chairperson. The transcript or tape recording of testimony, if such a transcript or tape recording has been prepared by the Board, and the exhibits, together with all papers and requests filed in the proceedings, shall constitute the public record.

C. The Board, in reaching said decision, shall be guided by standards specified in the applicable State Laws, Local Ordinances, policies specified in the Comprehensive Plan and by Findings of Fact by the Board in each case.

D. In reviewing an application on any matter, the standards in any applicable local ordinance or statute shall take precedence over the standards of these rules whenever a conflict occurs. In all other instances, the more restrictive rule shall apply.

E. When the Board of Appeals reviews a decision of the Code Enforcement Officer, the Board of Appeals shall hold a "de novo" hearing which allows the Board to receive and consider new evidence and testimony, be it oral or written. When acting in a "de novo" capacity, the Board of Appeals shall hear and decide the matter afresh, undertaking its own independent analysis of evidence and the law, and reaching its own decision.

When acting in an appellate capacity, the Board of Appeals may reverse the decision of the Planning Board, or other applicable administrative board, but only upon a finding that the decision was contrary to specific provisions of the Ordinance under review before the Planning Board, or other applicable administrative board, or contrary to the facts presented to the Planning Board, or other applicable administrative board. Alternatively, the Board of Appeals may remand the matter to the Planning Board or other applicable administrative board for further consideration.

F. The Board shall cause written notice of its decision to be mailed or hand delivered to the applicant within seven (7) days of the Board's decision. Any decisions affecting the Shoreland Zone shall be mailed or hand-delivered to the Department of Environmental Protection within seven (7) days. Copies of written decisions of the Board of Appeals shall be given to the Planning Board, Code Enforcement Officer and the municipal officers.

G. Decisions of the Board shall be filed in the office of the Town Clerk and shall be made public record. The date of filing of each decision shall be entered in the official records and minutes of the Board.

H. Variances granted must be recorded by certificate in the Hancock County Registry of Deeds within thirty (30) days of final approval. (Variances not recorded within this time shall be invalid.) The certificate must be prepared in recordable form and provided to the applicant. It must indicate the name of the current property owner, identify the property by reference to the last recorded owner, identify the property by reference to the last recorded deed or deeds of ownership in its chain of title, and indicate the fact that a variance including any conditions on the variance, has been granted and the date of the granting.

I. Unless otherwise specified, any order of decision of the Board for a permitted use shall expire if building permit for the use is not obtained by the applicant within ninety (90) days from the date of the decision; however, the Board may extend this time an additional ninety (90) days upon written request from the appellant within the original ninety (90) day period.

SECTION XI: RECONSIDERATION

In accordance with 30-A M.R.S.A. section 2691(3)(F), the Board may reconsider any decision. The Board must decide to reconsider any decision, notify all interested parties and make any change in its original decision within forty five (45) days of the date of the vote on the original decision. A request to the Board to reconsider a decision must be filed within ten (10) days of the decision that is being reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision. Reconsideration of a decision shall require a positive vote of the majority of the Board members originally voting on the decision, and proper notification to the landowner, petitioner, planning board, code enforcement officer, and other parties of interest, including abutters and those who testified at the original hearing(s). The Board may conduct additional hearings and receive additional evidence and testimony.

Appeal of a reconsidered decision to Superior Court must be made within (fifteen) 15 days after the decision on reconsideration.

SECTION XII: APPEAL TO SUPERIOR COURT

The decision of the Board of Appeals may be taken, within forty-five (45) days of the date of the vote on the original decision, by any party to Superior Court in accordance with the Maine Rules of Civil Procedure, Rule 80B. This time period may be extended by the court upon motion for good cause shown.

SECTION XIII: SEVERABILITY

The invalidity of any Section or provision of this Ordinance shall not be held to invalidate any other section or provision within the Ordinance.

SECTION XIV: AMENDING THE ORDINANCE

A. This Ordinance may be amended by a majority vote of the legislative body present at any regular or special town meeting.

B. Any proposed amendment to the Ordinance shall be presented at a public hearing before the town meeting. The Board of Selectmen may hold a public hearing on the proposed amendments to the Ordinance and report in writing its opinion on the desirability of the proposed change(s).

    1. If the vote on the amendment is by local referendum ballot, the Selectmen shall have a public hearing at least 60 days prior to the Town Meeting. If the amendment is at an open assembly town meeting, a public hearing must be held within thirty (30) days of the duly authorized town meeting.

    2. Notice of any public hearing on an amendment to this Ordinance shall be given in a newspaper with local circulation at least five (5) days before the hearing.

Appeal and Variance Provision from DEP Model Shoreland Zoning Guidelines (2015 Edition)

Section 16(H). Appeals

(1) Powers and Duties of the Board of Appeals. The Board of Appeals shall have the following powers:

(a) **Administrative Appeals**: To hear and decide administrative appeals, on an appellate basis, where it is alleged by an aggrieved party that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the Planning Board in the administration of this Ordinance; and to hear and decide administrative appeals on a de novo basis where it is alleged by an aggrieved party that there is an error in any order, requirement, decision or determination made by, or failure to act by, the Code Enforcement Officer in his or her review of and action on a permit application under this Ordinance. Any order, requirement, decision or determination made, or failure to act, in the enforcement of this ordinance is not appealable to the Board of Appeals.

NOTE: Whether an administrative appeal is decided on an "appellate" basis or on a "de novo" basis, or whether an enforcement decision is appealable to the board of appeals, shall be the decision of the municipality through its specific ordinance language. The Department is not mandating one alternative over the other. If a municipality chooses appeals procedures different from those in Section 16(H), it is recommended that assistance be sought from legal counsel to ensure that the adopted language is legally sound.

(b) **Variance Appeals**: To authorize variances upon appeal, within the limitations set forth in this Ordinance.

(2) **Variance Appeals**. Variances may be granted only under the following conditions:

(a) Variances may be granted only from dimensional requirements including, but not limited to, lot width, structure height, percent of lot coverage, and setback requirements.

(b) Variances shall not be granted for establishment of any uses otherwise prohibited by this Ordinance.

(c) The Board shall not grant a variance unless it finds that:

(i) The proposed structure or use would meet the provisions of Section 15 except for the specific provision which has created the non-conformity and from which relief is sought; and

(ii) The strict application of the terms of this Ordinance would result in undue hardship. The term "undue hardship" shall mean:

a. That the land in question cannot yield a reasonable return unless a variance is granted;

b. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

c. That the granting of a variance will not alter the essential character of the locality; and

d. That the hardship is not the result of action taken by the applicant or a prior owner.

(d) Notwithstanding Section 16(H)(2)(c)(ii) above, the Board of Appeals, or the codes enforcement officer if authorized in accordance with 30-A MRSA §4353-A, may grant a variance to an owner of a residential dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. The term “structures necessary for access to or egress from the dwelling" shall include railing, wall or roof systems necessary for the safety or effectiveness of the structure. Any permit issued pursuant to this subsection is subject to Sections 16(H)(2)(f) and 16(H)(4)(b)(iv) below.)

(e) The Board of Appeals shall limit any variances granted as strictly as possible in order to ensure conformance with the purposes and provisions of this Ordinance to the greatest extent possible, and in doing so may impose such conditions to a variance as it deems necessary. The party receiving the variance shall comply with any conditions imposed.

(f) A copy of each variance request, including the application and all supporting information supplied by the applicant, shall be forwarded by the municipal officials

to the Commissioner of the Department of Environmental Protection at least twenty (20) days prior to action by the Board of Appeals. Any comments received from the Commissioner prior to the action by the Board of Appeals shall be made part of the record and shall be taken into consideration by the Board of Appeals.

(3) **Administrative Appeals**

When the Board of Appeals reviews a decision of the Code Enforcement Officer the Board of Appeals shall hold a "de novo" hearing. At this time the Board may receive and consider new evidence and testimony, be it oral or written. When acting in a "de novo" capacity the Board of Appeals shall hear and decide the matter afresh, undertaking its own independent analysis of evidence and the law, and reaching its own decision.

When the Board of Appeals hears a decision of the Planning Board, it shall hold an appellate hearing, and may reverse the decision of the Planning Board only upon finding that the decision was contrary to specific provisions of the Ordinance or contrary to the facts presented to the Planning Board. The Board of Appeals may only review the record of the proceedings before the Planning Board. The Board Appeals shall not receive or consider any evidence which was not presented to the Planning Board, but the Board of Appeals may receive and consider written or oral arguments. If the Board of Appeals determines that the record of the Planning Board proceedings are inadequate, the Board of Appeals may remand the matter to the Planning Board for additional fact finding.

(4) **Appeal Procedure**

(a) **Making an Appeal**

(i) An administrative or variance appeal may be taken to the Board of Appeals by an aggrieved party from any decision of the Code Enforcement Officer or the Planning Board, except for enforcement-related matters as described in Section 16(H)(1)(a) above. Such an appeal shall be taken within thirty (30) days of the date of the official, written decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement.

(ii) Applications for appeals shall be made by filing with the Board of Appeals a written notice of appeal which includes:

a. A concise written statement indicating what relief is requested and why the appeal or variance should be granted.

b. A sketch drawn to scale showing lot lines, location of existing buildings and structures and other physical features of the lot pertinent to the relief sought.

(iii) Upon receiving an application for an administrative appeal or a variance, the Code Enforcement Officer or Planning Board, as appropriate, shall transmit to the Board of Appeals all of the papers constituting the record of the decision appealed from.

(iv) The Board of Appeals shall hold a public hearing on an administrative appeal or a request for a variance within thirty-five (35) days of its receipt of a complete written application, unless this time period is extended by the parties.

(b) **Decision by Board of Appeals**

(i) A majority of the full voting membership of the Board shall constitute a quorum for the purpose of deciding an appeal.

(ii) The person filing the appeal shall have the burden of proof.

(iii) The Board shall decide all administrative appeals and variance appeals within thirty five (35) days after the close of the hearing, and shall issue a written decision on all appeals.

(iv) The Board of Appeals shall state the reasons and basis for its decision, including a statement of the facts found and conclusions reached by the Board. The Board shall cause written notice of its decision to be mailed or hand-delivered to the applicant and to the Department of Environmental Protection within seven (7) days of the Board's decision. Copies of written decisions of the Board of Appeals shall be given to the Planning Board, Code Enforcement Officer, and the municipal officers.

(5) **Appeal to Superior Court**. Except as provided by 30-A M.R.S.A. section 2691(3)(F), any aggrieved party who participated as a party during the proceedings before the Board of Appeals may take an appeal to Superior Court in accordance with State laws within forty-five (45) days from the date of any decision of the Board of Appeals.

(6) **Reconsideration**. In accordance with 30-A M.R.S.A. section 2691(3)(F), the Board of Appeals may reconsider any decision within forty-five (45) days of its prior decision. A request to the Board to reconsider a decision must be filed within ten (10) days of the decision that is being reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision. Reconsideration of a decision shall require a positive vote of the majority of the Board members originally voting on the decision, and proper notification to the landowner, petitioner, planning board, code enforcement officer, and other parties of interest, including abutters and those who testified at the original hearing(s). The Board may conduct additional hearings and receive additional evidence and testimony.

Appeal of a reconsidered decision to Superior Court must be made within fifteen (15) days after the decision on reconsideration.

Appendix 2 – Notice and Procedure Materials

"Right to Know Law" Information Packet

MMA's Legal Services Department publishes a "Right to Know Law" Information Packet which is available by contacting the Legal Services Department (1-800-452-8786) or on MMA's website (http://memun.org/TrainingResources/LegalServices.aspx). You will need to apply for a password to enter that section of the website. The password is free for officials from municipalities that are members of MMA.

The packet includes:

- A multi-page memo discussing a variety of issues.
- A copy of the law (1 M.R.S.A. § 401 et seq.)
- A link to the state FOAA website.
- Executive Session Citation Guide.
- An article entitle "The Devil's in emails: How to manage FOAA requests" from the May 2016 *Maine Town & City*.
- Miscellaneous *Maine Town & City* Legal Notes regarding email, executive sessions and other issues.

Sample Board Member's Affidavit Regarding Missed Meeting

Now comes (insert board member's name), who, being duly sworn, deposes and says:

1. I am a member of the board of appeals of the town/city/plantation (choose one) of (insert name of the municipality).

2. The board is in the process of hearing and deciding an application submitted by (insert name of applicant) and dated (insert date of application) seeking approval of (describe subject matter of the application).

3. On (insert date of missed meeting) I was unable to attend the board meeting at which this application was discussed.

4. Since that meeting I have done the following in an effort to familiarize myself with the information presented and discussed at that meeting: (provide a summary of what documents, cassette tapes, video tapes, etc. have been reviewed by the board member and when this was done).

5. Having reviewed the above-described material, I believe that I have become sufficiently knowledgeable about the information presented and discussed at that board meeting to allow my continued participation in the proceedings related to this application in an informed and objective manner.

6. Accordingly, I make this affidavit as a record of the facts recited in it.

Date: _____ _____

(Signature of Board Member)

_____

(Printed name of Board Member)

State of Maine Date: _____

_____

_____ , ss.

Then personally appeared before me the above-named affiant, (insert name of board member), who swore that the facts recited in the foregoing affidavit are true of his/her own knowledge, and who executed the same in my presence.

_____

Notary Public/Attorney at Law

_____

(Printed name of notary/attorney)

My commission expires:

Sample Bylaw Provisions

1. Meetings

A. The regular meeting of the board shall be held once every other month or as necessary.

B. The annual organizational meeting of the board shall be the first regular meeting of the year.

C. Special meetings of the board may be called by the chairperson. At least forty-eight (48) hours written notice of the time, place and business of the meeting shall be given each member of the board, the selectpeople, the planning board and the code enforcement officer.

D. The chairperson shall call a special meeting within ten (10) days of receipt of a written request from any three members of the board, which request shall specify the matters to be considered at such special meeting.

E. The order of business at regular meetings of the board shall be as follows: (a) roll call; (b) reading and approval of the minutes of the preceding meeting; (c) action on held cases; (d) public hearing (when scheduled); (e) other business; (f) adjournment.

F. All meetings of the board shall be open to the public, except executive sessions. No votes may be taken by the board except in public meeting. The board shall not hold executive sessions except as permitted by the Right to Know Law.

2. Voting

A. A quorum shall consist of _____ (specify a number) members of the board. (Note: If the number is something other than a majority of the total number of regular members of the board, then this provision will require the approval of the legislative body.)

B. No hearing or meeting of the board shall be held, nor any action taken, in the absence of a quorum; however, those members present shall be entitled to request the chairperson to call a special meeting for a subsequent date.

C. All matters shall be decided by a show of hands vote. Decisions on any matter before the board shall require the affirmative vote of a majority (of the total number of regular members of the board) (of those members present and voting). (Note: Choose one and delete the other. If the "present and voting" rule is chosen, the legislative body must adopt it as part of an ordinance.)

D. A tie vote or favorable vote by a lesser number than the required majority shall be considered a rejection of the application under consideration.

E. If a member has a conflict of interest, that member shall not be counted by the board in establishing the quorum for the matter in which he or she has a conflict.

F. If the board has associate members, the chairperson shall appoint an associate member to act for a regular member who is: disqualified from voting, unable to attend the hearing, or absent from a substantial portion of the hearing due to late arrival. The associate member will act for the regular member on each appeal heard by the associate member until the case is decided.

G. If the board has no associate members, no regular member shall vote on the determination of any matter requiring public hearing unless he or she has attended the public hearing thereon; however, where such a member has familiarized himself or herself with the matter by reading the record and listening to or watching any audio or video recording of the meeting(s) from which the member was absent and represents on the record that he or she has done so, that member shall be qualified to vote on that matter.

3. Reconsideration

A. The board may reconsider any decision as provided in 30-A M.R.S.A. § 2691. The board must notify all parties. The board may conduct additional hearings and receive additional evidence and testimony.

B. Reconsideration should be for one of the following reasons:

1. The record contains significant factual errors due to fraud or mistake regarding facts upon which the decision was based; or

2. The board misinterpreted the ordinance, followed improper procedures, or acted beyond its jurisdiction.

Sample Rules for the Conduct of Public Hearings

The _____ Board of the Town of _____

I. Scope of Rules

These rules govern the practice, procedure and conduct of public hearings held by the _____ Board for the Town of _____ (hereinafter referred to as the "Board"). These rules shall be liberally construed so as to enable the Board to accomplish its duties and responsibilities in a just, speedy and inexpensive manner. Where good cause appears, the Board may permit deviation from these rules insofar as it may find compliance therewith to be impracticable or unnecessary.

II. Notice of Public Hearings

Notice of all public hearings shall be published in the _____(name of newspaper), the date of publication to be at least seven (7) days before such hearing and the notice shall be posted in at least three (3) prominent places at least seven (7) days before such hearing. The notice shall set forth the nature of the hearing, the time, date and the place of the hearing.

(**Note:** This needs to be consistent with applicable land use ordinances and with 1 M.R.S.A. § 601.)

III. Presiding Officer

The Presiding Officer shall, at all public hearings, either be the Chair or Vice-Chair of the Board or a member of the Board who is selected by those members present at the hearing. The Presiding Officer shall have authority to:

1. Rule upon issues of evidence;
2. Regulate the course of the hearing;
3. Rule upon issues of procedure;
4. Take such other actions as may be ordered by the Board or that are necessary for the efficient and orderly conduct of the hearing, consistent with these rules and applicable statutes.

IV. General Conduct of the Public Hearing

A. Opening Statement

The Presiding Officer shall open the hearing by describing in general terms the purpose of the hearing and the general procedure governing its conduct.

B. Record of Testimony

The Board shall make a record of the hearing by appropriate means. If a sound recording is made, any person shall have the opportunity to listen to the recording at such reasonable times and at such a place as may be designated by the Board.

C. Witnesses

Witnesses shall be required to state for the record their name, residence address, business address, business or professional affiliation, the nature of their interest in the hearing, and whom they represent.

D. Continuance

All hearings conducted pursuant to these rules may be continued for reasonable cause and reconvened from time to time and from place to place as may be determined by a majority of the Board members present. Continuances may be granted at the request of any person participating in such hearing if it is determined that a continuance is necessary. This provision shall not be interpreted in such a fashion as to cause unreasonable or needless delay in any hearing.

All orders for continuance shall specify the time and place at which such hearing shall be reconvened. The Board or the Presiding Officer shall notify interested persons and the public in such manner as is appropriate to insure that reasonable notice will be given of the time and place of such reconvened hearing.

E. Regulation of Filming and Taping

The placement and use of television and video cameras, still cameras, motion picture cameras, microphones, or other sound or video recording devices or equipment at Board hearings for the purpose of recording the proceedings may be regulated by the Chair or the Presiding Officer so as to avoid interference with the orderly conduct of the hearing.

F. Order of Business and Testimony

The order of business at a public hearing shall be as follows:

1. The Chair calls the hearing to order.
2. The Chair determines whether there is a quorum.
3. The Chair gives a statement of the case and reads all correspondence and reports received.
4. The Board determines whether it has jurisdiction over the appeal.
5. The Board decides whether the applicant has the right to appear before the Board.
6. The appellant or his or her representative and witnesses are given the opportunity to present his or her case without interruption.
7. The Board and interested parties may ask questions of the appellant through the Chair.
8. The interested parties are given the opportunity to present their case. The Board may call its own witnesses, such as the Code Enforcement Officer.
9. The appellant may ask questions of the interested parties and Board witnesses through the Chair.
10. All parties are given the opportunity to refute or rebut statements made throughout the hearing.
11. The board shall receive comments and questions from all observers and interested citizens who wish to express their views.
12. The Board shall receive and retain copies of any written statements and documents offered to the Board by the interested parties and by other parties.
13. The hearing is closed after all parties have been heard. If additional time is needed, the hearing may be continued to a later date. All participants should be notified of the date, time and place of the continued hearing.
14. Written testimony may be accepted by the Board for seven days after the close of the hearing.

G. The Board may Waive any of the Above Rules if Good Cause is Shown.

V. Evidence

A. Generally

The Board shall provide as a matter of policy for exclusion of irrelevant, immaterial, or unduly repetitious evidence.

B. Official Notice

The Board may, at any time, take notice of judicially cognizable fact, generally recognized facts of common knowledge to the general public and physical, technical or scientific facts within the specialized knowledge of the Board.

C. Documentary and Real Evidence

All documents, materials and objects offered as evidence shall, if accepted, be numbered or otherwise identified. Documentary evidence may be received in the form of copies of excerpts if the original is not readily available. The Board or the Presiding Officer shall require that any party offering any documentary or photographic evidence shall provide the Board with an appropriate number of copies of such documents or photographs, unless such documents or photographs are determined to be of such form, size or character as not to be reasonably susceptible of reproduction. All documents, materials and objects accepted into evidence shall be made available during the course of the hearing for public examination and explanation and shall become part of the record of the proceedings.

D. Objections

All objections to rulings of the Presiding Officer regarding evidence or procedure shall be made during the course of the hearing.

If after the close of the hearing and during its deliberations the Board determines that any ruling of the Presiding Officer was in error, it may reopen the hearing or take other action as it deems appropriate to correct the error.

VI. Conclusion of Hearing

At the conclusion of the hearing, no further evidence or testimony will be allowed into the record except as provided below.

VII. Leaving the Record Open

Upon such request made prior to or during the course of the hearing, the Presiding Officer may permit persons participating in any hearing pursuant to these regulations to file proposed findings, determinations, or other written statements with the Board for inclusion in the record after the conclusion of the hearing within such time and upon such notification to the other participants as the Presiding Officer may require.

VIII. Other

At any time prior to a final decision, the Board or the Chair may reopen the record for further proceedings consistent with these Rules, provided, however, that the Chair shall give notice of such further proceedings to the participants and the public in such manner as is deemed appropriate.

IX. Miscellaneous

A. Record

The record of the hearing shall consist of the recording of the hearing, all exhibits, all briefs, proposed findings and rulings thereon, and any proposed findings of fact and conclusions of the Presiding Officer. Such record shall be reported to the Board for its decision.

B. Copies of Records

Any participant or other member of the public may obtain a copy of the record from the Board upon payment of the cost of transcription, reproduction, and postage.

Town of Gorham–Planning Board Rules

(NOTE: ALTHOUGH THESE ARE PLANNING BOARD RULES, SOME OF THE PROVISIONS MAY BE OF INTEREST TO APPEALS BOARDS.)

NOVEMBER 1989
Amended August 3, 1992
Amended May 5, 1997

SECTION I – ESTABLISHMENT

Pursuant to Article IV of the Planning Board Ordinance of the Town of Gorham there is hereby created Rules of the Gorham Planning Board for which purpose they shall serve to enable the Planning Board to work clearly, effectively and impartially in carrying out the intent of said Ordinance. Officers of the Board shall consist of Chairman, Vice Chairman, and nonmember Clerk. The terms "Chairman," "he," "his," and similar words are to be interpreted as gender-neutral.

SECTION II – MEETINGS

A. REGULAR

The Board shall meet regularly on the first Monday of each month, unless the date falls on a holiday, in which case the meeting will be held the next following Monday. If warranted by the number of pending or newly submitted applications or by other business of the Board, a second regular meeting for the month may be called, typically for the third Monday of the month.

The meetings shall be held in the Council Chambers or such other time and place as the Board or Municipal Officers may designate.

B. SPECIAL

Special meetings may be called by the Chairman or when requested to do so by four members of the Board or by the Municipal Officers. Written notice of such meeting shall be served in person or left at the residence of each member of the Board at least seventy-two (72) hours before the time for holding said meeting unless all members of the Board sign waiver of said notice. The call for said special meeting shall set forth the matters to be acted upon at said meeting, and nothing else shall be considered at such special meeting. In accordance with State Law, the press shall be notified of any special meetings in the same manner as Board members.

C. WORKSHOP

Informal workshop meetings shall be held regularly immediately prior to regular meetings and may be called as special meetings from time to time. Such meetings shall be held at the same location at which the Planning Board meeting is held. The purpose of this type of meeting is to discuss business which may appear on the agenda of an immediate or future regular meeting of the Board or to discuss matters of Board administration or procedure. All workshop meetings shall be open to the public in accordance with State Law.

D. SITE WALK

Site walk meetings may be called by the Chairman or a majority of the Board for the purpose of allowing the Board and interested public to inspect the site of a pending proposal. Site walks are encouraged for all applications before the Board. The Vice Chairman is responsible for minutes of site walks. To ensure full and fair disclosure of Board actions to all members of the public, no formal motions shall be made nor votes taken at a site walk. Whenever possible, the time and place of site walks shall be set following adjournment of the meeting. Public notice shall be given of all site walks.

E. PUBLIC HEARING

Public hearings shall be held prior to amending or adopting the Comprehensive Plan or the Land Use and Development Code. Notice of hearings shall be by the same manner as provided in Section 213 of the Council-Manager Charter of the Town of Gorham (attached).

F. NOTICE

Notice of meetings shall be in writing and contain the items of business (agenda). The Town Planner shall prepare the agenda and send notice upon approval of the Chairman.

G. QUORUM

A quorum shall consist of at least four members of the Board for the transaction of business. A smaller number of members may be appointed by at least four members of the Board to a particular ad-hoc committee from time to time.

SECTION III – CONDUCT OF MEETINGS

A. GENERAL

1. The Chairman shall take the chair at the time appointed for the meeting, call the members to order, cause the roll to be called and identify those members absent. A quorum being present, the Chairman shall cause the Minutes of the preceding meeting to be discussed and accepted by the Board, with or without amendments, and proceed to business. Copies of the Minutes will be available prior to the meeting.

2. The latest edition of Robert's Rules of Order shall be used as the procedural authority for the conduct of meetings, except as otherwise provided by State Law, Town Ordinance, or these rules. In cases of procedural uncertainty, all such questions shall be resolved by the Chairman in a manner that most affords all members of the public a fair opportunity to be heard. All decisions of the Chairman are subject to a majority vote of the Board.

3. The Chairman shall declare all votes, but if any member doubts a vote, the Chairman shall cause a recount of the members voting in the affirmative and in the negative without debate. A record of all votes will be kept by the Clerk of the Board.

4. When a question is under debate, the Chairman shall receive motions that shall have preference in the following order:

    a. adjourn
    b. for the previous question
    c. to lay on the table
    d. to postpone to a day certain
    e. to refer to a committee or some administrative official
    f. to amend
    g. to postpone indefinitely

5. The Chairman shall consider a motion to adjourn as always in order except on immediate repetition; and that motion, and the motion to lay on the table, or to take from the table, shall be decided without debate.

6. Voting shall be conducted only on items included on the agenda of the meeting, except as allowed for reconsideration of all previous votes. A motion shall be passed only by the affirmative vote of a majority of Board members present and voting, except as otherwise provided in these rules, the Town's Planning Board ordinance, or

Maine statutes. [Note: A "present and voting" majority vote rule must be adopted by the legislative body by ordinance.]

7. After a vote is taken, it shall be in order for any member who voted in the majority, or in the negative on a tie vote, to move a reconsideration thereof at the same, or the next regular meeting, but not afterwards; and when a motion of reconsideration is decided, that vote shall be final and the matter may not be considered further. (In instances where a super majority vote is needed to pass a motion, a vote to reconsider must come from a member who voted on the prevailing side of the issue.)

8. When the previous question is moved and seconded, there shall be no further amendment or debate; but pending amendments shall be put in their order before the main question. If a motion for the previous question fails, the main question and any pending amendments remain open for debate. To maintain the clarity of a question, each main question shall be limited to two amendments.

9. No debate shall be allowed on a motion for the previous question. No motion for the previous question shall be amended. All questions of order arising incidentally thereon must be decided by the Chairman without discussion.

10. Full public disclosure of the nature of any potential conflict of interest shall be made before discussion of each agenda item. The affected Board member should indicate in public to the Board whether he believes that he can hear and vote on the matter impartially. To a limited extent, members of the public shall also be allowed to comment on this matter at this time. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting thereon shall be decided by a majority vote of the members present, except the member who is being challenged. In this determination the Board shall consider whether the alleged conflict is such that it:

    a. may reasonably interfere with the affected member's ability to hear and act on the item impartially; and
    b. whether it would give the appearance to the public of an inappropriate conflict of interest so as to undermine public confidence in the fairness of the meeting.

11. No agenda item will be taken up at a meeting after 10:00 p.m. The lateness rule may be waived for just cause by consent of the majority of Board members present.

B. MOTIONS

1. Every motion shall be reduced to writing by the Clerk.

2. Any member may require the division of a question when it makes sense to do so.

3. All questions relating to the order of agenda items shall be decided without debate.

C. DECORUM AND ORDER

The Chairman shall preserve decorum and decide all questions of order and procedure, subject to appeal to the Board. When a member is about to speak, he shall respectfully address the Chairman, confine himself to the question under debate and avoid personalities. No member speaking shall be interrupted by another, but by a call to order or to correct a mistake.

D. PUBLIC

Persons wishing to address the Board on an item which appears on the agenda shall wait until the Board considers such item. The Chairman may recognize a member of the public to speak to a particular question of the item under consideration. When a person is recognized by the Chairman he shall address the Board, shall state his name and address in audible tone for the record, and shall limit his remarks to the particular question under discussion. All remarks and questions shall be addressed to the Board as a whole and not to any individual member thereof. No member of the public shall interrupt the person having the floor.

E. RECORDS OF PROCEEDINGS

The votes for and against the passage of a motion shall be taken and entered upon the record of the Proceedings of the Board by the Clerk. Minutes of all regular and special meetings of the Board, except workshop meetings and site walks, shall be kept by the Clerk and shall take effect upon acceptance by the Board. An amendment by the Board of the minutes of a previous meeting shall not affect a previous vote of the Board.

SECTION IV - AGENDA PROCEDURE[1]

A. The following procedures shall be followed in establishing the agenda for Planning Board meetings.

[1] As amended June 5, 1995

1. To be placed on the Agenda for a Planning Board meeting, the applicant must submit the following materials to the Planning Department:

    a. Twelve (12) copies of the completed application form and supporting documents, with the signed original application on top,
    b. Twelve (12) copies of the site plan and all supporting plans, stapled and folded together,
    c. A letter of authorization, if the applicant is represented by an agent, and
    d. The required application fees and consulting escrow deposit.

2. All information shall be organized in packets containing one copy of all submitted material. The application form shall be the first item in the packet. Supporting documents should follow and all plans and other oversized material shall be folded to 9' x 12', with title displayed. Multiple plan sheets shall be stapled together.

3. Only complete applications for which all required information (as set forth in the Land Use and Development Code) is submitted will be considered for placement on an upcoming Planning Board Agenda, and only after completion of the staff review.

4. The staff will review all complete applications and advise the applicant of any staff questions or concerns about the project and the number of revised plans and supporting material needed. (The staff review will take between 15 and 30 days, depending upon the complexity of the submissions.)

5. Incomplete applications will be returned for resubmission at a later date. The revised set of materials must address all questions or concerns raised by the staff during its initial project review.

6. Applications will qualify for agenda slots only when the Town has received a complete application following the Staff review. Space on an agenda may not be reserved by a call, letter, or partial submission. Public Hearings are placed at the beginning of the Agenda. Items tabled at previous meetings will generally receive scheduling priority over new applications, in order of how long each has been pending, and new applications will be placed on the Agenda on a first-come, first-served basis.

7. No new or revised documentary information shall be presented at the meeting.

8. Consent Agenda. Certain administrative or noncontroversial items of business considered routine may be placed on the Consent Agenda if it is anticipated that there is no need for Board discussion and there will be no public comment on the item.

Staff recommended conditions of approval that might be attached by the Board should be available in advance. Any item on the Consent Agenda can be taken off the Consent Agenda and discussed as a regular item at the request of any member of the Board or any member of the public. Individual items on the Consent Agenda should be removed from the Consent Agenda by formal vote. The items on the Consent Agenda should be approved by a single motion and vote. Items which have been removed from the Consent Agenda should be discussed immediately following the approval of the Consent Agenda, in the order in which they appeared on the Consent Agenda.

a. Minor amendment to previously Board-approved application.
b. Routine reapproval of previously Board-approved application.
c. Town comments upon application under review by the Maine Department of Environmental Protection or other State agency.
d. Routine business relating to Planning Board administration.
e. Site plan review of new non-residential use in a single or multi-unit, non-residential building, if such building has previously been granted site plan review approval by the Board.
f. Street Acceptance Reports.
g. Final approval of items considered by the Board at the previous meeting if the Board, by affirmative vote at that meeting, rules that the items should be placed on the Consent Agenda for final review of conditions or revised plans.

9. Old business pending from previous meetings will receive scheduling priority over new business generally in order of the length of time each application has been pending. New final subdivision plan applications shall be considered new business. Certain business will always be afforded agenda priority over all other business, as follows:

a. Advertised public hearings.
b. Business tabled at the previous meeting because of lateness.
c. Requests for reconsideration of action taken at previous meeting.

10. New complete applications will be placed on the agenda on a first-come, first-serve basis. If more items qualify for scheduling than can be considered by the Board at a single meeting because of the number or complexity of previously scheduled items, then excess items will be carried over to be scheduled on the next regular meeting. Space on an agenda may not be reserved by a call, letter or partial submission. Applications will qualify for agenda slots only when the Town has received a complete application. Applications or projects of special significance to the Town of

Gorham may receive scheduling priority on the Planning Board agenda at the discretion of the Town Council.

11. The final recording mylar for any subdivision, site plan or private way plan may be signed by the Planning Board at the close of the meeting only if the mylar and three (3) paper copies have been filed with the Planning Department by noon on Monday one (1) week prior to a Planning Board meeting.

SECTION V – MISCELLANEOUS

A. Absence or disability of Board Chairman - In the temporary absence or disability of the Board Chairman, the Vice Chairman of the Board shall be and is hereby designated as Board Chairman Pro Tempore.

B. The rules of the Board shall not be dispensed with or suspended unless at least four members of the Board consent thereto, except as otherwise specified herein.

C. No rule of the Board shall be amended or repealed without the Board giving notice of such action through the minutes, at the preceding meeting. Such amendment or repeal shall require the consent of at least four members of the Board.

D. A Board member shall be counted absent from a meeting only for those items of business for which he is not present.

E. Public availability of application materials - All written materials submitted to the Town for Planning Board review are public documents and, as such, are available for public inspection in the Planning Department during normal business hours. At least one copy of each plan or document shall always be available for public inspection. Arrangements can be made to provide for photocopying of documents twenty-five pages or less at the Town's normal photocopying charge. Photocopies of longer documents or larger plans will have to be made by special arrangements with the Town staff. The Town will do everything reasonably possible to accommodate such requests subject only to maintaining at all times at least one copy of each submission document in the Planning Department file.

F. New member mentoring/training - The Town Planner shall provide a packet of orientation materials for new Board Members and shall be available as necessary to assist new members in understanding the procedural and substantive duties of the Board.

ATTACHMENT
(to Sec. II, E.)

COUNCIL-MANAGER CHARTER OF THE TOWN OF GORHAM:

Sec. 213. Public hearing on ordinances. At least one public hearing, notice of which shall be given at least (7) days in advance by publication in a newspaper having a circulation in said town and by posting a notice in a public place, shall be held by the Council before any ordinance shall be passed. The passage of such ordinance shall not be effective until 30 days after such publication.

Sample Zoning Board of Appeals Meeting Opening Remarks

NOTE: This narrative was prepared by the law firm of Jensen, Baird, Gardner and Henry for its municipal clients. It is reproduced here with permission.

Welcome to the _____ meeting
(date)

of the _____ .
(name of town)

Zoning Board of Appeals. The meeting will come to order. This is a public proceeding and, unless the Board specifically votes to go into executive session, you have the right to hear everything that is being said and to look at all of the exhibits that are offered. Please notify the Chairperson if you are unable to hear or to see.

The Board works from a prepared agenda and will be considering tonight's items in the following order:

1. _____

2. _____

3. _____

4. _____

5. _____

The following items on this evening's agenda will be tabled without discussion:

1. _____

2. _____

3. _____

In each instance, the burden is upon the applicant to demonstrate compliance with the provisions of the applicable ordinance or ordinances.

After the Board votes on the merits of each project application, it will prepare a written opinion. Because the written opinion may substantially affect any appeal rights, and also as a matter of courtesy, the Board asks that those attending the meeting with regard to a specific project not leave until the Board has taken this second vote adopting a written opinion.

Generally speaking, appeals from adverse decisions must be filed with the Superior Court, except as otherwise provided by law, within 45 days of this Board's decision. Also, to be certain that you preserve your individual right to file any such appeal, you must be certain that this Board's record evidences your appearance this evening and the basis for your support or opposition.

Again, remember this is a public proceeding and you have the right to hear and see what is happening. All persons speaking will be asked to first state their name and address or affiliation.

Are there any questions?

City of Portland "Zoning Board of Appeals Meeting Process"

contact us

You or your representative must attend the Zoning Board meeting in order to present your case and to answer any questions the Board may have concerning your Appeal. Have a copy of your Appeal with you.

First, the Chairperson will call the meeting to order and read the Board procedures. Next, the Secretary will call the roll of Board members present. The meeting will then open to the first Appeal on the Agenda.

The first Applicant will come forward to the small front table and give a verbal summary of what it is that they are appealing to the Board. The Board will have already received your written application packet. You then may need to answer questions from the Board.

The Public will have a chance to respond when the Chair first asks the public as to who would like to respond in favor or against of the Appeal application. The Applicant will be able to respond **after** all the public comments.

When the Board is satisfied that they have all the information they need to make a decision, the Chairperson will close the meeting to public comment and will begin their deliberations.

The Board will make a motion (usually in the affirmative) and then further discuss the issues involved. On rare occasions the Board may open the public portion again temporarily to ask another question to the applicant. After all the deliberations, the Board will take an official vote and thus make an official decision.

The Board will then ask the next applicant to come forward. The process continues until all appeals are heard and decisions rendered.

The Chairperson will then adjourn the meeting.

A copy of the Board's decision will be mailed to you, along with a bill for abutter's notices and legal ads. We will also include a building permit application if deemed necessary.

The Building Permit Application will have to be filled out and returned to Inspection Services on the third floor of City Hall, along with the appropriate fees as indicated on the permit application, along with the specifications of that particular permit application. Please note that all those specifications are your responsibility to bring with you, not for the City to copy and add into your submissions. Any submissions that were in your Appeal packet and are necessary for the

building permit, but are missing, will be copied from the Appeal packet and billed to you at $0.50 per page.

The Building Permit Application will then be processed. It takes approximately 15 business days to approve the permit. At the time of issuance of the permit, all fees incurred during the Appeal process must be paid.

You must then call and schedule an inspection as stated in your permit application packet. If a Certificate of Occupancy is necessary, you must call and schedule with us at 874-8703. Once the Inspector is satisfied you have complied with all State and Local regulations, a Certificate of Occupancy will be issued, the fee for which is $75.00.

(Note: This summary is posted on the City of Portland's website).

Sample Notice of Public Hearing–Appeals Board

Town of _____

The _____ Board of Appeals will hold a
(town)

public hearing on an application for a (permit, appeal, variance) as requested by _____

_____

(insert applicant's name and address)

_____

_____

Date of Public Hearing: _____

Time: _____

Place: _____

The application requests that (insert specifics): _____

_____

_____

_____

_____

_____

Chairperson, Board of Appeals

(For Newspaper Use Only)

Publish the above notice on the following dates:

_____

_____

_____

and charge to:

_____

_____

_____

"Newspaper Notice," "Legal Notes," *Maine Townsman*, August/September 1997

As was discussed in a February, 1997 Legal Note, there are a number of Maine statutes which require that notice of a public hearing on a particular license or application or on an ordinance amendment be given by publication in a newspaper of general circulation. The Municipal Subdivision Law (30-A M.R.S.A. § 4403), the Junkyard and Automobile Graveyards Law (30-A M.R.S.A. § 3754), and the statute governing zoning ordinance amendments (30-A M.R.S.A. § 4352) are examples. Title 1 § 601 provides that such hearing notices must, at a minimum, be published in newspapers meeting the following requirements, unless ordered otherwise by a court:

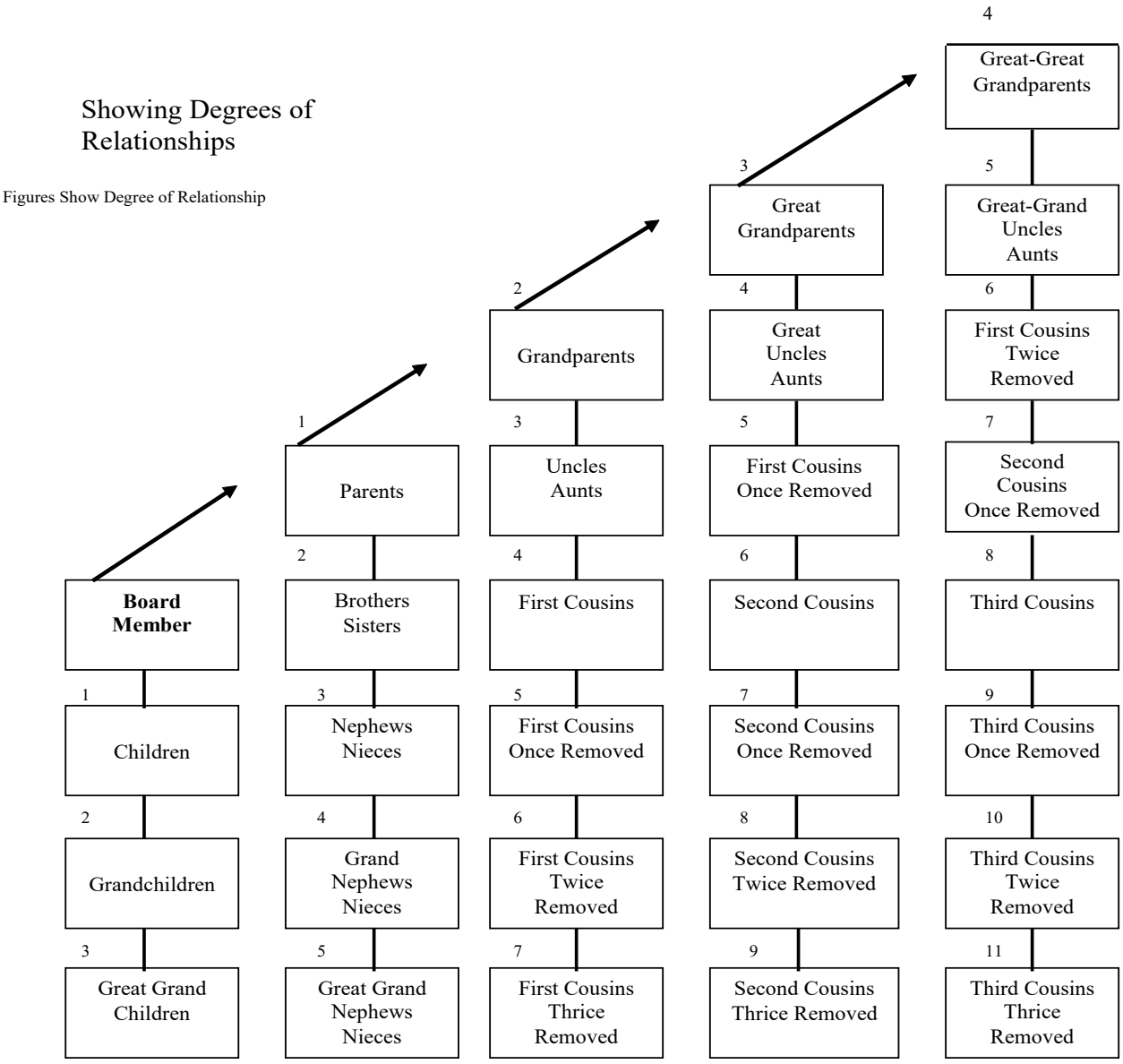
- The newspaper must be printed in the English language;
- It must be entered as second class postal matter in the United States mail at a post office; and
- It must have general circulation in the vicinity where the notice is to be published.

Any legal notice, legal advertising or other matter required by law to be published in a newspaper must appear in all editions of that newspaper.

Section 601 currently requires that the newspaper be published and printed in this State and that it be mailed at a post office in this State. This will no longer be required after September 18, 1997.

(By R.W.S.)

Table of Consanguinity



Each Number equals one "degree" of blood or marital relationship.

Sample Public Water Supplier Notification Form

Municipality of _____

Date: _____

To: _____

Public Water Supplier Name

_____

Public Water Supplier Address

_____

Public Water Supplier phone/fax/e-mail

The municipality has received a proposal from _____

(*Name of Applicant)*

To: (Please check all that apply)

- ❒ Change zoning or land use district ★
- ❒ Develop or subdivide ★ property *(please describe)* _____
- ❒ Expand an existing use/structure *(★ if structure uses subsurface wastewater disposal)*
- ❒ Install a subsurface wastewater disposal system
- ❒ Build a new ❒ single family ❒ multi family home
- ❒ Operate a ❒ business ❒ home occupation ❒ industrial facility
- ❒ Operate a junkyard, automobile graveyard or auto recycling business ★
- ❒ Store or use fuel or other chemicals
- ❒ Extract gravel, topsoil, or other resources
- ❒ Harvest timber
- ❒ Farm or keep livestock
- ❒ Grade or fill land
- ❒ Discharge, manage, or impound storm water
- ❒ Install utilities (power, water, sewer)
- ❒ Other *(please describe)* _____

Located (where) _____, Tax Map _____Lot _____,

❒ in ★❒ near the source water protection area of your water supply.

A copy of the proposal is available for inspection _____
(where)

by contacting _____.

The municipality ❒ will ❒ will not hold a public hearing on this proposal.

The public hearing will be held on _____
(date)

at the _____at _____.
(place) *(time)*

For additional information, please contact _____.

Sent by: _____Telephone: _____.

★ *Required notification under PL 1999 c.761. Notice is also required for land use projects reviewed by the municipality that require notification of abutters. Please check the statute and local ordinances.*

Maine Rural Water Association

"Ethics for Quasi-Judicial Boards," *Maine Townsman*, May 2007 by Douglas Rooks, Freelance Writer

A cell phone tower in Manchester. A revaluation in Kennebunk. A rock quarry in Windham. All these seemingly routine municipal matters have led to significant concerns about the ethics or biases of public officials in the recent past, and sometimes even to threats and lawsuits.

