

Maine  
Municipal  
Association

# Manual for Local Planning Boards: A Legal Perspective



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# Introduction

Serving on a municipal planning board is one of the most important contributions that a citizen can make toward shaping the community's future. It can be a very rewarding experience for a person who is interested in trying to help the municipality balance new development against the traditional character and quality of life of the community. But it also can be a frustrating experience—doing battle with the voters at town meetings who oppose a comprehensive plan or ordinance which the board has worked for months to develop, going head to head with an uncooperative subdivision developer or his attorney over information requested by the board, or wondering whether the board has legal authority to approve a particular project.

This manual has been prepared in an effort to lay out the basic legal information which every planning board member should know in order to feel confident in performing the board's responsibilities. It is a general discussion of the planning board's legal authority and duties. While it will apply to most municipalities, an individual municipality may have an ordinance or charter provision which imposes additional requirements for its planning board to follow.

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. After reading the whole law or regulation, rather than merely selected excerpts, the reader will have a better idea of whether the law or regulation covers a particular project or whether there are provisions which exempt the project.

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.

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 invaluable assistance in the production of this edition of the manual.

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## Terms and Abbreviations Used in This Manual

**A.2d** or **Me.** refers to the series of Maine Supreme 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 (1913) and 486 A.2d 102 (Me. 1984). The numbers “111” and “579” refer to the volumes of the Maine and Atlantic court reports. The numbers “119” and “58” refer to the pages on which the case begins. The number “1913” refers to the year of the court’s decision. A case cite such as “2011 ME 53” means that the case was decision number 53 in 2011 by the Maine Supreme Court.

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

**Et seq.** means “and following sections.”

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

**M.R.S.A.** means the Maine Revised Statutes Annotated. An example of a reference to the Maine statutes is 30-A M.R.S.A. § 4401. The number “30-A” refers to Title 30-A. The number “§ 4401” refers to section 4401 of Title 30-A. The Maine statutes are now frequently cited as “M.R.S.” rather than “M.R.S.A.” as recognition that an electronic version of the statutes is now frequently used and that version does not include case annotations.

**Municipal officers** mean the selectpeople or the town or city council.

**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. “Rule 80(B)” refers to a rule of Civil Procedure governing appeals from decisions made by local officials.

**Supra** indicates that the court case has been cited previously.

**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.

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 online. The website address for the Maine statutes is

[www.mainelegislature.org/legis/statutes](http://www.mainelegislature.org/legis/statutes). To access Maine Supreme Court cases from 1997 to the present, go to [www.courts.state.me.us](http://www.courts.state.me.us). Some Superior Court cases are available at: <http://webapp.usm.maine.edu/SuperiorCourt/>.



## **CHAPTER 1 – Creation, Qualifications, and Liability**

The powers and duties of local planning boards are governed by the provisions of State statutes, local ordinances and, in some cases, town or city charters. A planning board 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). 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 Planning Board**

The laws pertaining to the establishment of a planning board have been modified several times over the years. In order to determine whether a board 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. § § 4952 to 4957 of the Maine statutes (Chapter 405 of the 1957 Public Laws) governed how a city or town created its planning board, who could serve on the board, and the board's various powers and duties. (See Appendix 1). According to section 4952(1), the legislative body of the municipality (i.e., the town meeting or town or city council) had the authority to establish a planning board and the municipal officers (i.e., selectpersons or council) made appointments to the board. The board consisted of five members and two associate members serving five year staggered terms who elected a chairperson and secretary from the membership. Associate members could vote only if designated to do so by the chairperson because a voting member was absent 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.

If a municipality voted at a town meeting to create a planning board under one of the old planning board statutes, the clerk's records should include a vote approving a warrant article similar to the following: "To see if the Town will vote to establish a Planning Board pursuant to 30 M.R.S.A. § 4952."

In 1971, the Legislature repealed or revised the planning and zoning sections of Title 30 (which took effect on September 23, 1971). According to 30-A M.R.S.A. § 4324(2)(A), if a planning board was created pursuant to the repealed provisions of 30 M.R.S.A. § 4952(1), it can continue to function as a legally constituted planning board under that section until the

municipality decides to adopt a new ordinance or charter provision changing the composition of the board or its method of selection.