Attorneys who deal with quasi-judicial municipal boards say that volunteer service on boards is no longer an informal or routine matter, and can lead to significant time and expense – not to mention headaches – for local government and its officials, particularly when important precautionary steps are not taken.

The legal advice attorneys now provide to towns emphasizes that what worked in the past, and even meeting the minimum standards of state law, may no longer be enough to prevent long-running verbal and legal battles. They also say municipal board members need to avoid not only legal conflicts of interest, but also any strong appearance that they might be biased in deciding a particular case. Stating a possible interest in a case, or rescuing oneself when a conflict may exist, is often the right move, and should not be seen as an admission that an official lacks fair-mindedness, they say.

The lawyers cite cases where towns and cities that took steps to head off controversy early came out ahead, and where those that didn't found themselves in the midst of prolonged battles that caused hard feelings and may have undermined public faith in the board.

Ken Cole, an attorney with Jensen Baird in Portland, has spent many long nights with planning boards, boards of assessment review (BAR), and other panels that are not supposed to make policy, but simply interpret and apply the rules as written. Even when boards follow all the procedures, it sometimes isn't easy, particularly when the stakes are high.

"One of the towns we've served for a long time is Cumberland," Cole said. "At one time, we might have gotten one or two calls a month from the town office. Now, we get calls every day."

Legal Uncertainties

Curtis Webber, a partner with Linnell, Choate and Webber in Auburn, says that controversies over municipal procedures have certainly increased over the years, although the condition of Maine law may be responsible for some of the problems. For one thing, the relevant statutes are not very helpful in the kind of disputes that are likely to arise as land use and development rules become increasingly complex and affect larger numbers of abutters and, potentially, involve millions of dollars in investment.

While the statute books contain literally dozens of references to conflicts of interest, the definitions that govern municipal conflicts of interest are contained in Title 30-A, Section 2605, which was adopted in 1987. It covers "municipalities, counties and quasi-municipal corporations" and, in paragraph four, says, "In the absence of actual fraud" officials "deemed to have a direct or indirect pecuniary interest" in contracts must disclose that interest and abstain from voting on the proposed contract. It also specifies that 10 percent or greater stock ownership in a company creates a potential conflict.

As attorneys like Curtis Webber point out, the statute is clear but not very helpful. Most controversies over alleged bias in municipal officials do not involve contracts or direct financial gain. Instead, as in the hot-button cases occurring recently across the state, they revolve around suspicions about what being an abutter or neighbor might do to an official's judgment, whether a revaluation was performed correctly, or whether officials will bow to public sentiment rather than apply the law. Figuring out how to proceed in these instances is, well, tricky.

In addition to the statute's omissions, Webber said, there are few Maine Supreme Court cases dealing with conflict of interest and thus few precedents showing how the law should be applied. In fact, he had to go all the way back to 1983 for a relevant citation, *Mutton Hill Estates v. Town of Oakland*. That case involved meetings between parties to a planning board application before it was formally considered – a mistake Webber believes few municipal officials would now make. Most controversies involving planning and zoning boards have raged and gone away without providing much help to future decision-makers.

Perhaps recognizing the inexact nature of many conflict charges, the municipal conflict of interest statute was amended in 1989, two years after its adoption. The next-to-last paragraph of Sec. 2605 now says, "Every municipal and county official shall attempt to avoid the *appearance* of a conflict of interest by disclosure or by abstention." (Emphasis added.) And finally, it states, "In their discretion, the municipal officers may adopt an ethics policy governing the conduct of elected and appointed municipal officials."

With the law expressly suggesting that conflicts of interest are as much a matter of perception as actual definition, the recent controversies may be as useful a guide to the subject as any.

Chairman as Abutter

In Manchester, a cellular tower builder submitted an application in 2006 to the planning board, one of hundreds filed across the state in recent years. As it happened, the board chairman was an abutting landowner, and his role rapidly became the focus of contention between the parties – as well as front-page news in the local daily paper.

The attorney for the applicant requested that the chairman rescue himself because of potential bias, but the chairman refused and secured an opinion from town counsel backing his position. The controversy continued, however, with the applicant's attorney charging, in essence, that her client had been forced to jump through far more hoops than necessary during the planning board's preliminary review.

The board of selectmen then got involved, and, in an unusual move, asked the planning board chairman to step down from the case, which he did.

To Curt Webber, this was a relatively clear-cut instance where town officials should avoid the appearance of conflict. "An abutter can have a fairly direct financial interest in an application like this one," he said. "A cell tower, depending on its location, could reduce the value of neighboring properties." In Webber's view, the chairman might indeed have had a financial stake in the outcome and, in any case, could certainly not avoid the appearance of conflict.

The trouble, he said, is that an official has only one opportunity to rescue him – or herself, which is before any hearings on an application take place. By the time a case becomes publicized, or featured in the newspapers, it's too late to step down. This is why he advises his clients to declare an interest in any project due to come before a planning or zoning board "even if they think it's minor or inconsequential." That way, if questions are raised later, the official avoids any suspicion of improper dealing. "It's not that big a thing to step down from a particular vote," he said. "It doesn't affect overall service on the board." Most important, he said, such actions in advance of controversy maintain public confidence in the integrity of the board, which is probably its most important asset.

Perfect Storm for Revaluation

When Dan Robinson became town assessor in Kennebunk in 1999 – succeeding Barry Tibbetts, who is now town manager – he knew there was a storm brewing on the horizon. The coastal town, like most of its neighbors the focus of a booming real estate market, had not had a full-scale revaluation since 1979. Property values had not only skyrocketed since then, but had also shifted sharply toward desirable shorefront lots. A shorefront property valued at $300,000 back in 1979 might be worth $2 million two decades later, and the town braced for a whole lot of taxpayers unhappy with their new assessments.

The revaluation was done in-house, and was completed in 2003. As Robinson expected, there were lots of phone calls. From 6,000 tax bills, there were 500 requests for abatements, and 80 appeals to the BAR. Of the appeals, Robinson said, "95 percent of them involved waterfront property."

The revaluation also spawned a number of Superior Court filings by taxpayers unhappy with the town's decision on their appeals, and Kennebunk was upheld on all matters relating to the actual value of assessments. One case has just been adjudicated by the state Supreme Court where the plaintiff prevailed, though Robinson said it involved technical issues that won't affect the valuations of any properties.

What he did not expect was the sheer level of animosity created by the reassessment. "There were threats," Robinson said, "and since I live in town, the police were watching my house." One contract employee, who lived in Massachusetts, got a call from police there saying that "someone from Kennebunk is going through your garbage."

Although things have since settled down, Robinson still seems to be figuratively shaking his head: "None of this was necessary. No assessor gains anything through the value put on a particular property."

Nonetheless, the town weathered the legal challenges in good shape, according to Attorney Ken Cole, in part because it followed his advice to provide separate counsel for the assessor and the board of assessment review. Cole's firm represented the assessor, while the board worked with a different law firm. "You can't really claim to be neutral when you're representing both sides of the case," he said — in this instance an appeal to the assessment board of a valuation supplied by the assessor.

Cole notes that state law does not require towns to do this, and in smaller municipalities there may be resistance to the expense of hiring an additional law firm. "In the long run, you'll probably save money," Cole said. "Imagine what it would be like if we were trying to provide advice to both sides concerning all those disgruntled taxpayers in Kennebunk. It was like a perfect storm for appeals."

A Changing Landscape

The rock quarry in Windham was a case in which Cole was personally involved. "I must have spent a dozen evenings between April and December (of 2006) attending many-hour meetings in Windham," he said.

The issues raised were in many respects like those brought up in Manchester. "One of the town councilors was an abutter, and several others lived nearby," he said. While the project, proposed by Peter Busque (doing business as Windham Properties LLC), was frequently described in the press as a "gravel pit," the application for a site off Route 302, the town's busiest road, involved rock crushers and the noise such operations necessarily produce, Cole said.

The application was turned down by both the planning board and the zoning board of appeals. Windham Properties is now suing in Cumberland County Superior Court.

As for the town councilor who is an abutter, he took Cole's advice and stepped down. "He was happy to do so," Cole said. "Why would you want all the grief that comes from having people suspect your judgment? Who needs it?"

The prevalence of controversial planning and zoning cases, particularly in the southern Maine area where Cole has most of his clients, can be attributed to one big factor: intense growth and the resulting pressure on neighborhoods and natural resources.

Referring to his own lengthy service on Portland's planning board, he said, "We had a lot of difficult decisions because a lot of the sites were marginal. The good land has already been built on. What you're dealing with lately are a lot of sites with problems."

An Ounce of Prevention

Controversy concerning the role of volunteer, unpaid boards reviewing planning, zoning and assessment decisions seems certain to grow, not diminish. So what advice do the attorneys have for citizens dauntless enough to accept these appointments?

First, when in doubt, recuse, or at least declare an interest. Whether one feels a sense of bias or not, the official is always going to lose out when his or her conduct becomes the focus of discontent. "It's always going to come from the losing side," Webber said, "but you know it's going to be there, so you might as well anticipate it."

Second, hire separate counsel for boards performing separate functions. The attorney defending a code enforcement officer's decisions, Cole said, should not be the same one representing the zoning board's review of those decisions. The Kennebunk cases make it clear that assessors and review boards are in the same category.

Third, be aware of the ethics laws, and of the standards behind them. The Legislature is currently reviewing the definition of conflict of interest for legislators, based in part on a case that led to charges that a lawmaker was doing the bidding of his employer. The incident also led to the resignation of the then-commissioner of the Department of Environmental Protection.

No comparable review is apparently in the offing for the municipal conflict statute, so town and cities will have to make do with the current "unhelpful" definition and only a handful of legal precedents. In other words, they will have to strive to avoid not only conflicts of interest, but also the appearance of conflict – which in towns small or large can be very much in the eye of the beholder.

"Letter to the Editor," *Maine Townsman*, June 2007

An article, "Ethics for Quasi-Judicial Boards", by freelance writer Douglas Rooks in the May 2007 issue of the Maine Townsman discussed bias and the appearance of bias of municipal public officials. Three examples were cited including a situation in Manchester where the chairman of the Planning Board is an abutter to a proposed cell tower that's being reviewed by the Planning Board. The article stated that the "applicant requested that the chairman recuse himself because of potential bias but the chairman refused securing an opinion from town counsel backing his position." The property owner where the tower is proposed and his lawyer met with and urged the Selectmen to request that the chairman recuse himself. A majority of the Selectmen asked the chairman to recuse himself, which he did. Auburn municipal attorney Curtis Webber who was not involved in this case was asked by reporter Rooks to comment. In the article Webber indicated or strongly implied that the chairman should have recused himself early in the process before this project became publicized in the local paper to avoid an appearance of bias.

There was a major omission, which was not shared with readers of the article or with Curtis Webber apparently because Douglas Rooks was unaware of it. Early in the review process the property owner where the tower is proposed mentioned to the Town Manager that he was concerned that the Planning Board chairman was an abutter to his property. His comment was communicated to me and I promptly discussed with the town's attorney the property owner's concern as well as three reasons why I believed I did not have a bias. The reasons I gave were: 1) There is a self-storage facility which I own abutting his property. The business at and the property value of the facility would not be negatively affected by the proposed tower. 2) Our residence is located just west of the storage facility and the side of the house faces where the tower is proposed. The view from this side of the house is effectively screened by nearby mature fir trees. 3) Our residence is 3/10 of a mile from the tower site. The town attorney opined these were good reasons indicating I did not have a bias and recommended that I publicly state that I am an abutter, and present the three reasons at the next Planning Board meeting. He suggested that I ask the Planning Board to vote whether they think there is bias or appearance of bias and then recuse myself while the Board discusses and votes. I followed the town attorney's advice. The Planning Board discussed the issue. No complaints were voiced by the applicant during the Board's deliberation. The Board voted unanimously that I did not have bias or appearance of bias regarding the tower. This was done before there was any publicity on this issue.

After reading the May Townsman article I called Attorney Curt Webber and shared what had been omitted in the article. He opined that I "had done exactly the right thing". He further indicated that since the applicant did not negatively comment during the Planning Board's deliberation on this issue their right to complain was "closed" after that. The property owner began formally complaining in a letter to the Board a month later.

So the remedy according to Attorney Curt Webber is not restricted as a public official to simply recuse yourself if you're an abutter. Early in the review process you have the option of publicly stating why you believe you are not biased or have the appearance of bias. Have the Board you're a member of vote whether they perceive a bias and act accordingly. Curt Webber can be reached at (207) 784-4563 or at cwwebber@lcwlaw.com.

Sincerely,

Fred Snow, Chairman
Manchester Planning Board
fws319@aol.com

Appendix 3 – *Sample* Forms, Minutes and Decisions; DEP "Shoreland Zoning News" Articles; Excerpts from Court Cases; *Sample* Language

Sample Application for Administrative Appeal to Board of Appeals

1. Name of Applicant: _____

2. Mailing Address: _____

3. Telephone: _____

4. Name of Owner of Property Which is Subject of Appeal: _____

   _____

5. Please describe in detail what decision you are appealing, the date on which the decision was made and by whom, the facts surrounding this appeal, what you think is wrong about the decision which you are appealing, and what action you want the board of appeals to take in this matter. If you are not the original applicant and you are appealing a planning board decision, please indicate whether you participated in the Planning Board's proceedings. Also, please indicate how the Planning Board's decision will affect you and/or your property. Use extra sheets if necessary and attach them to this application.

   _____
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   _____

   I certify that the information contained in this application is true to the best of my knowledge and belief.

Date: _____ _____

Signature of Appellant

Application for Appeal

Town of Southwest Harbor
Board of Appeals

Applicant:

NAME: _____ MAILING ADDRESS: _____

CITY: _____ STATE: ____ ZIP CODE: _____ TEL.: _____

E-MAIL: _____ CELL PHONE: _____

Agent: (if applicable)

NAME: _____ MAILING ADDRESS: _____

CITY: _____ STATE:_____ ZIP CODE: _____ TEL.: _____

E-MAIL: _____ CELL PHONE: _____

RELATIONSHIP TO APPLICANT: _____

Please complete this application in its entirety. You may add other information as may be needed to adequately describe the purpose of seeking relief from the Southwest Harbor Board of Appeals (BOA). If you need assistance for any unanswered questions, please feel free to contact:

❒ Code Enforcement Officer ❒ Chairman or Member, Board of Appeals ❒ Tax Assessor

The following has been completed and attached, including section for relief (page 3.1 thru 3.5):

❒ Statement of Problem, Page 2

❒ Specific Request, Page 3.1-5 .....

❒ Standing, Page 4

❒ Administrative Appeal, Page 3.1

❒ Variance, LUO only, Page 3.2

❒ Setback Variance, LUO, Page 3.3

❒ Disability Variance, LUO, Page 3.4

❒ Permit Life Extension, LUO, Page 3.5

❒ List of Abutters, Page 5 (land use ordinance, road opening & special amusement)

❒ Copy of receipt-of-payment, Administrative Fee ($40.00) to cover notice to abutters and public notice in a local publication.

APPLICANT SIGNATURE: _____ DATED: _____

AGENT SIGNATURE (if applicable): _____ DATED: _____

APPLICATION for APPEAL

NAME OF APPLICANT: _____ DATE: _____

I wish to appeal to the Southwest Harbor Board of Appeals because I have a problem which is in regard to a matter of: **(PLEASE CHECK ONLY ONE)**

LAND USE

- ❒ Land Use Ordinance
- ❒ Road Opening Permit Ordinance
- ❒ Road Ordinance
- ❒ Subdivision Ordinance
- ❒ Flood Plain Management Ordinance

NON LAND USE

- ❒ General Assistance Ordinance
- ❒ Harbor Ordinance
- ❒ Property Tax Abatement
- ❒ Special Amusement Permit Ordinance
- ❒ State Plumbing Code
- ❒ Town Personnel Rules/Regulations
- ❒ Warning Sign Request Policy

And further, **I understand** that:

- ✓ The role of the BOA is to examine and resolve problems between the Town of Southwest Harbor and those affected by its ordinances, decisions or lack of action by the Town; and
- ✓ The only issues the BOA is legally authorized to deal with are those arising from the list above, and do not include such matters as constitutionality, civil rights, criminal acts, property disputes, surliness, etc.; and
- ✓ The BOA will not even hear my appeal unless I can show that I have "standing" (see page four) to have my complaint heard; and
- ✓ The BOA will try to decide my case based only on the factual information presented and what is written in the pertinent Town ordinance/regulation, State statute(s)/regulation(s) and the rulings of the rulings of the State Supreme Judicial Court; and
- ✓ The BOA tries to make decisions it believes would be upheld if appealed to Superior Court; and
- ✓ The local appeals process must be exercised and exhausted before the Superior Court will hear these cases; and
- ✓ Compliance with BOA decisions is voluntary by all parties, compulsion requires a court order.

APPLICATION for APPEAL

NAME OF APPLICANT _____ DATE: _____

I understand that the purpose of establishing my case for **Standing** is to limit appeals on an issue to those who are directly involved and/or affected.

I have right, title or interest in the affected property, or issue, as shown by _____

_____

_____

_____

_____

Unlike others in the community, I will suffer a particularized injury in this matter if not resolved in my favor. I am adversely and directly affected by: _ _____

_____

_____

_____

_____

_____

_____

I have participated in the proceedings which led to this appeal as shown by the following documentation and/or witnesses: _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

APPLICATION for APPEAL

NAME OF APPLICANT ______________________________ DATE: ______________

I am providing this up-to-date and complete **LIST OF ABUTTERS** to the property identified as the subject of this appeal, and further, I understand that:

- ✓ Although I am technically responsible for the notification of the abutters, the Town of Southwest Harbor will execute notification to those listed below (to ensure consistency and timeliness of procedure); and
- ✓ Failure to notify the present-day owner of each and every abutting lot may invalidate the decision of the Board of Appeals in this matter; and
- ✓ Map and lot number, book and page numbers as recorded in the Registry of Deeds, names and addresses of abutters are available in the commitment book, assessor's office.

NAME:	MAP:	LOT:	BOOK:	PAGE:
ADDRESS:		CITY:	STATE:	ZIP CODE:

NAME:	MAP:	LOT:	BOOK:	PAGE:
ADDRESS:		CITY:	STATE:	ZIP CODE:

NAME:	MAP:	LOT:	BOOK:	PAGE:
ADDRESS:		CITY:	STATE:	ZIP CODE:

NAME:	MAP:	LOT:	BOOK:	PAGE:
ADDRESS:		CITY:	STATE:	ZIP CODE:

NAME:	MAP:	LOT:	BOOK:	PAGE:
ADDRESS:		CITY:	STATE:	ZIP CODE:

USE ADDITIONAL SHEET FOR MORE ABUTTERS

ADMINISTRATIVE APPEAL APPLICATION (3.1)

NAME OF APPLICANT: _____ DATE: _____

I hereby request from the Southwest Harbor Board of Appeals to consider an

ADMINISTRATIVE APPEAL

as I contest the interpretation or application of the ordinance / regulation, and I seek relief from the: (CHECK ONLY ONE)

❒ DECISION ❒ LACK OF ACTION

of the following board or individual: (CHECK ONLY ONE)

❒ Planning Board ❒ Town Manager

❒ Code Enforcement Officer ❒ Tax Assessor

❒ Board of Selectmen ❒ Road Foreman

The decision/lack of action I object to is: _____

_____

_____

I object for the following reason(s) [Supported with citations(s), of pertinent ordinance(s), deeds, maps, documents, etc.]: _____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(USE BACK OF THIS PAGE OR ADDITIONAL SHEET AS NECESSARY)

APPLICANT/AGENT SIGNATURE _____ DATE: _____

VARIANCE APPLICATION, Land Use Ordinance (3.2)

NAME OF APPLICANT: _____ DATE: _____

I hereby request from the Southwest Harbor Board of Appeals to consider an

APPEAL FOR VARIANCE

which is applicable to a land use ordinance.

In requesting this variance, I understand that:

- ✓ The Planning Board must have reviewed my project permit application and rendered a decision other than 'approved'; and
- ✓ I am agreeing that my project does not conform to the ordinance; and
- ✓ I must show that without a variance, undue hardship would be imposed on any owner of the property, not just the present owner; and
- ✓ I must satisfy the legal test for undue hardship by showing that:

  A. Without a variance, this property has lost all, or most all of its value, and

  B. This property is affected by the ordinance in ways that neighboring properties are not, and

  C. Granting of a variance will not alter the essential character of the locality, and

  D. The loss of value does not result from my actions or those of prior owners.

Property Identification: Map_____ Lot _____ Book _____ Page _____

Owner of record: _____

Necessity for Variance: The proposed project is non-conforming in the following ways: _____

_____

_____

Justification for Variance: The four point legal test for undue hardship can be satisfied as follows: _____

_____

_____

_____

(USE BACK OF THIS PAGE OR ATTACH ADDITIONAL SHEETS AS NECESSARY)

APPLICANT/AGENT SIGNATURE: _____ DATE: _____

PRINTED NAME: _____

PERMIT LIFE EXTENSION, Land Use Ordinance (3.5)

NAME OF APPLICANT: _____ DATE: _____

I hereby request from the Southwest Harbor Board of Appeals to consider a

PERMIT LIFE EXTENSION

as provided by the land use ordinance, Sec IX, B.4.

This appeal is to extend, for one year, the following permit:

Permit Number _____ Permit Date _____

This will be ❒ First ❒ Second, such extension

Property Identification: Map _____ Lot _____ Book _____ Page _____

Owner of record: _____

This extension is required because: (check only one box)

❒ To complete the project already begun. The progress to date is:

_____

_____

_____

_____

_____

_____

❒ Because progress has been prevented by reasons beyond my control. The reasons are:

_____

_____

_____

_____

_____

_____

APPLICANT/AGENT SIGNATURE: _____ DATE: _____

PRINTED NAME: _____

DISABILITY VARIANCE APPLICATION, Land Use Ordinance (3.4)

NAME OF APPLICANT _____ DATE: _____

I hereby request from the Southwest Harbor Board of Appeals to consider a

DISABILITY VARIANCE

as provided by Title 30-A, M.R.S.A. § 4353, §§ 4-A

I need to make my property accessible to a disabled resident of my property. The Land Use Ordinance prevents construction of any reasonable access to the structure. My application for a permit has been duly processed and the decision of the Planning Board or Code Enforcement Officer has been other than "approved".

Property Identification: Map _____ Lot _____ Book _____ Page _____

Owner of record: _____

Name (s) of person (s) disabled: _____

Description of Disability: _____

I expect this disability to last approximately: _____ Months _____ Years

In requesting this disability variance, I understand that:

- ✓ Such a variance applies solely to the installation or equipment or structure necessary for Access to and from the property by the disabled person; and
- ✓ The equipment or structure, permitted by a disability variance, must be removed when there no longer is a disabled person living on the premises; and
- ✓ The granting of this variance must be recorded with the Registry of Deeds in Ellsworth; and
- ✓ If or when the lot or use ceases to be a single family residence, the setback reduction by this variance will be rescinded.

APPLICANT/AGENT SIGNATURE: _____ DATE: _____

PRINTED NAME: _____

SETBACK VARIANCE APPLICATION, Land Use Ordinance (3.3)

NAME OF APPLICANT _____ DATE: _____

I hereby request from the Southwest Harbor Board of Appeals to consider an

APPEAL FOR SETBACK VARIANCE

as provided by Title 30-A, M.R.S.A. § 4353, §§ 4-B. In requesting this variance, I understand that:

- ✓ The dwelling for which the variance being sought is my primary year-round residence
- ✓ The request for a setback variance does not exceed 20% of a required setback
- ✓ The variance will not allow any encroachment to the water
- ✓ The variance will not cause the area of the dwelling to exceed the maximum permissible lot coverage.
- ✓ The following legal test for undue hardship is explained:

A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood:

_____

_____

B. The granting of a variance will not alter the essential character of the locality:

_____

_____

C. The hardship is not the result of action taken by the applicant or a prior owner:

_____

_____

D. The granting of the variance will not substantially reduce or impair the use of the abutting property:

_____

_____

E. The granting of the variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

_____

_____

Property Identification: Map _____ Lot _____ Book _____ Page _____

APPLICANT/AGENT SIGNATURE: _____ DATE: _____

PRINTED NAME: _____

Falmouth Board of Zoning Appeals Request for Hearing

Name of Applicant: _____ **Phone#:** _____

Address of property under appeal: _____

Map/Lot: _____ **Tax Sheet:** _____ **Zone:** _____

Mailing Address (if different): _____

Property Owner (if other): _____

The undersigned requests that the Board of Appeals consider An Administrative Appeal:

Relief from the decision, or lack of decision, of the Code Enforcement Officer in regard to an application for a permit. The undersigned believes that (check one):

_____ An error was made in the denial of the permit.

_____ The denial of the permit was based on a misinterpretation of the ordinance.

_____ There has been a failure to approve or deny the permit within a reasonable period of time.

_____ Other _____

Please explain in detail the facts surrounding this appeal on a separate piece of paper. Section 8.8 requires "the aggrieved person shall specifically set forth on the forms the grounds for appeal."

I certify that the information contained in this application and its supplement is true and correct.

Date: _____ Signed: _____

Per requirements of 8.8 (Appeal Procedures), this application must be filed with the Town Clerk. A fifty dollar ($50) fee must accompany this application to cover the cost of notices and the conducting of the hearing.

Town of Bar Harbor Appeals Board Decision, dated April 22, 2010

Date:	April 22, 2010
Appeals Board Application Number:	AB-10-02
Applicant:	North South Corporation, LLC
Property Address:	West Street (Tax Map 104, Lots 113, 114, 115, 116, 117, 118, 122, 123, 143, 144, 146, 147, 149)
Application:	Appeal of a Decision by the Town of Bar Harbor Planning Board which denied the West Street Hotel SP-09-02.

North-South Corporation (hereafter "the Appellant") has appealed the March 17, 2010 decision of the Bar Harbor Planning Board denying it a permit to build a large hotel on West Street in Bar Harbor, Maine. After giving the background of the appeal and briefly discussing the issues raised in it, we explain why we granted the appeal.

Background

On March 18, 2009, The Appellant applied to the Bar Harbor Planning Board for a permit to build a 120 room hotel on West Street in the Downtown Business I land use district in Bar Harbor. The Planning Board held multiple exhaustive hearings on the application over the next year, and the proposed project went through several revisions that are not relevant to the issues raised in this appeal. Ultimately the Planning Board concluded that the project, a hotel of 102 rooms, complied with all of the requirements of the Bar Harbor Land Use Ordinance ("LUO") except the height requirements of LUO § 125-21(G). Since the Planning concluded that the project did not comply with § 125-21(G), it denied the application on March 17, 2010. The Appellant filed a timely appeal with this Board on March 23, 2010. After receiving briefs from both parties[1], this Board held "appellate review" hearings on April 13, 2010 and April 22, 2010.

[1] The Planning Board, represented by Town counsel (the Appeals Board has its own, independent counsel), functioned as the Appellee in the appeal. David Witham, an abutter, participated in both the Planning Board hearings and the appeal through his counsel, Edmund Bearor. On April 9, 2010, the Appeals Board's counsel inquired of Mr. Bearor what role he intended to play in the upcoming hearing so time could be fairly divided between the parties. Mr. Bearor responded by email that "Yes we will be participating. I am not sure how much time you are trying to allot between the participants, but I would expect Andy to go first and Lee or someone from BSSN [Bernstein Shur] to present the planning board's position. I would like an opportunity to follow those presentations. My arguments will be those previously made in writing to the Planning board, so I assume that the BOA has all of that as part of the record, unless the record in incomplete." The Appeals Board counsel then advised Mr. Bearor to co-ordinate with the Planning Board's attorney since counsel was going to recommend that the Appellant and Appellee get equal time, which would require dividing the Appellee's time between the Planning Board's attorney and Witham's attorney. Compare 6/1/07 Advisory Note to ME R App Proc 11. He was further advised that if the two attorneys could not agree on the division of the Appellee's time, the Board would divide it for them. Mr. Bearor then responded to counsel that "I will participate in tonight's proceeding as I have in the planning board process and that is best described as simply a member of the public.

Issues

The sole issue in this appeal is whether the Planning Board acted contrary to the ordinance when it concluded that the proposed hotel does not comply with the height requirements in LUO § 125-21 (G).[2] Further, the relevant facts, such as the height of the building, the height of the various stories in the building, the square footage of the floor areas, are not in dispute. What the parties disagree about is how to interpret and apply the standards in LUO § 125-21(G). That section states in full:

> G. Maximum height: 45 feet and:
>
> 1) Within 10 [feet] of the front property line, the building façade shall be no more than 35 feet or three stories of habitable space, whichever is less; or
>
> 2) With 10 [feet] of the front property line, the building façade shall be no more than 35 feet or three stories of habitable space, whichever is less and beyond 20 feet of habitable space, whichever is less and beyond 20 feet of the front property line, the portion of the building above 35 feet may include a fourth story of habitable space, provided that:
>
> a) The floor area above 35 feet in height, or square footage equal to that floor area, is dedicated in the building to dwelling units only;
>
> b) These dedicated dwelling units shall be rented for periods of no fewer than 90 consecutive days; and
>
> c) The building must provide a minimum number of dwelling units (See Table 3), which qualify as affordable housing as defined.

The pertinent part of the Planning Board's Decision states in full:

I will not need to have any time allocated to me from the Planning Board's presentation. I have spoken with Amanda about this." The end result was that the Appellant and the Planning Board's attorney were given equal time during the hearings. Mr. Bearor participated during the public comment period (members of the public were given 5 minutes each to address the Board) and argued in support of the Planning Board's decision. He also submitted a memorandum of law that was rejected by the Board as untimely under LUO § 125-103 (C)(12)(b).

[2] The Appellant also argued in both his appeal application and brief that the Planning Board failed to give him all the "green space" parking credits to which he is entitled. We see no reason to reach this issue, however, since the Planning Board gave him enough green space parking credits to comply with the parking standards. Since the Planning Board did not deny the application on this basis, the Appellant is not aggrieved by it, and the Appeals Board did not deal with this issue.

"The Board finds that the design of the building that is currently being proposed contains more than the allowable number of stories under Section 125-21G of the Ordinance, and finds further that the number of stories exceeds the limit imposed by Section 125-21G. The design calls for a height of 41 feet above the mean original grade and includes five stories of habitable space. Section 125-21G imposes a maximum height limit of 45 feet. It provides further that the structure may only contain three stories of habitable space, unless the dwelling unit and affordable housing requirements of section 125-21G (2), Section 125-69.R and Table 3 are met. These provisions require the dedication of residential dwelling space equal in square footage to the floor area of the fourth story, and the dedication of at least 30% of the total number of dwelling units to affordable housing. If these requirements are met, a fourth story of habitable space may be added. A fifth story is not allowed under any circumstances. In reaching this determination, the board interprets "habitable space" to include any space which guests can occupy or in which guests can be present as part of their rental privileges. The Board's findings on these points are supported by the unambiguous intent that is revealed by reading section 125-21 in its entirety and in a way to give meaning to all of its parts." Planning Board Decision § I. C.

For his first argument, the Appellant contends that as long as he complies with subsection G1 he need not comply with subsection G2 because those two subsections are separated by the disjunctive word "or." The Planning Board, however, required the Appellant to comply with subsection G2 since his hotel includes a fourth story of habitable space, saying in its decision that it interprets the ordinance's height requirement "…in a way that gives meaning to all its parts," (Planning Board Decision at page 3). The appellant's claim that as long as he complies with subsection G1 he need not comply with subsection G2 renders subsection G2 meaningless surplusage because it is *impossible* to comply with subsection G2 without also complying with G1, and therefore one would never have to comply with G2 since G1 would already be satisfied.

A much more reasonable reading of this section is that an applicant has an initial choice of complying with subsection G1 **or** subsection G2 **BUT** if the applicant wants to build a fourth story to be used for habitation, he must comply with subsection G2 because G2 is the only subsection that allows a fourth story used for habitation.[3] We agree with the Planning Board that

[3] While a "story" is a structure standard, habitation is a use. See the definition of "use" in LUO § 109. The appellant implies that since subsection G1 does not prohibit a fourth story for habitation, he can build and use such a story under G1 and ignore G2. § 125-7 "Omitted uses prohibited" however says, "It is the intent of this chapter that any use not specifically allowed as either a permitted use or a permitted use with site plan approval is specifically prohibited." Only subsection G2 permits the use of a fourth story for habitation and if an applicant wants such an additional story for such a use, he must comply with subsection G2. While 125-21 (G) consists primarily of dimensional height standards, which are structure standards, "habitable space" refers to *the use* of space for habitation.

such a reading "gives meaning to all" the ordinance's parts and is just as consistent with the plain meaning of the words in the section as the appellant's reading of the section.[4]

For his next argument, the Appellant claims that the Planning Board misconstrued the phrase "The floor area above 35 feet in height" as applying to all the floor area in the fourth floor even though it is undisputed that the entire fourth floor is below 35 feet in height. The ceiling of the fourth floor is 33 feet 5 inches above mean original grade. The Planning Board, relying upon what it perceived as "the unambiguous intent" of § 125-21(G)(2) as requiring dwelling units and affordable housing in buildings containing a fourth story of habitable space, presented two rationales for applying the phrase "floor area above 35 feet in height" to a floor that starts and finishes below 35 feet. First, it asserted that "floor area" could mean a horizontal plane above 35 feet that is the same as the amount of floor space in the fourth story even if the actual floor is below 35 feet. Second, it asserted that reading "floor area above 35 feet in height" literally would create an absurd result because it could allow a developer to construct a fourth story without supplying any affordable housing at all. In essence, the Planning Board held that what it perceived as the intent to provide dwelling units and affordable housing in *all* buildings with four stories of habitable space trumps the actual wording in the ordinance.

The Appeals Board, by a split 3-2 vote, concluded that when the Planning Board calculated the number of dwelling units required by § 125-21 (G)(2)(a), it misinterpreted the subsection when it included the floor area in the fourth floor as the area required for the dwelling space calculation even though the height of that floor is below 35 feet. The Appeals Board determined that only the floor area that is actually above 35 feet in height should be used in that calculation.

The Appellant also contends that the Planning Board misconstrued the term "habitable space." The Planning Board interpreted: "'habitable space' to include any space which guests can occupy or in which guests can be present as part of their rental privileges," (Planning Board Decision at page 3). The Appellant argues that the term "habitable space" is construction or structure-related terminology, which, pursuant to LUO § 125-108 (A) and § 125-91, is defined in the International Building Code. In essence, the Appellant claims that the Planning Board confused the term "habitable space" with the term "occupiable space," which is defined separately in the International Building Code. The Planning Board challenges the assertion that "habitable space" is a construction or structure-related term that incorporates IBC definitions by reference, and, instead suggests that the term should have its ordinary meaning within its context in the ordinance pursuant to §125-109 (A). Further, the Planning Board asserts that even if the

[4] The Appellant argues that such a reading renders § G1 meaningless surplusage. However § G1 would still apply to projects not including a fourth story of habitable space. More importantly, applying § G2 preserves the substantive standards in § G1 (the height of the façade in the first 15 feet) as well as the affordable housing standards when there is a fourth story of habitable space. Applying § G1 would mean that affordable housing is never required as long as the height requirement of the façade in the first 15 feet is met. Our interpretation maintains both substantive standards while the Appellant's interpretation preserves only the façade height requirements.

IBC definitions are used, "habitable space" includes space in the building used for "living," which should be interpreted broadly to accomplish the purposes of the ordinance. At stake is the status of the deck area around the pool and similar areas on the fifth floor roof-top. The Planning Board concluded that the pool deck and fifth level were habitable space because guests would use them as part of their rental privileges. The Appellant does not consider these areas habitable space because it does not qualify as such under the IBC, and therefore the Appellant does not count the fifth floor roof-top as a fifth story of habitable space.

The Appeals Board, by a split 3-2 vote, concluded that the Planning Board misinterpreted § 125-21 (G)(2) when it counted the fifth floor and pool deck as a fifth story of "habitable space," basing this on the IBC definition of "habitable space."

After a majority of the Appeals Board decided that the Planning Board misinterpreted § 125-21 (G)(2) and therefore acted clearly contrary when it concluded that the project did not comply with that section, the Appeals Board considered whether to vacate the decision and remand the case back to the Planning Board for further proceedings, or, whether it should reverse the decision and remand the case back with instructions to issue the permit, (see LUO § 125-103 (D)(1)(1)(1)). Since the facts-such as heights and floor space of the various stories-are not in dispute, the number of dwelling units and affordable housing that must be provided can be calculated using the correct interpretation of § 125-21 (G)(2). See Appellant's illustrative aid #20 for these calculations. Since these calculations have already been done by the Appellant, the Appeals Board unanimously decided that the Planning Board must issue the permit to approve the project since the Appellant has complied with § 125-21 (G)(2) when interpreted correctly.[5] In other words, the Planning Board must re-state the Finding I(C) to indicate that the applicant has compiled with § 125-21 (G)(2) of the LUO. This decision only affects § I(C) of the March 17, 2010 Planning Board Decisions; all other parts and conditions of that Decision remaining in full force and effect.

Decision

The Planning Board's March 17, 2010 Decision that the Appellant's project does not comply with § 125-21 (G)(2) is **REVERSED** and the case is remanded back to the Planning Board with instructions to issue the permit.

Date: 3 May 2010

Signed:

Ellen Dohmen, Chair

[5] This permit will not, of course, become "final" until all appeal periods have been exhausted, which includes the appeal period from this decision as well as the appeal period from the separate appeal file by David Witham.

Town of Bar Harbor Appeals Board Decision, dated May 11, 2010

Date:	May 11, 2010
Appeals Board Application Number:	AB-10-03
Applicant:	North-South Corporation
Property Address:	West Street (Tax Map 104, Lots 113, 114, 115, 116, 117, 118, 122, 123, 143, 144, 146, 147, 149)
Application:	Appeal of a Decision by the Town of Bar Harbor Planning Board which denied and approved several aspects of the West Street Hotel SP-09-02.

The Witham Family Limited Partnership (hereafter "the Appellant") has appealed the March 17, 2010 decision of the Bar Harbor Planning Board denying the North-South Corp. a permit to build a large hotel on West Street in Bar Harbor, Maine. After giving the background of the appeal and briefly discussing the issues raised in it, we explain why we deny the appeal.

Background

On March 18, 2009, North-South Corp. applied to the Bar Harbor Planning Board for a permit to build a 120 room hotel on West Street in the Downtown Business I land use district in Bar Harbor. The Planning Board held multiple exhaustive hearings on the application over the next year and the proposed project went through several revisions that are not relevant to the issues raised in this appeal. The Appellant, through its attorney, Ed Bearor, participated in those hearings as an opponent of the project. The Appellant challenged multiple aspects of the project under several different parts of the Bar Harbor Land Use Ordinance ("LUO"). Ultimately, the Planning Board concluded that the project, a hotel of 102 rooms, complied with all of the requirements of the Bar Harbor Land Use Ordinance ("LUO") except the height requirements of LUO §125-21(G). Since the Planning Board concluded that the project did not comply with §125-21(G), it denied the application on March 17, 2010.

North-South Corp. appealed the Planning Board decision to this Board on March 23, 2010. The Board reversed the Planning Board's decision on April 22, 2010 and remanded the case back to the Planning Board with instructions to issue the permit. The Appellant filed an appeal from the Planning Board's March 17th decision on April 13, 2010, the last day within the LUO 30-day allowable appeal period, but before the Appeals Board's April 22nd decision reversing the Planning Board's decision. After receiving briefs from both parties[1], this Board held an "appellate review" hearing on the appeal on May 11, 2010.

[1] Counsel for the Planning Board, whose decision was being appealed, did not participate in the Witham Family Limited Partnership appeal. North-South Construction served as appellee is this appeal.

Issues

1. ***Appellant's Standing.*** North-South Corp. moved to dismiss the appeal on the grounds that the Appellant lacked standing to appeal the Planning Board's denial of the permit because the Appellant, as an *opponent* of the hotel, is not aggrieved by the *denial* of the permit. North-South Corp. recognizes that the Appellant participated in the Planning Board hearings, filed a Notice of Appeal within the appeal period, and is an abutting landowner. North-South Corp. does not contest that the Appellant will suffer a "particularized injury" if the hotel is built; further, it does not contest the fact that the Appellant would clearly have standing to appeal the Planning Board decision *if the Planning Board had granted the permit.* North-South Corp's argument is that if we look *only at the situation that existed on the day the Appellant file his appeal, which was April 13, 2010, the Appellant was not "aggrieved" on that day because the Planning Board decision denying the application had not yet been reversed by the Board of Appeals.*

Appeals Board viewed the issue of standing more broadly. Even if we were to focus only on that one day[2], North-South Corp. had already filed its appeal attacking the Planning Board's decision, so the decision was at least *at-risk* of being reversed, which is exactly what happened less than ten days later. Since: 1) the Appellant is an abutter with a personal stake in the outcome of this case; 2) the Appellant participated in the Planning Board proceedings; 3) files its Notice of Appeal within the 30-day appeal period; 4) will suffer a particularized injury if the hotel is built; and 5) the Appeals Board has reversed the denial of the permit and ordered the Planning Board to issue the permit, we hold that the Appellant has standing to pursue this appeal.

In addition to its arguments about the hotel's height, which we have precluded the Appellant from arguing in this appeal as it was fully considered in the North-South Corp. appeal, the Appellant challenges the Planning Board's parking calculations (basing this on a variety of arguments), and the width of Lennox Street. After discussing the standard of review, we will consider each of the Appellant's arguments.

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[2] North-South Corp. cited *Brooks v Town of North Berwick,* 1998 ME 146, 712 A2d 1050 for the proposition that one cannot appeal a favorable decision. But the favorable decision in *Brooks* was a *final* decision. In the instant case, the Planning Board decision was not only not final but was appealed by an opposing party and ultimately reversed on appeal. North-South Corp. also cited *Madore v LURC* 1998 ME 178, 715 A2d 156 for the proposition that standing must be determined at the time of the filing of the appeal. But *Madore* deals with the "personal stake" aspect of standing, not the particularized injury aspect. In *Madore*, the appellants show their "right, title and interest" to the property for which they wanted a permit by producing a Purchase and Sale Agreement. The problem was that the Purchase and Sale Agreement had expired and the Madores had not renewed it, saying they would renew if they won their appeal but did not want the expense of renewing it at that time because they might not win their appeal. The Law Court held that an appellant had to have a personal stake, such as right title or interest in the property, at the time the appeal is filed and keep that stake throughout the appeal lest the dispute becomes moot. In the case before us, there is no question that the Appellant owned the abutting land when he filed his appeal and continues to own it. At least for opponents of projects, the "particularized injury" aspect of standing is always futuristic and contingent: the injury only occurs if and when the project actually gets built.

In an appellate review hearing, we review the record on appeal to determine if the Planning Board misinterpreted the LUO, found facts that are not supported by substantial evidence, or abused its discretion. We defer to the Planning Board's findings of fact if they are supported by substantial evidence even if the record also contains substantial evidence that would support a contrary finding. We limit our review strictly to the record that was before the Planning Board and do not accept new evidence to be introduced during our hearing on the appeal.

The Appellant challenges the Planning Board's finding, that the hotel has 102 rooms and the requisite 102 parking spaces on several grounds. The Planning Board based its findings on an aggregate of actual parking spaces provided and LUO allowed green space credits.

First, the Appellant argues that the Planning Board erred when it counted each of the "deluxe suites" as a single unit requiring one parking space. He claims that since each deluxe suite has two bedrooms these bedrooms could be rented separately, and should be counted as two separate rooms, each requiring its own parking space. The Planning Board effectively foreclosed this argument by both prohibiting the Appellant from renting the rooms in a deluxe suite separately and by requiring the Appellant to put only one single lock on the outmost door that is serviced by a single key. These actions show that the Planning Board understood what the LUO requires and took reasonable steps to ensure that the deluxe suites could only be used as a single unit.

Second, the Appellant claims that the Planning Board should have required the accessory uses in the hotel, such as the restaurant, to meet the parking requirements for those uses in addition to the parking required for the hotel (Transient Accommodation 8 (TA-8)). He bases his entire argument on the definition of TA-8, which includes the sentence: "Accessory uses *subject to site plan review include* restaurant, cocktail lounge, gift shop, conference room, recreational facilities, such as swimming pool, game courts, and recreational rooms, and the like," (LUO § 125-109, "Transient Accommodations" (H), emphasis added). The LUO, however, has a special provision saying exactly how many parking spaces a TA-8 hotel must have, which is one parking space for each guest room, (LUO § 125-67 (D) (3)(b)[2]). We agree that it is not reasonable to interpret the LUO as requiring a TA-8 hotel to have more parking than required by that section if the hotel has accessories, especially those accessories that can either be used only by hotel guests, who already have parking spaces by virtue of their rooms, or uses open to the general public, which will probably be dominated by hotel guests. Requiring a hotel restaurant to provide the same amount of parking as a stand-alone restaurant makes little sense since the hotel is already providing parking for its guests who patronize the restaurant.

Third, the Appellant contends that the retail shops on the ground floor are not accessories because they "are separate and apart from the hotel gift shop and are to be leased to commercial tenants," (Appeal Application page 7). Therefore he concludes that the Planning Board should have required these shops to provide their own parking. The LUO's definition of "Use, Accessory," however, does not hinge on whether the space is leased; rather it is the relationship

of the accessory use to the principal use. We see no sign that the Planning Board misunderstood the definition of "Use, Accessory" and that its implicit finding that these shops are accessory to the hotel is supported by substantial evidence.

Fourth, the Appellant challenges the Planning Board's allotment of "green space" credits to the hotel. To give an incentive for developers to leave green space in the downtown area, the LUO provides a credit of one parking space for every "contiguous 200 square feet of vegetative cover located within the front yard…" (LUO § 125-67(B)(4)). In essence, the Appellant argues that the hotel has no front yard because part of the hotel extends to the front boundary line and LUO definition of "Yard, Front" says that the front yard is the area between the front boundary line and the "nearest part of any building" to the front line. He also points out that the LUO definition of "Building Front Line" says that porches, whether enclosed or not, are part of the building. The area at issue is an outdoor seating area for the hotel's restaurant. It is set off by a fence that surrounds it; the fence has a gate allowing entrance to the outdoor eating area. The Appellant claims that this gate constitutes a "door" and that the eating area is part of the "building." Since this eating area extends to the front boundary line, the Appellant concludes that the hotel has no "front yard" and its finding that this outdoor area did not constitute a "porch" or other part of the "building" is supported by substantial evidence.

Finally, the Appellant contends that the Planning Board incorrectly allowed North-South Corp. to remove 18 parking spaces allocated for use by an adjacent hotel (owned by the appellee) to this new hotel. He asserts that since these 18 spaces are part of the site plan approved for the other hotel, they cannot be used for this hotel without formally amending the other hotel's site plan. The record shows, however, that North-South Corp. presented the Planning Board with a report from the Bar Harbor Code Enforcement Officer confirming that those 18 parking spaces are not needed by the other hotel. This report constitutes substantial evidence supporting the Planning Board's finding that these parking spaces are free to be used by the new hotel.

Based on the above, we conclude that the Planning Board's parking calculations are not clearly contrary to the ordinance because the Planning Board interpreted the ordinance correctly and all its findings of fact are supported by substantial evidence.

For his final argument, the Appellant challenges the layout and use of Lennox Street. He recognizes, as he must, that the Planning Board does not have jurisdiction over the ownership or direction of Lennox Street. The Planning Board did approve North-South Corp's proposal to convert Lennox Street into a one-way lane, but made that approval conditioned upon North-South Corp's receipt of the necessary changes by the Bar Harbor Town Council, which is the municipal body with jurisdiction over the ownership and direction of town roads. The Appellant asserts, however, that the Planning Board does have jurisdiction to make sure the project complies with the LUO's width requirements set forth in § 125-67 (E)(26). The minimum width for a commercial driveway for a TA-8 hotel is 18 feet. Pointing out that Lennox Street is only

12 feet wide, the Appellant argues that using it as a driveway for the hotel violates the 18-foot width requirement. The Appellant, however, confuses the width of a lane in the entrance way with the overall width of the whole driveway. The LUO allows a two-way driveway that is 18 feet wide, which implicitly means that each lane in such a driveway is no more than 9 feet wide. The proposed hotel will (after getting the Town's permission) use the 12-foot wide Lennox Street as a one-way lane that is just one part of the overall driveway. In addition to the 12 foot wide one-way lane, North-South Corp. will construct another 12-foot wide lane running next to Lennox Street for drop-off and unloading sites, etc. Thus when these two side-by-side lanes are measured together, it is clear that nowhere are the combined lanes less than 18 feet wide. The plans showing the layout of these lanes provide a substantial basis for the Planning Board's conclusion that the driveway into the hotel complies with the requirements of LUO § 125-67 (E)(26).

Decision

Since the Appellant has failed to convince the Appeals Board that the record on appeal shows that the Planning Board's parking and Lennox Street calculations were based on either a misunderstanding of the LUO, findings of fact that are unsupported by substantial evidence, or an abuse of discretion, the Planning Board's decisions on those issue are not clearly contrary to the LUO and, therefore, we must **DENY** the appeal.

Date:
24 May 2010

Signed:
Ellen L. Dohmen
Ellen L. Dohmen, Chair

Town of Deer Isle Notice of Administrative Appeal Decision

Application Number 02/08

TO: David O. Maxwell and Joan P. Maxwell
3525 Springland Lane, NW
Washington, DC 20008

Date: August 6, 2008

Dear Mr. and Mrs. Maxwell:

This is to inform you that the Deer Isle Board of Appeals acted on your application for an administrative appeal at its meeting on August 6, 2008, and made the following findings and conclusions:

Findings of Fact

1. The applicant and owners of the property are David O. Maxwell and Joan P. Maxwell who have demonstrated a legal interest in the property.

2. The property is located at Thompson Cove Lane (Bear Point), Deer Isle, Maine. It is in a limited residential district and is identified as Assessor's Map #11, Lot #30. It contains 4.4 acres.

3. The applicants propose to demolish a 12' X 46' cottage and a 16' X 48' boat house, both non-conforming structures, and to erect a partially non-conforming 24' X 36' cottage with a 10' x 20' deck on the subject property.

4. A completed application was submitted on July 23, 2008 (See exhibit 1)

5. A Public hearing was held on August 6, 2008.

6. The relevant sections of the Deer Isle Shoreland Zoning Ordinance (DISLZO) are 12 C 2, and 12 C 3. (See exhibit 2)

7. The other relevant facts are as follows:

   A. According to Deer Isle Town records the Maxwells took title to the property (tax map 11, lot #30) on October 16, 2007.

   B. The property contains two non-conforming structures, a 980 ft. house (situated 11 feet from the high water mark) and a 768 sq. ft. boat house. Both structures were built prior to the implementation date of Deer Isle Shore Land Zoning Ordinance. No information as to the date of construction of either building or any subsequent addition(s) thereto is readily available.

C. Site has subsurface waste disposal system in place and working (tank and leach field), as well as electric and phone service lines.

D. Area behind house (away from shore), surrounding boat house, and subsurface waste disposal system (leach field) is densely wooded.

E. Due to deterioration of foundation posts supporting the house from soil erosion an application (08/08) was made to the Deer Isle Planning Board for permission to "remove earth under building to install cement footing that will replace existing failed cement footing and raise building two feet." No action taken as the planning board felt that this was a repair covered under Section 12/B2 of the DISLZO. (See exhibit 3)

F. Subsequent survey indicated house not worth repairing. A recommendation was made to raze both non-conforming structures, (house and boathouse) and to replace them with one structure of a less non-conforming nature. The house would fit into the immediate area without necessitating a change in the utilities or subsurface waste disposal system already in place. This would also prevent any further damage to the immediate area.

G. An application was made to the Department of Environmental Protection (DEP) for a permit by rule on April 16, 2008 by L. R. Billings, P.E. on behalf of David and Joan Maxwell. Permit 45504 was approved April 17, 2008 by Val Whittier of the DEP pending planning board approval (The DEP had no negative comment on this application.) (See exhibit 4)

H. Application #19/08 for building permit (including demolition of two previously mentioned non-conforming structures) was made to Deer Isle Planning Board April 11, 2008, received by planning board on April 12, 2008, and declined by planning board April 24, 2008 for reason "doesn't meet conditions of sec. 12. C. 3 shoreland ord." re: 75' set back line. (See exhibit 3, also exhibit 5, Minutes of Deer Isle Planning Board Meeting April 24, 2008, phase 2)

I. At Deer Isle Planning Board meeting May 22, 2008 Chair Stewart noted receipt of a letter from L. R. Billings, P.E. regarding the Maxwell application #19/08 requesting reconsideration of the board's April 24th vote. Stewart recommended board take another look at the site "on fairness" to the applicants. (See exhibit 6, Minutes of Deer Isle Planning Board Meeting May 22, 2008, page 2)

J. Deer Isle Planning Board met at the Thompson Cove Lane site on June 11, 2008, to reconsider application #19/08. Members of the board present noted what, in their estimate, was the best site for the proposed new building behind the 75' set back. They also noted that the electrical service would have to be retrenched, but that the site would permit gravity feed to the sub-surface waste disposal system (leach field). Those members of the planning board present then voted again to decline approval of the Maxwell application. (See exhibit 7, Minutes of Special Meeting Deer Isle Planning June 11, 2008)

K. The Deer Isle Planning Board has submitted a **Findings of Fact** on application 19/08. This notes that there is at least one site behind the 75' set back line that would require the cutting of only a "few" trees, and notes that water and electric feeds – could be routed around the edge of the septic clearing and would not require significant vegetative disruption. (See exhibit 8, "Application 19/08 Joan and David Maxwell: Findings of Fact")

8. The Town of Deer Isle Board of Appeals, taking into consideration the concerns of the Deer Isle Planning Board, visited the Thompson Cove site on several different occasions. The board has reviewed and deliberated on material submitted, including that from the Deer Isle Planning Board and noted the following:

The Planning Board based its decision on the DISLZO, Section 12 C 3, "Reconstruction or Replacement," (see exhibit 2) which states as follows:

> "…and provided that such reconstruction or replacement is in compliance with the water set back requirement to the greatest practical extent."

Moreover in minutes and the statement of "Findings of Fact" on the Maxwell application the Deer Isle Planning Board stated that there was at least one alternative site behind the 75' set back line that could easily accommodate a new structure with the cutting of a "few" trees which would cause negligible damage to the environment, permit easy extension of utility lines, and permit gravity feed to the existing leach field.

The Board of Appeals in its review notes that there was no reference made to the final sentence of paragraph 1 of Section 12 C 3 which states,

> "In no case shall a structure be reconstructed or replaced so as to **increase its non-conformity.**"

and there is no evidence that the Planning Board considered, Section 12 C 2 "Relocation" which states,

> "A non-conforming structure may be relocated within the boundaries of the parcel on which the structure is located provided that the site of relocation conforms to all set back requirements to the **greatest practical extent** as determined by the Planning Board, and provided that the applicant demonstrates that the present subsurface sewage disposal system meets the requirements of State Law and the State of Maine Subsurface Wastewater Disposal Rules…In no case shall a structure be relocated in a manner that causes the structure to be more **non-conforming.**"

The applicants have proposed removing two non-conforming structures within the 75' set back zone comprising a total of 2,088 square feet and a volume of 16,861 cubic feet. They have requested permission to replace these with a single story structure totaling 1,064 square feet and a volume of 9,936 cubic feet. This is set further back from the high water mark and represents a significant reduction, by half, making it less non-conforming. This site chosen by the applicants permits them to use the subsurface wastewater disposal system presently in place, as well as the utility lines to the site with little disturbance of the surrounding area. As noted, except for the present open space on the point, the area is heavily wooded. Were the applicants to use the site recommended by the planning board behind the 75' set back zone it appears that they would have to clear at least a 50' X 50' area of trees which would in all probability further reduce the stability of the remaining tree growth. It would also require extension of utility and water lines. In addition, the present road, illegal by today's standards because most of it falls within the 75' set back zone, would have to be extended. This would mean cutting more trees. Note: The applicants have made no provision for replanting open areas left bare after removing structures, and this might be made a condition of any permit granted.

Conclusion

Based on the above stated facts and the provisions of the ordinance cited, the Board concludes that the applicant has proposed to eliminate two non-conforming structures and replace them with a single structure that will in size and location be materially less non-conforming. Moreover, relocation of the structure to the proposed site will result, in this case, less soil disturbance, tree cutting, and environmental damage. This would not be the case if it was placed in a location behind the 75' set back.

Decision

Based on the above findings of fact and conclusions, the Town of Deer Isle Board of Appeals voted to approve your application for an administrative appeal. If you are unhappy with this decision you may request a reconsideration by the Board within 30 days of the date of this decision. You may file an appeal in the Superior Court within 45 days of the date of this decision.

Board Chairperson _____
George Aldrich

Board of Appeals _____
Anthony Eaton

Board of Appeals _____
Danny Hypes

cc: Municipal Officers
Planning Board
Code Enforcement Officer

Town of Falmouth Zoning Board of Appeals-Findings of Fact

IN THE MATTER OF

JEFFREY H. and	**)**	
LYNNE F. LEIGHTON	**)**	**FINDINGS OF FACT,**
71 UNDERWOOD ROAD	**)**	**CONCLUSION OF LAW**
PARCEL #U19-109 ZONED "RA"	**)**	**AND DECISION**

BACKGROUND

Jeffrey and Lynne Leighton are the owners of property at 71 Underwood Road (Tax Map U-19, Lot 109). The property is located in the Residential A District. A single family residence and a garage exist on the property, which has an address of 71 Underwood Road.

In June of 2007, the Leightons asked the Code Enforcement Officer (the "CEO") for his opinion on whether they could split-off from their property the area composed of Lots 62 and 64 in order to create one buildable lot from the two undersized lots. By letter dated July 31, 2007, the CEO stated his opinion that the Leightons' lot (U-19, Lot 109) could not be divided for purposes of creating a buildable lot. The Leightons filed a timely appeal with this Board from the CEO's decision.

After the matter was tabled at the Board of Appeals ("the Board") meeting on September 25, 2007, the Board received letters providing legal analysis of the matter from the town attorney and the Leightons' attorney. The Board held a public hearing on October 23, 2007, at which the Leightons were present and were represented by counsel. At the hearing, the Leightons' attorney provided the Board with an aerial photograph of the property (altered with an orange line highlighting the perimeter of the entire property, and a divided line splitting the property in half) and a series of photographs from the 1970s depicting the garage and a construction project. After hearing testimony from the Leightons and a member of the public, the Board closed the public hearing.

Based upon the written materials submitted and the evidence taken at the Board's meetings, the Board makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Leightons' property appears as lots 58, 60, 62 and 64 on the 1909 Plan of Underwood Extension. This Plan encompassed more than 100 lots of varying depths, each with forty feet of frontage on Underwood Road. The 1909 Plan was not approved by any Town entity. It is recorded in Plan Book 14, Page 54 at the Cumberland County Registry of Deeds.

2. On the 1909 Plan, Lots 58, 60, 62, and 64—the same lots now at issue in this case—were each shown to be 40 feet by 100 feet, or about 4,000 square feet.

3. The evidence indicates that Lots 58, 60, 62 and 64 were treated as individual lots from 1909 until 1963.

    a. In 1922, George T. Edwards transferred by deed five contiguous lots of land to Wallace L. Merrill, including Lots 58, 60, 62 and 64.

    b. Merrill transferred Lot 58 to Lawrence M. White by deed in 1948.

    c. Harriet C. Merrill transferred Lot 64 to White by deed in 1953.

    d. White acquired Lots 60 and 62 from Herbert H. Shaw by deed in 1954.

    e. In 1960, White transferred by deed to Joseph and Constance Ham a small portion of Lot 58 as well as an easement for dripping of water.

4. In 1963, Lots 58, 60, 62 and 64 were conveyed via a single deed. White transferred the four lots to a "straw," J. Adelaide Bolster. Bolster then conveyed the property to White and his wife, Alice L. White, as joint tenants, by deed dated July 2, 1963. The two deeds described the property as "a certain lot or parcel of land…being lots numbered 58, 60, 62 and 64, as shown on Plan of Underwood Extension recorded in the Cumberland County Registry of Deeds, in Plan Book 14, Page 54, to which plan reference is hereby made for a more particular description."

5. As indicated in the testimony of Mr. and Mrs. Leighton, and confirmed via photographic evidence, Lots 58 and 60 were improved with the construction of a residential dwelling and a garage sometime prior to 1965 and prior to the adoption of the Zoning and Site Plan Review Ordinance in 1965. (There is no building permit for this construction in the Town's files). Since their construction, the buildings have not been moved from their original location. The address of the house is 71 Underwood Road.

6. As evidenced by the 1955 Town of Falmouth Tax Assessor's assessment sheet, Lots 62 and 64 were vacant, unimproved lots prior to the adoption of the Zoning and Site Plan Review Ordinance in 1965, and have remained vacant and unimproved.

7. Since 1963, every subsequent conveyance of these four lots has been via a single deed, all of which contain the same description found in the deed creating the joint tenancy between Lawrence and Alice White in 1963: "a certain lot or parcel of land…being lots

numbered 58, 60, 62 and 64, as shown on" the plan recorded in the Cumberland County Registry of Deeds.

a. In 1968, Mrs. White, then a widow, mortgaged Lots 58, 60, 62 and 64 to Maine Savings Bank via a single document using the same description found in the deed creating the joint tenancy between Lawrence and Alice White in 1963.

b. In 1971, Maine Savings Bank acquired the four contiguous lots from Mrs. White in a mortgage foreclosure proceeding.

c. On June 8, 1972, Maine Savings Bank conveyed Lots 58, 60, 62, and 64 to Albert and Gail Dunifer, by a deed using the same description found in the deed creating the joint tenancy between Lawrence and Alice White in 1963.

d. A few months later, on August 16, 1972, the Leightons took title to Lots 58, 60, 62 and 64, via a warranty deed from Mr. and Mrs. Dunifer containing the same description found in the deed conveying the four lots to Lawrence and Alice White jointly in 1963.

8. The Leightons moved to the property as tenants in 1971 prior to purchasing the property in 1972. Since that time, they have resided in the residential dwelling and utilized the garage. Those structures are located on Lots 58 and 60.

9. While Mr. Leighton testified that the town Sewer Superintendent informed him during the installation of a public sewer system on Underwood Road in 1971 that Lots 62 and 64 would be served by a sewer stub which was to be constructed at the border of the two lots, an inspection by the Town in 2007 revealed that no such stub could be located. The Leightons also testified that the Post Office has assigned 75 Underwood Road to the next house on their side of the street; suggesting that the Post Office may view the vacant land at issue as a building lot.

10. Just as did their predecessors in interest between 1963 and 1972, the Leightons have treated Lots 58 and 60 (the improved lots) and Lots 62 and 64 (the vacant lots) as a single lot since purchasing them in 1972.

a. In 1974, the Leightons obtained a building permit for the construction of a foundation for a porch attached to the home to replace one that had rotted. The building permit, signed by Mr. Leighton, describes the lot size as "160' x 100"'—16,000 square feet, *i.e.*, the size of all four lots combined.

b. Since purchasing the property in 1972, i.e., for 35 years, the Leightons have paid a single tax bill showing one lot (Map U-19, Lot 109) with structures. They have never paid taxes on a separate building lot.

c. The Leightons have mowed the small area covered by grass on Lots 62 and 64 (the vacant lots). Most of this property consists of moss and ledge.

11. The residential building sits on the foundation that it was originally built upon, and, besides the addition of the replacement porch, no other improvements have been made to the exterior of the building by the Leightons. The garage likewise remains in its original location. The Leightons received a building permit in 1981 to renovate a bathroom.

CONCLUSIONS OF LAW

1. The Leightons' property is located in the Residential A District, in which the dimensional requirements for a single family use currently are a 20,000 square foot minimum lot size and a 125 foot minimum lot width. Lots 58, 60, 62 and 64 each contain about 4,000 square feet, and therefore would be nonconforming lots under the Ordinance.

2. Because Lots 58 and 60 were built upon prior to 1965, they *de facto* have merged into one lot.

3. Lots 62 and 64, being adjacent vacant nonconforming lots in common ownership have merged pursuant to Section 6.8 of the Zoning Ordinance.

4. Lots 58/60 and Lots 62/64 have merged due to the Leightons' treatment of the property as a single lot, including*, inter alia:*

   a. They paid taxes on only one lot since 1973;

   b. Mr. Leighton signed a building permit stating that the property is only one lot;

   c. They never objected to the Assessor's map showing their property as one lot (Map 19, Lot 109).

5. Alternatively, Lots 58/60 and Lots 62/64 merged into one lot due to the 1963 deed description, before the Leightons even acquired title to the property as a "certain lot or parcel of land."

6. Because Lots 62/64 have not remained separate from Lots 58/60, they are not grandfathered under section 6.1 as a buildable lot.

DECISION

Based upon the foregoing, the Board makes the following Decision:

The Leightons have failed to meet their burden of establishing grandfathered status for their claimed vacant lot. Because the land had merged into a single parcel prior to the adoption of the Falmouth Zoning Ordinance, it cannot now be divided as requested by the Leightons.

The Appeal for property at 71 Underwood Road, Parcel #U19-109 zoned "RA" is therefore DENIED.

The vote on this appeal was taken at the Board's regular meeting on Tuesday, October 23, 2007. These Findings of Fact and Conclusions of Law were adopted by the Board at its meeting on May ___, 2008, after remand by the Superior Court.

Dated: _____ _____
Chair

Town of Islesboro Board of Appeals/Board of Assessment Review- Findings of Fact, Conclusions of Law and Decision, dated October 7, 2008

Findings of Fact:

1. Name of Applicant/Appellant: Northeast Point, L.L.C. (Northeast)
2. Mailing Address: 19 Main Street, Rockport, ME 04856
3. Telephone: (207) 236-4551
4. Tax Map Location: Map 22, Lot 9
5. This appeal was heard on October 2, 2008 by Board Members Marc V. Schnur, Maxine Nelson, Fred Thomas, Jane Haskell Boardman and Kim Tucker, voting Alternate Member. The appellant was represented by P. Andrew Hamilton, Esq. The Planning Board was represented by its Chair, Alice Faye and its attorney, John Conway, Esq. Intervener Islesboro Islands Trust was represented by its counsel, Clifford H. Goodall, Esq. Intervener Stop, Think, Plan was represented by its agent, Jack G. Knebal.
6. Nature of Appeal: This is an administrative appeal of the decision of the Town of Islesboro Planning Board on August 18, 2008, to deny the application by Northeast for final approval of a 14 building lot subdivision. The Board of Appeals has jurisdiction to hear this appeal under the provisions of DRO Chapter 6, Section 6.4.1. Northeast has standing to bring this appeal. The Planning Board ruled the application failed to meet the requirements of Development Review Ordinance (DRO) standards set forth in Chapter 13, Sections 13.10.1 and 13.10.10; determining that some of the waterfront lots had less than the required continuous shore frontage of 250 feet.
7. Northeast filed an application for a major subdivision on November 15, 2005.
8. The preliminary plan was approved by the Planning Board on January 21, 2008.
9. The Town of Islesboro held a special town meeting on June 3, 2008 that approved amendments to DRO Chapter 13 increasing the minimum lot size for waterfront lots from 1.5 acres to 3 acres (in Section 13.10.1) and increasing the minimum shore frontage from 200 feet of continuous shore frontage to 250 feet of continuous shore frontage (in Section 13.10.10) for waterfront lots in major subdivisions.
10. Northeast submitted its final subdivision plan to the Planning Board on June 6, 2008.
11. In denying the application for final plan approval, the Planning Board relied on DRO Chapter 11, Section 11.1.1. (5) that states, *"Notwithstanding approval of the preliminary plan, the final plan shall meet all the provisions of this Ordinance and any amendments thereto in effect at the time of submission of the final plan,"* to apply the amendments to Chapter 13, Sections 13.10.1 and 13.10.10 to Northeast's application for approval of its. Final subdivision plan.

12. Municipal ordinances are subject to statutes and court decisions.

13. Under the provisions of Title 1 M.R.S.A. Section 302, the amendment of an ordinance does not affect any proceeding pending at the time of the amendment. An application is a pending proceeding once *"the reviewing body has conducted at least one substantive review of the application and not before*."

14. All parties agree and the Board of Appeals finds that the Northeast application was a pending proceeding on the date of enactment of the June 3, 2008 amendments.

15. The Maine Supreme Judicial Court has held that Title 1 M.R.S.A. Section 302 is a rule of statutory construction and ruled in City of Portland v. Fisherman's Wharf Associates II, 541 A2d 160 (Me. 1988) *"…that if either a statute or an ordinance contains a provision of retroactivity, section 302's rule of prospectivity is negated."*

16. The Court held a similar view in Kittery Retail Ventures, LLC, et al. v. Town of Kittery, 856 A.2d 1183 (ME 2004) stating *"Nevertheless, section 302 is a rule of statutory construction, and does not apply when there is clear and unequivocal language that the statute or ordinance applies to pending proceedings."*

17. The Court similarly held in Lane Construction Corporation v. Town of Washington, 916 A.2d 973 (Me. 2007) *that "…section 302 can be over-ridden by a municipality when an ordinance is enacted if the ordinance clearly and unequivocally provides that it is retroactive."* The Court goes further to state that when an ordinance does not contain a provision expressly making it retroactive that there is a *"…strong indication that it was not the [t]own's intention that the ordinance be retroactive."*

18. In testimony before this Board the Planning Board Chair testified that it had not been the intention of the Planning Board in drafting the June 3, 2008 amendments to make the amendments to the DRO retroactive.

19. There was no discussion of retroactivity at the special town meeting.

Conclusions of Law:

The Planning Board's reliance on Chapter 11, Section 11.1.1 (5) to apply the June 3, 2008 amendments to the Northeast application was an error of law. The amendments to the DRO by the special town meeting of June 3, 2008 do not apply to the pending application of Northeast because there was no clear, unequivocal language in the amendments that stated the amendments were retroactive. Consequently, Title 1 M.R.S.A. Section 302 has not been over-ridden by the amendments to the DRO passed by the special town meeting on June 3, 2008.

Decision

We find the Planning Board erred as a matter of law in denying Northeast's submission of an application for final subdivision approval. We remand this matter back to the Planning

Board with instructions to consider the Northeast application for final subdivision approval and to act in accordance with this decision.

Dated: This 7th day of October, 2008

Marc V. Schnur, Chairman

Maxine Nelson, Member

Fred Thomas, Member

Jane Haskell Boardman, Member

Town of Islesboro Board of Appeals/Board of Assessment Review- Findings of Fact, Conclusions of Law and Decision, dated September 25, 2009

09-02 Islesboro Islands Trust, Appellant

Findings of Fact:

1. Name of Appellant: Islesboro Islands Trust (I.I.T.).
2. Attorneys of Record: Clifford H. Goodall and Mary A. Denison.
3. Mailing Address: Dyer Goodall and Denison, P.A., 61 Winthrop Street, Augusta, ME 04330.
4. Telephone: 622-3693.
5. Tax Map Location: Map 22, Lot 9.
6. Owner and Permittee: North East Point, L.L.C. (Northeast).
7. Hearing: This appeal was heard on September 22, 2009 by Board of Appeals members Marc V. Schnur, Maxine Nelson, Fred Thomas and Jane Haskell Boardman.
8. Nature of Appeal: This is an administrative appeal of the decision of the Town of Islesboro Planning Board to grant a major subdivision permit to North East for a subdivision containing thirteen residential lots, a common area lot and a "Town Lot" for a future parking area.
9. Jurisdiction: The Board of Appeals has jurisdiction to hear this appeal under the provisions of Chapter 6 of the Town of Islesboro Development Review Ordinance (DR)) and the provisions of the Town of Islesboro Board of Appeals and Board of Assessment Review Ordinance.[1]
10. I.I.T. has standing to bring this appeal because it is an abutter; it has participated in the Planning board's consideration of this matter; and it is aggrieved by the Planning Board's decision.
11. An appeal brief was submitted on behalf of the appellant by Attorney Clifford H. Goodall. Reply briefs were submitted on behalf of the Planning Board by their attorney, John W. Conway, and on behalf of North East by their attorney, P. Andrew Hamilton.

[1] Both ordinances were amended on June 25, 2009. The Planning Board voted to approve North East's final subdivision application on June 22, 2009 and signed the findings of fact granting approval on July 6, 2009. The appeal was submitted on July 1, 2009. While there are no significant June 25th amendments to the DRO that would have affected the Planning Board's approval, DRO Chapter 6, concerning appeals, was significantly changed. Under the provisions of Title 1 M.R.S.A. Section 302, amendment of an ordinance does not affect any proceeding *pending* at the time of the amendment. Because this appeal was not pending at the time of the amendments, it is being considered under the provisions of the June 25, 2009 amendments to the DRO Chapter 6 and Board of Appeals ordinance.

12. On July 6, 2009, the Planning Board approved North East's final subdivision application by signing a seventeen page findings of fact[2] together with five pages of conditions of approval, containing 32 separate conditions[3], applying to all development within the subdivision.

13. The Planning Board found in their Findings of Fact that the applicant had met the burden of proof required by the DRO Sections 4.1.1, 4.1.2, 4.1.3 and 4.1.11 as well as each and all of the subdivision review criteria required by 30-A M.R.S.A. § 4404, but placed conditions on that approval. Among these conditions are: Limits on the number of bedrooms permitted on each lot; limits on the quantity of water that may be used daily; limits on the outside uses of water; specifying the type of sewage treatment to be used; specifying the locations of wells and septic systems in the subdivision and specifying that wells be drilled and tested prior to development of the lots.

14. The Planning Board found that the applicant met the burden of proof required by DRO Section 4.1.1 and found that the project would not result in undue water pollution. The Planning Board based their conclusion on evidence presented on behalf of the developer by Robert Gerber, P.E. and Certified Geologist, and David Marceau, a licensed soils scientist and licensed site evaluator, as well as the Planning Board's hydro-geologic engineer, Matthew D. Reynolds. P.E., C.G. of Drumlin Environmental, LLC.

15. The Planning Board found that the applicant met the burden of proof required by DRO Sections 4.1.2 that the project would have sufficient quantity and quality of water available for the foreseeable needs of the subdivision. The Planning Board based their finding on evidence provided by Gerber, Michael Sabatini, the developer's project engineer and Reynolds.

16. The Planning Board found that the applicant met the burden of proof required by DRO Section 4.1.3 that the project will not cause an unreasonable burden on an existing water supply, in this case, groundwater. In making that finding, the Planning Board relied on the same evidence they utilized in considering DRO Section 4.1.2.

17. The Planning Board found that the applicant met the burden of proof required by DRO Section 4.1.11 that the project would not alone, or in conjunction with other activities, adversely affect the quality or quantity of groundwater. In reaching that finding, the Planning Board reviewed all the material contained in their findings for DRO Sections, 4.1.1 and 4.1.2. The Planning Board relied on the modeling performed by Gerber and the peer review performed by Reynolds, on behalf of the Planning Board.

[2] The Planning Board Findings of Fact references to the DRO were incorrectly numbered at the time of signing. With agreement from all the parties, the correctly numbered document has been substituted for the erroneous one and the original signature page is attached to it. DRO Section numbers in the above Findings of Fact refer to the corrected DRO Section numbers.

[3] The document contains 33 conditions, but condition number 30 is a duplicate of condition number 23.

18. Appellant alleges that "[t]he subdivision approval is not supported by and/or is contrary to the evidence in the record for DRO Sections 4.1.1, 4.1.2, 4.1.11, and 30-A §4404(1)(B), and 30-A M.R.S.A. § 4404 (2) and (12)."

19. Appellant alleges that the hydro-geologists' modeling and/or analysis of the extraction of 360 gallons per day (gpd) of water per lot relied upon by the Planning Board was misunderstood by them in the context of the legal requirements of the DRO and subdivision statute.

20. Appellant alleges that the Planning Board erred by assuming that most of the homes to be built in the subdivision would be used only seasonally.

21. Appellant alleges that the Planning Board erred in assuming the 360 gpd in the Gerber model and analysis was a daily average, averaged over an entire year, while the Gerger analysis assumed 360 gpd would not be exceeded more than 80 out of 100 days. Thus, appellant alleges, if one of the lots was occupied for only 90 days a year, 1,460 gallons a day could be used for each of those 90 days, overwhelming the septic system.

22. Appellant alleges the Planning Board erred not only in deciding there was sufficient water for domestic use, but also erred in their interpretation that there was sufficient water for "the reasonable foreseeable needs of the proposed subdivision." Appellant alleges that the Planning Board recognized that there is not sufficient water as required by DRO Section 4.1.2 when they required lawns and landscaping be watered by sources other than wells, such as collected rainwater, in one of the conditions of approval. Appellant alleges this is an erroneous conclusion not supported by the record because nowhere in the record is there any indication as to how much rainwater can be collected on each lot and how that amount relates to the outside water use on each lot.

23. Appellant alleges that the Planning Board under DRO Section 4.1.3 "requires elaborate landscaping plans for protecting the buffers [to] be fully implemented and certified every three years", which requires watering; but the Planning Board provides no evidence "as to the sufficiency and the availability of that needed water just for the landscaping." Appellant alleges the same holds true for water needed for re-vegetation of disturbed soils and lawns; for filling the two 25,000 gallon underground tanks to be used for firefighting purposes; and for filling swimming pools.

24. Appellant alleges that "plain reading of the language [in Section 4.1.2] requires that the subdivision itself…must be the location of the source of sufficient quantity of water for the reasonably foreseeable needs of the proposed subdivision." Appellant alleges the Planning Board misinterpreted and misapplied Section 4.1.2 by agreeing with North East that they could bring water in by tanker to fill the swimming pools and from some unknown source outside of the subdivision to fill the underground tanks.

25. Appellant alleges that enforcement of the DRO, the subdivision approval and conditions of approval are "discretionary" and dependent on the willingness of the Codes

Enforcement Officer and Board of Selectmen to spend the time and money on prosecuting a violation.

26. Appellant alleges that the Planning Board ignored or failed to evaluate the issue of whether restrictive covenants would be enforced by the owners' association or individual lot owners. Appellant alleges that the 360 gpd limit on well use is not enforceable because water taken from the wells will not be metered. Appellant further alleges that if outside watering or pool filling is to be enforced, neighbors or other home owners would have to "trespass onto the property of a [violator] neighbor, sneak through the woods and see where the water is coming from, if they can." They would then have to take photographs and go to court to obtain a judgment against the neighbor. Legal costs would be incurred. Appellant states that to expect that scenario is not common sense.

27. Appellant alleges that wells for lots 1, 2, 6, 9, 10, 11, 12, and 13 should not have been approved by the Planning Board as having sufficient quality or quantity of water required by Sections 4.1.2 and 4.1.11 because the wells have not been drilled or tested.

28. Appellant alleges that by not drilling those eight wells, the burden of proof to demonstrate sufficient water exists has been shifted to the future of lot owners.

29. Appellant alleges that 30-A M.R.S.A. §4401 and the DRO that incorporates subdivision law are as much consumer protection law as environmental law and the Planning Board takes away that protection and transfers the burden to future lot owners.

30. Appellant alleges that because Planning Board's attorney, John Conway states, *"…So the conditions in this case are really done to protect the [Planning] [Board's…the approval of it, because no development can happen until the wells work"*[4], the conditions of approval for the lots that have not had wells drilled or tested demonstrates that North East did not meet the burden of proof under the standards required by DRO Sections 4.1.2 and 4.1.11 and 30-A M.R.S. A. §4401(2) and (12).

Conclusion of Law

The Board of Appeals is charged with hearing appeals from decisions of the Planning Board solely as an appellate body, considering only the record made by the Planning Board. As set forth in the Board of Appeals Ordinance Section 3.1.7, the Board "shall determine, after written or oral arguments presented by the relevant parties, the correctness of the decision by the Planning Board…with regard to possible error of law, misinterpretation of the ordinance or misapplication of the law to the facts." That section concludes by stating that the "burden of proof in any appeal…shall be upon the appellant."

What the Maine Law Court stated as a standard of review of Planning Board findings in *Gensheimer v. Town of Phippsburg*, 868 A2d 161, 166 (Me. 2005), could apply equally to this Board of Appeals.

[4] Transcript: Hearing June 22, 2009, p. 14.

"We review factual findings of the Planning Board with deference and may not substitute our own judgment for that of the Board."[5] The Board's decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it."[6] Further, "[a] demonstration that no competent evidence supports the local board's findings is required in order to vacate the board's decision."[7]

Specifically, the Board of Appeals finds the following:

1. The appellant's claim that hydro-geologists' modeling and/or analysis was misunderstood by the Planning Board is not borne out by the record. Appellant alleges that the Planning Board relied on the supposition "that most of these homes would be used only for a portion of the year." However, the record indicates that as early as the public hearing for the preliminary plan review held on October 2, 2006, Mr. Bearor, attorney for intervenor, Stop, Think, Plan (STP), asked Robert Gerber (Page 32, Line 14): *"Okay. And you stated before that you have used conservative assumptions. You described-I think your words were considering how these houses will be used… You were assuming that these houses would be used in a certain way."* Gerber replies (Line 22): *"I was assuming for the purposes of the modeling if they're used full time, all year round at full capacity."* Gerber continues (page 33, line 1): *"All I was doing is commenting on the fact that I have never seen a development of this type fully occupied year round like that, but I knew for the purposes of this evaluation, I had to assume that."* Mr. Bearor then asks (line 6): *"So you did assume year-round occupancy?"* Mr. Gerber (Line 8) replies: *"Definitely."* At the final plan review hearing held January 19, 2009 Gerber says, in part (Page 14, Line 22): *"Assuming all the wells and septic systems are used every day of the year…this is probably going to be used seasonally, but you have to do the evaluation assuming it could be eventually used year-round…"* Thus, the record indicates while it is probable that some of the houses may be year-round and some seasonal, the modeling the Planning Board relied on was based on all the houses being occupied at full capacity year-round.

2. The appellant's claim that the Planning Board erred in assuming the 360 gpd was a daily average averaged over an entire year is not borne out by the evidence. In fact 360 gpd is a daily maximum permitted by the Plumbing Code based on the maximum of four bedrooms permitted on each building lot. Further, the Gerber analysis in his report clearly states, *"Septic systems were simulated as discharging 360 gallons per day, year-round, as shown in* ***Table 3****. Wells were assumed to be pumping at 360 gallons per day, year-round."*[8]Together with the testimony of the

[5] *Perrin v. Town of Kittery,* 591 A.2d, 863 (Me. 1991).
[6] *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995).
[7] *Thacker v. Konover Dev. Corp.,* 2003 ME 30 § 8, 818 A.2d 1013, 1017.
[8] Robert Gerber, Simulated Groundwater Impact Northeast Point at Islesboro, Part 2 of a Report for Leucadia Financial, Stratex LLC, Portland, ME September 27, 2006 Sections 8.1¶ 3

soils scientist, David Marceau, that each building lot could sustain two 360 gpd subsurface sewage disposal systems, sufficient evidence was obtained for the Planning Board to find that requirements of DRO Section 4.1.1 were met.

3. The appellant's claim that the Planning Board erred in deciding that there was not sufficient water for the "reasonably foreseeable needs of the proposed subdivision"; because well water could only be used for interior domestic purposes; and water would have to be obtained either from rain water or trucked or barged in for landscaping; is not borne out by the evidence. *Sufficient,* as defined by Black[9] means, *"adequate, enough, equal or fit for [the] end proposed and that which may be necessary to accomplish an object. Of such quality, number, force or value as to serve a need or purpose".* The Planning Board reasonably could find that 360 gpd was sufficient for interior domestic use. Using rain water and water trucked or barged in for outside purposed does not negate the sufficiency of water for the foreseeable needs of the subdivision merely because outside uses could not utilize well water. The Planning Board had sufficient evidence to find that the requirements DRO Section 4.1.2 were met.

4. The appellant's claim that enforcing violations of the DRO, subdivision approval and conditions of approval are discretionary and may or may not be pursued by the CEO and Board of Selectmen is not borne out by any evidence. Appellant has not cited any facts or testimony that would have led the Planning Board to deny the application on the grounds that their approval or conditions of approval are not enforceable.

5. The appellant's claim that restrictive covenants are not practically enforceable is not borne out by any evidence. To the contrary, Maine case law is replete with cases in which the courts upheld deed covenants. The Planning Board was justified in not denying the application on those grounds.

6. The appellant's allegation that because wells for lots 1, 2, 7, 9, 10, 11 ,12, and 13 have not been drilled or tested, those lots should not have been approved by the Planning Board as having sufficient quality or quantity of water. That allegation is not borne out by the evidence. The reports and analyses of Gerber and of Reynolds as to the sufficiency and quality of water are enough evidence for the Planning Board to find those lots meet the requirements of DRO Sections 4.1.2 and 4.1.11. In addition, the Planning Board requires that wells for those lots are to be drilled and tested by North East prior to development of those lots.

7. The appellant's allegation that the Planning Board's approval of the project transferred the burden of consumer protection from the law to the future lot owners is not a consideration that the Planning Board is required to address. In any event, the

[9] *Black's Law Dictionary, West Publishing Co.,* St. Paul, MN 1990

allegation is not borne out by the evidence. The Planning Board's subdivision approval requirements and conditions of approval provide adequate protection to future lot owners. No evidence to the contrary has been furnished by the appellant.

8. The appellant's allegation that because of the Attorney Conway's statement that, *"…no development can happen until the wells work,"* the conditions of approval for the lots that have not had wells drilled or tested demonstrates that North East did not meet the burden of proof under the standards of DRO Sections 4.1.2, 4.1.11, and 30-A M.R.S.A. § 4401(2) and 12 is not borne out by the evidence. As indicated above, the reports and analyses of Gerber and of Reynolds as to the sufficiency and quality of water are enough evidence for the Planning Board to find those lots meet the requirements of DRO Sections 4.1.2 and 4.1.11 and 30-A M.R.S.A. §4401(2) and 12.

9. The Planning Board conducted an intensive review of North East's application over a period of three and a half years. They held numerous meetings and public hearings; they required comprehensive expert opinions from the applicants; and they had their own experts review much of the evidence presented by the applicant, the appellant and an intervenor, Stop, Think, Plan. The Board of Appeals finds that the Planning Board carefully considered each relevant DRO Section; they did not create any error of law; they interpreted the ordinance correctly in light of the large amount of evidence; they properly applied the law to the facts; and they were correct in their decision to grant approval to the project.

10. The Board of Appeals finds as a matter of law, that the appellant, Islesboro Islands Trust, has not met the burden of proof sufficient to reverse the Planning Board's approval of North East Point, L.L.C.'s final subdivision plan.

Decision

The appeal of Islesboro Islands Trust is hereby DENIED.

Signed this 25th day of September, 2009, by Town of Islesboro Board of Appeals and Board of Assessment Review:

Marc V. Schnur, Chairman

Maxine Nelson, Vice-Chairman

Fred Thomas

Jane Haskell Boardman

Town of Lincoln-Decision of Board of Appeals on Appeal of Planning Board Decision on Permit Application of Evergreen Wind Power III-January 8, 2009

FINDINGS OF FACT
PRE-HEARING PROCEDURAL FINDINGS

1. On November 3, 2008, Evergreen Wind Power III ("Evergreen") filed an application with the Town of Lincoln for construction of the Rollins Wind Project which application was more particularly described in materials submitted with and made part of the Evergreen application.
2. The Planning Board of the Town of Lincoln held public hearings on the Evergreen's application on November 17, 2008 and December 1, 2008.
3. On December 1, 2008, the Planning Board approved Evergreen's application; the Planning Board subsequently issued Findings of Fact confirming its approval.
4. On December 15, 2008, an appeal of the Planning Board's decision was filed with the Town of Lincoln by the "Friends of Lincoln Lakes."
5. On January 8, 209, pursuant to public notice, the Board of Appeals held a hearing on the appeal from the Planning Board decision filed by the "Friends of Lincoln Lakes."

PROCEDURAL STANDARDS FOR THE BOARD OF APPEALS

6. The jurisdiction and duties of the Board of Appeals in considering appeals from the Planning Board are set forth at Section 1311.6(L)(2) of the Municipal Code of the Town of Lincoln.
7. Section 1311.6(L)(2) provides in pertinent part that: "The Board of Appeals may, upon written application of an aggrieved party and after public notice hear appeals from determinations of the Planning Board or the Code Enforcement Officer in the administration of this Ordinance."
8. The Board of Appeals conducts hearings pursuant to Section 1311.6(L)(2) under Procedural Rules. The Procedural Rules of the Board of Appeals provide in pertinent part as follows:
   A. "Any person aggrieved by an action which comes under the jurisdiction of the Board pursuant to the ordinances of the Town of Lincoln must file such application for appeal, in writing on forms provided within thirty (30) days of the granting or denial of a permit. The applicant shall file this appeal at the office of the Town Clerk, setting forth the ground for his/her appeal." *Procedural Rules, Appeals Board of the Town of Lincoln,* Article II.

B. "The Board determines whether it has jurisdiction over the appeal." *Procedural Rules, Appeals Board of the Town of Lincoln.* Article V(B)(5).

C. "The Board decides whether the applicant has a right to appear before the Board. *Procedural Rules, Appeals Board of the Town of Lincoln.* Article V(B)(6).

EVIDENCE OF LEGAL IDENTITY, INTEREST AND STANDING OF APPELLANT, FRIENDS OF LINCOLN LAKES

9. In beginning its consideration of the appeal filed by the Friends of Lincoln Lakes, the Board of Appeals voted unanimously to first consider evidence relating to Article V(B)(5) and (6) of the Procedural Rules.

10. Lynne Williams, Esq., an attorney representing the Friends of Lincoln Lakes, submitted a copy of Articles of Incorporation for the Friends of Lincoln Lakes, which articles were duly entered into the record.

11. The Articles of Incorporation submitted by Attorney Williams showed that "Friends of Lincoln Lakes" had been incorporated on December 31, 2008. Dr. Gary H. Steinberg was identified as the Registered Agent of Friends of Lincoln Lakes as incorporated. Dr. Gary H. Steinberg, Harry Epp, and Bradbury D. Blake were listed as incorporators. The Articles of Incorporation also provided that there were to be "no members" of Friends of Lincoln Lakes as incorporated.

12. The Board of Appeals asked Attorney Williams and members of the attending public generally to submit evidence that would demonstrate that the applicant who filed the appeal on December 15, 2008 as the "Friends of Lincoln Lakes" is the same as the entity that became incorporated on December 31, 2008 as the "Friends of Lincoln Lakes."

13. The Board of Appeals also asked Attorney Williams and members of the attending public generally to submit evidence that the applicant who filed the appeal participated in either the Planning Board meeting of November 17, 2008 or December 1, 2008 and, further, to the extent that such evidence was submitted, to provide evidence that the "Friends of Lincoln Lakes" that participated in one or both of the Planning Board hearings was the same as the "Friends of Lincoln Lakes" that filed the appeal on December 15, 2008 and the same as the "Friends of Lincoln Lakes" as incorporated on December 31, 2008.

14. Attorney Williams represented that, before December 31, 2008, the Friends of Lincoln Lakes was an unincorporated association and, as such, was qualified to appear before the Board.

15. Attorney Williams submitted what she represented was documentary evidence of banking activity in the name of the Friends of Lincoln Lakes but refused to permit the documentary evidence to be copied and entered into the public record; upon objection by counsel for Evergreen, the Board of Appeals rejected the documentary evidence offered by Attorney Williams.

16. Neither Attorney Williams nor any members of the public submitted any documentary evidence bearing on whether the "Friends of Lincoln Lakes" that filed the appeal on December 15, 2008, had participated, as such, in either of the Planning Board hearings or was the same as the legally incorporated entity, "Friends of Lincoln Lakes."

17. Attorney Williams advised that she had not signed the Town form that was filed with the appeal.

18. Dr. Gary Steinberg said that he had signed Town form that was filed with the appeal.

19. The Town form was part of the record before the Board of Appeals. Ruth Birtz produced the Town form during the hearing and it bore no signatures. It bore the handwritten name of Gary Steinberg in block letters.

20. Lynne Williams advised that the "Friends of Lincoln Lakes" had by-laws. She said that she had not brought copies of the by-laws with her because she did not believe that it was necessary.