### **Boards Created After September 23, 1971**

At the same time that the Legislature repealed section 4952 in 1971, it enacted 30 M.R.S.A. § 1917 (now 30-A M.R.S.A. § 3001), known as the “home rule” statute. Section 3001 provides authority for a municipality’s legislative body to adopt a “home rule” ordinance establishing a planning board. A sample ordinance and the procedure for adopting it are included in Appendix 1. This ordinance may be used to establish a new board or to reestablish one which was created under the old statutes, but it should be revised where necessary to meet the particular needs of the town or city adopting it. The Legislature repealed the old planning board statutes to allow municipalities to have more flexibility in creating a planning board which would meet local needs. Such things as the number of members and term of office can now be determined through an ordinance rather than by statute.

A new planning board also may be created in municipalities which have a charter by amending the charter using the home rule charter procedures found in 30-A M.R.S.A. § 2104 and 2105 and Article VIII, part 2, § 1 of the Maine Constitution. Generally, the charter provision would be supplemented by a more detailed ordinance.

### **Boards Created Before 1957**

Boards created before 1957 will need to refer to one of the following public laws, depending on when the board was formed: (1) Chapter 5, § 137 et seq. of the 1930 Revised Statutes; (2) Chapter 80, § 84 et seq. of the 1944 Revised Statutes; or (3) Chapter 91, section 93 et seq. of the 1954 Revised Statutes.

### **Ordinance or Article Wording**

It is important to remember that a planning board 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 planning board,” is not a sufficient procedure by itself to create a board because it leaves unanswered questions such as the number of board members and their terms of office. Nor is a provision in the town’s shoreland zoning ordinance or other ordinance which simply states that a board is established “as provided in State law” sufficient to create a legal board. Sample ordinances to establish a board and to reestablish one which was improperly created and sample warrant article wording to adopt the ordinance appear in Appendix 1.

## **Elected Board Members**

A number of Maine towns have established elected planning boards. If a municipality has an appointed planning board and wants to change to an elected board, 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* (3<sup>rd</sup> ed. rev.), § § 12.117-12.119, 12.121. If the positions are to be filled by written ballot election from the floor at an open town meeting, the ordinance or charter provision must 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 must be adopted 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 a charter provision also must conform to 30-A M.R.S.A. § § 2101-2109. The “90-day” rules described above also apply where an elected board is being changed to an appointed one.

## **Qualifications for Office**

### **Age, Residency, Citizenship**

Title 30-A M.R.S.A. § 2526(3) states generally that a person must be 18 years old, a resident of the State, and a U.S. citizen to hold a municipal office. Most municipal officials, including planning board members, do not have to be registered voters or legal residents of the town or city in order to serve in an elected or appointed position, unless required by local charter; the selectpeople or Council 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, dedimus justice, or an attorney, before performing any official duties as a board member. 30-A M.R.S.A. § 2526(9). The oath must 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 the planning board may not hold another office which is “incompatible” with the planning 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* (3<sup>rd</sup> ed. rev.), § 12.67. An example of incompatible

positions would be if one person served on both the planning board and zoning 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. [One Superior Court justice has held that it also is not legal for a husband to serve on the planning board and his wife to serve on the appeals board. *Inhabitants of Town of West Bath v. Zoning Board of Town of West Bath*, CV-91-19 (Me. Super. Ct., Sag. Cty, May 7, 1991).] The positions of an appointed planning board member and selectperson probably are incompatible, since the board of selectpersons has the power to remove an appointed planning board member for just cause under 30-A M.R.S.A. § 2601. For a planning board established under the old planning board statute, 30 M.R.S.A. § 4952 prohibited a municipal officer (a selectperson or councilor) from being a member or associate member of the planning board. The positions of local plumbing inspector and local code enforcement officer also may be incompatible with the position of planning board member if the planning board generally must pass judgment on a decision of the LPI or CEO in the process of making its own decision regarding an application or a violation of the ordinance. Not all attorneys agree that the positions of CEO or LPI are probably incompatible with the office of planning board member. Likewise, not all agree that the offices of selectperson or councilor are incompatible with the office of appointed planning board member where the planning board was created under a home rule ordinance rather than the old planning board statute. There appear to be no Maine court cases directly addressing this incompatibility issue.

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*.

## **Vacancy**

As a general rule, when a permanent vacancy occurs in an appointed planning board position, the municipal officers have the authority to fill the vacancy 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” using § 2602 as a guide and adding other items, such as repeated absences. If a vacancy occurs on an elected planning 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* (3<sup>rd</sup> 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 a board member 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 a planning board position is one which is filled by an appointment made by the municipal officers, then the municipal officers may remove that person for just cause, after notice and hearing. 30-A M.R.S.A. § 2601. “Just cause” means a legally justifiable reason, such as a blatant disregard for the law. It 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. 30-A M.R.S.A. § 2602.