21. Lynne Williams advised that she had signed the appeal of December 15, 2008.

22. Board Member John Shaefer noted that the application for appeal bore notations indicating that it had been delivered by Dr. Gary Steinberg and Don Thomas, but that the form, itself, was not signed.

23. Lynne Williams represented that there was a membership list for the "Friends of Lincoln Lakes" but that she did not have list with her.

24. Bradbury Blake represented that in late October of 2008 he had written by-laws for the "Friends of Lincoln Lakes". He did not have copies of the by-laws with him. No oral evidence was offered regarding whether, when or by what process the by-laws had been approved. The by-laws, themselves, were not produced.

25. No minutes of the meetings of or decisions made by the "Friends of Lincoln Lakes" were presented to the Board of Appeals for entry into the record.

26. Mary Nolette represented that the "Friends of Lincoln Lakes" had met at her home and that she planned to take a tax deduction for that meeting. No information was provided on when the meeting had occurred, who had attended or on what legal authority the tax deduction would be based.

27. The Board of Appeals inquired as to whether the applicant, filing the appeal as the "Friends of Lincoln Lakes" had, by its members, voted to file the appeal, whether, if such a vote was taken, had the vote been taken pursuant to any by-laws of the "Friends of Lincoln," and whether and how the members of the "Friends of Lincoln Lakes" had voted on these matters. Attorney Williams advised that she could not answer these questions of her own personal knowledge. Bradbury Blake advised that the decision to take the appeal had been reached by "consensus."

DECISION OF THE BOARD OF APPEALS

28. A motion was made that as of January 8, 2009, the Board of Appeals lacked sufficient evidence on the identity and interest of the "Friends of Lincoln Lakes" to hear the appeal on the merits and that, therefore, the appeal should be denied. The motion was seconded and was voted on by the Board of Appeals, and was approved on a vote of 4 to 2: Board of Appeals Chairman Alan Grant and members Judy Junkins, Diana Johnston, and John Shaefer voted in favor. Members Theodore Ocana and Brian Stormann voted against. On the motion as carried, the Board of Appeals makes the following particular findings.

29. The Board of Appeals finds that it lacks sufficient evidence to ascertain the legal identity of the "Friends of Lincoln Lakes" as of either November 17, 2008 or December 1, 2008, the dates of the Planning Board hearings; in particular, the Board lacks sufficient evidence to determine whether the "Friends of Lincoln Lakes" existed in any legally cognizable form on those dates.

30. Accordingly, the Board of Appeals finds that it lacks sufficient evidence to determine whether any persons who actually participated in the Planning Board hearings of November 17, 2008 or December 1, 2008 was authorized the "Friends of Lincoln Lakes" to participate on its behalf or in its name. The Board of Appeals also lacks sufficient information to determine what, if any, legal identity and interest the "Friends of Lincoln Lakes" had that pertained to the issues presented by the application of Evergreen before the Planning Board as of those dates.

31. The Board of Appeals finds that it lacks sufficient evidence to ascertain the legal identity of the "Friends of Lincoln Lakes" as of December 15, 2008, the date on which the pending appeal was filed' in particular, the Board lacks sufficient evidence to determine whether the "Friends of Lincoln Lakes" existed in any legally cognizable and ascertainable form as of that date.

32. Accordingly, the Board of Appeals finds that it lacks sufficient evidence to determine whether any persons who actually filed the appeal were authorized by the "Friends of Lincoln Lakes" to participate on its behalf or in its name. The Board of Appeals also lacks sufficient information to determine what, if any, legal interest the "Friends of Lincoln Lakes" had that pertained to the issues presented by the decision of the Planning Board on the application of Evergreen and the appeal taken therefrom.

33. The Board finds that it lacks sufficient evidence to determine whether the entity that was incorporated on December 31, 2008 as the "Friends of Lincoln Lakes" is the same as the "Friends of Lincoln Lakes" that is identified as having filed by appeal of the Planning Board decision on December 15, 2008.

34. The Board of Appeals finds that it lacks sufficient evidence to determine whether the entity that was incorporated on December 31, 2008 as the "Friends of Lincoln Lakes" is the same as the "Friends of Lincoln Lakes" as of the Planning Board hearings of November 17, 2008 and December 1, 2008. As noted above, the Board of Appeals also finds that it lacks sufficient evidence to determine whether the "Friends of Lincoln Lakes," in any legally cognizable and ascertainable form, participated in the Planning Board hearings of November 17, 2008 and December 31, 2008.

35. Based on the evidence before the Board of Appeals on January 8, 2009, the Board of Appeals concludes that it lacks sufficient evidence to find that it has jurisdiction over the appeal as required by Article V(B)(5) of the Procedural Rules of the Board of Appeals; in particular, the Board of Appeals lacks sufficient evidence as to the legal identity of the applicant on December 15, 2008; lacks sufficient evidence to determine whether the applicant participated in either of the Planning Board hearings on November 17, 2008 or December 1, 2008; and, lacks sufficient evidence to determine what, if any, legal interest inhered in the applicant as of those dates that pertained to the issues raised by the application of Evergreen as considered by the Planning Board.

36. Based on the evidence before the Board of Appeals on January 8, 2009, the Board of Appeals concludes that it lacks sufficient evidence to find that the applicant has a right to appear before the Board of Appeals; in particular, the Board of Appeals lacks evidence as to the legal identity of the applicant on December 15, 2008; lacks sufficient evidence to determine whether the applicant participated in either of the Planning Board hearings on November 17, 2008 or December 1, 2008; and, lacks sufficient evidence to determine what, if any, legal interest inhered in the applicant as of those dates that pertained to the issues raised by the application of Evergreen as considered by the Planning Board.

January 29, 2009	/s/
Date	Alan Grant, Chairman, Board of Appeals
January 29, 2009	/s/
Date	Diana Johnston, Vice-Chairman, Board of Appeals
January 29, 2009	/s/
Date	John Shaefer, Member, Board of Appeals

Town of Falmouth Board of Zoning Appeals-Request for Variance

Name of Applicant: _____ Phone #: _____

Address of Property: _____

Map/Lot: _____ Tax Sheet: _____ Zone: _____

Mailing Address (if different): _____

Property Owner (if not applicant): _____

E-mail Address:_____

This application and all documentation must be filed with the Code Enforcement Officer by the 4th Tuesday of the month. Public hearings on applications are held the following 4th Tuesday of the month at 6:30 p.m. A one hundred dollar ($100) fee and nine (9) complete copies of all information for this application are due at submission deadline.

Describe the general nature of the variance request: _____

_____

To the applicant:

The goal of zoning is to provide building and use standards that apply to all properties equally within a given zone. Getting an exception or variance to zoning standards is purposely difficult because granting variances to the standards would diminish the value of zoning in protecting neighboring properties. It is important that you respond completely to the requests below:

1. Please complete the attached variance criteria form. Pay particular attention to the information provided in parentheses ( ).

2. A detailed plot plan or diagram must be provided showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings or alterations, and any natural or topographic peculiarities of the lot in question. This plot plan should also include the distances to the nearest structures on abutting properties.

3. Blueprints, surveys, photos and other documents may be helpful in explaining your variance request and should be included in your application.

I certify that the information contained in this application and its supplement is true and correct.

Date: _____ Signed: _____

*** Please contact Code office prior to submission of this application ***
(207) 781.5253

VARIANCE CRITERIA

In order for a variance to be granted, the applicant must demonstrate to the Board of Appeals that the strict application of the terms of the zoning ordinance would cause undue hardship. There are four criteria, each of which must be met before the ZBA can find that a hardship exists. Please explain how your situation meets each of these criteria listed below, either in the space provided or on a separate sheet:

A. The land in question cannot yield a *reasonable return* unless the variance is granted. (The applicant must demonstrate that he or she will lose all or substantially all of the value and use of the property without a variance.)

_____

_____

_____

_____

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood. (The applicant must show that this property has unique characteristics different from surrounding properties and that these differences are the reason for the need for a variance.)

_____

_____

_____

_____

C. The granting of a variance will not alter the essential character of the locality.

_____

_____

_____

_____

D. The hardship is not the result of action taken by the owners or a prior owner. (The applicant must demonstrate that the need for a variance is due to the nature of the property, not the action of owners.)

_____

_____

_____

_____

Sample Board of Appeals Application for Variance

City/Town of _____

A. General Information

1. Name of Applicant: _____
2. Mailing Address: _____.
3. City or Town: _____ State: _____.
4. Telephone: _____.
5. Name of Property Owner (if different from applicant): _____.

   _____
6. Location of property for which variance is requested (street/road address): _____

   _____

   _____.
7. Zoning district in which property is located: _____.
8. Tax map and lot number of subject property: Map _____ Lot _____
9. The applicant has the following legal interest in the subject property (deed, purchase and sale agreement, lease, option agreement or other – circle appropriate one and attach copy).

B. Reasons/Supporting Information for Variance

1. The applicant proposes the following building, structure, use or activity on the subject property: _____

   _____

   _____.
2. The applicant seeks a variance(s) from the following dimensional standard(s): _____

   _____

   which is/are found in section(s) _____

   of the Zoning Ordinance.

3. The lot is currently being used for the following: _____

_____

_____

4. The conditions and character of the neighborhood are: _____

_____

_____

5. The applicant requests the following type of variance (check appropriate one):

   a. ____ Undue Hardship Variance (30-A M.R.S.A. § 4353(4));

   b. ____ Disability Variance for Access to/Egress from a Dwelling (30-A M.R.S.A. § 4353(4-A));

   c. ____ Disability Variance for Storage/Parking of Noncommercial Vehicle (30-A M.R.S.A. § 4353 (4-A)(A), **available only if the municipality has adopted an ordinance to authorize this variance);**

   d. ____ Setback Variance for Single-Family Dwellings (30-A M.R.S.A. § 4353(4-B), **available only if the municipality has adopted an ordinance to authorize this variance**); or

   e. ____ Practical Difficulty Dimensional Variance (30-A M.R.S.A. § 4353(4-C), **available only if the municipality has adopted an ordinance to authorize this variance**).

C. The applicant shall complete the appropriate section below for the particular type of variance sought:

1. **Undue hardship dimensional variance.** The Board of Appeals may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship, which means that the application meets each of the criteria listed below.

   Please explain why you believe that the subject property meets each of the following criteria for this type of variance:

   a. The land in question cannot **y**ield a reasonable return unless a variance is granted:

   _____

   _____

b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood: _____
_____
_____

c. The granting of a variance will not alter the essential character of the locality: _____
_____
_____ ; and

d. The hardship is not the result of action taken by the applicant or a prior owner: _____
_____
_____

2. **Disability variance.** The Board of Appeals may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The Board shall restrict any variance granted under this provision solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The Board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in/regularly uses the dwelling. For the purposes of this provision, a disability has the same meaning as a physical or mental handicap under the Maine Human Rights Act and the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

Please answer the following questions to explain why you believe that the subject property meets each of the following criteria for this type of variance:

a. Does a person with a disability reside in the dwelling? _____.

b. Does a person with a disability regularly use the dwelling? _____.

c. Is the installation of equipment or the construction of structures proposed under this application necessary for access to or egress from the dwelling by the person with the disability? (Explain) _____
_____
_____.

d. Does the disability have a known duration? _____.
If so, what is that duration? _____

3. **Disability variance for residential garage for storage of a noncommercial vehicle owned by permanently-disabled owner of dwelling. (Available only where the municipality has adopted an ordinance that permits the Board to grant this type of disability variance pursuant to 30-A M.R.S.A. § 4353(4-A)(B).)** The Board may grant a variance to the owner of a dwelling who satisfies each of the criteria listed below.

   (As used in this provision, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A. "Noncommercial vehicle" means a motor vehicle as defined in Title 29-A section 101(42) with a gross weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, section 521 and owned by the person with the permanent disability.)

   Please answer the following questions to explain why you believe that the subject property meets each of the following criteria for this type of variance and attach supporting documents as proof, where applicable:

   a. Are you the owner of the dwelling where the construction will occur? _____

      _____

   b. Do you reside in the dwelling? _____

   c. Do you have a permanent disability? _____

      What is the nature of your disability? _____

      _____

   d. Is the vehicle to be stored or parked in the proposed structure owned by the owner of the dwelling? _____

   e. Will the proposed construction be used for any other purpose than to store the vehicle? _____

   f. Is the vehicle a "noncommercial vehicle" as defined in 30-A M.R.S.A. § 4353 (4-A)(B) (see above)? _____

   g. What are the dimensions of the proposed structure and where will it be located on the property? (attach proposed plans)

      _____

4. **Set-back variance for single-family dwellings**. **(Available only where the municipality has adopted an ordinance that permits the Board to grant a set-back variance for a single-family dwelling using a version of the "undue hardship" text described in 30-A M.R.S.A. § 4353(4-B).)** An ordinance adopted under this provision

may permit a variance from a set-back requirement only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship, which means that the application meets each of the criteria listed below.

(An ordinance adopted under this provision is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this provision may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. (The ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38 M.R.S.A. § 435, et seq., if the petitioner has obtained the written consent of an affected abutting landowner.)

Please explain why you believe that the subject property meets each of the following criteria for this type of variance:

a. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood: _____

_____

_____;

b. The granting of a variance will not alter the essential character of the locality: _____

_____

_____;

c. The hardship is not the result of action taken by the applicant or a prior owner: _____

_____

_____;

d. The granting of the variance will not substantially reduce or impair the use of abutting property: _____

_____ ; and

e. The granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available: _____

_____

_____.

5. **Variance from dimensional standards based on "practical difficulty." (Available only where the municipality has adopted an ordinance pursuant to 30-A M.R.S.A. § 4353(4-C) that permits the Board to grant a variance based on a "practical difficulty" test.)** The Board may grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty, which means that the application meets each of the criteria listed below.

   (As used in this provision, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements. As used in this provision, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.)

   Please explain why you believe that the subject property meets each of the following criteria for this type of variance:

   a. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood: _____

      _____

      _____

   b. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties: _____

      _____

      _____

   c. The practical difficulty is not the result of action taken by the petitioner or a prior owner: _____

      _____

      _____

   d. No other feasible alternative to a variance is available to the petitioner: _____

      _____

      _____

   e. The granting of a variance will not unreasonably adversely affect the natural environment: _____ ; and

f. The property is not located in whole or in part within shoreland areas as described in Title 38, § 435:._____

_____

_____

D. Additional Information

In addition to the information provided above, please submit a sketch plan of the property showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings, additions and alterations, the locations of roads and driveways, the location of any water body adjacent to the property, and any natural and topographic peculiarities of the lot in question.

E. Signature of Applicant

To the best of my knowledge, all information submitted on and with this application is true and correct.

Date: _____, ____ By: _____
(Signature)

_____
(Print Name)

Town of Bellville-Board of Appeals Hypothetical Application for Variance

A. General Information

1. Name of Applicant: Angela Smith
2. Mailing Address: P.O. Box 908
3. City or Town: Plainview State: NH
4. Telephone: 603-123-4576
5. Name of Property Owner (if different from applicant): same
6. Location of property for which variance is requested (street/road address): 21 Lakeshore Dr., Bellville
7. Zoning district in which property is located: L-R
8. Tax map and lot number of subject property: Map 3 Lot 51
9. The applicant has the following legal interest in the subject property (deed, purchase and sale agreement, lease, option agreement or other – circle appropriate one and attach copy).

B. Reasons/Supporting Information for Variance.

1. The applicant proposes the following building, structure, use or activity on the subject property: 10 ft. by 20 ft. attached garage, 10 ft. by 20 ft. attached deck, and a 12 ft. by 20 ft. addition to existing 20 ft. by 30 ft. cottage.
2. The applicant seeks a variance(s) from the following dimensional standard(s): 28 ft. variance needed for deck and addition from the 100 ft. required water setback, and 5 ft. variance needed for garage from the required 30 ft. side setback which is/are contained in section(s) 15 (M) of the Zoning Ordinance.
3. The lot is currently being used for the following: year-round residence. Existing house is 60 ft. from the water and is on a 32,000 sq. ft. lot which slopes steeply to the water and is heavily vegetated.
4. The conditions and character of the neighborhood are houses comparable to my existing house, situated further from the water than mine, and the lots are flatter and more open and larger than mine.
5. The applicant requests the following type of variance (check appropriate one):
   a. X Undue Hardship Variance (30-A M.R.S.A § 4353(4);
   b. _____ Disability Variance (30-A M.R.S.A § 4353(4-A));

C. The applicant shall complete the appropriate section below for the particular type of variance sought:

1. **Undue hardship dimensional variance.** The Board of Appeals may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship, which means that the application meets each of the criteria listed below.

Please explain why you believe that the subject property meets each of the following criteria for this type of variance:

a. The land in question cannot yield a reasonable return unless a variance is granted: I'll have to sell if I can't get a variance. I have a heart condition and need space for a live-in nurse. I can't walk to the lake because of the steepness and vegetation, so the deck will make it possible for me to enjoy it from a distance. The garage will make it possible to get to my car from my house via an interior ramp, so easier on my heart in the winter.

b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood: My lot is steeper to the water than others in the area. It has thick natural vegetation, unlike the other lots which cut theirs when it was legal. Most of the other lots are larger than mine and the buildings are setback further from the water.

c. The granting of a variance will not alter the essential character of the locality: Having a garage, deck, and addition will make my lot more like the others in the area.

d. The hardship is not the result of action taken by the applicant or a prior owner: I bought the land and built my existing cottage in 1963, before the town had zoning.

2. **Disability variance.** The Board of Appeals may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The Board shall restrict any variance granted under this provision solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The Board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling or regularly uses it. For the purposes of this provision, a disability has the same meaning as a physical or mental handicap under the Maine Human Rights Act and the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

Please answer the following questions to explain why you believe that the subject property meets each of the following criteria for this type of variance:

a. Does a person with a disability reside in the dwelling? _____

b. Does a person with a disability regularly use the dwelling? _____

c. Is the installation of equipment or the construction of structures proposed under this application necessary for access to or egress from the dwelling by the person with the disability? (Explain) _____

_____

_____

d. Does the disability have a known duration? _____

If so, what is that duration? _____

D. Additional Information

In addition to the information provided above, please submit a sketch plan of the property showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings, additions and alterations, the locations of roads and driveways, the location of any water body adjacent to the property, and any natural and topographic peculiarities of the lot in question.

E. Signature of Applicant

To the best of my knowledge, all information submitted on and with this application is true and correct.

Date: 6/23/10 By: /s/
(Signature)

Angela Smith
(Print Name)

Sample Board of Appeals Notice of Decision-Variance

CITY/TOWN OF _____

To: _____

_____

_____

_____

Dear_____:

This is to inform you that the Board of Appeals has acted on your application for a variance as follows:

A. Findings of Fact

1. Name of Applicant: _____.

2. Mailing Address: _____

3. City or Town: _____ State: _____.

4. Telephone: _____.

5. Name of Property Owner (if different from applicant):_____

_____.

6. Location of property for which variance is requested (street/road address):_____

_____.

7. Zoning district in which property is located: _____.

8. Tax map and lot number of subject property: Map _____ , Lot _____.

9. The applicant has demonstrated a legal interest in the subject property by providing a copy of a _____
(specify whether deed, purchase and sale agreement, lease, option agreement or other).

10. The applicant has proposed the following building, structure, use or activity on the subject property:_____

_____.

11. The applicant seeks a variance(s) from the following dimensional standard(s): _____

_____

which is/are contained in section(s)_____

of the Zoning Ordinance.

12. The land is being used as: _____.

13. The conditions and character of the neighborhood are:_____

_____

_____.

14. The conditions of the property are: _____

_____

_____.

15. The applicant has requested the following type of variance (check appropriate one):

a._____ Undue Hardship Dimensional Variance (30-A M.R.S.A. § 4353(4));

b. _____ Disability Variance for ingress/egress to a dwelling(30-A M.R.S.A. § 4353(4-A)(A);

c._____ Disability Variance for residential garage (30-A M.R.S.A. § 4353-A(B) available only if the municipality has adopted an ordinance to authorize this variance.

d. _____ Setback Variance for Single-Family Dwellings (30-A M.R.S.A. § 4353 (4-B), **available only if the municipality has adopted an ordinance to authorize this variance**); or

e._____ Practical Difficulty Dimensional Variance (30-A M.R.S.A. § 4353(4-C), **available only if the municipality has adopted an ordinance to authorize this variance**).

16. On _____,

the Board of Appeals conducted a public hearing(s) on this application for a variance and the Board also met on _____

to deliberate on this application and to prepare Findings of Fact and Conclusions of Law.

17. Additional facts (other facts relevant to ordinance criteria): _____

_____

B. Conclusions of Law

Based upon the facts stated above and for the reasons that follow, the Board concludes that:

1. **Undue Hardship Dimensional Variance.** The applicant has/has not (circle one) shown that strict application of the ordinance to the applicant and the applicant's property would cause undue hardship.

   (To the Board—Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance)

   a. The land in question can/cannot (circle one) yield a reasonable return unless a variance is granted: _____

   _____

   _____;

   b. The need for a variance is/is not (circle one) due to the unique circumstances of the property and is/is not (circle one) due to the general conditions in the neighborhood:

   _____;

   c. The granting of a variance will/will not (circle one) alter the essential character of the locality: _____; and

   d. The hardship is/is not (circle one) the result of action taken by the applicant or a prior owner: _____

   _____

   _____

2. **Disability variance for access to/egress from a dwelling.** The applicant has/has not (circle one) shown that a variance is needed for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling.

   (To the Board—Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance)

a. A person with a disability resides/does not reside (circle one) in the dwelling:_____

_____

_____

b. A person with a disability regularly uses/does not regularly use (circle one) the dwelling: _____

_____

_____

c. The installation of equipment or the construction or alteration of structures proposed under this application is/is not (circle one) necessary for access to or egress from the dwelling by the person with the disability: _____

_____

_____

d. The disability does/does not (circle one) have a known duration: _____

_____

(If applicable) that duration is: _____

_____

_____

3. **Disability variance for residential garage for storage of a non-commercial vehicle owned by the permanently-disabled owner of the dwelling. (Available only where the municipality has adopted an ordinance that permits the Board to grant such a disability variance.)** The applicant has/has not (circle one) shown that a variance is needed for the construction of a place of storage and parking for a non-commercial vehicle owned by the owner of the dwelling who is permanently disabled.

(To the Board—Please complete the following additional findings of facts necessary to your decision that the subject property meets or does not meet each of the following criteria for this type of variance)

a. The owner of the dwelling does/does not (circle one) reside in the dwelling: _____

_____

b. The owner of the dwelling does/does not (circle one) have a permanent disability: ___

_____

_____

c. The proposed construction is/is not (circle one) solely for the purpose of storing and parking a non-commercial vehicle owned by the owner of the dwelling: _____

_____

_____

d. The width and length of the structure will not be larger than 2 times the width and length of the non-commercial vehicle: _____

_____

4. **Set-back variance for single-family dwellings. (Available only where the municipality has adopted an ordinance that permits the Board to grant a set-back variance for a single-family dwelling.)** The applicant has/has not (circle one) shown that strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship.

(To the Board—Please complete the following additional findings of facts necessary to your decision that the subject property meets or does not meet each of the following criteria for this type of variance)

a. The property that is the subject of this variance application is/is not (circle one) a single-family dwelling that is the primary year-round residence of the petitioner.

b. The variance under this provision does/does not (circle one) exceed 20% of a set-back requirement and does/does not (circle one) cause the area of the dwelling to exceed the maximum permissible lot coverage.

c. Where the ordinance allows for a variance under this provision to exceed 20% of a setback requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38 M.R.S.A. § 435, et seq., the applicant has/has not (circle one) obtained the written consent of an affected abutting landowner or of affected abutting landowners.

(To the Board—Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance)

d. The need for a variance is/is not (circle one) due to the unique circumstances of the property and is/is not (circle one) due to the general conditions in the neighborhood: _

_____;

e. The granting of a variance will/will not (circle one) alter the essential character of the locality: _____;

f. The hardship is/is not (circle one) the result of action taken by the applicant or a prior owner: _____

_____

g. The granting of the variance will/will not (circle one) substantially reduce or impair the use of abutting property: _____ ; and

h. That the granting of a variance is/is not (circle one) based upon demonstrated need; is/is not (circle one) based on convenience; and there is/is not (circle one) another feasible alternative available: _____

_____

5. **Variance from dimensional standards for Practical Difficulty. (Available only where the municipality has adopted an ordinance that permits the Board to grant a set-back variance for a single-family dwelling.)** The applicant has/has not (circle one) shown that strict application of the ordinance to the applicant and the applicant's property would cause a practical difficulty.

(To the Board—Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance)

a. The need for a variance is/is not (circle one) due to the unique circumstances of the property and is/is not (circle one) due to the general condition of the neighborhood:

_____;

b. The granting of a variance will/will not (circle one) produce an undesirable change in the character of the neighborhood and will/will not (circle one) unreasonably detrimentally affect the use or market value of abutting properties: _____

_____;

c. The practical difficulty is/is not (circle one) the result of action taken by the petitioner or a prior owner: _____;

d. Another/No other (circle one) feasible alternative to a variance is available to the petitioner: _____

_____;

e. The granting of a variance will/will not (circle one) unreasonably adversely affect the natural environment: _____ ; and

f. The property is/is not (circle one) located in whole or in part within shoreland areas as described in Title 38, § 435:

C. Decision

On the basis of the above Findings of Fact and Conclusions of Law, the Board of Appeals voted by vote of _____ to grant/deny (circle one) the application for variance, subject to the following Conditions of Approval, if any.

D. Conditions of Approval

(To the Board—must be reasonably related to the requirements of the ordinance/statute)

1. _____

2. _____

3. _____

4. _____

E. Recording of Variance

As required by 30-A M.R.S.A. § 4353(5), the applicant must record the certificate of variance provided by the Board of Appeals in the appropriate Registry of Deeds within 90 days of this notice or else this variance shall be void.

F. Appeals

Parties aggrieved by this decision may appeal it to Superior Court within 45 days from the date of decision pursuant to 30-A M.R.S.A. § 2691 and Maine Rules of Civil Procedure, Rule 80B.

Date: _____ By: _____

Chairman

_____

Member

_____

Member

_____

Member

_____

Member

_____

Member

_____

Member

_____

Board of Appeals

Town of Bellville-Board of Appeals-Hypothetical Notice of Decision-Variance

To: Angela Smith

P.O. Box 908

Plainview, NH 05432

Dear: Ms. Smith:

This is to inform you that the Board of Appeals has acted on your application for a variance as follows:

A. Findings of Fact

1. Name of Applicant: Angela Smith
2. Mailing Address: P.O. Box 908
3. City or Town: Plainview State: NH
4. Telephone: 603-123-4576
5. Name of Property Owner (if different from applicant): same
6. Location of property for which variance is requested (street/road address): 21 Lakeshore Dr., Bellville
7. Zoning district in which property is located: L-R
8. Tax map and lot number of subject property: Map 3 Lot 51
9. The applicant has demonstrated a legal interest in the subject property by providing a copy of a deed (specify whether deed, purchase and sale agreement, lease, option agreement or other).
10. The applicant has proposed the following building, structure, use or activity on the subject property: 10 ft. by 20 ft. attached garage, 10 ft. by 20 ft. attached deck, and 12 ft. by 20 ft. addition to existing house.
11. The applicant seeks a variance(s) from the following dimensional standard(s): 28 ft. variance for deck and addition from the required 100 ft. water setback and 5 ft. variance for the garage from the required 30 ft. side setback which is/are contained in section(s) 15 (M) of the Zoning Ordinance.

12. The land is being used: as year-round residence. Existing house is 60 ft. from the water and is on a 32,000 sq. ft. lot which slopes steeply to the water and is heavily vegetated.

13. The conditions and character of the neighborhood are: houses comparable to applicant's existing house, situated further from the water and lots that are flatter and more open and larger than applicant's.

14. The conditions of the property are: steep slope to the water and heavy vegetation.

15. The applicant has requested the following type of variance (check appropriate one):

    a. X Undue Hardship Variance (30-A M.R.S.A § 4353(4);

    b. _____ Disability Variance (30-A M.R.S.A § 4353(4-A));

    c. _____ Setback Variance for Single-Family Dwellings ((30-A M.R.S.A § 4353(4-B), **available only if the municipality has adopted an ordinance to authorize this variance**); or

    d. _____ Practical Difficulty Dimensional Variance ((30-A M.R.S.A § 4353 (4-C), **available only if the municipality has adopted an ordinance to authorize this variance**).

16. On 07/6/10, the Board of Appeals conducted a public hearing(s) on this application for a variance and the Board also met on 08/3/10 to deliberate on this application and to prepare Findings of Fact and Conclusions of Law.

17. Additional Facts (other facts relevant to ordinance criteria): _____

B. Conclusions of Law

Based upon the facts stated above and for the reasons that follow, the Board concludes that:

1. **Undue Hardship Dimensional Variance.** The applicant has/has not (circle one) shown that strict application of the ordinance to the applicant and the applicant's property would cause undue hardship.

   (To the Board–Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance.)

a. The land in question can/cannot (circle one) yield a reasonable return unless a variance is granted: The applicant provided no evidence regarding whether she has attempted to sell her property without the variance without success. She also has not shown whether there are other legal uses to which the property could be put without a variance. She is not entitled to maximum return on her investment, just a reasonable return.

b. The need for a variance is/is not (circle one) due to the unique circumstances of the property and is/is not (circle one) due to the general conditions in the neighborhood: Although the lot is steeper and more vegetated than others in the neighborhood, the need for the variance relates more to the applicant's heart condition and physical limitations.

c. The granting of a variance will/will not (circle one) alter the essential character of the locality: The size of the cottage with an addition, deck and garage will be consistent with the general neighborhood.

d. The hardship is/is not (circle one) the result of action taken by the applicant or a prior owner: The lot and cottage were in existence before the ordinance took effect and the applicant was the owner at that time.

2. **Disability Variance.** The applicant has/has not (circle one) shown that a variance is needed for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling.

(**To the Board–Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance.)**

a. A person with a disability resides/does not reside (circle one) in the dwelling: _____

b. A person with a disability regularly uses/does not regularly use (circle one) the dwelling: _____

c. The installation of equipment or the construction of structures proposed under this application is/is not (circle one) necessary for access to or egress from the dwelling by the person with the disability: _____

_____

d. The disability does/does not (circle one) have a known duration: _____

(If applicable) that duration is: _____

_____

_____.

C. Decision

On the basis of the above Findings of Fact and Conclusions of Law, the Board of Appeals voted 3-2 to grant/deny (circle one) the application for variance, subject to the following Conditions of Approval, if any.

D. Conditions of Approval

1. _____

2. _____

3. _____

4. _____

E. Recording of Variance

As required by 30-A M.R.S.A § 4353(5), the applicant must record a certificate of variance in the appropriate Registry of Deeds within 90 days of this notice or else this variance shall be void.

F. Appeals

Parties aggrieved by this decision may appeal it to Superior Court within 45 days from the date of decision pursuant to 30-A M.R.S.A § 2691 and Maine Rules of Civil Procedure, Rule 80B.

Date: 8/3/10

By: /s/
Chairman

/s/
Member

/s/
Member

/s/
Member

/s/
Member

_____
Board of Appeals

Camden Zoning Board of Appeals Minutes of Meeting-March 15, 2010 (Draft)

PRESENT and VOTING: Chair: Frank Toole; Members: Leonard Lookner and George Wheelwright; Alternate Member: Linda Norton.

ABSENT: Members: Tom Laurent and Sam Smith.

ALSO PRESENT: CEO, Jeff Nims; Town Attorney, Bill Kelly; and Applicants' Attorney, Paul Gibbons.

The Meeting was called to Order at 5:05 p.m. in the Washington Street Conference Room. There are four voting members present and a 3-1 vote is required for approval. The Applicants' representative chose to go forward and not wait for a time when there is a full Board present.

DECLARATION OF CONFLICT

Members were asked to declare any possible conflicts of interest they might have regarding the case before them; none did.

CHANGE IN A NONCONFORMING LOT

Request to create two non-conforming lots in the Shoreland District.

Joseph and Deborah McClusker: Map 114 Lot 212: V & S (Traditional Village and Shoreland) Districts: 10 Ames Terrace: Megunticook River.

The Applicants' Attorney was familiar with the Board's review process so the Chair turned directly to the CEO for a summary of the request before the Board. Prior to the adoption of the Camden Zoning Ordinance the Applicants owned a lot with two residential dwellings – a house and a house trailer, as well as a garage with an apartment over. In 1986, a permit was issued for a trailer. There was already the house and the garage unit, and this third unit was allowed under the 1985 Ordinance for lots in the (then) Residential II District. Prior to the 1989 adoption of the Shoreland Zoning Ordinance, the minimum lot size in this District was 10,000 SF (on sewer) and the lot, at about 37,500 SF, was conforming with the three dwelling units. At that point in time the Applicants could have created three separate legal lots, but Shoreland Zoning increased the minimum lot size to 40,000 SF and the situation became non-conforming. On October 8, 1996, a permit was issued to replace that grandfathered trailer with a double-wide. That unit was owned

by a family member now deceased, and in order for the estate to be settled the unit must be sold. The Applicants are seeking approval of their request to split the non-conforming lot into two non-conforming lots so they can sell the modular unit.

Mr. Nims referred the Board to Article VII of the Ordinance (Zoning Board of Appeals) Section 3. Powers and Duties (3) Changes in Nonconforming Uses; or Lots, Structures and Uses in the Shoreland Areas: This section gives the Board the power to address non-conformities as described in Section VI Nonconformances, Section 3 Nonconforming Uses. However that Section been amended at the direction of the DEP several times over the years and all references to lots have been dropped - the section now applies to uses on lots only. So, the Board has the Power to address a non-conforming situation that no longer exists within the Ordinance. Although this "disconnect" needs to be addressed, it remains that there is currently no mechanism to make a change to a non-conforming lot within this referenced section.

Mr. Nims then turned to Article VI Section 2. Nonconforming Lots (2) Lots with Structures which was recently amended by the voters and which now contains the following provision:

"(b) If two or more principal uses or structures existed on a single lot of record on the effective date of this ordinance, each may be sold on a separate lot provided that the above referenced law and rules are complied with. When such lots are divided each lot thus created must be as conforming as possible to the dimensional requirements of this Ordinance."

The amended Ordinance was adopted by the town on December 15, 2009, and members of the Board received their copies this evening – their first meeting of the year. The Applicant's Attorney noted that he had been prepared to make other arguments, but upon discovering this amendment, he is confident that his client's request falls squarely within this provision.

Although the provision does not reference the ZBA in any way, Mr. Nims believes that the language "as conforming as possible" requires a decision by someone other than the CEO who is not given the authority to make such judgment calls. He is asking the Board to make a decision on whether or not this application falls under their purview or his. If they determine that it is his decision to make they should formally refer the matter back to him.

The Applicant's Attorney presented his client's request: The owner's mother-in-law, who purchased the double-wide for use as her residence, passed away recently. Although the unit has been rented, the estate wants the full value of the house now and the property owners don't have that money. If they cannot split the lot they will have to sell the entire property including their house. This was a legal lot before the Ordinance change and the Applicants argue that splitting the lot into two parcels will be a change on paper only – there will be no change in appearance

from the street and will have no impact on the neighborhood now or in the future since neither of the lots can be further developed. The division will not give the future owners of either lot any more rights to expand than the current owner has at this time. Mr. Gibbons asks that his clients be able to keep the right they had before Shoreland Zoning took effect to divide this lot.

The Applicants submitted a packet titled *Jay McClusker* and dated March 15, 2010. In it they presented two scenarios for division prepared by Landmark Associates - both versions dated March 10, 2010 and both labeling the proposed lots Parcel A and Parcel B. The most important difference between the two proposals is the way it treats the river frontage. The first version (Exhibit A) splits the river frontage equally between the two parcels and results in two lots of approximately the same size: Parcel A = 18,800 SF and Parcel B = 18,000 SF. The second version (Exhibit B) leaves all of the approximately 50′ of frontage with the McClusker's house lot (Parcel B) and results in two lots of different sizes: Parcel A = 13,000 SF and Parcel B = 23,000 SF (approximate areas). Both versions use the same Ames Terrace frontage: Parcel A = 75′ (the minimum required) and Parcel B = 132′.

QUESTIONS from the Board:

Mr. Lookner: Asked the status of the doublewide trailer. The CEO responded that this unit was upgraded in 2005, put on a slab and is now classified as manufactured housing. It remains a grandfathered dwelling unit. He asked if the lot meets the set back and lot coverage requirements – Mr. Gibbons did not know. Mr. Nims replied that all of the structures were well outside the 75′ setback requirement so that does not apply here. However, the units are in the Shoreland Zone so other provisions do apply.

Mr. Nims spoke to resulting non-conformities: In both cases both lots have adequate road frontage so that nonconformity is not increased; Exhibit A results in two equally sized lots which makes them equally non-conforming while Exhibit B results in Parcel A being more non-conforming than Parcel B; because the frontage on the river (50′) remains the same as it is now, the one lot with the frontage requirement does not become more non-conforming - it does with Exhibit A in which the frontage for each lot is 25′; the only issue where non-conformity may be increased in accepting either version is lot coverage – he does not have the figures available, but since lot coverage will now be based on smaller lot sizes, the lots could become non-conforming in this regard, or the change could limit the ability to expand the dwellings in the future.

Mr. Toole prefers Exhibit "B" because there are fewer new non-conformities resulting.

Mr. Kelly noted that as a matter of law, it is difficult to allow non-conforming shore frontage to be divided – Exhibit B would prevent that situation from occurring. He did note that Exhibit B

results in Parcel A being smaller than Parcel B. If the result is that Parcel A becomes non-conforming with regard to lot coverage, the proposed division line may have to be adjusted to prevent that or to at least reduce that non-conformity to the greatest extent possible. That line adjustment could be made a condition of approval.

MOTION by Mr. Lookner, seconded by Mr. Wheelwright to close the Public Hearing.
VOTE: 4-0-0

The first question before the Board was whether this was a ZBA issue or whether the application should be returned to the CEO for a decision. The Chair polled the Board:

Mr. Toole: The subjective language of the ordinance "as conforming as possible" convinces him that this is within the ZBA's purview.

The rest of the Board agreed.

MOTION by Mr. Lookner, seconded by Ms. Norton that the application brought before the Zoning Board of Appeals tonight is one that the ZBA should move on.
VOTE: 4-0-0

Mr. Wheelwright: The lot is clearly within the Shoreland, and the Board should give greater weight to considering non-conformities that will be created by either division as related to that Ordinance than they do to other non-conformities that will result. He asks if the Board should give weight to the economic impact that would result in denying this application as they make their decision.

Mr. Toole: Finds the following:

- The current situation – a non-conforming lot three dwellings within the Shoreland Zone - is more non-conforming that the result of a division: a non-conforming lot with one dwelling and a non-conforming lot with two dwelling units.

- The lot with three dwellings was conforming at the time the third dwelling was added.

- Replacing and then upgrading the third dwelling unit did not make the situation more non-conforming because that non-conformity existed prior to the Ordinance.

- The Applicant's proposal will result in two non-conforming lots.

Mr. Gibbons added that the fact that the dwelling units are there legally actually creates a division of the lot into dwelling areas – the proposal just formalizes that division.

Mr. Wheelwright asked Mr. Kelly about the impact on their decision of the Maine Supreme Court Case submitted in support of the Applicant's request. Mr. Kelly replied that this case, *John W. Wickendon et al v. Genia Luboshutz et al* did not need to be referenced because it is now clear that the Ordinance permits a division. This case was entered as argument before the new amendment permitting the division was discovered. Voters passed this amendment and it doesn't give the ZBA the discretion to decide whether or not to permit the division – it is allowed if the Board finds that there were two uses on this lot prior to the approval of the Ordinance amendment in 2009.

Mr. Nims added that the lot size requirements are met as proposed because the lots are on sewer. The buildings also meet street and side setbacks in both proposals. He has now done the lot coverage calculations based on the estimated square footage of each lot in both proposals:

The trailer has a 1,775 SF footprint; 20% of the smaller of the two lot divisions for Parcel A is 2,600 SF so both proposed divisions comply. The house & garage have a total footprint of 1,425 SF and 20% of the smallest proposed division is 4,600 SF. In both versions both lots would be conforming with regard to lot coverage. So, outside of the Shoreland requirements, both proposals conform to the other (space and bulk) standards of the Ordinance.

MOTION by Mr. Wheelwright, seconded by Ms. Norton that as a Finding of Fact there were in fact two separate structures existing on the one lot as of the effective date of this Ordinance.
VOTE: 4-0-0

MOTION by Mr. Wheelwright, seconded by Mr. Lookner that based on comments and testimony from the Code Enforcement Officer each structure may be sold; the laws above do not apply; the State minimum lot size and the subsurface disposal laws do not apply because the lots are on Town sewer; and the Application can be approved per Article VI Section 2.2(b).
VOTE: 4-0-0

The Board went on to deliberate "as non-conforming as possible".

Mr. Lookner: Both divisions will limit the scope of any expansions of the dwellings so there is no difference there. But B is the more sensible with regard to river frontage unless it should be that each lot should have some frontage if they are in the Shoreland Zone.

MOTION by Mr. Lookner, seconded by Mr. Wheelwright to Find that it is the position of the Board that the property division labeled Exhibit B is preferable by members of the Board in view of many factors discussed by the Board today including: 1) That it limits future expansion of the dwelling on Parcel A and 2) Only one lot will have direct water access to the river.
VOTE: 4-0-0

MOTION by Mr. Wheelwright, seconded by Mr. Lookner that the Board should approve the application based on calculations from the surveyor and the Code Enforcement Officer that Parcel A meets current lot coverage restrictions.
VOTE: 4-0-0

MOTION by Mr. Wheelwright, seconded by Mr. Toole that Exhibit B, relative to Article VI, Section 2. 2(b) meets those guidelines as being as conforming as possible to demonstrate the requirements of the ordinance.
VOTE: 4-0-0

MOTION by Mr. Wheelwright, seconded by Ms. Norton to approve the Minutes of August 27, 2009 as submitted.
VOTE: 3-0-1 with Mr. Lookner abstaining due to his absence.

There being no further business before the Board they adjourned at 6:15 p.m.

Respectfully submitted,
Jeanne Hollingsworth, Recording Secretary

Town of Deer Isle Board of Appeals-Minutes of Meeting-August 6, 2008

Present: Aldrich, Eaton, Hypes, Miller

Excused: Billings

Also present: Hubert R. Billings, CEO
L.R. Billings, P.E.
Renee Sewall, Contractor
Raymond Weed

Note: Prior to calling the meeting to order Chairman Aldrich noted that when he arrived this evening he found on the table the following documents left by Deer Isle Planning Board (DIPB)

1. Findings of Fact on Maxwell building permit application #19/08, (unsigned, undated.)
2. Minutes of meeting held April 24, 2008.
3. Minutes of meeting held May 22, 2008.
4. Minutes of meeting held June 6, 2008.

Chair Aldrich also distributed copies of certain definitions taken from a dictionary.

Secretary Miller passed out copies of the July 23, 2008 Board of Appeals meeting.

A quorum present, Chair Aldrich allowed time for those present to review the DIPB information distributed and then called the meeting to order at 6:05 PM.

Secretary Miller was asked to read the minutes of the July 23, 2008 meeting. There were no additions or corrections to the minutes as distributed and read. A motion was then made to accept the minutes by D. Hypes, seconded by T. Eaton and passed by a vote of 4-0.

Chair Aldrich then addressed the matter before the Board of the application of David and Joan Maxwell for Administrative Appeal noting that the Board of Appeals was approaching this on a *de novo* basis. A motion was then requested to go into a public hearing. This was moved by A. Eaton, seconded by D. Hypes, and approved by a vote of 4-0.

Larry R. Billings, representing David and Joan Maxwell was then recognized by Chair Aldrich. Mr. Billings stated that he had been to the Planning Board to request a building permit for a new cottage on the Bear Point (Thomson Cove Lane) property which would replace the two non-conforming structures (a house and a boathouse) that presently existed on the lot. The present house is approximately 10 feet from the high water mark and the boathouse is forty feet back.

The footings now supporting the house are failing, the cottage itself is in poor condition, and the new cottage was proposed so as to prevent the immediate shore area from being torn apart in the process of doing foundation repair. Moreover, it was also suggested that the boathouse be torn down to provide the best site for this new structure. Mr. Billings then approached the Department of Environmental Protection (DEP) for a permit by rule. He noted that the DEP thought the idea "reasonable" as it would eliminate two non-conforming buildings and lead to preservation of the shore front. However, the Planning Board refused this idea and said that any new building would have to be placed behind the 75' set back line. Mr. Billings went on to note that he thought Section 12 C 3 of the Deer Isle Shore Land Zoning Ordinance (DISLZO) permitted home owners to place their homes as far back as "practical". There were subsequent conversations with the Maxwells, the number of trees that would have to be cut down was checked, as well as changes to the road and the utility lines. In conclusion Mr. Billings then exhibited several large photographs reinforcing his feeling that a large number of trees would have to be cut if the house was to be moved behind the 75' set back line, as well as use of the subsurface waste disposal system, and utility lines. These were reviewed and discussed with the members of the appeals board who were present.

Chair Aldrich then asked the others attending, Rennee Sewall and Ray Weed if they wished to make any comment and they indicated that they had nothing to add. (Note: as previously mentioned the Board of Appeals had earlier reviewed the material left by someone on behalf of the Deer Isle Planning Board.

There be no further comment Chair Aldrich called for a motion to end the hearing phase of the meeting. It was so moved by A. Eaton, seconded by D. Hypes, approved 3-0. Then D. Hypes moved that the Board return to the regular meeting. This was seconded by G. Aldrich, and approved by a 3-0 vote.

Mr. Billings asked to add a final comment regarding the word "practical" noting that in his mind it meant to make something function well i.e. utilities, Subsurface waste disposal system, and the elimination of two non-conforming structures.

A motion was then made by D. Hypes, seconded by A. Eaton to have the Board go into deliberation. This motion passed 3-0.

Chair Aldrich first noted that according to the figures for square footage and volume submitted by Larry Billings that with the elimination of the two presently non-conforming structures and the construction of the proposed new house should result in a significant reduction in the amount of non-conforming square footage, and volume. Moreover, removing the house from within

12 feet off the high water mark would also be an improvement in reducing the non-conformity, and would permit much better erosion control (i.e., foundations of house are failing.) It was noted that it did not appear the Planning Board had taken into consideration Section 12 C 2, as well as section 12 C 3, and there was some discussion, with particular note of the last sentence in each. Reference was made to the "Findings of Fact" regarding the DIPB's decision on the Maxwell application. It was noted that it would not necessarily be easy to re-route electric and utility lines around the present subsurface waste disposal system. It was also noted that the DIPB had found at least one suitable site ("the lot is quite large and could be place in a number of locations [behind the 75' set back line]" but that nothing had been presented to show the location. Attention was also called to the statement regarding removal of vegetation "….there would be a minimal amount of tree cutting required…..The few trees that would need to be cut would not adversely affect the total tree stand." The Board felt however, that to position a house behind the 75' setback line, on this narrow point of densely wooded land, would necessitate clearing a 50' x 50' area which would lead to probable further damage from "blow downs" to the surrounding wooded acre. It was also noted and questioned that the Planning Board had determined (minutes of June 11, 2008 meeting) that all the trees were "…mostly dead or dying." It was also observed that positioning a house further back would mean some extension of the present road, which is grand-fathered and would be illegal under the present DISLZO; this in turn might require the cutting of even more trees. It was noted that the DEP had issued a permit by rule and had raised no objections to the proposal put forth by the Maxwell's. It was also noted that the Maxwell's had received a timing approval from the Department of Marine Resources (DMR). It was noted that under the proposed plan that the septic tank and pump can remain where they are. There was more discussion about the project and the consensus of the Board members present was that given the information available approval of the Maxwell proposal would result in the least negative impact on the environment of the point. With regard to the reduction in non-conforming square footage and volume, CEO Billings, noted that the cottage was built in the 1970's and a 30% expansion was added sometime late. He also noted that the boat house was built quite a bit later.

There being no further discussion G. Aldrich moved that the Application for Administrative Appeal by David and Joan Maxwell, Tax Map # 11, Lot #30 be approved that this matter together with findings of fact be returned to the DIPB for the issuance of a building permit. This was seconded by A. Eaton and passed by a vote of 3-0.

G. Aldrich then moved that the Board resume its regular meeting. This was seconded by D. Hypes and approved by the vote of 3-0.

P. Miller then proposed that the Board of Appeals consider moving their regular meeting date from the third Wednesday of the month to the fourth Wednesday thus positioning their meeting

after the monthly DIPB meeting on the third Thursday. This was discussed and there was general agreement. Chair Aldrich asked Secretary Miller to draw up the necessary change to the by-laws and a letter requesting approval from the Selectmen. There being no further business to come before the Board and on a motion by A. Eaton seconded by G. Aldrich the meeting was adjourned.

Philip A. Miller
Secretary

Town of Glenburn Board of Appeals Meeting-March 18, 2010

Let the record reflect that Chairperson Glendon Newcomb called the March 18, 2010 Board of Appeals meeting to order at 7 P.M.

Roll Call

Members Glenwood Newcomb, Joseph Murphy, Ira Lepage, Scott Chaffee, and David Carson were present. Associate Member Thomas Edes was absent.

[HAROLD BROWNELL] To see what action the Board of Appeals will take regarding a variance appeal of the CEO's decision on the request for expansion of a dwelling in shoreland zoning. The property is located on Glenburn Tax Map 42/Lot 023.

Chairperson Newcomb advised that this item has been resolved without action from the Board; therefore, it would not be heard.

[SCOTT CUNNINGHAM] To see what action the Board of Appeals will take regarding a variance appeal of the CEO's decision on a request to build a garage on property in shoreland zoning. The property is located on Glenburn Tax Map 25/Lot 096.

Mr. Newcomb advised that the Board needs to decide which ordinance or statute gives them the authority over this matter. From reading the information provided to him, he understands that it would be the Shoreland Zoning Ordinance; however, CEO Richard Watson advised that was not correct. He recently discovered that the lot the Cunningham's are building on is actually out of the shoreland zoning. Shoreland zoning does encompass 250 feet; however, anything outside of 100 feet is strictly a situation where only requirements of the Land Use Ordinance have to be met.

Mr. Newcomb advised that due to the change in information, the Shoreland Zoning Ordinance does not pertain to this matter, and each Board member was given a copy of the current Land Use Ordinance.

Mr. Newcomb stated that the first question would be if the ordinance gives the Board authority over this matter. The building permit was denied by CEO Watson based on dimensional requirements. There is no question on ownership of the property.

Mr. Newcomb asked if anyone other than the involved party wished to be heard, and there was no one who wanted to be heard. Town Manager Michael Crooker advised that he was present as an interested member of the town and would answer any questions from the town's perspective. Otherwise, he has no intent to comment on the proposal or appeal.

Ira Lepage stated that he needed to know the setback requirements. Mr. Watson referred to the Land Use Ordinance, and it states 20 foot setbacks. Does this structure fit within that requirement? Mr. Watson advised that was questionable. He has seen drawings that past owner Ronald Cunningham presented to the Planning Board in 1988, and it shows 20-foot setbacks and a 25 x 40 foot garage.

Mr. Newcomb asked the Cunninghams if they had reviewed the ordinance and did they know what they had to prove, and they advised that they are aware of the proceedings. Mr. Newcomb advised that there are specific requirements that must be met in order for the Board to grant a variance.

Scott Cunningham approached the podium and stated that he and his wife, Kendra, are proposing to rebuild a structure that was previously on the property of Glenburn Tax Map 25/Lot 096. The issue at hand is the timeline of a Land Use Permit that was not sought after or taken into consideration due to circumstances that bring them here tonight. The previous structure, that was there until the final debris was cleared in the spring of 2008, was a dilapidated garage that was not properly built. It was not on a slab or footing of any sort. Due to the poor construction, the roof had caved in 1995. The building stayed in that state for a number of years until the previous owners, Mr. Cunningham's parents, were asked to clean it up in order for a new leach field to be installed. Their proposal is to replace the structure smaller in size and better built. He did not request a permit to build the new structure until now because he was unaware until recently that, per the Shoreland Zoning Ordinance, a permit had to be issued within a year of the old structure coming down.

Mr. Newcomb referred to the packets handed out to the Board as Exhibit #1. It contains the request for an appeal, the proposal as stated, the application for a building permit, and the CEO's letter to Chairperson Newcomb, dated February 16, 2010. Attachment A is a drawing showing the old structure. Attachment D has a more detailed drawing and a picture of the replacement structure.

CEO Watson advised that he wanted to clear up a zoning matter. He stated that at the time that Mr. Cunningham applied for the permit he felt that part of the old garage had been in shoreland zoning, and that is the reason why a permit had to have been applied for or issued within a year's time. However, it is out of shoreland zoning. It is not involved at all; therefore, it is the setback issues that the Board is confronted with tonight. Mr. Newcomb asked if he meant the dimensional setbacks including the sidelines and back setback, and Mr. Watson advised that was correct. There is no lake setback involved. Mr. Lepage advised that only the side setbacks are an issue. The back is 27-feet from the edge of the Parkhurst Drive, and that is within the 20-foot required setback. Mr. Watson stated the he has not measured the property; however, if Mr. Cunningham says it is 27-feet from Parkhurst Drive to the garage, the setback has been met.

Mr. Lepage asked if the right-of-way is taken into consideration of the property lines because the right-of-way can be used by anyone. Mr. Watson advised all rights-of-way are considered. The right-of-way is approximately 10 to 15 feet wide. Mr. Lepage stated that if the right-of-way was 10-feet and it could be used as part of the property line, the garage would fit into the 20-foot requirement. Mr. Watson advised that the right-of-way could not be used as part of the property line. There has to be 20-feet from the outer most limits of the right-of-way; therefore, if there is only 10-feet from the edge of the right-of-way to the garage, there is only a 10-foot setback.

Mr. Newcomb stated that he understands that there are two setbacks that are questionable. There is a 12-foot sideline setback and a 10-foot sideline setback from the right-of-way. Both sides are required to have 20-foot setbacks. The variance requested regards these two setbacks.

Mr. Cunningham added that this proposed structure is a replacement of a structure that was previously there and the last remnants were removed in 1998. He understands that he does not meet the ordinance requirements for the setback rules on the property lines and the right-of-way; however, he is here to ask for a variance because when the previous structure was torn down and removed to put the leach field in, a permit for a new structure was not requested within the one year requirement of the ordinance. Mr. Newcomb advised that was a requirement of the Shoreland Zoning Ordinance, and they are no longer dealing with that ordinance.

Mr. Newcomb stated that if there was a preexisting structure that met the same variances, the variance would be grandfathered; however, that would be effective for only a year, so that is not applicable in this case. This would be only in shoreland zoning.

Mr. Watson advised that if a structure is out of shoreland zoning, there is no rule for rebuilding within a certain time frame. Reconstruction can take place on the same footprint even though the setbacks are not correct. This is called a legal non-conforming lot.

Mr. Newcomb asked if this should be referred back to the Planning Board as under the new understanding of this situation, it is under their jurisdiction. Mr. Watson advised that the Board of Appeals is hearing this tonight because of the setbacks and the size of the lot that the structure is being built on. He feels that somewhere there was some misrepresentation as far as setbacks are concerned. Mr. Newcomb stated that if this is grandfathered, a variance may not be necessary; therefore, this would be within the Planning Board's jurisdiction. Mr. Watson advised that the Planning Board would not have to hear this case if it is strictly a grandfathered lot or a structure being built on a legal non-conforming lot.

Joseph Murphy asked Mr. Watson if this was a grandfathered lot. Mr. Watson stated that it is and it is not. It is a very small lot. There is a septic system that is close in proximity to the proposed building and there must be a 15-foot setback from the leach field to the building. He has not measured the lot himself. He feels that since there was a previous structure permitted by the

Planning Board in the 1980s which is no longer there, and the structure that Mr. Cunningham is proposing to build is smaller in size than the original, a permit could be issued. However, Mr. Watson did not want to issue the permit because of the setbacks which do not meet the requirements.

Mr. Newcomb stated that a more appropriate determination is needed of whether or not this is a grandfathered use or not. If not, a variance would be necessary. Ira LePage suggested that Mr. Watson stake out the property to see if there is a 15-feet setback from the leach field and a 20- foot setback from the road because these are the two points that would need to be varied. Mr. Watson stated the road, the right-of-way, and the property line would need to be varied. Mr. LePage stated that if it fits within the guidelines a permit can be issued. If not, the Planning Board would hear the case and either deny or approve a permit with a variance. Mr. Watson advised that the Planning Board cannot issue a variance. They can only issue a waiver. Mr. Newcomb advised that the likelihood would be a variance if this is not a grandfathered use, and it would come before the Board of Appeals for determination.

Mr. Newcomb wants to make sure there is a clear understanding of who determines whether or not this is a grandfathered use. Mr. Watson stated that he is very adamant about setbacks.

Mr. LePage asked if the garage was going to be a house or simply a garage, and Mr. Cunningham advised it would be strictly a garage with no water or sewer. This is a place to store vehicles, their boat, and other recreational items. The previous structure did not have a slab. It was on dirt. The new structure would be on a slab.

Town Manager Michael Crooker stated that he has not looked into the ordinance as far as grandfathering the original building. As this has unfolded tonight, the circumstances have changed. If the ordinance does not specify who has responsibility for the determination, it would seem to fall within the duties of the code enforcer unless a denial has been issued based upon that reason. If so, it would be the responsibility of the Board of Appeals. However, in this case, it does not appear that this is the reason for denying the permit.

Mr. Watson stated that he denied the permit with the thought that part of the garage would be in shoreland zoning and the setback requirements not being met. He verified with Mr. Cunningham that the parcel of land in question is the small corner lot that is split off from the parent lot and sits next to Parkhurst Drive, and Mr. Cunningham advised that is correct. Mr. Cunningham stated that he and Mr. Watson had determined that the lot was 160 feet on one side and 157 feet on the other side with 52 feet of road frontage and 50 feet of water frontage. Mr. Watson stated that was correct; however, is this the same parcel that was figured to be 59 feet on the side of the right-of-way that goes down to the lake, 45.8 feet towards the Parkhurst line, and 52 feet on Parkhurst? Is this the small corner lot that sets in the corner of Lot 96 where the original garage was? Mr. Cunningham stated that he was unaware of this lot. To his understanding, the entire lot of

that depth is Lot 96. He is not sure of the measurements that Mr. Watson quoted. Mr. Watson stated that he believed the lot that he is talking about was originally a parcel of land that did not go with Lot 96 and was purchased by someone prior to Mr. Cunningham. It is specified on the map with dotted lines. The garage actually was on that lot very close to Parkhurst Drive. Mr. Cunningham stated that from history and measuring where the old structure was located, the outside wall would have been in the same area as where the new structure is proposed. It is roughly 27-feet from the road edge.

Mr. Cunningham asked if he was correct in understanding that when you purchase land that is side-by-side the lots are joined. Mr. Watson advised that is not necessarily true. The State statute states that all land in contiguous ownership of the same individual is considered one parcel of land. Mr. Cunningham understood that they had one lot from the dead end road, Parkhurst Drive, to the lake, and the dimensions of that area are the only dimensions that he was aware of. Mr. Watson advised that was correct; however, on the map it shows individual numbers where Mr. Watson assumed the old garage had been setting. Mr. Cunningham advised that it was definitely closer to Parkhurst Drive than it was to the water. The old structure was 105 feet from the water, and the new structure would be 104 feet from the water. Mr. Watson asked if this is close to the area where the leach field is now, and Mr. Cunningham advised that there is a 15-foot setback from the garage to the leach field.

Mr. Newcomb asked if there was a question on the dimensions on the drawings submitted. Mr. Cunningham stated that he believes Mr. Watson was referring back to a history of the lots and a separate section of the lot where the original structure was. He is not sure if this structure was the one that was recently demolished or a structure built previous to that. His father, Ronald Cunningham, was the previous owner, and Mr. Cunningham stated that his father did tear down a structure prior to building the garage which is now gone.

Mr. Newcomb advised the Board that they can proceed with the hearing; however, it is difficult to grant a variance unless all four points stated thus far are proven. Mr. Cunningham asked if the Board is able to approve a restructure of an existing structure. He stated that the time line was the issue. He did not request a permit within a year after the old structure was taken down. Joseph Murphy advised that issue was not a factor at this point because the proposed garage is not in shoreland zoning.

Mr. Cunningham asked if this is determined grandfathered, can he rebuild the 20 x 40 foot garage that was previously there? Mr. Newcomb advised that the question is who determines whether or not this is grandfathered.

Mr. Cunningham advised that they do not own any adjoining property. They own another parcel where they live, but it is on the other side of the right-of-way and another parcel of land owned by another party.

Mr. Newcomb stated that there is a good reason for setback requirements and that is fire jump. Fire can jump from one building to another and in the case of a structure fire, are they creating an unsafe environment by having setbacks less than required? Mr. Cunningham stated that the closest structure to the proposed garage would be 32 feet away, and that is a bunkhouse/sleeping quarters on the Parkhurst side and owned by Bruce Parkhurst. The home on that lot is 62+ feet from the bunkhouse. Mr. Newcomb advised that if both parties had a 20-foot setback that enforces the rule; however, if Mr. Cunningham has a 10-foot setback, he cannot require owners on the other side of that line to have a 30-foot setback. This needs to be taken into account for granting a variance.

Mr. Newcomb believes that a grandfathered use is an entirely different issue, and that is why he hesitates to get into a variance issue if a grandfathered use is something that still needs to be explored. If Mr. Watson has determined that he denied the permit with the wrong ordinance in mind, who would determine if this is grandfathered? Would it be Mr. Watson or the Planning Board? Mr. Watson advised that he is not interested in making that determination himself until he physically measured the lot and saw a stake out of where the proposed garage is going to be. He agrees with the possibility of grandfathering (which is now termed a legal non-conforming structure or lot). The original garage was torn down or fell down and laid there for several years before it actually got cleaned up. When it came to the point of putting in a septic system, a Well Release was needed from the Parkhursts next door. They would not sign the release until everything was cleaned up on the lot. At that time, the debris was cleaned up.

Joseph Murphy asked Mr. Watson if he measures the lot and everything matches the drawing, would he have the authority to decide if this is a legal non-conforming lot? Mr. Watson stated that perhaps he would have the authority; however, he is not comfortable with this and because of the setback issues he felt that the Board of Appeals should be involved. Scott Chaffee stated that he feels that when the Planning Board issued a permit to Mr. Cunningham's father several years ago for the garage that is now demolished, they decided this issue. They already said that it could be there.

Mr. Newcomb referred to Section II of the Land Use Ordinance. Mr. Watson advised that this section pertains to the use of existing non-conforming buildings and does not pertain to rebuilding a structure.

Mr. Watson referred to Attachment A of Exhibit #1 which is a portion of a Planning Board meeting in which Ronald Cunningham requested a permit to build a garage on the lot in question today. A drawing of the lot was included with the request. Mr. Watson pointed out that according to the drawing the lot is only 52 feet wide. The proposed structure was to be 40 feet wide. With a 20-foot setback on each side, the width of the lot should have been at least 80 feet wide.

Mr. Lepage asked if the Board denies the variance, can Mr. Cunningham ask Mr. Watson to do the measurements to verify that the points do fit in and they are grandfathered? Mr. Newcomb advised that if the Board denies the variance, Mr. Cunningham's only option is to go to court. If the Board allows Mr. Watson to measure the property to verify the measurements, he can either deny the permit or accept it. If he denies it, then the Board can hear the case at that time and go to the variance side. Mr. Newcomb stated that he understood Mr. Watson was not comfortable to rule favorably even if he measured it and found that the setbacks did fit. Mr. Watson stated that he would measure the property, but he was not comfortable in determining whether or not it is grandfathered. He personally feels that it is grandfathered; however, he does not feel comfortable to ask the Board to agree with his thoughts. There was a garage there, and he has seen the ruination of it.

Mr. Newcomb advised that the only thing before the Board was the possibility of a variance. At this point, the only issue to decide is to grant a variance or not or to table the matter until further action is taken by others.

Town Manager Michael Crooker stated that one of the questions he has for the Board is what basis is the appeal on? If Mr. Watson denied a permit because of a shoreland zone infringement, that case is no longer a case. Mr. Crooker questions whether or not the Board has any standing at all tonight to review anything, and if not, it would automatically revert back to Mr. Watson. If he wants to deny the permit because he deems it not to be grandfathered or that he does not have the right, then a new appeal could be filed by the applicant. Mr. Crooker is cautioning the Board to make sure that the request falls within what was publicly posted and what has been presented tonight.

Mr. Lepage stated that something else has come to light and it needs to go back to the code enforcement officer to either deny or accept a permit. If he denies it, Mr. Cunningham can come back to the Board with the correct reason for denial which does not involve shoreland zoning.

Mr. Cunningham advised that he would like to table his request for a variance due to the additional information that has been brought forth tonight. He would like to meet with Mr. Watson and take measurements and reevaluate his request for a permit. Mr. Newcomb advised that if he is denied a permit with the new information he can come back before the Board of Appeals again; however, if a decision for approval or denial of a variance is made tonight and that decision is a denial, Mr. Cunningham would have to go to court to overturn the decision of the Board.

Mr. Crooker stated that the variance that Mr. Cunningham requested as part of the application process applied to the shoreland zone. It has been determined tonight that shoreland zoning no longer applies; therefore, it does not need to be further discussed. It becomes another issue which has not been ruled by the code enforcement officer.

Mr. Watson stated that after Mr. Cunningham filed his application and it was sent to Rich Baker at DEP, Mr. Cunningham came into the office and they discussed what his plans were. He asked Mr. Cunningham if they had discussed that part of the old garage was likely in shoreland zoning, and Mr. Cunningham stated that he did not recall discussing that. Mr. Cunningham stated that if the original structure was 25' x 40' as stated, it would have been 105 feet from the shore. Mr. Watson stated that he felt that a piece of the land was in shoreland zoning. It is in LR which is 250 feet back; therefore, that is the reason he followed the Shoreland Zoning Ordinance rules and denied the permit. He also noted on the denial that there were setbacks. After the notice was publicly posted, the new information came to light.

Mr. Newcomb asked Mr. Watson if he was stating that with the new understanding, the appeal did not need to be submitted on the basis of the shoreland zoning rules, and Mr. Watson stated that was correct.

Mr. Cunningham asked if it is the responsibility of the Planning Board or the code enforcement officer to determine if this is a grandfathered structure, and Mr. Newcomb advised that it is the responsibility of the code enforcer. Mr. Cunningham asked if Mr. Watson determined that the old structure was grandfathered, could he issue a permit for the new structure. Mr. Newcomb advised that Mr. Watson would have to make that decision. If Mr. Watson denies it, he can make an appeal.

Ira Lepage motioned to dismiss this proposal. It was seconded by Joseph Murphy and unanimously approved.

Scott Chaffee motioned to adjourn and it was seconded by Ira Lepage. The motion was unanimously approved, and the March 18, 2010 Board of Appeals meeting was closed at 8:03 P.M.

Attested by: _____

Draft - Leeds Zoning Board of Appeals Minutes of Meeting – July 18, 2002

Members Present: Paul Binette, Scott Drown, William Trommer, Jan Wiegman, Tammy Judd, alternate.

Brian Dench, attorney for the Town of Leeds, joined the meeting late.

Before entering into the business of hearing the Appeal of Michael Burgess, board members met at 6:40 PM for the purpose of selecting a new chairman to replace outgoing chairman Alan Wheeler and to decide upon the job of secretary. Following some discussion, Mr. Trommer nominated Mr. Weigman as chairman. The nomination was seconded by Mr. Drown. Mr. Weigman was elected unanimously. Further discussion resulted in a decision to make the job of secretary a revolving position. Mr. Trommer volunteered to keep the minutes for this meeting.

At 7:00 PM, the meeting reconvened for the purpose of hearing the appeal of Michael Burgess.

The January 31, 2002 decision of the Leeds Zoning Board of Appeals to deny Mr. Burgess' appeal was remanded back to the Appeals Board by order of the Superior Court Civil Action, Docket No: AP-02-05 for a de novo hearing of the planning board's denial of Mr. Burgess' appeal.

Mr. Anthony K. Ferguson, attorney for Mr. Burgess, began by presenting information regarding the case and the argument for granting an appeal to Mr. Burgess. (See: Michael Burgess Appeal – Facts and Argument pp. 1-7 dated July 18, 2002.) The argument has two key aspects. The first is based on existing lot coverage and lot coverage upon the completion of the project. Mr. Burgess argues that, at the present time, 30.5% of the lot is covered by buildings, parking areas, and impervious surfaces. The lot is in a residential zone, and as such, the buildings, parking areas, and impervious surfaces are nonconforming structures and are allowed to exist. The proposed project covers 24.5% of the lot and thus reduces the area of the lot that would be covered.

Mr. Burgess' second argument was that the proposed driveway from the street to the parking lot should not be considered an impervious surface. Therefore, the total lot coverage of the proposed project would be less than the 20% lot coverage allowed by the ordinance.

Following Mr. Ferguson's presentation, the board discussed the definition of an impervious surface and considered the intent of the ordinance in regard to the driveway being considered an impervious surface. After considerable discussion, the board reached consensus that the driveway should be considered as an impervious surface for the purposes of calculating lot coverage.

The board went on to discuss Mr. Burgess's first argument. The board looked at the plan that was used to calculate the existing lot coverage and asked Mr. Burgess to explain how the 30.5% coverage was calculated. The Board then discussed the surveyor's notations regarding the existing parking areas on the plan. It appeared that a particular gravel parking area was apparent to the surveyor at the time of the survey and labeled "Existing Gravel Parking Area". A second area was denoted as "Former Parking Area Perimeter +/- per client. Totals 6,000 s.f. +/-". The board discussed how the purported former parking area was determined. The board also discussed that the surveyor must have had indications of the current limits of gravel parking area in order to show it on the plan.

Since the area of the "Existing Gravel Parking Area" and the area of a driveway to Mr. Burgess' home crossing a corner of the lot were not indicated on the plan, Mr. Binette performed an approximate calculation to determine the impervious area of the lot. Based on his calculations, the existing lot coverage was 5,066 square feet or 20.066% of the lot area.

A motion was made by Mr. Trommer and seconded by Mr. Drown that the board interpret the existing gravel parking area, the driveway on the North end of the lot, the existing building footprint and the shed on the map dated June 14, 2001, revised October 3, 2001 as the impervious area on the lot, and that area to total approximately 5,066 square feet. The motion passed unanimously.

The following finding was moved by Mr. Wiegman and seconded by Mr. Drown: That the board finds the existing lot coverage ratio to be 20.066%. The motion passed unanimously.

The following finding was moved by Mr. Wiegman and seconded by Mr. Drown: That the appellant's proposal calls for a lot coverage ratio of 24.5%. The motion passed unanimously.

The following conclusion was moved by Mr. Drown and seconded by Mr. Binette: That the proposed site plan violates the lot coverage limits in Article 1, Section 3-F. The motion passed unanimously.

Mr. Drown moved that the board deny the appeal based upon the findings of fact and conclusions. The motion was seconded by Mr. Binette. The motion passed unanimously.

The meeting was adjourned.

Respectfully submitted,
William Trommer, Acting Secretary

City of South Portland-Minutes of the South Portland Board of Appeals-September 23, 2009

Council Chambers, City Hall
September 23, 2009

This meeting was televised on SPCTV.

MEMBERS PRESENT	STAFF PRESENT
Gordon Stanhope (Chair)	Patricia Doucette, Code Enforcement Officer
William Arnold	Cathy Counts, Secretary to the Board
Gary Crosby	
John Howard	
Susan Russell	
Shari Sobel (first meeting)	
Cecilia Inman (first meeting)	

Total number of meetings in the previous twelve-month period: 9
Number of meetings required to attend for 75% attendance: 6
All Board members are in good standing with attendance.

Board of Appeals Chair Gordon Stanhope called the meeting to order at 7:00 p.m.

1. **Acceptance of Minutes of the June 24, 2009 meeting.**
   Mr. Arnold moved and Mr. Howard seconded to accept the minutes as presented, accepted 6-0 (Sobel abstaining, not present at 6/24/09 meeting. Ms. Inman did attend the 6/24/09 meeting as an audience member.)

2. **Tabled request of Pauline Robishaw–48 Hall Street-052*0000*074*–A Residential Zone–Lot Coverage Variance (2009-10).**
   The property owner was seeking a 9% lot coverage variance to demolish an existing shed and replace it with a 24' x 24' detached garage. In addition to existing building coverage, this will bring lot coverage up to a total of 1,718 square feet lot coverage on this 5,000 square foot lot, or 34% of the lot. Lot coverage is limited to 25% in the A Residential zone. The Board heard this request based on the "practical difficulty" test. Mr. Crosby moved and Mrs. Russell seconded to table this item to the next regularly scheduled meeting to allow the applicant to provide accurate and adequate information. ***(2009-10)***

   Mrs. Doucette read the public hearing notice and listed items submitted by the applicant. Representing property owner Pauline Robishaw in her absence, Edward Stowell came forward to address the practical difficulty criteria as follows. A variance from the

dimensional standards of Chapter 27 shall be granted when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

1) The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood. *The existing shed will be removed. This is a grandfathered lot of record from 1974. The owner has lived here since 1981.*

2) The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties. *Other homes in the neighborhood have two-car garages. It will not adversely affect others.*

3) The practical difficulty is not the result of action taken by the petitioner or a prior owner. *This is a small lot that is currently improved with a single family home and shed.* Storage is needed for lawn and snow equipment and a car and utility trailer.

4) No other feasible alternative to a variance is available to the petitioner. *The shed or garage would not contain the items inside which would change the character of the neighborhood and market values. Also the existing shed encroaches on the setback.*

5) The granting of a variance will not unreasonably adversely affect the natural environment. *It will not.*

6) The property is not located in whole or in part within the shoreland areas as described in M.R.S.A. Title 38 Section 435. *No.*

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements. *The lot coverage is something that the applicant can't control, as the house was built by others.*

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner. *The house and lot would have decreased value without storage space for lawn equipment and vehicles. Storage is now a little dumpy looking. Neighbors have said the new garage will enhance the neighborhood.*

Mr. Stowell then responded to questions from the Board. Mr. Crosby asked for a detailed list of items and measurements considered in determining the percentage of lot coverage. Mrs. Doucette said that the porch was figured in. Through discussion it was determined that the information provided by the applicant compared to the information available from the Assessor's office differed somewhat. Mr. Arnold wondered about the measurements of

the existing shed. Mrs. Russell said it was best to start "from scratch" when figuring lot coverage, since the shed is being removed anyway. She said she wasn't comfortable trying to guess what the facts are, that there was not enough information and no dimensions are provided on the house on the plot plan.

Mr. Arnold noted that the other houses with double garages to which Mr. Stowell referred in his address are actually on larger lots than this subject lot, making their relevance not comparable to this smaller lot. One of the double garage lots is a double lot, and one is a triple lot. Mrs. Russell agreed that the examples are not comparable.

Mr. Crosby said that it is not proper for the Board to make any decision on lot coverage without accurate and adequate information. Mr. Stowell said he thought the surveyor provided measurements, but now he understands there is not enough information on the survey. Mr. Stanhope agreed that in this case the Board needs more information to make a decision. Mr. Crosby said the survey needs to show accurate numbers that hold true. Mrs. Russell noted a possible discrepancy in the size of the home.

Mr. Arnold found that there was also a lack of information on how the property owner could drive a car into the garage as it is proposed to be located. Mr. Stowell responded that the garage would be a one car garage with a 16' wide door and with additional storage on the side. Mr. Stanhope asked if the proposed window shown above the garage door would be for an upper floor. Mr. Stowell answered that there would be no second floor and that the window would just be for ventilation.

No one came forward to address the Board at public hearing, pro or con, and Mrs. Doucette reported that the Department of Planning and Development received no mail on this request. Mr. Stanhope closed the public hearing and entertained a motion.

Mr. Crosby moved and Mrs. Russell seconded to table this item to the next regularly scheduled meeting to allow the applicant to provide accurate and adequate information. Mrs. Doucette said that, pending receipt of requested information, it could be on the next meeting's schedule. Mr. Arnold said the Board needs a drawing of what will be built and that the applicant would be held to building as shown on the drawing. Mrs. Doucette noted that Mr. Stowell needed to ask the surveyor to do the measurements and calculations. Mrs. Russell added that the information on the lot coverage is important. The Board voted 7-0 to table this item to the next meeting pending receipt of the requested information. Mr. Crosby cautioned the applicant to work closely with Mrs. Doucette to be sure they provide her with everything requested by the Board. **(2009-10)**

3. Discussion of old and new business.

Board members greeted new members Shari Sobel and Cecilia Inman. Mrs. Doucette noted that Sally Daggett still has another hour of workshop with the Board for this year to address the handling of any procedures the Board wished to cover. The Board would be willing to meet from 6 p.m. to 7 p.m. prior to the regularly scheduled meeting. Mr. Stanhope thought that would be a good idea, as the newer Board members would especially benefit from the workshop. The Board decided to meet with Sally Daggett before the regular meeting on October 28, 2009 at 6 p.m., if she was available.

4. Adjournment.

Mr. Howard moved and Mr. Crosby seconded to adjourn. The Board adjourned by unanimous vote at 7:38 p.m.

The next meeting will be Wednesday, October 28, 2009. Deadline for applications is Thursday, October 8, 2009. The item tabled from tonight's meeting will be the first public hearing item on the October agenda.

Respectfully submitted,

Cathy Counts
Secretary to the Board

Town of Southwest Harbor Board of Appeals Minutes-December 15, 2009

Southwest Harbor Fire Station Meeting Room

1. Call to order: The call to order was at 6:00 p.m. Present: James Geary, Chairman; Lunn Sawyer, Ted Fletcher, Charles Morrill. Excused: Gretchen Strong.

   Mr. Geary thanked the parties for the ability to re-schedule the meeting from last week during the storm. The meeting will end at 10:00 p.m. Protocol for the meeting was reviewed with attendees: Appellant will present information; The Board and property owner will be allowed to ask questions; the property owner will be able to present their side of the case; questions will be taken; the public hearing will be closed and the Board will deliberate and make their decision.

2. Applications:
   I. Applicant: Agent: Lynne Williams for Mark Kryder & Craig Patterson. Administrative Appeal of: The decision made by the Southwest Harbor Planning Board on July 16, 2009 to rescind the decision made by the Southwest Harbor Planning Board to deny the Subdivision Permit application of the Village at Ocean's End on June 18, 2009. Chair noted that the appeal was filed about 3 months after the due date, and asked to address that first.

   Attorney Williams spoke, representing the appellants. She said the appeal "turns on" the decisions at the July Planning Board meeting, to rescind the decision of the June Planning Board meeting. Referring to Section 6 in the reply memorandum of the Kryder Appeal, page 8, she said the attorney for the appeal himself said the ruling is tentative and preliminary until all criteria is reviewed. She argued that while the Planning Board made decisions on certain criteria, the process was continuing, and her client has as much right to appeal the decision as Mr. Patterson and his clients have to appeal the decision on November 17, 2009. It was William's contention that after the decision in July the Planning Board went on to reach a final decision in November, and therefore her clients have the right to file a timely appeal looking at that November date.

   Mr. Hamilton, for the appeal, clarified his words saying that what constitutes finality is a denial. At the SWH Planning Board meeting of June 18, 2009 that vote constituted a denial, even characterizing that as interim, so a denial even at a preliminary plan stage is considered in the court as a final decision. The June 18 decision was given as final, even though there was no subdivision review. His words that were quoted by Williams were spoken in the context of a sub-division review.

Williams said, in terms of the denial, it might have been a final decision. This appeal is for the motion to rescind that was made. Her clients are not appealing a final decision, but the motion and decision to rescind the June decision. The July vote on the motion to rescind was not a final decision since the Planning Board activity continued many months hence.

Hamilton: there is a distinction to be considered. A motion to reconsider and a motion to rescind are two very different things. The Planning Board decided to wipe the slate clean and conduct a full blown subdivision review and a full planning board review. The June 18 decision and the motion to rescind was a final action with respect only to the June 18 decision. Focusing on the July 16 decision – the LUO says if the decision is made the appeal must be brought within 30 days.

Fletcher asked where in the Board of Appeals Ordinance it refers to Roberts Rules. Hamilton said it does not, but does show in the LUO and in the Planning Board By-laws. The Board agreed to hear comments from visitors who were directly involved in this appeal.

Anna Demeo argued that as a former Planning Board member, and after listening to Board tapes of the approval of the VOE subdivision, Mr. Hamilton said 'this is a completely fluid process from the application date to now,' and submits into the record the minutes of the May and July minutes, again stating it is one fluid process. The new Planning Board decided to start their review process from "compliance," and therefore, it is all one process.

Mr. Hamilton provided a timeline document specifically related that was an illustrative exhibit, and he reviewed those with the Board. He pointed out that Demeo and Johnson filed an appeal within 30 days, and for lack of standing, withdrew their appeal. Hamilton said this indicates that they understood the timeline required. Fletcher asked Hamilton if it were possible that the Planning Board might have decided after July 16 to review the decision to rescind. Hamilton said that taking action on a motion to rescind is final action, according to the Town Attorneys. Geary said that since Roberts Rules appear in the LUO and in the PB By-laws, is it appropriate that they be considered during this session?

Hamilton said that Chad Smith and James Collier were heard first by the Planning Board, and the Planning Board action to rescind was taken on advice of the attorneys.

Geary said his ultimate concern is that the Board might allow an untimely appeal to be heard, and it would open up the Board to future appeals. Fletcher said it is a murky area, and dealing with unrepresented applicants adds to that. He said the Board asked

Patterson to wait, and it is possible that the Board might have re-visited the decision. Hamilton said that Roberts Rules supplies a framework, section 35, page 296, relating to rescind: a negative vote on these decisions can be reconsidered, but not an affirmative vote. The PB was bound. Williams argued that the motion was inappropriate. Sawyer said he has the same fear of opening up future appeals, but agrees that there is a lot of ambiguity. Geary cautioned that to open up what appears to be a final decision of the Planning Board after 90 days sets a precedent. He feels the Planning Board made a final decision, and actions taken by others to file an appeal within the 30-day time period, were taken although they never got to the final stage. Johnson said it did appear at the time to be the appropriate, but within the time framework, and the withdrawal was only due to lack of standing. She felt that as the application proceeded, it became obvious that it was one long process. Hamilton referred to the factual statement in the timeline presented, saying that no other parties were substituted for the appeal made by Johnson and Demeo within the 30-day timeframe, although there was plenty of opportunity to gain standing by doing so. Demeo said the Town Attorneys did not speak to the Planning Board members.

Chairman Geary asked the Board to make a decision.

Williams said the message to her through the two clients was that they should appeal at the end.

Hamilton said the decision that was made was to rescind, and it was not a motion to reconsider. He said this is a final action and should be entitled to the protection of the property owner's rights.

Geary closed the public hearing at 6:55 p.m. The Board was instructed to deliberate on the timeliness of the appeal. Geary feels this was a final decision of the Planning Board, and the action to appeal that decision by Johnson and Demeo within the 30-day window suggests that there was legitimate concern that that was when it should be appealed. He expressed concern for opening up other unlimited appeal periods.

Sawyer said if the Board was to hear the appeal, and if they were to lose, and if they went to a law court, it would appear that they might kick it back and say the BOA had no right to hear the appeal.

Morrill said based on the finality of the decision, as explained in Roberts Rules and referenced in the LUO, the BOA has little choice.

It was moved Fletcher and Seconded Sawyer that the decision of July 16, 2009 of the Southwest Harbor Planning Board to rescind its' prior vote of June 18, to deny the

application of VOE, was the final decision to which an appeal needed to be made in 30 days, and therefore the appeal by the Patterson Trust et al is untimely and will not be heard by the Southwest Harbor Board of Appeals Vote 4- 0. Motion carried.

Fletcher asked if Hamilton or Williams wanted to submit reference to the findings of fact. Hamilton will submit a draft of findings for the Board's consideration.

Break at 7: 00 p.m. – Reconvene at 7:10 p.m.

Board of Appeals-Application #2-December 15, 2009

The meeting was reconvened at 7:15 p.m. by the Chairman.

II. Applicant: Agent: James E. Patterson for Ruth S. Brunetti; Mark & Sandra Kryder & Craig & Anne Patterson. Appeal of: The decision(s) of the Southwest Harbor Planning Board to approve the Final Subdivision Plan submittal from the Village at Ocean's End on October 22, 2009.

Chairman Geary reviewed the rules of the hearing to be conducted. He said there is an issue to address immediately: whether it is a de novo or an appellate appeal. Patterson said the Chair has substantial authority to make a decision, and unless the Town clearly states it is appellate, it defaults to de novo. While he does not agree, he is here prepared to review this as an appellate appeal. He is not prepared to hear this as de novo. Mr. Hamilton also said he was not prepared to conduct a de novo review. He referenced cases that clarify this and said the ordinance is clear referring to the decision of the law court citing *Yates vs. the Town of Southwest Harbor*. The Board of Appeals determined they would hear this application as an appellate appeal.

Mr. Patterson said no new evidence will be accepted in an appellate review. Patterson said that storm water management is a big issue; the applicant does not take issue with the final plan, but with: the timing, since the day zero plan has various stages: first stage houses 1–4, second stage houses 5–9 and where the final retention plan is located. He said on October 22, the ponds that were in place were not retention ponds, but sediment ponds. The October 14, 2008 document is an entrance permit, and refers to catch basins on the Village at Ocean's End (VOE) land, but did not approve the VOE design as far as highways are concerned, and they referred only to the retention devices on the VOE property. He said the Planning Board's (PB) responsibility in granting subdivision approval should have addressed all of these issues as of October 22. Secondly, regarding the right of way of Western Way Condominium (WWC), on the plans, there is a landscaped boulevard running along the south side of the VOE property, and for some distance covers the right of way (ROW) that WWC has, and

that raises concerns that they "can't get there from here". Not addressed adequately by the PB was how WWC would retain their rights. The Land Use Ordinance (LUO) draws a distinction between road and driveway. He said the decisions ignore the fact that the landscaped boulevard accesses two lots; the VOE lot and also accesses the WWC lot. There has been reference made that the attorneys at Maine Municipal Association (MMA) have blessed the project. Patterson said the WWC right of way was not addressed in correspondence to MMA. Patterson said concerning the concept of common foundations, referring to the October 22, final meeting of the Planning Board, that the Planning Board accepted the Board of Appeals (BOA) ruling for "one project", allowing the multi-unit. Patterson said he asks first that the BOA look at the multi-unit concept and reconsider that. What did the adoption of the SWH LUO mean when that definition was adopted? Patterson expects that Hamilton will present the "common" foundation, which is only a raceway, and unusable by the owners. The opinion of MMA was that the drawing depicted a two-family dwelling. Mr. Patterson made the following requests of the Board of Appeals:

1. Make a determination that the PB decision on October 22 was in fact contrary to the provisions of the Ordinance and the facts presented to that Board;

2. Grant the appeal and remand the matter back to the PB with the following provisions:

    a. require VOE to complete final retention basins and ponds before any houses are built in phases 1 and 2;
    b. instruct the Planning Board on remand that VOE comply with the 40,000 s.f. required in zone C;
    c. instruct the PB to provide that WWC's ROW is fully protected and available for full use by the residents;
    d. the PB be asked to obtain evidence from Maine DOT or Johnston /McCullough that the outlet structures on Route 102 are acceptable. Is the water going into that concrete box going to exit with such velocity as to damage WWC property across Route 102?;
    e. declare that the landscaped ROW is a road and not a driveway and subject to road standards.

Hamilton thanked the Board for reviewing all the materials, saying that Mr. Patterson has taken the Board off course with his comments on appellate review. Standard review is when an applicant is trying to seek to overturn the Planning Board decision; the party seeking appeal bears the responsibility of proof of damage. Does the evidence sufficiently support the findings of the Planning Board? He said the PB has thoroughly reviewed this application, and did their job, and the Board has the record. Scope is limited: only allowing questions relating to Sections 5 and 6C of the LUO,

and definitions of multi-unit and driveway. Hamilton said that Andrew McCullough was brought in by the PB to review the storm water runoff issues at the request of WWC. The law court stated they review the findings of the Board. Concerning the driveway decision, the standards within the LUO are separate and apart from the Road Ordinance, and testimony was received by the PB from Johnson that the driveway was designed to road standards and there was no attempt to under design the access way. Regarding density, Hamilton said the density of the VOE project would be the same as that originally approved for WWC. The ROW provides access to a shed, and not a lot, and the PB in two different reviews (tabs 9 & 13 of the transcript notebook), on page 10 under tab 13, indicates the finding of the PB concerning the driveway. Regarding private property rights issues, only 3 owners have come forth on this issue. Hamilton said that Mr. Patterson is raising an issue of the ROW. Hamilton showed the BOA the plat indicating the right of way. The final subdivision plan shows that the depressed curve is similar to a handicapped ramp, allowing access to the ROW without going up over a curb. Collectively, there is nothing to obstruct WWC to enter or exit their right of way.

Regarding multi-unit dwellings, first: what is the definition? The PB discussed the issue at least five times, and the final decision on the preliminary plan application and final decision on the final plan application for multi-unit was evidenced in the Finding of Facts regarding multi-unit. The question is whether the PB decision is contrary to the LUO. Was there an error of law in the application of these decisions? The Planning Board made a decision to rescind the decision to deny and to start over fresh. The question is, did they break any laws of the LUO? He referenced all the decisions of the Planning Board re: multi-unit.

Mr. Hamilton addressed storm water issues and referenced *Nestle Waters vs. Town of Fryeburg*, allowing for the PB to rely on testimony of their peer review consultant. This Planning Board was asked by Mr. Diehl of WWC to hire a 3rd party consultant to perform an engineering peer review of the storm water drainage plan. The Planning Board did that. The review was performed and the engineer for VOE incorporated all the recommendations made into the final plan for review by the Planning Board. The 3rd party reviewer also addressed the post development peak flow at Route 102 and the record is clear. The DOT entrance permit indicates approval. Concerning the day zero plan, McCullough said the day zero plan is suitable, and the phasing plan makes sense. There is no evidence presented to the contrary.

Chairman Geary called for a recess at 8:40 p.m. The meeting was called to order again at 8:50 p.m.

Hamilton summarized that the PB findings were consistent with the LUO. He said there is competent and substantive evidence in the record to support the finding. Mr. Hamilton reviewed each of the requests made by Mr. Patterson. The decision and findings are not contrary to the LUO, there is no abuse of the law, and the final review exceeded expectations. Mr. Hamilton concluded by saying that the appellant has failed to provide evidence that supports the appeal.

Mr. Fletcher asked Hamilton if it was the client's opinion that the BOA's opinion that their decision in January of 2009 concerning multi-unit dwellings was irreversible. Hamilton said there was a 6–1 finding of the Planning Board that it was a multi-unit dwelling. The PB did not rely on the decision of the BOA, but they made their own review of the definition.

Mr. Patterson was asked if he had comments. Regarding the storm water, he said there was a rain event last fall that did substantial damage to WWC. The developer did not repair that, said Patterson, and there was damage to the property across the road. Patterson said the issue with the right of way and the curbing has changed. Geary asked if there was any access that was limited. Patterson said access to the 16 acres, in the back, are unavailable.

Geary informed both Hamilton and Patterson that it was clear the BOA knew the project was headed for 40 units at the meeting in January when they ruled on the multi-unit concept.

Sawyer pointed out that the findings of the peer review cover the day zero requirements and it is not up to the BOA to determine if it will work. He said that would appropriately be a civil suit.

Chairman Geary asked Mr. Patterson about the storm event in 2008, and if that was the only event. Patterson said that was the major event, but there have been ongoing events. Fletcher asked what the applicant feels is deficient in the day zero plan. Patterson said the concern is the retention basins. Fletcher asked what Patterson thought was wrong with the BOA and the Planning Board definition of structure. He feels the definition was applied inappropriately.

Demeo asked if there would be an opportunity to speak to the public record. The BOA allowed her public comment as long as it pertained to the current discussion. She said there was extensive debate about the issue of multi-unit while she was a Planning Board member. The definition is only 3 years old, and was crafted to allow for affordable housing. Johnson said there was nothing provided to give purpose to the structure. Lee Worcester, current Chairman of the Planning Board, said there was

significant discussion at every phase of the VOE application of the multi-unit definition. There is no problem with the definition of structure.

Demeo said the difference between a driveway and a road is the fact that a road must be taken into consideration when calculating lot coverage. Worcester read the definitions of driveway and road and said the Planning Board, after extensive deliberation, determined the access way at VOE was a driveway, within one lot. The road giving access to the lot is Route 102. Hamilton reminded the Board that appellate review standard should be considered. He said, the issue is, can you find an error of law in the Planning Board's deliberation and decision? He reminded the Board that in the event of ambiguity the MMA manual recommends finding for the applicant. WWC access is defined as a driveway. Patterson contended that there is more than one lot served by the right of way, as the "shed" sits of 14 acres.

Hamilton said when the two different groups of the Planning Board came to two different conclusions on *roads vs. driveway*, it shows that the terms are ambiguous, and the tie breaker is that the decision goes in favor of the applicant in those circumstances. Again, he reminded the Board this was an appellate review.

Geary said there is more work for the Appeals Board to do on this application and January 6 is the next scheduled meeting. Because of conflicts in individual schedules, this application will be re-schedule to January 5, 2010 at 6:00 p.m. Location of the January 5th meeting will be announced on Wednesday, and participants will be notified by e-mail.

The Board of Appeals Meeting of December 15, 2009 was adjourned at 10:16 p.m.

Southwest Harbor Board of Appeals Minutes-February 10, 2010

Southwest Harbor Town Office
6:00 p.m.

The Southwest Harbor Board of Appeals will meet at 6:00 p.m. on Wednesday, February 10, 2010 to hear the following appeal:

I. Applicant: Harbormaster, Town of Southwest Harbor; Administrative Appeal of Decision of the Harbor Committee to reinstate a mooring and permit that was discontinued by the Harbormaster for lack of permit fee payment. This appeal was withdrawn by Dennis Dever.

The Chairman opened the meeting at 6:10 p.m. and explained the hearing procedure that will be used. Mr. Lyman indicated, with consent from Charlotte Gill that he will be her representative.

II. Applicant: Robert Bosserman, 148 Seawall Road
Purpose: Appeal the Board of Selectmen's decision of December 17, 2009 to grant a Special Amusement Permit to Charlotte Gill, d/b/a Gatsby's at 146 Seawall Road. James Collier, representing the Town made a point of procedure ref the ordinance regarding jurisdiction. He contends the Board does not have jurisdiction based on the Special Amusement Permit (SAP), saying it is the position of MMA and Mr. Collier that only the licensee can make an appeal according to the ordinance, and Mr. Bosserman is not the licensee and may not appeal. Chairman asked, referring to the BOA ordinance section 5, Powers and Limitations Paragraph E: Board shall have the power using an appellate review, under the BOA ordinance he feels he has jurisdiction. Town Attorney Chadbourn Smith referred to Section 10, Item D saying clearly the SAP Ordinance applies and overrules the BOA ordinance. Attorney Collier: Article 2, Section J of the SAP follows State Law and it is clear that what is intended by State law is that the licensee may appeal, and they only, and it states the standards under which an appeal is successful. Collins of MMA agreed with that context. The Chair of the Board of Selectmen has warned the applicant, and the recourse is that the permit may be revoked at any time with just cause. Chairman asked Mr. Bosserman if he had a rebuttal. Bosserman said he thought it was clear that the Board, under their Ordinance, had jurisdiction. Chairman and Board members determined they did not have jurisdiction to hear the Special Amusement Permit appeal. Bosserman asked if he had the ability to appeal to the State. Chairman and Board members were unable to give that advice. With respect to Appeal Number 1, the granting of a SAP, the BOA determined that they do not have jurisdiction to hear the appeal. It was Moved (Morrill) and Seconded (Sawyer) that the BOA recognizes that they do not have jurisdiction to hear the appeal of a special amusement permit.
Vote: 3–0

III. Applicant: Robert Bosserman, 148 Seawall Road

Purpose: To Appeal the CEO's stipulation that 146 Seawall Road meets all the requirements of the SWH LUO and that the parking is adequate for the proposed 26 seat establishment. Chairman: this is an appeal of the Code Enforcement Officer's information presented to the Board of Selectmen on December 17, 2009 during the granting of the SAP. Mr. Collier referenced the BOA ordinance, also in regard to Section 5.E, and Item B (special amusement permit)–Mr. Lagrange did not make any decision on the special amusement permit but only gave evidence, and it is not appealable. Chairman asked if it was relevant that the Selectmen acted on poor evidence–Collier said it is not relevant, and the remedy of the neighbors is to challenge at the meeting and they do not have the right to appeal later. The decision is made by the selectmen and not by the Code Officer. Chairman asked Mr. Bosserman if he had the opportunity to argue the testimony of Mr. Lagrange. He said in some cases he did, and had presented some information. He provided transcripts of that meeting. Chairman asked Collier for the rational of there being no relief at the local level. Mr. Collier said the SAP is a subset of the liquor licensing process and in a sense goes to the local control. Once a liquor license is issued by the State, with the Selectmen approving it first, it is possible to request a Special Amusement Permit, which tracks liquor licensing procedure and is done by the Town directly. There is opportunity for the abutters to protest, and present to the Board of Selectmen. If the Board does not agree and uses their own discretion or judgment the recourse again at the local level is the ability to revoke, and beyond that it is only a one-year permit. Chairman and Board members understood. Bosserman: part of the application for a liquor license requires the municipality to stipulate that the location meets the requirements of their land use ordinance. It is part of the appeal that the land use ordinances are not all in compliance; that aspects of the premises may or may not be in compliance or may need to be changed because of the issuance of the Special Amusement Permit. Sawyer said that the CEO has not made a decision and the Board cannot rule until that decision is made. Geary said that part of this, unlike an addition, is that a permit can be revoked. Two issues in the second appeal, the CEO did not make a decision but only provided information; therefore, there is no authority for the Board to hear this appeal. It was Moved Geary that the BOA does not have jurisdiction to hear the appeal filed by Mr. Bosserman relating to the CEO interpretation of the property in question. Seconded Morrill.

Vote 3–0

IV. Applicant: Robert Bosserman, 148 Seawall Road

Purpose: To Appeal the issuance of a permit for renewal of previous permit #1320 (1998) for a 26 seat restaurant. Mr. Collier said he would represent the CEO in this matter. Procedural matter: referring to Section 9, Hearing, C: Board shall provide for exclusion of irrelevant materials and he submits to the Board that Mr. Lagrange did not issue that permit. The applicant asked for a permit for a sign and dumpster. The CEO asked for more buffering along the lot line to be completed by June. There is no room to go into a

discussion of whether the restaurant should or shouldn't be there–all that should be under appeal is the permit for a dumpster and a sign–the Ordinance provides that unduly repetitious information be ignored.

Bosserman: In a notice to abutters issued on Dec. 28th: a permit application refers to the renewal of the permit. Lyman told the Board that was not supplied to the property owner prior to this hearing and was not part of the materials submitted for this evening. The letter to abutters says the permit is being renewed. The Board recessed at 7:05 p.m. and reconvened at 7:20 p.m.

Attorney Collier and the CEO returned to the meeting and said there was imprecise language in the permit notice and application, and it was not a renewal of a previous permit, but Section 2 .A. 9 of the SWHLUO, General Regulations states: The CEO shall determine compliance. If the property is not in compliance, a permit shall not be issued. The CEO received an application for a permit for dumpsters and signs and he noticed buffering needs to be improved; he thought that had something to do with the old permit. Collier said his experience is that it is the job of the CEO to bring property into compliance, and this CEO was attempting to be sure the property was in compliance–what he needed to do was tell the applicant that before the permit the buffering has to be fixed. The CEO can order items to be fixed prior to issuing permits–the notice to abutters wrongly stated "renewal". The issue is that the CEO was bringing the property into compliance in order for the permit to be issued. There was no renewal of anything.

Bosserman is unwilling to agree to that. He said it flies in the face of facts–the Board of Selectmen discussed buffering and the 1998 permit. The CEO admitted that there were buffering issues; secondly, as part of the process, he submitted a modified site plan with respect to how the parking was laid out; Bosserman contends the new parking plan is not in compliance with the parking ordinance; the 1998 site plan on the original approval, was substantially in error to 1998 standards and subsequent alteration to that as part of the process for this new permit, the CEO changed that. Thirdly, the concept of "renewing" the permit.

Lyman spoke saying there is no section of the LUO talking about the permit renewal process. There needs to be a separation between the original proposed use permit, and it doesn't expire, become abandoned or discontinued; the renewal process referred to does not exist; Lyman feels CEO was talking, in order to grant the new permit for the dumpster and sign, about buffering. Permit established in 1998 does not need to be renewed, and is still in effect, but some of the standards of the property need to be brought up to current standards.

Chairman said that Bosserman has raised issued about the parking. Chairman said the Board would like to hear the applicant's case. Morrill said he would like the Board to have a copy of the 1998 ordinance in order to review this application. Chairman said it is relevant if the 1998 standards are met. Collier reiterated the authority of the CEO.

Bosserman: Section 2, General Regulations regarding previously issued permits: there are 4 areas of this issue that are relevant to this subject. Life of the permit: 1998 buffering provision that was never satisfied; second in 2004 CEO, independent of the Planning Board, reviewed and approved a 14 x 14 addition on the front of the property, built over one portion of an existing front parking space–again the question of buffering was brought up; applicant thinks the validity of or continuation of Permit 1318 is invalid due to the expiration of the permit, reference Section 8 H 2; discussing life of the permit. At the end of the two year period the applicant must have his project in compliance with the ordinance. Bosserman said the main purpose of the LUO is to promote conformity. Section 4 of that says applicants need to provide site plans including parking and buffering, so long as no undue hardship is involved; Bosserman believes these things should be brought into compliance. The parking configuration due to site plan irregularities; Bosserman discussed parking spaces by use; the permit authorized not only a restaurant, but also a residence on the second floor–parking included 2 parking spaces for that residence; vehicle movement impacts the public safety. Mixed use zoning carried responsibility when approaching the issue of compliance. Bosserman presented three drawings saying the 1998 drawing and the 2009 drawing were the same with minor adjustments and some of the same mistakes. Geary said the 1998 parking standards and the current parking standards seem to be one and the same. Bosserman discussed the history of the driveway/vehicular access to the two properties at the rear of the Gatsby property. The petitioners disagree with the parking configuration and call into question the 26 seat facility. He contends that it also constitutes a change of use. The second floor area has been changed to transient use, and that only requires one parking spot. Parking standards indicated are out of compliance with the 1998 and current ordinance. Bosserman said a larger issue is "can a CEO alter an existing site plan used in a prior Planning Board approval?" Parking and buffering are clearly Planning Board review items. He contended that the change of use is the change from a residence on the second floor to transient use of the second floor. Bosserman said the CEO exceeded his authority and this should be remanded back to the Planning Board. Referencing the change of use and the addition of a Special Amusement Permit, that changes the use of the property. Going from a residence to a transient residence is also a change of use; Section VIII, B: Use definition states: the purpose or activity for which land or any building thereon. Bosserman said the impact of the "change of use" raises the level of buffering required. He proposed the new use of entertainment and hours of the restaurant will have a heightened serious negative impact on the neighbors. The life of the permit expired; parking and road issues do not meet the current standards; change of use and buffering are also Planning Board issues.

Chairman asked if Collier or the CEO had questions. None. Board did not have questions at this point. Collier was asked to respond. Collier will discuss the law and CEO the facts. 1. the life of the permit is simple: get a permit from CEO with a year to make substantial start and complete within two years. Standards that were in place were standards of the day. New approval must go to the new standards. Regarding the permits on the property, it was done and Bosserman should have gone to Lagrange and asked for enforcement of the permit. It can be appealed. If the neighbors did not like the 1998 permit, it should have been appealed then. The standards in place at the time are expected to be lived up to; this is an application for a dumpster and a sign. Under Section II A. 9 reference Section 10.b the CEO's job is to inspect and enforce the Ordinance, notify abutters in writing, suggest improvements. In each case of a violation it is inspected, the technically correct thing is to send a letter to the person involved and suggest the corrective methods. This CEO works with the citizens. Owner can appeal to the BOA and if that doesn't work, it goes to court. CEO is an excellent Code Officer; he talks to people and works with them–as in this case, he looked at the dumpster and the sign and saw no outstanding violations. Collier asked the Board to give the CEO room to do his job. Anything happening after thirty days is not subject to complaint.

Chairman asked CEO to comment: The CEO discussed the sequence of permits and checked to be sure that parking was available with no deficiency. Nine (9) spaces adequately fit restaurant seating. The change from residence to a transient dwelling unit still makes it a dwelling unit. The CEO was satisfied that there was nothing wrong except the buffering which, with the application for the liquor license–Section VI.5.a–due to the season buffering may be done at a more convenient time. The 1998 permit approved by the Planning Board, with no changes in use, no expansion in use, meets the requirements. Sign and dumpster needs a permit–no new permit needed–the buffering was attached to the new permit. The CEO feels that what was previously used (conforming use, not a non-conforming use) was accurate.

Definition of change of use was requested by Chairman. CEO said that accessory use is not a change of use. It is incidental and subordinate to the principal use. Chairman asked if the impact of use comes into play with the addition of the accessory use. CEO said the use is within the same footprint, and the use hasn't changed. Chairman feels the PB should review buffering. Collier said under definition of use the purpose is a restaurant, the liquor license is an accessory use and the SAP an accessory to that–the Selectmen voted 5–0 that Gatsby's met the requirements. Bickford said that after each application that comes before the Selectmen the statement is always made 'what we give we can always take away'. CEO said without a liquor license there is no permit required for amusement. Bosserman said the pervious permit was a restaurant and the current permit is a restaurant lounge. He said that constitutes a change of use. Collier objected. There is a restaurant, a permit for a sign, and a dumpster. Geary asked re parking: it appears the 1998 permit was looking for 11 spaces–

CEO said there are only 9 spaces now. The decrease in use is in the dwelling unit. The seating was determined based on the parking available.

Shriner described the difficulties of maneuvering the Ice Pond Road since the opening of Gatsby's. Bosserman said the parking standards were in existence in 1998, the same; the standards are not met, and it is out of compliance. CEO said he cannot go back and change what happened, the decisions stand now. Looking at the parking area there, the Planning Board approved what is there. Bosserman said no one is contending the structure should change, the parking should be further away from the road–the appellant is saying the conditions have changed since 1998.

Lyman suggested that the compliance with the 1998 permit is in the proper hands when it is in the hands of the CEO, and where there is not compliance with the approval of the Planning Board, CEO has the right as in the case of buffering, to ask the owner to fix it.

Collier reminded the Board again that the permit being appealed here is for a sign and a dumpster. Chairman asked for accounting of the 9 spaces. CEO provided that. Sawyer asked what happened with overflow and the CEO said complaint could call him or it could be a civil issue. Gill said that she has spoken to the church and asked for permission for parking there. Shriner said the church told her that they did not give permission for parking in their lot. Bosserman asked if parking for the restaurant is only in the 9 designated spaces. Collier said the CEO role is to know the ordinance. If there is one person to go to, it's the CEO. Give deference to the experience of the CEO.

Bosserman said the dumpster and sign comes together with a revised site plan and a recommendation for buffering. He believes a higher buffering standard should be applied today, and that is the pervue of the Planning Board. The chairman closed the public hearing at 10:00 P.M.

Discussion: Charles said there is clearly no change of use. Geary and Sawyer were not ready to make a decision on this application. Collier asked that the public hearing be officially closed. It was Moved Morrill, Seconded Sawyer to close the public hearing.
3–0 in favor.

Discussion of continuation meeting: February 11th, Thurs., 6 p.m., library at school.

The meeting was adjourned at 10:08 p.m.

Southwest Harbor Board of Appeals-Continuation Hearing-February 11, 2010 (Draft)

Pemetic School Cafeteria

I. Call to Order/Roll Call: The meeting was called to order at 6:03 p.m. Board members present: Lunn Sawyer, Jim Geary, Charles Morrill.

II. Continuation: Applicant: Robert Bosserman, 148 Seawall Road
Purpose: To Appeal the issuance of a permit for renewal of previous permit # 1320 (1998) for a 26 seat restaurant.

The Public Hearing was closed at 10:08 p.m., Wednesday, February 10, 2010. The continuation hearing began on Thursday, February 11, 2010 at 6:00 p.m.

Sawyer: when there is a 26 seat restaurant, is that occupancy? CEO: the basis is the seating and that should follow through with the State as well. More than 26 is not a problem. Permitting: If the Seaweed Café was closed for 20 years, and 20 years from now someone wants to open a restaurant, is that OK? CEO that may be a judgment call, but its last use was a restaurant. If someone buys it as a home, that is the last use. There is no abandonment clause in our ordinance. Collier said that the usual concept is if you had a restaurant in a completely residential zone, in some ordinances there is an abandonment clause for say 1 year or 1 ½ years, only with that clause would the permit for the restaurant be void.

Geary: Asked the CEO about the driveway being converted to a road with back lot access, please walk through the property and the transition that has taken place. CEO: the division of land was somewhere in the early 80's, a survey is around 1981 – three parcels predating the ordinance. The structure where the restaurant is also early 1980's. There were deeded Rights of Way (ROW) to other lots. This is the driveway next to the building. By our ordinance it now falls into the category of a road. The house behind the restaurant was built in the 1980's and in 2004, a building permit was allowed for the Mattingly's to build on the third lot. As the CEO looked at that, he questioned the issuing of the permit. There is a 25' ROW over a stream on the other side of the restaurant that accesses the back properties, and building setbacks from the stream is 25'–the CEO also questioned why someone would give a ROW over a stream, unless there wasn't a stream there at the time the ROW was granted. Geary: when formal access was granted on the driveway which turned it into a road to the third lot, it didn't turn it into a non-conformity. CEO said when the ordinance came into effect, in 1988, it turned it into a non-conformity. The use is conforming, although it is a non-conforming lot in zone C. There was an office prior to the restaurant, and in 1998 it came to the Planning Board which then approved the restaurant use. CEO

made a decision as he measured the parking area in the front it is no different than that approved by the Planning Board except that it took away a spot but allowed another parallel spot. Back parking allows for diagonal parking, and there are sufficient spots for the use. CEO has the authority to permit the signs, and the dumpster because it is under 250'.

Geary said it appears there was some sloppiness dealing with this issue going back to 1998, which he finds unusual. Having reviewed the LUO many times, he can't find anything that can be done about it today. There is a potentially troubling situation which could occur at the restaurant with the parking and the driveway, that may cause potential problems, but he said he doesn't know, that in respect to the CEO issuing a permit for a sign and a dumpster, that there is anything that the Board can do about the parking. There is a need for the property owner to consider being a good neighbor. He hears and feels the concerns for the neighbors of this property, as the usage has the additional use of live entertainment to potentially later hours in the evening, and there is a need for sensitivity on the part of the property owner on that issue. To the extent it can be relieved by buffering, we have no jurisdiction to mandate anything, but the message is those things are extremely important and can be addressed by the CEO. Other than asking for cooperation there appears to be nothing this Board can do. Morrill pointed out that the division of land took place before the ordinance was in place. The expansion of the road was not mandated because the division of property was already accomplished prior to the ordinance. Morrill would like to see the back parking lot extended north.

Sawyer said looking at the access of the property, it appears that the Seaweed Café should not have been permitted originally, and the development of the third lot compounded the problem. There appears to be nothing that the Board can do about this. Expansion of the back parking area would be an improvement.

Geary said, going over the ordinance, there appears to be no jurisdiction of this Board to do anything about the permit for a dumpster and sign, and failing that, there is nothing the Board can do about the other issues that were raised.

It was Moved (Geary) and Seconded (Morrill) that the Board of Appeals denies the Bosserman appeal of the issuance of a permit for renewal of previous Permit 1320 issued in 1998 for a 26 seat restaurant, because the permit that the CEO issued was related to a dumpster and a sign, and other conditions on the property are basically unchanged since the 1998 permit was issued. The Board of appeals has no jurisdiction to address the current parking and buffering on the property site. Vote: 3–0 Motion carried.

Collier accepts as a matter of fact that the CEO's testimony re Section II a 9 is the case. The Board accepts the testimony of the CEO as regards the standards outlined in Section

II.a.9 of the SWH LUO, with the exception that he has required that the buffering be brought up to standard, and has found fewer parking spaces than was originally allocated. The Board found the testimony to be credible and based the decision of the Board upon that testimony.

Moved Morrill, Seconded Geary that the Board heard testimony from the CEO about the property, and he testified that it was not in compliance with the previously issued permit with respect to the buffering. He has required that the buffering be installed no later than June 1, 2010 and looked at the parking and determined that it is in compliance with the ordinance and that there were no other deficiencies found on the property. Vote: 3–0 Motion passed.

Geary addressed the visitors and thanked them for their civil participation in this process. He expressed frustration that, personally, the process for relief comes to calling the police. Everyone here wants this to work, and hopes all can remain neighborly and succeed in the process.

The meeting was adjourned at 6:40 p.m.

Southwest Harbor Board of Appeals Minutes-March 17, 2010

Southwest Harbor Town Office
6:00 p.m.

I. Roll Call/Call to Order: The meeting was called to order at 6:04 p.m. Present: Donald Lagrange, Code Enforcement Officer; James Geary, Charles Morrill, Lunn Sawyer, Ted Fletcher (excused).

Visitors: Robert Bosserman, Erika Schriner, Steve Lyman, Charlotte Gill.

II. Request for Reconsideration: Robert Bosserman, 148 Seawall Road: denial of appeal of the issuance of a permit for renewal of previous Permit #1320 (1998) for a 26 seat restaurant. Lyman asked to clarify the ground rules of a reconsideration saying he understands it is reconsideration of the evidence already presented. Geary explained that if the Board decides to reconsider it was possible to enter new evidence and if either party needed time to prepare materials that time could be allowed. All members of the Board would need to vote unanimously to reconsider, as the BOA ordinance requires a majority of three (3) under Section 7 Voting. Gill questioned how the Board could reconsider the permit for a 26 seat restaurant as the appeal was for the sign and the dumpster. Geary and the Board said they did hear testimony about other items during the appeal process.

Mr. Bosserman was asked to speak to the Board. Bosserman asked why the Town Council was not here, as his appeal is against the Code Officer. Lyman asked if the Board was going to allow testimony before the reconsideration decision. Bosserman asked if there was anything in his letter requesting reconsideration that was of interest. Lyman objected. Geary asked Bosserman to convince him and the other Board members to reconsider. Bosserman addressed the due process issue re the closed hearing on February 11th. He felt he did not have the same privilege. He also did not get to present a summary and the questions that went to the CEO and his counsel was specific from the BOA and he felt they re-argued and summarized the case which Bosserman did not have. Currently this is a limited opportunity to do that. There was incorrect testimony as to when the road came into being as it refers to the parking issues and changed the travel way. Bosserman said the change wasn't grandfathered into the 1998 permit. The driveway at that point was non-conforming. There was conflicting and suspect testimony regarding the measurements of the back parking lot. Why take such pains with that while ignoring other standards of parking such as the aisle width. There was an error in the number of parking spots in the front area which would affect the number of seats in the restaurant. Bosserman read from the Planning Board minutes of March 5, 1998 and amended on March 19, 1998: Reports #4, last paragraph. The fact that the parking situation was not modified resulted, according to Bosserman, in the CEO looking at a sketch that was incorrect. Parking and buffering are connected to that. He contends that the adjustments would only allow a 20 seat restaurant.

He referred to Section II a 9 of the LUO which states that if there are areas out of compliance no additional permits may be issued. Geary read the section allowed. Bosserman does not believe the CEO has the authority to evaluate the buffering, and feels strongly that it is a change of use and that creates a need for the Planning Board to determine the impact of the change of use on the buffering, as is parking. Bosserman said because of those issues, the property is out of compliance. There is, according to Bosserman, a real issue of allowing this type of establishment in a predominantly residential area. He feels the Board should assure themselves that they are enforcing all the parking standards, and to mitigate the increased impact of that use through a Planning Board review of the buffering standards. Section VI, A, buffering was quoted. Geary told Bosserman he was covering the same ground as before. Bosserman said his is contesting the issuance of a permit. Bosserman said the new evidence is that the previous Planning Board eliminated the two parking spaces and reduced the number. Geary said the only authority the Board has is to tell the CEO to take away the permit for the sign and the dumpster. Geary reiterated that Bosserman needs to convince the Board that there is reason to reconsider. Bosserman again referred to the error of parking. Geary urged him to move on. Bosserman referred to the conflicting testimony of the CEO about measuring the back parking lot and does not agree with the measurements. He stated he went to the file today and still did not find any additional information on the parking spaces measured. Bosserman said it is a very simple process for the BOA to send this back to the Planning Board. Geary said the CEO issued a permit for a sign and a dumpster only. It is untimely to appeal the permit issued in 1998 and the Board does not have jurisdiction over that. The Board had no questions. Bosserman said the Board has the authority to negate the sign and dumpster permits. Sawyer said if the permits for those two items were taken away the restaurant would still be there. Bosserman said the BOA could remand this back to the Planning Board – and Geary and Sawyer both said this Board did not have the authority to remand a permit that was issued in 1998 back to the Planning Board. Bosserman said the findings of fact (14d) (14e) are in error and the reliance on that was in error.

Geary asked for a motion to reconsider the appeal of Bosserman. No member of the Board made a motion to reconsider the appeal.

The Board discussed with CEO and recorder, upcoming appeals, drafts of minutes and the appeal to superior court of a decision on Village at Ocean's End.

III. Adjournment: The meeting was adjourned at 7:30 P.M.

Town of Turner Zoning Board of Appeals Minutes-July 11, 2002

1. Meeting called to order by Chairman, Mr. William Rupert at 7:03 p.m. Those Board Members present were Mr. Rupert, Mr. Harris Bradeen, Mr. Daniel Fitzsimmons and Mr. Paul Bernard. Board Members: Mr. Jaison Breton, Mr. Paul Varney and Mr. Leroy Hunter were not present. Also present were CEO, Mr. Roger Williams; the Turner Town Manager, Mr. James Catlin; and the Turner Town Attorney, Mr. Bryan Dench. There were also present several persons in the audience with an interest in this evening's agenda.

1A. Mr. Rupert addressed the Board Members and stated that Mr. Jaison Breton and Mr. Paul Varney had resigned from the Appeals Board. Mr. Rupert asked the Board Members if they could suggest any replacements to let him know. In the meantime Mr. Rupert will notify the Selectmen that there is a need to fill these two open positions.

1B. The Board Members reviewed the minutes from June 19, 2002 Board Meeting. Mr. Fitzsimmons made a motion to accept the June 19, 2002 Minutes. Mr. Bernard seconded the motion. The Board voted unanimously to accept the June 19, 2002 minutes.

2. ADMINISTRATIVE APPEAL FILED BY EUGENE JORDAN

Mr. Rupert stated that this Appeals Board Meeting was being held this evening at the request of Mr. Eugene Jordan as a continuance of the June 19, 2002 meeting. Mr. Jordan had requested via a letter presented at the June 19, 2002 meeting that he be given additional time to secure legal counsel to represent him with regards to this Appeal. At the June 19, 2002 meeting the Appeals Board Members voted to give Mr. Jordan until July 11, 2002 to have his Appeal heard before the Zoning Board of Appeals. Mr. Rupert then read a letter that he had received today, July 11, 2002 from Ms. Sandra Philipon, Assistant to the Town Manager. This letter stated that Mr. Jordan had telephoned her at 3:45 that afternoon to say he needed more time to secure legal counsel and that he was not ready to represent himself this evening. Copy of letter from Ms. Philipon is attached. It should be noted at this time Mr. Eugene Jordan was not present, although he arrived later. Mr. Roger Williams then stated that Mr. Jordan had been advised of this date by certified mail and by ordinary mail, and that notice had also been published in the newspaper. He noted that Mr. Travis Jordan, Mr. Eugene Jordan's son is present this evening to represent his father. The administrative appeal names Travis Jordan as appellant along with Eugene Jordan. The Board Members agreed to let Travis Jordan speak on his father's behalf. Mr. Bradeen then read a statement with regards to how this Administrative Appeal would be handled by the Board. Mr. Bradeen also stated that the CEO, Roger Williams who represented the Town of Turner on April 3, 2002, inspected the property on Tax Map #8, Block 1, Lots 22 and 22A. These properties are in the names of Eugene Jordan, Travis Jordan and Nezinscot River Property, Inc. Mr. Williams inspected these properties because the consent agreement had

expired and found these properties to be in continued violation of the Turner Automobile Graveyard and Junkyard Ordinance and the Turner Zoning Ordinance. Mr. Williams, acting as CEO for the Town, sent Mr. Jordan two Notices of Violation dated April 29, 2002. An appeal regarding these notices of violation has been filed by Mr. Eugene Jordan as an Administrative Appeal. There was some discussion regarding the ownership of Lots 22 and 22A. Mr. Travis Jordan confirmed that he and his father, Eugene Jordan own both lots. It was then discussed among the Board Members that the Administrative Appeal had only been filed for Lot 22A. The discussion then turned to the issue of whether the appellants have shown standing. Mr. Dench advised the Board that he felt that there was indeed potential harm if Mr. Jordan was not allowed to continue his business. Therefore, the answer to whether there is standing regarding this issue is yes. Mr. Dench also stated that the burden is upon Mr. Jordan to demonstrate that Mr. Williams was in error in issuing the Notices of Violation and Order to Correct. Mr. Brian Small then addressed the Board and stated that he had been asked by Mr. Eugene Jordan to ask the Board for another continuance since he has not been able to retain an attorney. Mr. Fitzsimmons then asked Mr. Small where Mr. Jordan was this evening. Mr. Small responded that Mr. Jordan was on an AAA tow call, and that is why he is not present at the time. Mr. Fitzsimmons then asked Mr. Small if Mr. Jordan had ever threatened any Board Member or Town Official with regards to this Appeal issues. Mr. Small's response was Never. Mr. Rupert then asked if there were anyone in the audience who would like to make any comments regarding this appeal. Mr. Catlin commented that he believed Mr. Williams followed all the necessary procedures with regards to the Notices of Violation. Mr. Catlin also stated that he did not think that there was any evidence to show any errors in the way this issue was handled. The Board then asked Mr. Small if the abutters to Mr. Jordan's property had been notified of this Appeal. Mr. Small's response was No. Ms. Jody Goodwin who is representing the Sun Journal then addressed the Board Members. Ms. Goodwin stated that according to the town of Turner's Ordinance more than 3 junk (unusable) cars on any said property constitutes a junkyard. Mr. Williams then stated that on May 13, 2002 upon his inspection of Mr. Jordan's property there were approximately 60 vehicles as well as an old mobile home. There was then some discussion regarding the fact that the Appeal filed by Mr. Jordan only named Lot 22, but that a letter received from Mr. Jordan did refer to All Notices. Mr. Dench advised the Board that he felt this Appeal should include both Lots 22 and 22A. The Board Members agreed. Mr. Fitzsimmons then made a motion to deny this appeal based on the fact that no material had been provided to prove that the CEO or the Town of Turner had made Administrative errors. Mr. Bernard seconded the motion. Mr. Bradeen then stated that he thought Mr. Fitzsimmons should amend his motion to include the fact that none of the Abutters had been notified regarding this Appeal. Mr. Fitzsimmons withdrew his motion, as did Mr. Bernard. Mr. Fitzsimmons the made a motion to deny this Appeal based on the fact that the Abutters had not been notified properly and also that there was not enough evidence to prove that the Town had made any Administrative errors. Mr. Rupert then explained to Travis Jordan that the procedure for notifying all Abutters to

this property had not been followed. A letter sent from Mr. Eugene Jordan via Ordinary Mail as well as Certified Mail should have been sent to the Abutters regarding this Appeal, and in fact this was not done. Mr. Bernard commented that Mr. Jordan had not complied with the Appeal Application procedure. Mr. Fitzsimmons then commented that the Appellant had not shown any evidence that the Junkyard Ordinance is incorrect. Mr. Bernard added that he felt that Mr. William's interpretation of this Ordinance was indeed correct. Mr. Bradeen also stated that this business has been operating for a long time without a permit. Seeing no other discussion Mr. Bernard seconded the motion. This motion was then tabled for further discussion. Mr. Dench was asked to read his notes concerning the suggested Findings regarding this Appeal by the Board Members. Mr. Dench read the following:

1. The Board has jurisdiction over this Appeal, one appellant, Travis Jordan appeared, and Mr. Eugene Jordan was represented by Travis Jordan and Brian Small.
2. The Board continued this Appeal at the request of the Appellant on June 19, 2002 to July 11, 2002. The Appellant had notice of this hearing by the vote of the Board on June 19, 2002, and by notice by ordinary and certified mail following the June 19, 2002 meeting.
3. The Board voted on June 19, 2002 it would not continue the Appeal again.
4. The Appellant has failed to notify the Abutters as required by the Town Ordinance.
5. The Appellant has presented no facts, no evidence, and no argument to demonstrate any error by the CEO in the Notices of Violation dated April 29, 2002.

Mr. Dench then asked the Board Members if they agreed to these findings. The Board Members response is as follows: Mr. Bernard, Yes; Mr. Fitzsimmons, Yes; Mr. Bradeen, Yes; Mr. Rupert, No.

Mr. Dench then stated that based on the facts that the Abutters had not been properly notified and that the appellants had provided no evidence to show that the CEO had not acted properly there was really no basis for this Appeal. This Appeal should be denied. Mr. Dench felt that such Findings would satisfy a Court of Law. Mr. Bradeen asked Mr. Dench if any fines would be imposed. Mr. Dench's response was that this issue would be decided by a Court of Law.

Mr. Rupert then asked Travis Jordan if he understood the discussion that just took place. Mr. Jordan's response was yes. Mr. Small then asked Mr. Bernard if he was a Member of the Turner Conservation Committee. Mr. Bernard's response was yes. Mr. Small asked that this be noted in the record. Mr. Bradeen then read from the Town of Turner Zoning Ordinances on Page 111, Section 6. Administrative, Enforcement and Penalties. Copy of this Section is attached. Mr. Bradeen stated that Mr. Williams had been reappointed and sworn in on April 1, 2002. Therefore, Mr. Williams legally represented the Town of Turner.

Mr. Rupert then read again the Findings drafted by Mr. Dench. Mr. Fitzsimmons made a motion to accept Mr. Dench's Findings. Mr. Bernard seconded the motion. Mr. Bradeen wants to include in these Findings that the issues addressed by the CEO, Roger Williams were handled properly and that Mr. Williams had the authority to issue these violations. Mr. Rupert then asked each Board Member if they agreed with the above mentioned Findings. The Board Members response is as follows: Mr. Fitzsimmons, Yes; Mr. Bradeen, Yes; Mr. Bernard, Yes; Mr. Rupert, Yes. The Board Members voted unanimously to accept the Findings with the above-mentioned additions. Mr. Fitzsimmons then made a motion to deny the Administrative Appeal filed by Mr. Eugene Jordan based on the Findings voted on above and on the facts that the actions taken by Mr. Roger Williams, the Turner CEO were correct. Mr. Bradeen seconded the motion. Mr. Rupert then polled each Board Member regarding this motion. Mr. Fitzsimmons stated that, yes, he agreed with this decision. Mr. Fitzsimmons also stated that there was no evidence by the Appellant that contradict the CEO or the Town Ordinances. Mr. Bradeen stated that, yes, he agreed with this decision. Mr. Bradeen also stated that he did not believe there was enough evidence to support this Appeal. Mr. Bradeen also stated that Mr. Williams acted properly. Mr. Bernard stated, yes, he agreed with this decision. Mr. Bernard also stated that he supported the Findings, there was insufficient evidence and that the Abutters had not been properly notified. Mr. Rupert stated that, yes, he agreed with the decision. Mr. Rupert also stated that the CEO acted properly with regards to this violation. The Board Members then voted unanimously to deny the Administrative Appeal filed by Eugene Jordan. Mr. Rupert then stated that the next step would be to file an Appeal with Superior Court.

It should be noted that Mr. Eugene Jordan appeared at this hearing at approximately 8:15 p.m.

3. OTHER ITEMS ON THE AGENDA

Mr. Rupert asked if there were any other items to discuss this evening. There were none.

4. ADJOURNMENT

Motion to adjourn made by Mr. Fitzsimmons at 8:27 p.m., seconded by Mr. Bernard, and unanimously accepted.

Respectfully submitted,
Karen Wilcox
Recording Secretary

Excerpts from Maine Supreme Court Decisions

A. *Widewaters Stillwater Co. v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597:

The only evidence of the Board's decision in the administrative record is the transcript of the April meeting. The administrative record contains no written decision or findings of fact by the Board. Because the Board made no findings whatsoever, the parties have sought to glean the basis of its decision from the remarks of the individual members found in the transcript of the April Board meeting. Each of the five Board members spoke during that meeting, with each giving his reason for voting for or against the permit. All three members voting against the permit spoke of their concerns about the nature of the Penjajawoc and its unique habitat. One of the three, however, stated that his single reason for voting against the permit was the location of the detention pond. The member stated he would have voted for the permit if the storm water detention pond was more than 250 feet from the Penjajawoc. Section 165-114(J) of the Code states that when part of any project is within 250 feet of any stream, the Board must consider whether the project "will not adversely affect the shoreline of such body of water." Questions concerning the location of the detention pond were raised at the April hearing, and a representative of Widewaters stated that "a good portion" of the pond was located within 250 feet of the Penjajawoc.

Although one of the Board members clearly stated that his reason for rejection was the location of the detention pond, the other two members voting in the majority were less direct. One appeared to agree that the location of the detention pond within 250 feet was a problem and that Widewaters had not shown that the project would not adversely affect the Penjajawoc, but he also spoke about the "irreplaceable natural beauty" of the Penjajawoc. The lack of findings in this case severely hampers judicial review. The majority of the Board should have stated the basis of the denial of the permit and should have made factual findings underlying the decision. If the basis of the Board's decision was the impact of the proposed development on the "scenic or natural beauty of the area or on historic sites or rare and irreplaceable natural areas," Code § 165-114(I), then we would have to reach the issue of whether that section is unconstitutional. We do not reach constitutional issues when it is unnecessary to do so. *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, 769 A.2d 857. Because of the lack of findings by the Board, it is not clear that we must reach this constitutional issue.

As we said in *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, 14-18, 769 A.2d 834, 838-40, when an administrative board or agency fails to make sufficient and clear findings of fact and such findings are necessary to judicial review, we will remand the matter to the agency or board to make the findings. Although both parties assert facts as though they were found by the Board or state that the Board made certain findings, this is not a case in which the facts are obvious from the record. Our reasons for requiring findings

in *Christian Fellowship* are equally applicable here. Those reasons include the statutory requirement to make findings as well as policy concerns. See 1 M.R.S.A. § 407(1) (1989); see also 30-A M.R.S.A § 2691(3)(E) (1996). This case has the additional aspect of a constitutional challenge to the Bangor Code. Because findings are necessary for a reviewing court to determine the factual basis for the Board's decision and whether that decision is adequately supported by the evidence, we remand the matter for findings.

RUDMAN, J., with whom SAUFLEY, C.J. and DANA, J. join, concurring. Although I concur in the opinion of the Court, I feel constrained to write separately to advise the Bangor Planning Board and other similar boards what we seek when we remand for findings of fact. We have on at least three occasions recently remanded pending cases for findings of fact. We review, in this case, the Planning Board's findings of fact to determine whether those findings are supported by substantial evidence. When a board's findings of fact are insufficient to apprise us of the basis of the Board's decision, it is impossible for us to determine whether that decision is supported by substantial evidence.

The Bangor Land Development Code contains in section 165-114 the standards to be used by the Planning Board when reviewing any plan for approval of a land development project. The City Solicitor directed the Board to section 165-114 prior to the Board's consideration of Widewaters' application. Before the Board commenced deliberations, the Planning Officer reviewed the approval standards and indicated the conclusion of the Planning staff that Widewaters' site plan met all of the ordinance requirements. The Chair then indicated that he would accept a motion in the affirmative. A member of the Board then stated, "I so move," which motion was seconded. Each of the Board members then spoke at length, after which the Chair stated, "I think pretty much the decision has been made," denying the Board's approval of the site development plan. The record, however, is devoid of an indication as to which of the standards of section 165-114 a majority of the Board determined were not met.

We remand to the Bangor Planning Board so that the Board may specifically indicate which of the eleven standards were met and which of the standards were not met. It may well be that when considered separately there are three members of the Board that found the applicant satisfied all eleven standards. Rather than to have considered a blanket motion to approve, to permit effective appellate review, the Board should have voted separately on each of the applicable standards or in some manner indicated which of the standards the applicant satisfied and which the applicant did not. In this manner, a reviewing court can determine whether there is substantial evidence in the record to support the Board's decision.

B. Chapel Road Associates v. Town of Wells, 2001 ME 178,787 A.2d 137:

The Board issued "Findings of Fact" which stated that the l.02-acre parcel is located in the general business district; that abutters were notified of the proceedings; that the Board conducted a site walk and held a public hearing and several workshops; that the proposal is for a 3,800 square foot fast food restaurant with forty-two parking spaces; and that the applicant submitted plans and studies considered by the Board. The findings also noted that the Board considered peer reviews of the traffic plan as well as staff reviews. The findings concluded with the following statement: "The Board finds that the applicant failed to demonstrate compliance with Chapter 138, Land Use Code of the Town of Wells, Maine. In particular, the applicant failed to demonstrate compliance with section 10.6.1 of this code…." The Board then quoted the traffic portion of the ordinance:

"Traffic. The proposed development shall provide safe access to and from public and private roads. Safe access shall be assured by providing an adequate number of exits and entrances that have adequate sight distances and do not conflict with or adversely impact the traffic movements at intersections, schools or other traffic generators. Curb cuts shall be limited to the minimum width necessary for safe entering and exiting. The proposed development shall not have an unreasonable adverse impact on the town road system and shall provide adequate parking and loading areas. No use or expansion of a use shall receive site plan approval if any parking spaces are located in a public right-of-way or if any travel lane of a state number highway is used as part of the required aisle to access any parking spaces. Wells, Me., Land Use Ordinance § 10.6.1 (1985-2000)." Other than its general conclusory statement that Chapel Road Associates failed to demonstrate compliance with section 10.6.1, the Board made no findings concerning traffic. The Board's findings neither indicated the portions of section 10.6.1 that were not met by the proposal nor stated the evidence upon which it relied in determining noncompliance….

The Board's findings in the instant case neither meet the requirements of the ordinance or statute nor are they sufficient to permit judicial review. As noted above, they consist of a summary of the proposed development; a statement that the Board considered the plans, specifications, and studies; and a conclusion that the applicant failed to comply with the traffic standard. This recitation does not constitute findings, see *Christian Fellowship*, 2001 ME 16, 7, 769 A.2d at 837, nor is this a case in which the facts found by the Board are obvious or in which the subsidiary facts can be inferred from stated conclusory facts, see *Wells v. Portland Yacht Club*, 2001 ME 20, 10, 771 A.2d 371, 375. Because there is no indication of either the specific portions of the traffic standard on which the decision turned or an indication of the evidence on which the Board relied, there can be no meaningful inquiry as to whether the Board's decision was supported by the evidence.

"[T]he remedy for an agency's failure to…make sufficient and clear findings of fact is a remand to the agency for findings that permit meaningful judicial review." *Kurlanski v. Portland Yacht Club*, 2001 ME 147, 14, 782 A.2d 783, 787 (quoting *Christian Fellowship*, 2001 ME 16, 12, 769 A.2d at 838). A court should not "embark on an independent and original inquiry," *Harrington*, 459 A.2d at 561, or review the matter by implying the findings and grounds for the decision from the available record.

The entry is: Judgment vacated. The case is remanded to the Superior Court with instructions to remand the case to the Town of Wells Planning Board for further findings of fact.

C. *Conservation Law Foundation, Inc. v. Town of Lincolnville*, 2001 ME 175, 786 A.2d 616:

Although they made no request for findings of fact, CLF and Osgood also argue that the Board's findings were insufficient to support its decision. They contend that the findings were conclusory and failed to explain how the Board reached its decision. Again, the Board found that the proposed subdivision "will not have an undue adverse effect upon the scenic or natural beauty of the area" and that the view corridor would sufficiently mitigate any undue effect caused by the development. Due to the subjective nature of the section 1(H) requirement, it is difficult to envision more adequate findings. The Board members were familiar with the site and the minutes from the Board's meetings reflect much discussion concerning the proposed subdivision. It is clear that the Board fully and conscientiously considered the proposed easement before it made its final decision. We conclude that the Board's findings were adequate.

D. *Kurlanski v. Portland Yacht Club*, 2001 ME 147, 782 A.2d 783:

The Planning Board failed adequately to consider and make findings about a number of required site plan elements: the driveway, parking, landscaping, and lighting. For instance, based on the site plan submitted, there is only one light depicted in the parking lot.

Although the Falmouth ordinance permits the Planning Board to waive the standards in sections 9.10 through 9.31, the Planning Board expressly waived only the parking lot aisle width standard in section 9.10(b). Id. § 9.8 (stating that the standards in sections 9.10 through 9.31 apply to all site plans unless "the Planning Board finds that, due to special circumstances of a particular plan, the application of certain required performance standards are not requisite in the interest of public health, safety, and general welfare, the Planning Board may waive the required standards, subject to appropriate conditions"). The Planning Board did not state whether for site plan approval purposes it accepted as grandfathered any violations of current off-street parking setback provisions, Id. § 5.5(g), or shoreland zoning provisions, Id. § 7. The Planning Board made no findings to allow us to determine whether it

waived certain requirements for site plan approval or approved the site plan on the Club's demonstration that it satisfied those requirements.

"[T]he remedy for an agency's failure to act on all matters properly before it or to make sufficient and clear findings of facts is a remand to the agency for findings that permit meaningful judicial review." *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 12, 769 A.2d 834, 838 (quoting *Harrington v. Inhabitants of Town of Kennebunk*, 459 A.2d 557, 561 (Me. 1983)); *Chapel Road Associates v. Town of Wells*, 2001 ME 20, 10, 771 A.2d at 375 ("[I]f an agency's findings of fact are insufficient to apprise us of the basis of the agency's decision and whether it is supported by substantial evidence, we should usually remand to the agency for further findings of fact.").

The entry is: Judgment vacated. Remanded to the Superior Court with instructions to remand to the Planning Board to complete site plan review in accordance with Falmouth's site plan review ordinance.

E. *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834:

The county commissioners issued a document entitled "Findings of Fact" in which they concluded that the Center was not entitled to a tax exemption and denied the abatement request. The "Findings of Fact" includes a detailed statement reciting the procedural posture of the case and the respective legal and factual contentions of the parties. The findings contain several paragraphs describing the position and claims of the Center, including the sentence, "[The Center] notes that Christian Fellowship and Renewal Center should continue to be tax exempt as they provide religious, charitable and food distribution services." Another paragraph sets forth the position of Limington. McGlauflin, on behalf of the Town of Limington, notes that the Center property is used for a variety of functions for fees and not solely charitable or benevolent purposes. "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 *Newsweek Magazine v. Dist. of Columbia Comm'n on Human Rights*, 376 A.2d 777, 784 (D.C. 1977); *Roy v. Town of Barnet*, 522 A.2d 225, 226 (Vt. 1986).

The only portions of the findings which could be considered factual findings are statements that (1) the Center owns ninety-one acres of land in Limington; (2) Limington was advised by the State of Maine Bureau of Property Taxation that the Center did not qualify for exemption as a charitable and benevolent organization but that a portion of the property used for religious purposes did qualify; and (3) Limington followed the State's opinion and exempted from taxation the retreat center and three acres of land.

The commissioners made no findings as to whether the Center was a benevolent and charitable institution and whether the Center used or occupied the property exclusively for its own charitable and benevolent purposes. Limington presented evidence that the Center offered its facilities for rent for weddings, baby and bridal showers, graduations, family reunions, and receptions, and that in some years it sold gravel from its land. The Center, on the other hand, supplied evidence of churches and other groups that used its facilities. It also presented evidence that no gravel was sold in 1996.

The commissioners failed to make findings sufficient to apprise either us or the parties of the basis for their conclusion that the Center was not entitled to the tax exemption. The insufficient findings do not allow a reviewing court to determine whether the commissioners' decision is supported by substantial evidence.

F. *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172:

The Board met and discussed the plan for the subdivision numerous times between August of 1998 and June of 1999. The Board held two public hearings and conducted one site review. Abutters participated in both public meetings and voiced various concerns. On June 21, 1999, the Board voted to accept and approve the final plan for the subdivision on three conditions, one of which was the condition that "the developer will discuss bonding requirements with the Town Manager."

The Board later issued twelve pages of findings of fact approving Young's application. Included in its approval were waivers of five Ogunquit Subdivision Standards requirements and one Ogunquit Zoning Ordinance requirement discussed at many of the meetings: a thirty-two foot road width requirement, a six percent road grade requirement, a cul-de-sac dead end street design requirement, a two street connections requirement, and a five foot sidewalk width requirement. The Board disclosed the lengthy considerations underlying each waiver. Finally, the findings included the statement that Young had not demonstrated a legal interest in the property.

At a subsequent Board meeting on May 22, 2000, the findings of fact were amended to fix a "clerical error" by removing the word "not" from the statement that Young had not demonstrated an interest in the property. Thus, the Board found that Young *did* have a legal interest in the property for the proposed subdivision.

The Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances, on a Board finding of extraordinary and unnecessary hardship *or* because of the special circumstances of a plan. The record is replete with evidence that there are special circumstances associated with Young's plan necessitating these four waivers. This is true even though some of the rationale for the waivers could

apply to any plan. For example, the steepness of the property caused significant concerns regarding storm water runoff and retention, and resulted in the Board permitting a seven rather than a six percent road grade. The waivers also operate to preserve more of the natural features of the property, which is aesthetically desirable, and better for the environment because they reduce the impact on clam beds and vegetation. The waivers also are beneficial in reducing the property's potential flooding problems. Four of the waivers were therefore granted by the Board pursuant to its authority under State statute and municipal ordinance. These four waivers were based on substantial evidence of special circumstances as is required by the Subdivision Standards.

The remaining fifth requirement, however, that streets must be thirty-two feet in width, is mandated not just by the Subdivision Standards, but also by Ogunquit Zoning Ordinance itself, which provides, "…paved traveled surface shall be at least 32 feet in width." Ogunquit, Me., Ogunquit Zoning Ordinance § 10.2(B)(3) (Apr. 5, 1999). See supra note 3. This requirement is limited to "collector streets," defined in the Zoning Ordinance as, "Any street that carries the traffic to and from the major arterial streets to local access streets, or directly to destinations or to serve local traffic generators." Ogunquit, Me., Ogunquit Zoning Ordinance § 2 (Apr. 5, 1999). At least one of the street width waivers granted by the Board was for a collector street; in fact, the Board's findings of fact specifically state, "The Board approved the requested waiver from 32 feet to 24 feet from the collector road, Windward Way…." Therefore, in granting Young a waiver of the thirty-two foot street width requirement, the Board has granted Young a waiver of a provision mandated by the Ogunquit Zoning Ordinance. This is impermissible.

York also contends that the twelve pages of findings of fact issued by the Board regarding the five waivers as well as the criteria for subdivision approval enumerated in 30-A M.R.S.A. § 4404 (1996 & Supp 2000) are both inadequate and based on insufficient evidence pursuant to 1 M.R.S.A. § 407(1) (1989). We disagree. Although agencies are required to make written factual findings sufficient to show the applicant and the public a rational basis of its decision, the agency is not required to issue a complete factual record. *Cook v. Lisbon Sch. Comm.*, 682 A.2d 672, 677 (Me. 1996). "If there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings." *Forester v. City of Westbrook*, 604 A.2d 31, 33 (Me. 1992). Substantial evidence exists if there is any competent evidence in the record to support a decision. *Adelman v. Town of Baldwin*, 2000 ME 91, 12, 750 A.2d 577, 583.

The record before us reveals considerable evidence to support the Board's determinations, including the four properly granted waivers. All of the issues were addressed and discussed at numerous Board meetings held over the course of more than a year. There was sufficient competent evidence, including evidence supporting a finding of the special circumstances of Young's plan, on which the Board could have based its ample findings of fact.

"Expanding Nonconforming Structures Revisited," "Legal Notes," *Maine Townsman*, December 1998

In a December 1995 *Maine Townsman* Legal Note ("Expansion of Nonconforming Structures"), we posed the following question:

> Our zoning ordinance permits the expansion of nonconforming structures provided there is no "increase" in nonconformity. Does this mean that no part of a structure within a required setback may be expanded in any direction, including sideways or upward, or simply that the expansion may not further reduce the existing setback?

The Maine Supreme Court has now answered this question, but not in the way we had predicted. In *Lewis v. Town of Rockport*, 1998 ME 144, an abutter appealed the Zoning Board's approval of an addition to a building that already encroached on the required sideyard setback and exceeded the maximum allowable height. The Board's reasoning was that as long as the addition did not encroach beyond the current "limit of nonconformance" (the extent to which the existing building was nonconforming), the addition would be "no more nonconforming," as the ordinance specified. The Law Court, however, found this reasoning "unconvincing."

Noting that the phrase "no more nonconforming" was undefined in Rockport's ordinance, and citing its longstanding rule that ordinance provisions governing nonconformities should be strictly construed, the Court stated flatly, "Any modification of or addition to a building that would increase the square footage of nonconforming space within the building, even if it would not increase the linear extent of nonconformance, does make the building more nonconforming."

The *Lewis* case has important consequences for planning boards and boards of appeals in interpreting zoning ordinances generally, many of which incorporate the concept of expansion of nonconforming structures and allow it as long as the expansion creates no greater nonconformity. However, unless an ordinance defines "no more nonconforming" (or a similar standard) more liberally, the restrictive *Lewis* definition will control.

The Court's decision could affect interpretation of shoreland zoning ordinances as well. While *Lewis* did not directly address the expansion of nonconforming structures under shoreland zoning, a possible reading of *Lewis* is that for an expansion under the 30% rule (for structures or portions of structures within the required water setback), no lateral or vertical expansion along the most nonconforming portion of the structure is permitted. This runs counter to the longtime interpretation – by both DEP and municipalities – that expansion is allowed along a structure to the extent of any grandfathered encroachment into the required setback. The phrase "increase in nonconformity" is not defined in the shoreland zoning statute or the State's minimum shoreland guidelines, however, so the *Lewis* definition threatens the continued validity of this traditional interpretation.

In light of *Lewis*, boards should be careful in applying ordinance provisions governing expansion of nonconforming structures. Boards may wish to recommend that their legislative bodies adopt a more flexible definition of "no more nonconforming" (or a similar standard) if the municipality wants to avoid the result in the *Lewis* case. For shoreland zoning ordinances, DEP is proposing a change to the State's minimum shoreland guidelines that would provide a more liberal standard for municipalities wishing to incorporate it into their ordinances. On the other hand, it is not necessary to amend local ordinances to add a definition – some municipalities may agree with the result in *Lewis* and not want to liberalize their ordinances.

(By J.N.K.)

[Editor's Note: The DEP model shoreland zoning guidelines now include a definition of "increase in nonconformity" that addresses the *Lewis* decision. State law has also been amended to eliminate the 30% rule discussed in this article see 38 M.R.S.A. § 439-A.]

Shoreland Zoning News, DEP-Bureau of Land Quality Control-Tracking Expansions of Non-Conforming Structures

Volume 3 Number 5 **September/October 1989**

Shoreland Zoning News

********** **Andrea M. Lapointe, Editor 289-2111**

Tracking Expansions of Non-Conforming Structures

By Laurel M. Dodge, Summer Intern

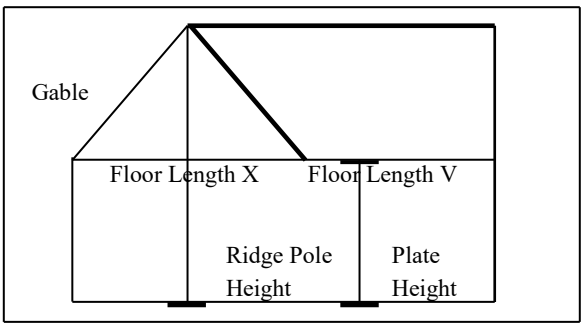
Frequently, municipal officials are called upon to search their memories on issues involving incremental changes in a structure's size. In order to assess with accuracy and fairness when the 30% expansion of floor space or volume of a nonconforming structure as regulated by Title 38 M.R.S.A. § 439-A(4), has been reached, it is necessary to have documentation of the original size of the structure and dates and dimensions of any later additions.

This type of organizational record to physically keep track of original dimensions and incremental changes over time could be housed in either a file, notebook, or computer spreadsheet indexed by tax map and lot number and perhaps cross referenced by landowner name. Such a central collection of data could also serve to reduce disagreements revolving around whether or not mandated limits have been exceeded or met where the original size of later expansions is in dispute.

Follow these steps:

1. Determine the original size and volume of the structure:

   a. Volume of structure - the total volume is calculated by dividing the structure enclosed by a roof and exterior walls into three-dimensional cubes. Measurement of length, width and height is made from the exterior faces of roof and walls. The length, width and height measures for each section of the structure are multiplied to calculate a subtotal in cubic feet. The subtotal volumes of all sections of the structure are then added to arrive at the total volume of the structure. To calculate the attic space or any 3-sided area, refer to the diagram below and use the following formula: ½ (floor length under gable X difference between ridge pole height and plate height) X floor length not under the gable.



   Under current policy, foundations that do not exceed the existing structure's footprint or cause the structure to be elevated more than three (3) additional feet are not included in this calculation.

   b. Square footage of structure – The square footage of a structure is measured in much the same manner as the volume. The floor of the structure including decks and porches is divided into rectangles or squares. These sections are measured in length and width from the outside edges and multiplied together. The resulting measures in square feet are added together to arrive at the total square footage for the structure.

2. Record this data in the appropriate column and row on the sample chart portrayed on the back page.

3. When an expansion is proposed, compare the volume and square footage of the existing structure with the proposed expansion. Use the same method if possible as was used to determine the original measure to ensure consistency.

4. Calculate the difference in volume or square footage from the original and the percentage that it represents and compare with the regulated standards using the following example as an aid:

EXAMPLE:	Original volume	= 40,000 ft3
	-New total volume	= 46,200 ft3
	Difference	= 6,200 ft3

   then: 6,200 ft3 is what percent of the original?

   a. 6, 200 ft3 = n% x 40,000 ft3
   b. 6,200 ft3/40,000 ft3 = .155
   c. .155 x 100 = 15.5%

5. Record the date, dimensions, and percentages of each new expansion.

   In the event that a structure is located partially outside the setback area, calculate the floor area and volume of only that portion within the setback area. Likewise, if only a portion of the proposed expansion will be within the setback area, calculate the floor area and volume of only that portion within the setback area.

Property Owner: **Doug Brown** SAMPLE RECORD PAGE Map: 6 Lot: 9

Subject Structure / Date	Volume (FT3)	Floor Area (FT2)	Percent Increase (volume)	Percent Increase(floor area)
Existing Principal				
Expansion 1				
Expansion 2				
Existing Accessory A				
Expansion 1				
Existing Accessory B				
Brief Description Accessory A Accessory B		Total % Increase Per Structure		

Municipal Choices Under the Nonconforming Structures Expansion Section

Maine DEP "Shoreland Zoning News"
Spring 2017, Vol. 30, No. 1

In 2015 the Department amended the Municipal Shoreland Zoning Guidelines (Chapter 1000) in an effort to bring the guidelines into compliance with 38 M.R.S. § 439-A (4), which was amended in 2013. One primary amendment in Title 38 M.R.S. § 439-A (4), Setback requirements, commonly referred to as the Expansion Provision, no longer permits the old "30% expansion rule" that allowed nonconforming structures in the Shoreland Zone to expand by 30% of the floor area and volume. The legislature replaced that language with new expansion limits for nonconforming structures that are based on square footage and height. We introduced the new provisions in the summer 2014 Shoreland Zoning News.

The new provisions limit footprint by square footage or percent, whichever allows for more expansion. Including both limitations would provide landowners with the choice of which limitation to apply to their property. Municipal officials may choose to include only one of the limitations, either square footage or percent. This would be more restrictive on the landowner, but simpler for municipal officials to administer and enforce.

Many municipalities continue to use the old "30% rule" even though the law requires municipalities to adopt "ordinances that are consistent with or are no less stringent than the minimum guidelines" 38 M.R.S. § 438-A (2).

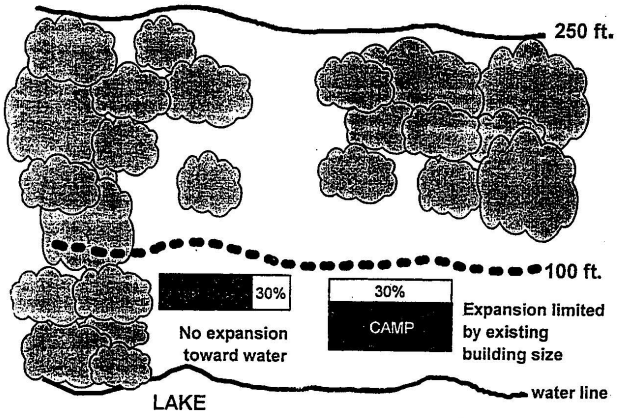
The Department strongly urges these municipalities to amend local ordinances in a manner that is consistent with current state law. Consistency between local ordinances and state law will provide clarity to property owners and code enforcement officials, which will in turn reduce the likelihood of costly legal disputes. Additionally, in the event the "old 30% rule" is less restrictive than 38 M.R.S. § 439-A (4), municipalities run the risk of violating 38 M.R.S. § 443-A(3).

The Chapter 1000 Guidelines must be modified for local adoption. Shoreland Zoning staff is available to assist municipalities with this process. Ordinances must be approved by the Department in order to become effective, and the Shoreland Zoning staff urges municipalities to contact us early in the amendment drafting process.

News from the 118th Legislature-Current 30 Percent Expansion Rule by Geoff Herman, Maine Municipal Association

The second session of the 118th Legislature, which finally adjourned (from a special session) on April 9th, included among its enactments only a few changes to existing law that directly impact on the municipal planning community.

CURRENT 30 PERCENT EXPANSION RULE



(Illustrations provided by the Shoreland Zoning Unit, Maine DEP)

Shoreland Zoning

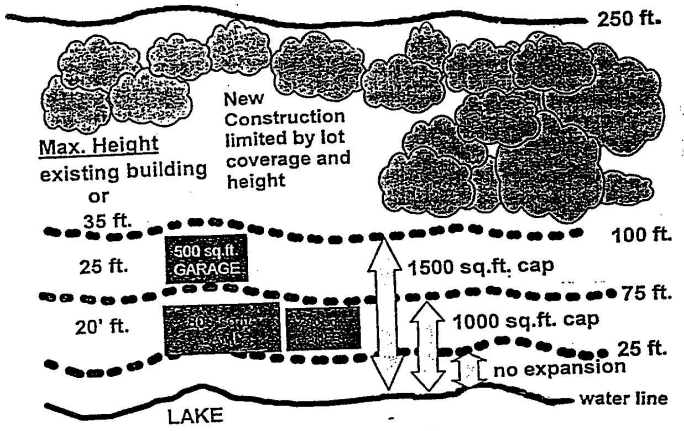
There was one mandatory and one optional change to the shoreland zoning law.

Boathouses. The mandatory change (PL 1997, chap. 726) is that residential boathouses may *not* be considered "functionally water-dependent uses" under shoreland zoning law and therefore may not be permitted for construction within the building set back zones. As a point of clarification, this law also expressly *includes* retaining walls as functionally water dependent, at least potentially. The background of this legislation was the discovery of some ambiguity in the definition of "functionally water-dependent" in Title 38 M.R.S.A. which allowed for some property owners and a couple of municipal Code Enforcement Officers to adopt an interpretation of that definition that would allow the construction of a residential boathouse within the setback zone as a functionally water-dependent use. The Department of Environmental Protection's Shoreland Zoning Unit took the position that such an interpretation was never the "legislative intent", and submitted this legislation to "clarify" the law in this area. The Maine Municipal Association opposed the legislation as a DEP overreaction and an unwarranted further intrusion of state government into the shoreland zone, but the Legislature ultimately adopted DEP's approach. This law institutes the prohibition as a matter of statute and becomes effective on July 9, 1998. Because the prohibition is effected by statute, clarifying changes to the municipality's shoreland zoning ordinance are not required, but may be appropriate for housekeeping purposes and to avoid any confusion on the local, permitting level.

Alternative to the 30% rule. The optional change to shoreland zoning law was enacted as part of PL 1997, chap. 748. This enactment provides municipalities with the authority to adopt an alternative system to govern the expansion of nonconforming structures that exist within the building setback of a shoreland zone. The existing standard is the so-called 30% rule which has come under criticism in the past for being inequitable and difficult to administer.

Under the new law, municipalities are authorized as of July 9th to amend their shoreland zoning ordinance to replace the 30% rule with the following alternative. Instead of a rule that begins with the original size of the nonconforming structure, the alternative would allow for

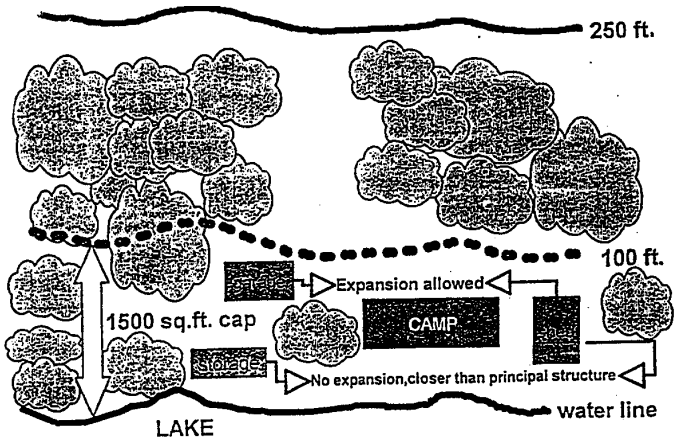
EXPANSION OPTION



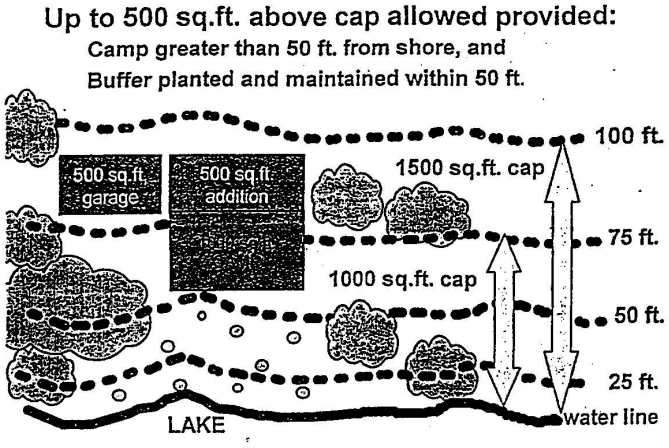
expansion up to the maximum square foot allowance. Within the first 75' setback, the maximum allowance would be 1,000 square feet and the maximum height of the structure would be 20' or the structure's existing height, whichever is greater.

Within the 100' setback, the maximum allowance would be 1,500 square feet and the maximum height of the structure would be 25' or the structure's existing height, whichever is greater. A bonus 500 square foot expansion allowance would be granted under this alternative if the property owner creates and maintains a 50' buffer strip of vegetation along the shoreline and files an enforceable "mitigation plan" to be approved by the local planning board which describes how the property owner is going to control erosion and storm water runoff from the site.

EXPANSION OPTION–Accessory Structures



SPECIAL EXPANSION ALLOWANCE



Additional DEP "Shoreland Zoning News" Articles and Interpretations

Summer 1992

Question:

The shoreland zoning law limits the allowable expansion of nonconforming structures to less than thirty percent of the existing volume and floor area. If a landowner has more than one nonconforming structure on the property, such as a camp and storage building, can they remove the storage building and "credit" that building's floor area volume toward an expansion of the camp?

Answer:

No. The shoreland zoning law limits the expansion of that portion of a nonconforming structure located within the setback area to less than 30 percent of the existing volume and floor area of the structure as of January 1, 1989 (effective date of statute amendment). This provision applies for the lifetime of the structure. The law does not make any provisions for combining structures or "crediting" the allowable expansion of one structure to another. Simply put, each nonconforming structure is treated separately when calculating the allowed expansion for that structure.

Spring 1995

Question:

I have a legally existing non-conforming deck attached to my camp. If I add a roof over the deck, will I create additional volume? What if I decide to screen in the deck?

Answer:

Unless your Town's local ordinance specifically addresses open sided roofed additions, simply adding a roof over the existing deck would not add volume to the structure for the purpose of calculating the 30 percent volume limit for non-conforming structures. Under DEP guidelines, volume is defined as "all portions of a structure enclosed by a roof and fixed exterior walls as measured from the exterior faces of these walls and roof." Since the roofed deck does not have walls, no volume is created.

If the deck is screened, without fixed walls, it is our policy that no additional volume has been created. However, if the deck is enclosed with fixed walls and/or glass (such as a half-wall porch with windows), volume has been created and is limited to the lifetime 30 percent expansion limit.

Spring 1995

Question:

A year ago, our Planning Board approved a new full basement beneath a non-conforming camp. No other expansions or additions were proposed. In approving the project, the Planning Board required the owner to move the camp to maximize the water setback and ensure that the basement did not raise the building by more than three feet. The owner now wants to expand the camp and use the previously approved basement area toward calculating the 30 percent expansion allowance. Is this allowed?

Answer:

NO. The 30 percent expansion limit applies to the floor area and volume of the camp as of January 1, 1989 (the date the 30 percent rule went into effect). The new basement area, while exempted from the 30 percent calculation, cannot be used toward a new expansion because it did not exist on 1/1/89.

Fall 1995

Question:

Our Planning Board was recently faced with an interesting question. A camp owner has two non-conforming structures on his lot. A camp and a storage shed. He wants to expand the camp by more than 30 percent using the combined allowable expansion area of both the camp and the shed. As part of the deal he would agree to never expand the storage shed. Is this something the Planning Board can allow?

Answer:

No. While the camp owner's proposal seems reasonable, particularly if the shed is closer to the water than the camp, the proposal is not allowable under the shoreland and zoning law. In addition, it could create an administrative headache for both the landowner and the Town over time.

The reason is that the law is clear that the expansion of any non-conforming structure by 30 percent or more is allowed only by variance from the Board of Appeals, and that the 30 percent provision applies to each structure separately.

In addition, approving a greater than 30 percent camp expansion with a condition prohibiting future shed expansion could easily lead to future violations since tracking that condition over time would be very difficult.

Also, selling the property would be made more difficult because lending companies may not be willing to loan money to purchase a property which on its face violates the 30 percent expansion cap of the shoreland zoning law.

Summer 1996

NON-CONFORMING STRUCTURE EXPANSIONS

Over the years, the *Shoreland Zoning News* has had many articles concerning the 30 percent expansion cap for structures which are non-conforming due to the fact that they are too close to the shoreline. However, based on the number of questions we received from town officials and land owners, the subject bears repeating.

We cannot over emphasize the potential nightmare that can be created for both landowners and town officials when this provision of the law if overlooked. Not only are the municipality and landowner subject to potential legal action, fines, and reconstruction costs, but we have heard of several situations where landowners have been unable to sell their property, because lenders were justifiably unwilling to hold mortgages on property which violate the local ordinance and state law.

In concept, the law and local ordinances are quite clear. As of January 1, 1989, the portion of any structure which does not meet the shoreline setback standard of the Town's zoning ordinance may not be expanded by 30 percent or more, in either its volume or floor area, nor can the structure be expanded closer to the shoreline. This restriction applies for the lifetime of the structure.

When reviewing a permit application to expand a non-conforming structure, it is very important for the town officials to:

1. Confirm the size of the structure as of 1989,

2. Confirm the allowable square footage and volume increase **(neither the floor area nor volume can be increased by 30% or more over the size on 1/1/89).**

3. Check Town records to see if any other additions were made since 1989, and subtract those additions from the allowed total. (A site visit will help confirm any possible unauthorized additions made in recent years),

4. Confirm that the applicant's plans do not exceed the allowed expansion limit or reduce the existing shoreline setback distance.

Finally, it is very important that any approved expansion be properly recorded and filed so that future Planning Boards, Code Enforcement Officers, Assessors, and property owners can determine what has been legally approved.

Summer 1996

Question:

If there is more than one non-conforming building too close to the shoreline, can one be torn down and its floor area and volume plus 30% "credited" to an addition to one of the other buildings?

Answer:

As a general rule the answer is NO.

The 30 percent expansion cap for non-conforming structures applies to each structure individually. In addition, when any non-conforming structure is relocated or reconstructed, it must meet the shoreline setback standard to the greatest practical extent. It cannot simply be moved over to another building, and certainly not closer to the water than its current location.

Two situations where a non-conforming building might possibly be joined or "credited" to another building is if they are already very near each other, so that a 30 percent expansion of one or both would bring them together. The other possibility is if the site of relocation to the greatest practical extent brings two structures close enough so that they could be joined.

Summer 1996

RELOCATING NON-CONFORMING STRUCTURES

Next to expansions, the most troublesome issue for Planning Boards seems to be how to deal with proposals to relocate non-conforming buildings. These projects usually come up when a landowner decides to add a full basement to a structure, or when the building has deteriorated to the point where replacing it makes more sense than maintaining what is there.

It is important to keep in mind that the goal of the relocation standards is to limit new non-conforming development near the shoreline, and if possible, to reduce it over time. Once a new basement is placed under an existing building, or a damaged or dilapidated building is replaced, it will be there for a very long time.

As with expansions, the key to making sense of relocation and reconstruction projects is to first get a clear description from the applicant, in writing, of exactly what is proposed.

Ask questions if anything is unclear, and then break down the review into simple steps, comparing each part of the project against the standard of relocation to the greatest practical extent:

1. What are the limitations for relocation?

2. Could the setback be improved if the building size or orientation were modified?

3. Will the septic system be replaced as part of the project, and can it be sited to improve the building setback?

4. If an expansion is also proposed, will the lot coverage exceed 20 percent, or make existing coverage over 20 percent more non-conforming?

5. Does the proposed basement, if any, raise the building by less than three feet?

6. How will the area where the building is now be re-vegetated to re-establish the shoreline buffer?

In order for everyone to have a clear picture of the proposal, a scale drawing of the property must be included with the application. The drawing should include the lot dimensions, lot lines, shoreline, cleared and wooded areas, all existing buildings, driveway, parking areas, sewage disposal system, well, and any other features which may affect potential expansion and relocation, including any tributary streams or wetlands. Without this information, the Planning Board cannot adequately review the proposal and make an informed decision.

It is important to ask whether the existing building is to be relocated, or if a new replacement structure is proposed. Too often, the Planning Board is led to believe that the existing building cannot be moved because of some limitation, only to learn after-the-fact that the actual plan was to tear down the old building and build a new one in the same spot. If the Planning Board had known, they may have been able to require reconstruction further from the water, and avoid the limitation.

While it could be argued that the above situation may be a violation if the misrepresentation was intentional, the point is that once the new building is up, the options for correcting the situation become much more difficult, and may be avoided by asking enough questions during the permitting process.

Summer/Fall 2001

Question:

A camp owner has approached me for a permit to remove a rotting deck and replace it with a new one of the same size and in the same location as the existing deck. The deck is attached to the water-side of a nonconforming camp. I don't believe that I can issue a permit to remove the deck and replace it with a new one since it does not meet the water setback and is being removed by more than 50% of its market value. Am I correct in telling the applicant that the deck must be rebuilt meeting the setback requirement to the greatest practical extent?

Answer:

If the deck is attached to the camp you are probably wrong. The deck, if attached, would be considered to be part of the principal structure. Therefore, removing the deck alone will not result in the removal of more than 50% of the market value of the structure (the camp and deck together). You, as the code enforcement officer can issue a permit to rebuild the deck.

Winter/Spring 2001

Question:

There is an existing one-story camp located on a peninsula. The building is set back from the water 30 feet on one side, 45 feet on the opposite side, and 60 feet from the tip of the peninsula. The setback standard is 100 feet. Can this building be expanded?

Answer:

Yes, but the options are limited. The shoreland zoning law allows legally existing nonconforming structures to be expanded by less than 30% of its size (both volume and floor area) as it existed on January 1, 1989 (the effective date of the law). The law also states that no structure may be expanded so as to increase its nonconformity (i.e. get closer to the water).

In the situation you describe the building is already too close on three sides, so expansion in those directions is not allowed. The only options left are to expand toward the base of the peninsula or to raise the roof slightly to create a ½ story loft. Remember that floor area and volume may not be increased by more than 30%, so a full second floor (100% floor area expansion) could not be permitted.

Winter/Spring 2001

Question:

Scenario: A property owner proposes to add a full basement to an existing one-story camp located 20 feet from the river. The property is entirely within the 100-year flood plain. The owner has agreed to move the building as far back from the water as possible, but it will still be within 75 feet of the river. Raising the new basement one foot above the base flood elevation will cause the existing structure to be raised by more than three feet.

Can the basement addition be exempted from the 30% expansion cap for nonconforming structures in order to satisfy the flood ordinance standards?

Answer:

No. In order for a project to be approved, it must meet all of the applicable ordinance standards. The Town may not waive one standard in order to satisfy another.

In this case, both the shoreland zoning and flood ordinances require the lowest floor, including basements, to be elevated at least one foot above the base flood elevation. In addition, the non-conforming structure standards specify that basement additions can only be exempt from the 30% expansion rule if the building is relocated away from the water to the greatest practical extent (which the owner proposes to do) and the basement addition does not cause the building to be raised by more than 3 feet. Since it is not possible in this scenario to meet both standards, the proposed basement must be denied. The owner still has the option of adding another type of foundation to further protect the building from flooding, but he cannot add a full basement in this flood-prone area.

Spring 2003

Question:

A shorefront property owner wishes to rebuild an aging boathouse for his recreational watercraft. The building is located at the immediate shoreline. Can I, the CEO, grant a permit to the owner to rebuild on the same footprint?

Answer:

No. First of all, in 1998 the Maine Legislature declared that recreational boat storage buildings are not water-dependent. Therefore, the boathouse you refer to is a nonconforming structure. If a nonconforming structure is removed, damaged, or destroyed by more than 50% of its market value (a complete rebuild certainly meets this criteria), it can only be rebuilt after obtaining a permit from the planning board. The planning board must require the new structure to be placed at the location of the lot that complies with the setback requirement to the greatest practical extent. This may result in the new structure being set back 100 feet from a lake or 75 feet from a tidal or riverine waterbody. If the full setback cannot be met, then the next most practical location must be determined. Only if there is no other location on the property where the structure can be rebuilt further from the water, can the planning board allow it to be built at the same setback as the previously existing structure.

Spring 2003

DECKS AND PORCHES

Department Shoreland Zoning staff frequently receive calls from municipal officials inquiring whether someone can enclose a legally existing deck without counting the new space toward the 30% volume expansion limitation. The town can grant a permit for the construction of fixed walls to enclose a deck and that would not add *floor area*, but would count toward the 30% *volume* limitation. This position is further supported by the Superior Court decision, *Fielder v. Town of Raymond and John Cooper*, a decision you may want to familiarize yourself with. In the case of an individual seeking to create a screened porch with a roof over a legally existing deck, the Department's opinion is that neither volume nor floor area are created. The floor is

already present and there are no fixed walls to create volume. We do not consider screens as fixed walls.

Excerpt from August 23, 2003 e-mail from Richard Baker, Shoreland Zoning Unit Coordinator, to MMA Legal Services

Regarding your question, the 30% expansion allowance applies to both floor area and volume. Each one can be expanded by 30%. For instance, if I build a deck (not closer to the water of course) that expands the floor area of my structure by 30%, I can still expand my volume by 30%, whether now or later. That volume expansion might be by enclosing the deck or, perhaps, raising the pitch of the roof. Once I have expanded my volume by 30% and the floor area by 30%, I can expand no more in the lifetime of the structure.

Note also, that when calculating the allowable floor area and volume expansions, only the floor area and volume that is located less than the required setback can be used for determining the base floor area and volume. If a 20' x 30' structure lies such that half of the building is within the setback area and half is outside the setback line, the allowable floor area expansion within the setback area is 30% of 300 square feet (10' x 30'). The same would be true to volume.

Fall 2004

Replacement of a Structure: Part II

After our last edition of the Shoreland Zoning News we were contacted by a CEO from a town that adopted and administers the alternative to the 30% expansion rule. He requested that we clarify the non-conforming structure replacement standards under this alternate provision, much like we did in our last edition for those towns with the standard 30% expansion rule.

As you may be aware, the alternative to the 30% expansion rule is an optional method of limiting expansions of non-conforming structures based on certain criteria. Here are the highlights:

- No portion of a structure located within 25 feet of the shoreline may be expanded;
- For structures located less than 75 feet from the shoreline, the maximum combined floor area for all structures is 1,000 square feet, and the maximum building height is 20 feet or the height of the existing structure, whichever is greater;
- For structures located less than 100 feet from the shoreline of a great pond or river flowing to a great pond, the combined maximum floor area for all structures is 1,500 square feet and the maximum building height is 25 feet. However, no more than 1,000 square feet may be within 75 feet of the waterbody.

The alternative language replaces only the *30% expansion* section of most ordinances (Section 12-C(1) of the Guidelines), and therefore the relocation, reconstruction or replacement, and

change of use provisions still apply as usual. The replacement of 50% or more of the market value of a structure would then require the replacement structure to meet the shoreline setback to the greatest practical extent. That said, if one has a 1,600 square foot structure located 7 feet from a great pond and the "greatest practical extent" is determined to be 60 feet from the water, the structure must be moved to 60 feet from the water even though the size doesn't conform to the maximum allowable floor area. Obviously an expansion within 100 feet of the pond would not be allowed, since the structure is already greater than 1,500 square feet in total floor area.

Fall 2005

How Much of the Structure do I Count Towards the Expansion Anyways?

One of the questions we in the Shoreland Zoning Unit get from landowners most often is how much of their non-conforming structure they can count towards their expansion allowance. One would think this would be a simple question, but alas, there are variables that must be considered. The first thing that you as a CEO must determine is the date which the structure became legally nonconforming. In most cases it is the date of the original adoption or imposition of the Shoreland Zoning Ordinance in your municipality. It may also be a subsequent date when the ordinance was amended to cause the structure to be non-conforming. Bear in mind, the regulation in question is a structure setback requirement. Non-conforming uses, except residential non-conforming uses, cannot be expanded in most municipalities.

So now we know we have to look up the date to find out when the structure became non-conforming. But the ordinance in § 12.C.1.a says "[a]fter January 1, 1989 if any portion of a structure is less than the required setback from the normal high-water line of a water body or upland edge of a wetland, that portion of the structure shall not be expanded, as measured in floor area or volume, by 30% or more, during the lifetime of the structure." So doesn't that mean we automatically use January 1, 1989? No. If the structure became non-conforming at a later date, that later date is when the 30% rule affects the structure. For example, if a structure was built 75 feet from a lake in 1980, it was a conforming structure at that time. Suppose, however, that the town on June 3, 1993, amended its ordinance to increase the lake setback to 100 feet. The structure is now non-conforming and the 30% expansion rule would be based on the size of the structure as it stood on June 3, 1993, not January 1, 1989. So while no non-conforming structure expanded after January 1, 1989, can be expanded by more than 30% of the volume or floor area, the date by which we calculate the volume and floor area is the date the structure became non-conforming.

Next, we have to look at exactly what we are calculating. Volume is defined as "all portions of a structure enclosed by roof and fixed exterior walls as measured from the exterior faces of these walls and roof." It is important to note that "livable area" is not mentioned anywhere in that definition, and that we measure from **outside** the structure. This would indicate that we include all the eaves and attic spaces, as well as full basements. Similarly, the definition of floor area is "the sum of the horizontal areas of the floor(s) of a structure enclosed by exterior walls, plus the

horizontal area of any unenclosed portions of a structure such as porches and decks." This means we add all stories of the structure including full basements at least six feet in height. Also remember that we also have to calculate both floor area and volume, because neither one can exceed 30% of what existed on the date the structure because non-conforming.

Sample Wording for Use in a Permit Issued to a Landowner Where Title to the Land, Boundary Location or Other Title Problem has Been Raised by a Third Party

"This permit represents a finding by the (Board)/(CEO) that the application satisfies the requirements of the town's ordinance. It is approved on the basis of information provided by the applicant in the record regarding his/her ownership of the property and boundary location. The applicant has the burden of ensuring that he/she has a legal right to use the property and that he/she is measuring required setbacks from the legal boundary lines of the lot. The approval of this permit in no way relieves the applicant of this burden. Nor does this permit approval constitute a resolution in favor of the applicant of any issues regarding property boundaries, ownership or similar title issues. The permit holder would be well-advised to resolve any such title or boundary problems before expending money in reliance on this permit."

Sample Wording for Use in Approving a Development Plan to Ensure that the Plan will be Developed Exactly as Depicted Unless Revisions are Approved by the Appropriate Authority

"The (Board)/(CEO) approves the development proposal submitted by (applicant's name) as described in his/her application dated _____,

including all depictions on the accompanying plan and other attachments. Except to the extent that the (Board)/(CEO) has expressly indicated in its/his/her decision that certain depictions may be revised by the applicant without further review and approval by the (Board)/(CEO), any changes to the plan and attachments must receive prior approval by the (Board)/(CEO), including but not limited to changes in the proposed location of structures, roads, wells, and subsurface disposal systems, the method of waste disposal, and the extent and location of vegetated areas."

Sample SPO Model Site Plan Review Ordinance Fee Provision

7.4 Fees

7.4.1 Application Fee

An application for site plan review must be accompanied by an application fee. This fee is intended to cover the cost of the municipality's administrative processing of the application, including notification, advertising, mailings, and similar costs. The fee shall not be refundable. This application fee must be paid to the municipality and evidence of payment of the fee must be included with the application.

7.4.2 Technical Review Fee

In addition to the application fee, the applicant for site plan review must also pay a technical review fee to defray the municipality's legal and technical costs of the application review. This fee must be paid to the municipality and shall be deposited in the Development Review Trust Account, which shall be separate and distinct from all other municipal accounts. The application will be considered incomplete until evidence of payment of this fee is submitted to the Planning Board. The Board may reduce the amount of the technical review fee or eliminate the fee if it determines that the scale or nature of the project will require little or no outside review.

The technical review fee may be used by the Planning Board to pay reasonable costs incurred by the Board, at its discretion, which relate directly to the review of the application pursuant to the review criteria. Such services may include, but need not be limited to, consulting engineering or other professional fees, attorney fees, recording fees, and appraisal fees. The municipality shall provide the applicant, upon written request, with an accounting of his or her account and shall refund all of the remaining monies, including accrued interest, in the account after the payment by the Town of all costs and services related to the review. Such payment of remaining monies shall be made no later than sixty (60) days after the approval of the application, denial of the application, or approval with condition of the application. Such refund shall be accompanied by a final accounting or expenditures from the fund. The monies in such fund shall not be used by the Board for any enforcement purposes nor shall the applicant be liable for costs incurred by or costs of services contracted for by the Board which exceed the amount deposited to the trust account.

7.4.3 Establishment of Fees

The Municipal Officers may, from time to time and after consultation with the Board, establish the appropriate application fees and technical review fees following posting of the proposed schedule of fees and public hearing.

Appendix 4 – Variances

Zoning Appeals and Variances Statutes (30-A M.R.S.A §§ 4353 and 4353-A)

30-A M.R.S.A. § 4353 Zoning Adjustment

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section.

1. **Jurisdiction; procedure.** The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance. The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.

2. **Powers.** In deciding any appeal, the board may**:**

A. Interpret the provisions of an ordinance called into question;

B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board, agency or department to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and

C. Grant a variance in strict compliance with subsection 4.

3. **Parties.** The board shall reasonably notify the petitioner, the planning board, agency or department and the municipal officers of any hearing. These persons shall be made parties to the action. All interested persons shall be given a reasonable opportunity to have their views expressed at any hearing.

4. **Variance.** Except as provided in subsections 4-A, 4-B and 4-C and section 4353-A, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The land in question cannot yield a reasonable return unless a variance is granted;

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

C. The granting of a variance will not alter the essential character of the locality; and

D. The hardship is not the result of action taken by the applicant or a prior owner.

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.

4-A. Disability variance; vehicle storage. A disability variance may be granted pursuant to this subsection.

A. The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this paragraph solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability.

The board may impose conditions on the variance granted pursuant to this paragraph, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this paragraph, the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

B. If authorized by the zoning ordinance establishing the board, the board may grant a variance to an owner of a dwelling who resides in the dwelling and who is a person with a permanent disability for the construction of a place of storage and parking for a noncommercial vehicle owned by that person and no other purpose. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle. The owner shall submit proposed plans for the structure with the request for the variance pursuant to this paragraph to the board.

The person with the permanent disability shall prove by a preponderance of the evidence that the person's disability is permanent.

For purposes of this paragraph, "noncommercial vehicle" means a motor vehicle as defined in Title 29-A, section 101, subsection 42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, section 521 and owned by the person with the permanent disability.

The board may impose conditions on the variance granted pursuant to this subsection.

All medical records submitted to the board and any other documents submitted for the purpose of describing or verifying a person's disability are confidential.

For purposes of this subsection, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a set-back variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a set-back requirement only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

B. The granting of a variance will not alter the essential character of the locality;

C. The hardship is not the result of action taken by the applicant or a prior owner;

D. The granting of the variance will not substantially reduce or impair the use of abutting property; and

E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;

B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;

C. The practical difficulty is not the result of action taken by the petitioner or a prior owner;

D. No other feasible alternative to a variance is available to the petitioner;

E. The granting of a variance will not unreasonably adversely affect the natural environment; and

F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster development, to accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a variance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B.

5. **Variance** recorded**.** If the board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the local registry of deeds within 90 days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.

30-A M.R.S.A. § 4353-A Code enforcement officer; authority for disability structure permits

Notwithstanding section 4353, a municipality by ordinance may authorize a code enforcement officer to issue a permit to an owner of a dwelling for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. If the permit requires a variance, the permit is deemed to include that variance solely for the installation of equipment or the construction of structures necessary for access to or egress from the dwelling for the person with the disability. The code enforcement officer may impose conditions on the permit, including limiting the permit to the duration of the disability or to the time that the person with a disability lives in the dwelling.

All medical records submitted to the code enforcement officer and any other documents submitted for the purpose of describing or verifying a person's disability are confidential.

For the purposes of this section, the term "structures necessary for access to or egress from the dwelling" includes ramps and associated railings, walls or roof systems necessary for the safety or effectiveness of the ramps.

For the purposes of this section, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.

"Zoning Variance" Information Packet

MMA's Legal Services Department publishes a "Zoning Variance" Information Packet which is available by contacting the Legal Services Department (1-800-452-8786) or on MMA's website (http://memun.org/MemberCenter/InfoPacketsGuides.aspx). You will need to apply for a password to enter the member section of the website, which is free for officials from municipalities that are members of MMA.

The packet includes:

- A memo discussing a number of variance issues
- A copy of 30-A M.R.S.A. §§ 2691 and 4353
- A sample "Certificate of Zoning Variance" for recording at the Registry
- Miscellaneous "Legal Notes" from the *Maine Townsman* magazine

Certificate of Zoning Variance Approval

I, _____, the duly appointed and qualified Secretary

of the Board of Appeals for _____, _____

County, State of Maine, hereby certify that on the _____ day of _____ , 20 ____,

the variance described below was granted by the Board pursuant to the provisions of 30-A

M.R.S.A. § 4353 and the _____ Zoning Ordinance:

1. Property Owner: _____.
2. Property Description: _____County Registry of Deeds, Book _____ Page _____.
3. Variance and Conditions: _____

_____

_____

_____

_____

_____

_____

/s/ _____
Board Secretary

_____
(Printed or Typed Name)

STATE OF MAINE

County of _____

Then personally appeared before me the above-subscribed _____ official and acknowledged the above certificate to be his/her free act and deed in his/her official capacity.

Date: _____, 20

_____
(Notary Public) (Attorney at Law) Signature

_____
(Printed or Typed Name)

My commission expires: _____ (Notary)

My Bar Number: _____ (Attorney at Law)

This certificate must be recorded in the Registry of Deeds within 90 days of the date of final written approval of the variance or the variance is invalid (30-A M.R.S.A. § 4353).

Certificate of Abandonment of Approved Zoning Variance

I, _____ , am the duly appointed and qualified secretary of the Board of Appeals for _____(name of town), _____ County, State of Maine. I hereby certify that on _____, 20____, the _____ Board of Appeals voted to approve the abandonment of a zoning variance as requested by _____, the owners of the subject property. The zoning variance that was abandoned as a result of this action is described in a Certificate of Zoning Variance Approval that was recorded on _____ (date) at Book _____, Page _____ at the _____ County Registry of Deeds. The property in question is located at _____ (street address), _____(name of town), Maine and is further described in a deed recorded at Book _____, Page _____ in the _____ County Registry of Deeds. The reason the variance abandonment was requested is: _____. The original variance becomes void as a result of this abandonment decision and may not be relied upon for any future land use activity.

Date: _____

_____
Board Secretary

_____
(Print or Type Name)

STATE OF MAINE

County of _____

Then personally appeared before me the above-subscribed _____,

Board of Appeals Secretary, and acknowledged the above certificate to be his/her free act and

deed in his/her official capacity.

Date: _____ _____

(Notary Public) (Attorney at Law)

_____

(Print or Type Name)

My commission expires:_____ (Notary)

My Bar Number: _____(Attorney at Law)

Summary of/Excerpts from Maine Supreme Court Decisions Regarding Variances-the "Undue Hardship" Test

1. Generally most zoning variance requests will not meet all four statutory standards (30-A M.R.S.A. § 4353) as well as local ordinance standards; courts have noted that variances should be granted sparingly.

2. Only variances specifically authorized by the ordinance may be granted. Requests must be reviewed in light of the applicable standards.

3. The statutory standards only govern variances covered by a zoning ordinance; for non-zoning variances, only the standards in the relevant ordinance will apply.

4. If frequent requests for the same type of variance are made for lots or uses in the same neighborhood, that may be a sign that the ordinance needs to be amended to avoid the need for a variance in those cases.

5. "Undue hardship" relates to a problem created by some feature of the land, not a personal problem of the applicant.

6. Summary of Maine court cases:

    1) *Barnard v. Town of Yarmouth*, 313 A.2d 741 (Me. 1974)—One seasonal dwelling already located on a 40,000 square foot lot. Lot size required is 30,000 square feet per building.

    Owner applied for lot size variance to enable construction of second year-round dwelling. Variance denied and court upheld denial.

    Court noted that the area was comprised of 35-40 house lots, mostly less than 20,000 square feet, and mostly used for year-round homes (winterized summer cottages). Remainder of the land in the zone is undeveloped or conforming lots. Court found that the need for granting a variance wasn't due to the general conditions of the neighborhood or to unique circumstances of the property. Court also found that owner could still realize a reasonable economic return without the variance because the owner would still have a legal right to enjoy full occupation and use of the existing house. Also noted that the only uniqueness of the lot is that it is larger than most in the neighborhood and that to allow its division would violate the intent of the lot size provision. Even though denial of variance prevented owner from increasing property value, court noted that property was not rendered unmarketable and that "reasonable return" isn't synonymous with "maximum return."

2) *Thornton v. Lothridge* (Brunswick CEO), 447 A.2d 473 (Me. 1982)—Variances granted for number of stories and parking spaces to allow expansion of nursing home. Existing nursing home had 2 1/2 stories, 47 beds, and 12 parking spaces. Wanted expansion to 3 1/2 stories in part of building and a total of 50 beds and 24 parking spaces. Zoning ordinance only allowed maximum of 2 1/2 stories and required 39 parking spaces.

Court upheld the variances based on evidence in the record of the need for a slightly larger nursing facility and the prohibitive cost of acquiring additional land for the required off-street parking. Court noted also that the proposed building complies with height requirements of the ordinance.

(**NOTE:** The decision in this case is baffling in light of earlier variance decisions and the statutory standards governing "undue hardship.")

3) *Leadbetter v. Ferris* (and City of Waterville), 485 A.2d 225 (Me. 1984)—Variance for setback granted by BOA for a loading dock. Court overruled it.

Ferris rented building to Nissen's Bakery. Used as retail outlet store and then decided to expand building by adding an enclosed loading dock to have both retail and wholesale operations. Area is zoned for commercial uses. Side setback required is 50 feet. Proposed loading dock would reduce existing setback on one side from 27 feet to nine feet. Retail business already involved deliveries to the store by one trailer truck five nights a week at 3:00 a.m. With wholesale business, possibly one more trailer truck would make deliveries to the store and three or four route trucks would make deliveries from the store. BOA approved variance to allow nine-foot setback on conditions relating to aesthetics and noise.

Court found insufficient evidence in record to show that Ferris couldn't realize a reasonable economic return without a variance or that complying with the ordinance would result in practical loss of substantial beneficial use of the land. Letter from an appraiser regarding previous uses of the lot which failed was inconclusive. Court noted that Nissen's retail operation was successful and there was no evidence to show that it would cease if no variance were granted. Also no evidence that a reasonable economic return from sale of the lot could not be realized without a variance.

4) *Curtis v. Main* (Kittery CEO), 482 A.2d 1253 (Me. 1984)—Request for variances for lot size, setback, and sewage setback denied by BOA. Court upheld denial by BOA.

The twenty-one lots in question are on an island and were part of an old subdivision plan. Curtis wanted to combine 12 of them into five new lots (A – E), each lying

between a road and a creek. Lots A and B are contiguous and E is contiguous with the land on which Curtis has a summer house. Minimum lot size in this zone is 80,000 square feet. All of the proposed lots are 38,500 square feet or less. None of the lots can meet the required setback from a road or a water body for buildings. Only Lot C can meet the required setback for sewage systems. BOA found that Curtis met the "unique circumstances" and "self-created hardship" standards but not the standards pertaining to reasonable return and essential character of the locality. Court found that BOA's decision was not arbitrary or capricious.

Court noted that record contained evidence of value of the five lots with variances but not their value for other than residential use. Also noted that without setback variances, the lots would be worthless because of their location between road and water, but that Curtis did not prove that there were no other beneficial uses for the lots – failed to prove the absence of nonresidential beneficial uses.

5) *Sibley v. Inhabitants of the Town of Wells*, 462 A.2d 27 (Me. 1983)—Variances for lot size and setback denied by BOA. Court upheld BOA.

Sibley owns two contiguous lots, each with 50-foot frontage on road and 100 feet deep. Purchased one (#30) in 1973 and lived on it in a mobile home since 1974. Purchased second (#29) in 1977 for $4,200. Lot #29 was 5,000 square feet. Town minimum lot size of 20,000 square feet was adopted in 1976. Lot #29 has a deed restriction requiring structures on it to be a least 26 feet wide. Ordinance also requires a 15-foot side setback. Not possible to build on that lot and comply with ordinances lot size and setback. Without a permit, built a foundation on Lot #29 which was 11 feet from one line and four feet from the other. Sibley and BOA treated lots as merged. Granted lot size variance on condition that the mobile home be removed after new dwelling completed. Denied sideline variance, so foundation would have to be moved. Second variance request submitted 18 months later just for variances for Lot #29 to allow a 20 x 26 foot house on foundation. BOA denied because Sibley wouldn't merge the lots.

Court noted that all the undeveloped lots in the neighborhood were substandard, so nothing unique. Sibley failed to show that the deed restriction was unique to his property. Also because he owned the adjoining lot, merger would allow compliance with setback without variance – could solve own problem without administrative relief, even though won't realize maximum profit from the lots. Court also noted that they created own hardship because they bought Lot #29 knowing that the town's ordinance would restrict its use and then built a foundation illegally.

(**NOTE:** See *Twigg v. Kennebunk* now regarding self-created hardship based on prior knowledge of ordinance requirements.)

6) *Driscoll v. Gheewalla* (Saco ordinance), 441 A.2d 1023 (Me. 1982)—Variances granted by BOA for setback. Court upheld. Lot involved is undersized and located on a corner. Needs large on-site sewage system. If setback requirements not varied, Gheewalla could only build on 7% of total lot and structure could only be 17 x 20 feet. BOA approved variances for street setback and for side-yard setback, after Gheewalla was denied at an earlier hearing and returned one month later with a modified plan.

   Court found no self-created hardship; that a variance wouldn't alter the essential character of the neighborhood because other houses in the immediate area were already as close to the street as Gheewalla proposed; that there were unique circumstances because of the need for a larger on-site sewer system, the lot's small size, and its location on a corner which resulted in two road setback requirements; that no reasonable return could result without a variance because otherwise only a 17 x 20 home could be built.

7) *Lovely v. ZBA of City of Presque Isle*, 259 A.2d 666 (Me. 1969)—use variance case.

8) *Lippoth v. ZBA of City of South Portland*, 311 A.2d 552 (Me. 1973)—personal hardship case.

   Landowner applied for "setback" variance for construction of garage. A neighboring landowner was granted leave to intervene as party defendant. The Zoning Board of Appeals denied the application and the landowner appealed. The Superior Court ordered that the variance be granted. The intervenor appealed. The Supreme Court held that the alleged hardship upon the landowner from being periodically required to move his automobiles from the street to permit access to neighboring lots was caused by the landowner's ownership of three cars and his deteriorated physical condition and did not meet the requirement for granting of a variance. The Board's decision, made after inspection of landowner's property and surrounding area, that construction of the garage would create traffic problems had no basis in fact.

9) *Marchi v. Town of Scarborough*, 511 A.2d 1071 (Me. 1986)—Plaintiffs bought a corner lot in a residential zone for $16,000 contingent on obtaining a setback variance. Without the variance, the buildable portion of the lot would be an area 5 x 19 feet. A neighbor offered to buy the lot for $3,500 if the variance was denied. The zoning ordinance limited the lot to residential use. The board of appeals denied the variance, finding that the lot owner could realize a reasonable return without the

variance by selling the lot to the neighbor. The Superior Court upheld this decision. The Supreme Court reversed and ordered the granting of the variance. The court found that since the lot could only be used for residential purposes, the owner would be deprived of substantial beneficial use of the land without a variance. The fact that the property has a potential for sale to an abutter does not by itself outweigh the owner's showing that there is no beneficial use of the property without a variance.

10) *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987)—Defendant purchased a small lot and small (20' x 32') two-story house eight years after the city adopted zoning. Defendant sought a setback variance in order to build a large (24' x 36') addition onto the house. The BOA granted the variance and Plaintiff appealed. The Superior Court overturned the variance and the Maine Supreme Court upheld the Superior Court, finding that the Defendant had not shown "undue hardship." The court found that although the existing house was small, it offered adequate living space and that Defendant had not shown that a loss of all beneficial use of his property would result without the variance.

11) *Perrin v. Town of Kittery*, 591 A.2d 861 (Me. 1991)—In 1980 the Perrins purchased Lot 7, a two-acre lot located in Bartlett Farms, an approved subdivision in the Town's Rural Residence Zone, and thereafter constructed a residence on a portion of the lot. In September of 1987 the Planning Board approved the Perrins' application to divide Lot 7 into two one-acre lots. The portion of the lot designated as 7A was the site on which the Perrins had constructed their residence, and the portion designated as 7B was unimproved. At that time the Town's zoning ordinance required that a building in a Rural Residence Zone be set back a minimum of 100 feet from any "streams, water bodies and wetlands." In October 1987 the Town amended its ordinance concerning wetlands and classified wetlands into "coastal," "inland," and "transitional," (see Ordinance, Ch. I, § 111), and required that there be a minimum setback of 100 feet for coastal and inland wetlands and a 50-foot setback from transitional wetlands. Ordinance Ch. I, § VI(D)(2).

In April 1989 the Perrins applied to the CEO for a building permit to construct a single family dwelling on that portion of Lot 7 designated as 7B. In May 1989 the CEO denied the application on the ground that the site of the proposed structure was within 25 feet of a wetland. After a hearing on the Perrins' appeal, the Board concluded there were wetlands on the property and the proposed house would have to be 100 feet from these wetlands, and affirmed the denial of the building permit. The Perrins did not seek a judicial review of this decision. In August of 1989 the Perrins filed an application for a variance from the wetland setback requirement. As a part of this proceeding the evidence presented to the Board on the appeal from the denial of the building permit was incorporated into the record requesting a variance. Following

a public hearing at which no additional witnesses were presented on behalf of the Perrins, the Board denied the variance on the ground that the Perrins "could not meet all four criteria for hardship for a variance."

By a complaint against the Town, filed in the Superior Court pursuant to M.R.Civ.P. 80B, the Perrins sought review of the decision by the Board and the CEO. By Count I of their complaint the Perrins alleged that the application for a building permit was part of a pending proceeding at the time of the enactment in October 1987 of the provision of the Ordinance relating to wetland and therefore the provision did not apply to Lot 7B. Count II alleged that the Board had improperly denied a variance to the Perrins. Count III alleged that the wetlands issue was determined by the Planning Board at the time of its consideration of the Perrins' application to divide Lot 7 and could not be reexamined by the CEO or the Board. After a hearing the court granted a judgment to the Town on Counts I and III and to the Perrins on Count II, and the party's appeal.

In the instant case, to satisfy the first prong of undue hardship the only evidence before the Board was that the application of the wetland setback would prevent the Perrins from building another residential structure on that portion of Lot 7 designated as 7B. The record does not address the value of Lot 7B if used for the construction of a residence nor its value if used for other purposes, including its use as an unimproved lot contiguous to Lot 7A on which the Perrins had constructed their residence. See *Sibley v. Inhabitants of the Town of Wells*, 462 A.2d at 31*; Barnard v. Zoning Bd. of Appeals*, 313 A.2d 741, 747, 749 (Me. 1974); cf., *Marchi v. Town of Scarborough*, 511 A.2d at 1073 (no reasonable return from unbuildable lot where applicant is not the abutting owner). The Perrins failed to prove that beneficial uses did not exist for Lot 7B other than its use for the construction of residence. On the evidence presented to it the board was not compelled to conclude that the Perrins had satisfied the first prong of the undue hardship test. Accordingly, the court did not need to determine whether the Perrins met their burden of proof as to the remaining three prongs of that test. See 30-A M.R.S.A. § 4353(4)(A)-(D).

12) *Waltman v. Town of Yarmouth*, 592 A.2d 1079 (Me. 1991)—The Waltmans' property is located in a turn-of-the-century subdivision on Littlejohn Island. All or nearly all of the lots in this subdivision, many of which are undeveloped, are undersized for construction under the terms of Yarmouth's zoning ordinance, which was enacted in 1981. The Waltmans bought their land in 1982.

In March 1990, the Waltmans filed a variance request with the Board for permission to construct a house on the lot. The proposed house measured 24' by 36' with two 8' by 24' porches; it required dimensional setback variances of 29 feet from the front

setback requirements of 70 feet, 15 feet from the side setback requirement of 30 feet, and 63 feet from the rear setback requirement of 75 feet.

After holding a public hearing, the Board denied the variance request, on the basis that the Waltmans had failed to show that their need for a variance was due to unique circumstances of the lot and not to the general condition of the neighborhood, and that they had failed to show that their hardship was not the result of action taken by the applicant or a prior owner.

The Waltmans contend on appeal that the Board improperly determined that their hardship is not unique but is one common to the general condition of the neighborhood. They concede that the lots in the Littlejohn Island subdivision are generally of substandard size, and hence share the difficulty from which they seek relief by means of a variance. That circumstance, in itself, is insufficient to support the Board's finding that the hardship is not unique to their lot; the Board properly concluded that, as the difficulty is one imposed by the zoning ordinance on the neighborhood generally, relief must come by way of legislative action—that is, amendment of the zoning ordinance by the town council – and not by variance. See, e.g. *Radin v. Crowley*, 516 A.2d 962, 964 (Me. 1986) (area where majority of lots undersized); *Sibley v. Inhabitants of Wells*, 462 A.2d 27, 30 (Me. 1983) (all undeveloped lots in neighborhood of substandard size*); Barnard v. Zoning Board of Appeals of Town of Yarmouth*, 313 A.2d 741, 747, 749 (Me. 1974) (numerous nonconforming lots in neighborhood).

The Waltmans suggest their lot is "unique" because, unlike other lots in the neighborhood, it would be developable if only the Board would grant a variance. They contend that none of the other lots in the vicinity would qualify for variances to the State Plumbing Code for installation of wells or septic systems. The Maine Supreme Court rejected a similar argument in Barnard. Moreover, there is no evidence in the record that owners of the other undersized undeveloped lots in the area have ever sought approval for wells or septic systems, or that they could not arrange for those services or obtain State Plumbing Code variances similar to those granted for the Waltmans' hardship was not due to unique circumstances of their lot, but was a hardship shared in common with the other lots in the neighborhood.

Because the Waltmans were entitled to a variance only if they established that they met all four of the criteria in the ordinance, the court didn't need to address their contention that the Board improperly found their hardship to be the result of their own actions. See *Perrin*, 591 A.2d at 864.

13) *Forester v. City of Westbrook*, 604 A.2d 31 (Me. 1992)—Michael Forester appeals from the City of Westbrook's grant of a zoning variance to a neighboring landowner, Royden Cote. Cote applied to the Westbrook Zoning Board of Appeals for a variance permitting him to build a two-level deck on a two-family home. Forester appealed the Board's decision to the Superior Court pursuant to Rule 80B. The Superior Court affirmed. Because Cote failed to satisfy the statutory prerequisites for the grant of a variance, the variance should not have been upheld. Consequently, the Maine Supreme Court vacated the judgment.

Forester contends that the Zoning Board of Appeals did not address the first element of "undue hardship," that "the land cannot yield a reasonable return unless a variance is granted," and in any event could not have found "undue hardship" from the evidence before it. Cote's application explains that the variance would allow him to convert existing storage space into living space in a two-family home. However, the statute requires more than that the variance will increase the value of the land. *Grand Beach Ass'n v. Old Orchard Beach*, 516 A.2d at 554. "The fact that the variance would permit the defendant to increase his return does not, in any way, support the conclusion that the land cannot yield a reasonable rate of return unless a variance is granted." Although no economic proof was required to establish undue hardship where, in the absence of a variance, the applicant's home would be limited to dimensions of 17' by 20', *Driscoll*, 441 A.2d at 1030, limitations on living space alone do not constitute undue hardship. In *Anderson v. Swanson*, 534 A.2d at 1289, the court held that the defendant failed to establish deprivation of a reasonable rate of return by simply showing that without a variance his house was confined to a 20' x 32' footprint.

Only once was the issue of hardship mentioned at the Zoning Board of Appeals hearing; the Board member making the motion to approve Cote's application stated, "It is not clear to me that we've dealt with the hardship issue; (sic) however, I find the request to be a reasonable one." Since the Zoning Board of Appeals had before it no evidence that "the land cannot yield a reasonable return unless a variance is granted," its grant of the variance may not stand.

14) *Greenberg v. DiBiase*, 637 A.2d 1177 (Me. 1994)—DiBiase owned two lots which were separated by a private road, both with some shore frontage. One was developed with a single-family residence. She obtained setback variances from the BOA to build a small residence and septic system on the other lot and the neighbors appealed. The court upheld the variances, finding that there was substantial evidence in the record supporting a finding of "no reasonable return." Economic proof is not necessary to support a finding of no reasonable return (citing *Forrester v. Westbrook*). Without a variance, the setback requirements would preclude construction of any residential

structure. The court concluded that this would result in the practical loss of substantial beneficial use of the land; it didn't expressly find that the town's ordinance only allowed residential uses on this lot, but cited *Marchi v. Scarborough* to support its conclusion. The court distinguished this case from *Sibley v. Wells*, finding that the lots in this case weren't contiguous because a private road separated them, so the board correctly analyzed "reasonable return" by just considering the vacant lot standing alone.

15) *Brooks v. Cumberland Farms, Inc.,* 703 A.2d 844 (Me. 1997)—Cumberland Farms (prospective buyer) received setback variances to permit it to replace existing gas tanks, erect a canopy, and relocate a sign. It submitted evidence to demonstrate that the gasoline sales couldn't legally continue under State law unless the tanks were replaced. It also submitted financial information to show that the existing convenience store had been unprofitable for four of the last five years and that an apartment building on the property was uninhabitable unless a significant amount of money was spent on renovations. On this basis the BOA found "no reasonable return" without the variances. An abutter (Brooks) appealed, arguing that the zoning ordinance permitted other uses which could be conducted. The Superior Court agreed with Brooks and overturned the variances. Cumberland appealed. The Supreme Court found that the undue hardship test shouldn't be modified just because Cumberland wanted to continue an existing use. The court stressed that Cumberland had to demonstrate the practical loss of <u>all</u> beneficial use of the land without variances. Cumberland failed to do this because it failed to show that it couldn't yield a reasonable return from <u>any</u> use allowed by the zoning ordinance or that the expense of establishing such an allowed use would be prohibitive.

16) *Goldstein v. City of South Portland*, 728 A.2d 164 (Me. 1999)—The Rosses owned and were renting to tenants a two bedroom house with garage. They planned to use this as their retirement home and wanted to reconstruct and expand the house, but needed a rear yard setback variance to do so. At the BOA hearing on the variance application, witnesses for the Rosses testified that the house would continue to decrease in value without the variance. The BOA concluded that the Rosses' land couldn't yield a reasonable return based on this evidence and granted the variance. Abutter Goldstein appealed to the Superior Court and the court overturned the variance. The City appealed. The Maine Supreme Court held that the variance was improperly granted because the Rosses hadn't demonstrated that the denial of the variance would result in practical loss of substantial beneficial use of the land. They were receiving rental income and there was no evidence in the record that they weren't receiving net income.

17) *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995)—BOA granted the former landowner a variance to build a single-family dwelling. He failed to record it and it expired. He applied again and it was granted. He failed to record the second variance. Before it expired, the bank foreclosed on his mortgage and Twigg bought the property at a foreclosure sale. The second variance expired before Twigg applied for a building permit for a similar single-family home. The CEO denied the permit. The BOA denied Twigg's variance application, finding that Twigg failed to demonstrate no reasonable return without a variance and also that the hardship was self-created. The board based its finding of self-created hardship on evidence that Twigg "knew, prior to his purchase, of the complications and prohibitions attached to this property and its use." The Maine Supreme Court reversed the board's finding of self-created hardship, but upheld the denial on the basis that Twigg had failed to prove that he couldn't realize a reasonable return without the variance. Regarding "self-created hardship," the court adopted the modern rule, finding that prior knowledge of zoning restrictions is a factor which the board may consider but it is not by itself determinative. Regarding the "reasonable return" standard of the hardship test, the court noted that Twigg failed to show that his property could only be used for residential purposes and that the commercial purposes for which the property was used historically were no longer permitted. The record showed that Twigg had used the property for recreational activities since buying it and there was nothing in the record to show that these uses couldn't continue.

18) *Rocheleau v. Town of Greene*, 708 A.2d 660 (Me. 1998)—The Rocheleaus bought an unimproved shorefront lot from a family member and applied for a building permit 12 years later to build a seasonal cottage. The CEO denied the permit because the application failed to meet various dimensional requirements. The Rocheleaus appealed and requested a variance, which the BOA denied, citing self-created hardship based on a presumption the Rocheleaus knew of the ordinance restrictions which were in effect when they bought the lot. The Maine Supreme Court reversed the BOA's finding of self-created hardship, on the basis of *Twigg v. Kennebunk*. Because the record wasn't clear whether the BOA's denial could be based on one of the other standards, the court remanded the case for a redetermination by the BOA.

19) *Rowe v. City of South Portland*, 730 A.2d 673 (Me. 1999)—Buck's contractor built a house for Buck on an irregular shorefront lot. To avoid an unanticipated erosion problem the contractor built the house back further from the ocean than shown on the approved application. The result was that the house was in violation of the front yard setback by 1.26 feet and the rear setback in three places by 1.56 feet, 2.05 feet, and .79 feet. The neighbor, Rowe, was doing a survey for other reasons, discovered the encroachments, and notified the city. The building was substantially complete at this point. Buck's certificate of occupancy was denied and she appealed, seeking a

variance after the fact. The BOA granted the variance and Rowe appealed. Citing *Pepperman v. Town of Rangeley*, 659 A.2d 280 (Me. 1995), the court overturned the variance, stating that the same requirements and analysis apply whether the variance is sought before construction begins or after it is completed. Buck could have built a smaller house without a variance and still had a beneficial use of her property. She could still enjoy a beneficial use if she moved the house or rebuilt the part that was encroaching. Buck argued that to do either of those things would be cost prohibitive, but the court noted that those were not construction costs caused by the ordinance requirements; they were the result of human error in constructing a building that could have conformed to the ordinance. The court acknowledged that the Legislature expressly authorized municipalities to adopt the more relaxed "practical difficulty" test in 30-A M.R.S.A. § 4353(4-C), but until the city adopted that standard, a court had no power to apply it. The court also refused to apply a "de minimis" test to uphold the variance for the same reason.

20) *Bailey v. City of South Portland*, 707 A.2d 391 (Me. 1998)—Murphy purchased three nonconforming lots of record which were described in a single deed "by its metes and bounds." A single family home existed on one of the lots and the other two were unimproved. Murphy applied for a street frontage variance to build a house on the two combined vacant lots and the BOA granted it. An abutter, Bailey, appealed, arguing that all three lots must be treated as one merged lot because of the language in the city's ordinance and because they were described in one deed. The court disagreed, finding that the ordinance merger clause only applied to nonconforming lots with continuous road frontage and that none of the three lots fronted on the same street. It also found that the technique of describing three lots in a single deed didn't automatically cause the three lots to lose their individual identity. And finally, without describing the evidence, the court found that there was substantial evidence in the record to support the board's findings on each element of "undue hardship," upholding the board's decision. (Note: This case made no reference to *Sibley v. Town of Wells*, 462 A.2d 27 (Me. 1983), which appears to contradict *Bailey* on the issue of the reasonable return standard.)

"Zoning Variances–Which Ones Will Courts Uphold?" "Legal Notes," *Maine Townsman,* August/September 2004

from Legal Notes Archive Collection

The traditional zoning variance requires a showing of "undue hardship," and this in turn requires proof that, among other things, "[t]he land in question cannot yield a reasonable return unless the variance is granted" (see 30-A M.R.S.A. § 4353(4)).

The "no reasonable return" test has always been the most difficult one for appeals boards to interpret and for appellants to satisfy. We know from longstanding case law that a reasonable return does not mean the landowner is entitled to a maximum return (see, e.g., *Barnard v. Town of Yarmouth*, 313 A.2d 741 (Me. 1974)) and that undue hardship exists where strict application of the ordinance would result in the practical loss of all beneficial use of the property (see, e.g., *Thornton v. Lothridge*, 447 A.2d 473 (Me. 1982)). But in practical terms, what do these maxims really mean?

We recently reviewed most of the Maine Supreme Court's decisions in this area over the past two decades and identified what we believe are some guiding principles based on *real* cases. Although predicting what courts will do is inherently risky (courts can and sometimes do deviate from precedent, though usually not radically), here are our best guesses on how the courts would rule on certain variance scenarios, together with some of the cases we think confirm our views:

A variance will probably be upheld if the land is unimproved (unbuilt), is not abutted by any other land in the same ownership, is not practically buildable, and no other beneficial uses are permitted.

In *Marchi v. Town of Scarborough*, 511 A.2d 1071 (Me. 1986), the buildable portion of a vacant corner lot was limited by setback requirements to an area measuring 5 feet by 19 feet, and the appellants owned no abutting land. As the lot was strictly confined to residential use and was unbuildable without a variance, the Court found that there would be no other beneficial uses and upheld the variance. An offer from an abutter to purchase the lot at a discount did not, by itself, constitute a reasonable return because the appellants were entitled to *use* their property and were not required to sell it.

Similarly, in *Greenberg v. DiBiase*, 637 A.2d 1177 (Me. 1994), a vacant lot was confined to residential use only and was, by virtue of setback requirements, unbuildable. The Court again found that there would be no reasonable return and upheld the variance. The fact that the owner also owned nearby (but not contiguous or abutting) property was held irrelevant.

A variance will probably be overturned if the land is unimproved but has some value in relation to abutting land in the same ownership.

In *Sibley v. Inhabitants of Town of Wells*, 462 A.2d 27 (Me. 1983), the appellants bought a substandard lot adjacent to the one they occupied and sought a variance on the grounds that the second lot, without a variance, was worth substantially less than they paid for it as a building lot. The Court found no undue hardship and rejected the variance (and a "takings" claim), observing that "[the appellants'] land has substantial use and value in conjunction with the adjacent lot."

Likewise, in *Perrin v. Town of Kittery*, 591 A.2d 861 (Me. 1991), where the appellants divided their land and sought a setback variance in order to build on the second lot, the Court held that they had failed to prove that there would be no reasonable return from their use of the second lot as "an unimproved lot contiguous to [the first lot] on which [they] had constructed their residence."

A variance will probably be overturned if the land, with minor improvements, is suitable for some low-intensity use.

In *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995), the Court refused a variance for a new residence to replace an existing boathouse where the record showed that the appellant had used the property for docking his rowboat and storing gear. Noting that there was no proof this recreational use could not continue, the Court wrote, "Such use is relevant to the reasonable return analysis."

Twigg cited, among other precedents, *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). In *Hall*, the Court found a beneficial use (and thus rejected a "takings" claim) where the availability of water, sewer and electrical services made it feasible to park a seasonal camper on a sand dune.

A variance will probably be overturned if the land is improved (built), even if space is limited or the property is losing income or value.

In *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987), the Court rejected a variance for an addition to a 20-foot by 32-foot house, concluding that the house, though small, "offers adequate living space."

Likewise, in *Forester v. City of Westbrook*, 604 A.2d 31 (Me. 1992), the Court overruled a variance to expand a two-family dwelling, noting that "limitations on living space alone do not constitute an undue hardship."

In *Brooks v. Cumberland Farms, Inc.*, 703 A.2d 844 (Me. 1997), the Court overturned a variance needed to modernize a convenience store's gasoline sales area, even though, without it, the business would be unprofitable, where the evidence showed that there were numerous other lawful uses available without the need for a variance.

And in *Goldstein v. City of South Portland*, 728 A.2d 164 (Me. 1999), the Court refused a variance to enlarge a two-bedroom rental, even though it would continue to decrease in value in comparison to other rentals, where the property was in fact rented and generating income.

A variance will probably be overturned if the cost of compliance, even if substantial, is due not to the ordinance but to the owner's mistake.

In *Rowe v. City of South Portland*, 730 A.2d 673 (Me. 1999), a large oceanfront home was nearly completed when minor setback violations were discovered and the owner applied for and was granted an after-the-fact variance. Although the cost to correct the violations was tens of thousands of dollars, the Court overturned the variance because "[the owner] could still enjoy a beneficial use as a residence if she moves the house or rebuilds [it]." The cost of doing so was caused not by restrictions in the ordinance but by human error, so the expense involved was not relevant to reasonable return.

We should note that the traditional undue hardship variance also requires proof of three other elements in addition to no reasonable return and that variances are occasionally overturned for these or other reasons as well.

For more on zoning variances, see our "Information Packet" on variances, available free of charge to members on MMA's web site at www.memun.org.

(By R.P.F.)

Board of Appeals Workshop-"Undue Hardship Test" Slides with Commentary

I. "The Land in Question Cannot Yield a Reasonable Return Without a Variance"

Example #1:

This slide is designed to illustrate the classic variance request. The landowner has a principal dwelling structure and wants one or more setback variances or a lot size variance in order to build an accessory structure, such as a garage, or to expand the principal structure to add an extra bedroom, a porch or deck, or even a second dwelling unit. Where a principal structure exists, it is virtually impossible to satisfy the "undue hardship" test. Proposed accessory structures or expansions would generally constitute maximizing the owner's return on the land rather than seeking a reasonable return on the land. The existing use is usually sufficient to provide the owner with a reasonable return.

Example #2:

This photo shows an undersized lot with an existing single family dwelling and a small pond in front of the dwelling. The owner seeks a variance from the road setback in order to build a garage. While granting a variance from the road setback requirement may not change the character of the neighborhood if everyone else in the vicinity has a garage or other structure very

close to the road, the fact remains that adding an accessory structure generally constitutes maximizing return rather than realizing a reasonable return on the land. It doesn't matter that the town is located in a snowy part of the state and the board feels that everyone is entitled to have a garage.

Example #3:

This photo shows an undersized vacant lot not adjoined by other land in the same ownership. Such lots usually are "grandfathered" as to lot area and shore frontage/road frontage requirements under the applicable zoning or shoreland zoning ordinance. While it is possible that in some cases the owner may be able to prove undue hardship and obtain a setback variance to build a reasonable size principal structure that is not always the case.

Two Maine court cases have dealt with this issue or a related "takings" issue [*Hall v. Board of Environmental Protection* (Maine Supreme Court) and *Drake v. Town of Sanford* (Superior Court)]. In *Hall*, the landowners (Hall) lost their seasonal cottage due to severe beach erosion. They bought an adjoining vacant lot for $200; the owners of that lot had removed their cottage because of erosion. The Halls began using their two lots as one from that point. They obtained a building permit from the town to build a new seasonal cottage, but their application to the BEP under the Sand Dune Law to build a new cottage was denied. The court found that the Halls had been using their property by living in a large motorized camper that was connected to various utilities on the site; the property could accommodate an even larger mobile unit. It also found that both the Halls and others in the area had rented trailer and RV sites in the neighborhood for a reasonable price. There was also evidence in the record that properties comparable to the Halls' lot had sold for substantial sums even though only used for such seasonal uses. The court found that the denial of the Sand Dune permit did not constitute a taking of the Hall property because mobile units would still be a legal, beneficial use of the property. In *Drake*, the owner of two adjoin nonconforming lots on a peninsula wanted a setback variance to allow the construction of a seasonal camp. The board of appeals reviewed the shoreland zoning ordinance and found that there were a number of permitted non-structural uses (mineral exploration, wildlife management

activities, harvesting wild crops) and denied the variance application on the basis that the owner could realize a reasonable return without a variance by conducting one of those uses. The court upheld the denial, finding that the evidence in the record suggested that the land could be used for swimming, picnicking and access to the water; however, the court criticized the board for taking a "short cut" and basing its findings just on its reading of the ordinance rather than making an analysis of the actual property.

Example #4:

In *Brooks v. Cumberland Farms*, the owner of a Cumberland Farms applied for a setback variance to construct a canopy over an island of gasoline pumps in order to protect customers in inclement weather. The Maine Supreme Court found that the owner didn't satisfy the "undue hardship" test because he didn't offer proof that there was no other legal use of the property permitted by the town's ordinance which could be conducted and provide a reasonable return on the land without a variance. A solution in a case like this would be for the town to consider amending the ordinance to create a smaller setback or eliminate the setback requirement for a canopy-type structure.

Example #5:

This illustrates a neighborhood where a landowner might buy a modest seasonal cottage and then apply for a variance to add horizontal or vertical space and turn it into a year-round home. The issue is whether a variance for such an expansion is needed in order to allow a reasonable return. The burden is on the owner to show that a reasonable return is not possible without the additional horizontal or vertical expansion because no one will buy the property from the owner in its present condition.

Before getting to the issue of whether a variance is needed in order to provide a reasonable return and whether it is legally supported by the evidence in the record, the board of appeals should study the ordinance provisions related to expansion of nonconforming structures. Under some ordinances, certain expansions of an existing nonconforming structure may be possible without having to comply with setback requirements, making a variance and the "undue hardship" analysis unnecessary.

II. "The Need for the Variance is Due to the Unique Circumstances of the Property and Not to the General Conditions in the Neighborhood"

Example #1:

Due to the slope of the land and the owner's desire to take advantage of the beautiful view from the higher part of the lot, the owner of the land depicted above wants to build his house close to the adjacent town road, even though there is plenty of flat land on the lower part of the lot. However, building on the lower part of the lot would require a much longer driveway and there would be no view of the lake. In relation to other lots in the neighborhood, this lot is fairly unique as far as the slope of the land. The variance application arguably satisfies the "unique circumstances" part of the "undue hardship" test. However, if the owner has the option of building in another location on the lot that is conforming, even though it is less desirable, wouldn't that mean that he is seeking more than a reasonable return on the land under the first prong of the "undue hardship" test?

Example #2:

The owner of an existing lot wants a variance from the road and side setback requirements in order to build a porch on the front and side of her existing cottage. In a crowded neighborhood such as this, it is difficult to prove that the lot and cottage in question are unique, since virtually all of the buildings in the neighborhood are too close to the road and side lot line, and all of the lots are undersized. Without a natural feature like a wetland or ledge outcropping on the lot which is not found on other lots in the area or without evidence that the lot in question is smaller than others in the neighborhood, the owner would be hard pressed to meet the "unique circumstances" prong of the "undue hardship" test.

The solution may be for the town to take a look at the ordinance setback requirements for this neighborhood and see if they are realistic, given the existing land use patterns. It may make sense to adopt smaller setback distances for such a neighborhood. That is a legislative decision, not one that the board of appeals can make.

III. "Granting a Variance Will Not Alter the Essential Character of the Locality"

In the previous photo, the granting of a variance to allow a building to expand closer to the road or to the side property line probably will not alter the character of this particular neighborhood. However, if the variance sought is from a height restriction in order to allow a building to expand

vertically, such a variance might alter the neighborhood character in some cases, depending on how much of a variance is sought.

IV. "The Hardship is Not the Result of Action by the Applicant or a Prior Owner"

The land owner obtains a permit from the town to build a house and attached garage on the lot above. The lot is large enough to allow the house to be built in a spot which conforms to all setback requirements. Before beginning construction, the owner's contractor takes measurements from the side property line and is off by several feet. The house is completed and then the error comes to light. The owner submits an application for a variance to get "after-the-fact" approval for a variance to allow the building to remain where it is, arguing that it wasn't his fault and that in any case it is only a minor encroachment into the required setback. In the case of such an after-the-fact application, the board must review the application as though nothing had been constructed. If the landowner's project would have met the "undue hardship" test for a setback variance originally, then the board can grant a variance after-the-fact. However, if the building could have been built in compliance with setback requirements originally but for the contractor's error, then no variance is justified after-the-fact, regardless of how minor the violation is. The Maine Supreme Court has made such a finding in *Rowe v. City of South Portland*.
(RWS 12-17-06)

Excerpt from South Portland Zoning Ordinance—Variances (including Practical Difficulty and Disability Variances)

Sec. 27-36. Powers and Duties.

The Board of Appeals shall have the following powers and duties:

(b) *Variance appeals.* To hear and decide appeals in specific cases for variance from the terms of this chapter.

1) General Provisions.

Variances may be granted by the board only of height, area and size of structures, size of yards and lots and length of frontage. The board shall not allow a lot conforming in area to be divided so that lots nonconforming in area are created. No variance shall be granted for establishment or expansion of a use otherwise prohibited nor shall any variance be granted because of the presence of nonconforming lots, buildings or uses in a particular zoning district or adjoining district. Further, in the shoreland area only, variances also may be granted by the board from water setback requirements and for substantial expansions of nonconforming buildings. In granting by majority vote any variance, the Board of Appeals may prescribe conditions and safeguards as are appropriate under this chapter.

2) Dimensional Variances.

The board may grant a variance from the dimensional standards of any provision of this chapter unless otherwise expressly stated when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

(i) The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;

(ii) The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;

(iii) The practical difficulty is not the result of action taken by the petitioner or a prior owner;

(iv) No other feasible alternative to a variance is available to the petitioner;

(v) The granting of a variance will not unreasonably adversely affect the natural environment; and

(vi) The property is not located in whole or in part within shoreland areas as described in M.R.S.A. Title 38, Section 435.

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

3) Disability Variances.

The board may grant a variance to the owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The board may impose conditions on the variance. Any equipment or structures permitted with a variance may be removed at any time but may not be modified, expanded, or enclosed unless a subsequent variance is granted by the board. For the purpose of this subsection, a disability has the same meaning as a physical or mental handicap under Title 5, section 4553 and the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall, or roof systems necessary for the safety or effectiveness of the structure.

4) Variances other than Dimensional or Disability Variances.

A variance other than a dimensional variance, or a variance for property that is located in whole or in part within shoreland areas, as described in MRSA Title 38, Section 435 shall only be granted when strict application of this chapter or any provision thereof to the applicant's property would cause undue hardship. The words "undue hardship" mean that the board shall have determined that the following criteria have been met:

(i) That the land in question cannot yield a reasonable return unless a variance is granted;

(ii) That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

(iii) That the granting of a variance will not alter the essential character of the locality; and

(iv) That the hardship is not the result of action taken by the applicant or a prior owner.

(c) *Miscellaneous appeals.* To hear and decide only the following miscellaneous appeals from the provisions of this chapter. In granting, by majority vote, any such miscellaneous appeals, the board of appeals may prescribe conditions and safeguards as are appropriate under this chapter:

(1) To permit the location of off-street parking of passenger vehicles only on lots other than the principal building or use where it cannot reasonably be provided on the same lot. This shall apply only to those lots in residential districts provided that: The use shall be accessory to and under control of one or more uses located in and conforming with the uses permitted in the adjacent business or industrial district, such control to be evidenced by deed or lease and, if a lease, the period of the parking use shall automatically terminate with the termination of the lease; no such appeal shall be in order for hearing before the board of appeals until the City Planning Board shall have reviewed the site plan accompanying the application for building permit or certificate of occupancy for such use and shall have submitted its recommendations with respect thereto; the board of appeals may impose such conditions as deemed necessary to ensure development compatible with that of the immediate neighborhood notwithstanding the provisions of any other section of this chapter, and may at its discretion limit the period of such use.

(2) To permit the location of required off-street parking on lots other than the principal building or use where it cannot reasonably be provided on the same lot and subject to the conditions of Article XXII of this chapter.

(3) To permit changes to nonconforming uses in accordance with Sec. 27-16(d).

Sec. 27-37. Conditions.

Except in the case of appeals for dormers, pursuant to Sec. 27-16 (a), in granting variances and miscellaneous appeals under this article, the Board of Appeals may impose conditions of approval on the variance or miscellaneous appeal that address the following:

(a) Location, character and natural features.

(b) Fencing and screening.

(c) Landscaping, topography, and natural drainage.

(d) Vehicular access, circulation and parking.

(e) Pedestrian circulation.

(f) Signs and lighting.

(g) All potential nuisances.

(h) Public safety.

(i) Availability of public utilities and services.

(j) Any other standard or criterion considered in granting the variance or miscellaneous appeal.

Falmouth Board of Zoning Appeals-"Mislocated Dwelling Appeal"

8.2.1 Mislocated single family dwelling appeal

Name of Applicant: _____ **Phone#:** _____

Address of property under appeal: _____

Map/Lot: _____ **Tax Sheet:** _____ **Zone:** _____

Mailing Address (if different): _____

Property Owner (if other): _____

Email Address: _____

The undersigned requests that the Board of Appeals consider An Appeal:

8.2.1 Mislocated single family dwelling appeal.

In addition to other powers conferred by this section 8.2, the Board of Zoning Appeals shall have authority to hear and decide appeals taken from decisions made by the Code Enforcement Officer that an existing single family dwelling or its attached garage violates the setbacks for the zoning district in which it is located and that the violation must be remedied by removal or relocation of the portion of the structure which encroaches into the setback or by the acquisition of abutting property. If the Board finds that the violation exists, as found by the Code Enforcement Officer, it may nevertheless grant the appeal and render a decision that permits the existing structure to remain but shall not authorize any expansion, enlargement or relocation of the structure within the required setback area provided that the Board finds that the following criteria:

a. It would not serve the public interest to require the removal or relocation of the structure or the acquisition of abutting property;

b. Allowing the structure to remain in its existing location would not be contrary to the public health, safety or welfare and would not unreasonably detrimentally affect the use or market value of abutting properties;

c. The setback violation is not the result of a willful, premeditated act or of gross negligence on the part of the petitioner, a predecessor in title or agent of either;

d. The petitioner has no reasonably available alternative to this appeal.

The appeal application must be accompanied by a survey, stamped by a Maine professional licensed land surveyor, showing the property boundaries and the location of the offending structure.

Any appeal granted under this section shall be conditioned upon the petitioner's entering into a Consent Agreement with the Town, acting through the Town Council, which provides that the Town will not bring an enforcement action with respect to the violation if the petitioner pays a civil penalty to the Town stated in the Consent Agreement. The Consent Agreement shall reference the action of the Board and shall become effective upon signing by the petitioner and the Code Enforcement Officer and payment of the civil penalty. The Consent Agreement shall be recorded at the Cumberland County Registry of Deeds by the Town.

Sec. 1-14. General penalty; continuing violations; consent agreements

(a) Whenever in this Code or in any ordinance of the town any act is prohibited or is made or declared to be unlawful or an offense, or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, where no specific penalty is provided therefore and except as otherwise provided by state law, the violation of any such provision of this Code or any ordinance shall be punished by a fine not to exceed the maximum amount as allowed by 30-A M.R.S.A. § 4452 for each offense. All fines shall be recovered to the use of the town on complaint or by other appropriate action before a court of competent jurisdiction.

(c) In determining what, if any, civil penalty to impose as part of a consent agreement entered into pursuant to section 8.2.1 of the Zoning and Site Plan Review Ordinance, the Town Council may consider:

(1) how long the violation has existed;

(2) the circumstances surrounding the construction which violates the setback;

(3) whether a building permit was issued for the construction;

(4) whether the violation is the result of survey work conducted after the construction which resulted in a shift of the boundary line; and

(5) such other facts as the Council deems relevant.

Application Authorization

I hereby make application to the Town of Falmouth for the above-referenced property(ies) and the development as described. To the best of my knowledge the information provided herein is accurate and is in accordance with the Zoning Ordinance and Subdivision Ordinance of the Town, except where waivers are requested. The Town of Falmouth Planning Board and/or town employees are authorized to enter the property(ies) for purposes of reviewing this proposal and for inspecting improvements as a result of an approval of this proposal. I understand that I am responsible for appearing, or having someone appear on my behalf, at any and all meetings before the Planning Board.

Signed: _____ Date: _____

Printed name: _____

Please identify yourself (check one): Agent* _____ Property Owner _____

* (If you are an agent, written authorization from the property owner must be attached to this form.)

I certify that the information contained in this application and its supplement is true and correct