## **Alternate Members of the Board**

It is advisable to create one or more alternate or associate member positions by ordinance. Use of alternates can minimize attendance problems which many boards experience. It can also serve as a training ground for future full voting members. Before a person may legally be designated as an alternate or associate member, the position must be established by vote of the legislative body.

## Liability of Board Members

### Nonperformance of Duty

Title 30-A M.R.S.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 planning board 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 permit); “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 permit for a use which is expressly prohibited by the ordinance governing the board’s review. An example of an action outside the scope of authority of a board member is where a board member is consulted by a member of the public about whether a certain permit 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 person’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 attorneys 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.

- **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 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 the 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 are 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 planning 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 that decision was made pursuant to a municipal “policy, custom, or practice.” The municipality cannot rely on the board’s good faith in defending a suit against the municipality.
- **Damages; Attorneys 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. If the court finds that the suit was frivolous, however, it will be quick to require the person filing the suit to pay the municipality’s attorney fees. *Burr v. Town of Rangeley*, 549 A.2d 733 (Me. 1988). There is no statutory limit on damages under the federal law as there is under the Maine Tort Claims Act. Title 14 M.R.S.A. § 8112(2-A) 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 (Right to Know Law)**

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 planning 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. If the board willfully violates the FOAA, the municipality or the board members could be liable to pay a \$500 fine. 1 M.R.S.A. § § 409 and 410. Also, the



statute states that certain decisions made in violation of the Right to Know Law are void. 1 M.R.S.A. § 409.

## **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. They are available on the State of Maine's website at [www.maine.gov/sos/cec/rules/index.html](http://www.maine.gov/sos/cec/rules/index.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 planning board 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 a person wants a copy of a public record, the municipality may charge a reasonable fee for the copy 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 (5) working days to determine whether the record is public and to issue a written denial if it is not. 1 M.R.S.A. § § 402, 409. Virtually all materials received or made by the board in connection with the transaction of public business are "public records," regardless of the form in which they are prepared and maintained. Application materials, board minutes, email communications, computerized records, audio tapes 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 records must acknowledge a request to inspect and/or copy public records within a reasonable time of receiving the request. Although a request need not be made in writing, the custodian should acknowledge the request in writing if possible.

If an elected planning 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 immediate 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 planning board member and a constituent.

## CHAPTER 2 – The Decision-Making Process

The discussion which follows should be used by the planning board as a general guide in dealing with the applications that it must review. There may be provisions in a local ordinance which conflict with these general rules and which would control the board's decision, unless the board's attorney advises otherwise.

### 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 2. Others may be available from the regional planning commission or council of governments 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 be consistent with the town or city ordinance which governs the application. Application forms must be consistent with the requirements of the ordinance which governs the project. Application forms do not normally require the approval of the legislative body. The board generally has implicit authority to develop and use forms.

### Bylaws/Rules of Procedure

In the absence of a local ordinance or charter provision to the contrary, any administrative board, like a planning board, can (and should) adopt written bylaws to govern non-substantive "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 that the board will use to run its regular meetings and public hearings, where not otherwise addressed in a State law, local ordinance or charter. Issues such as the number of 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 part of an 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. 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, charter, or State statute, such as the Maine Freedom of Access Act (1 M.R.S.A.

§ 401 et seq.) (see Appendix 2 for information on how to obtain a copy of MMA's Right to Know Law Information Packet).

A board created prior to 1971 should avoid conflicts between its bylaws and the old planning board statute (30 M.R.S.A. § 4952) (see Appendix 1 for a copy). 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 procedures, and the courts will defer to the board, as long as the procedure is fair and does not conflict with State, federal or local law. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987).

## **Jurisdiction of the Board/Other Assignments**

In a municipality which has established a planning board, 30-A M.R.S.A. § 4403 requires the planning board to serve as the municipal reviewing authority for subdivisions requiring local approval. Title 30-A M.R.S.A. § 4324 authorizes the municipal officers to appoint the planning board as a comprehensive planning committee, but the planning board does not automatically serve in that capacity. Where a new zoning ordinance or shoreland zoning ordinance or amendment is being proposed, 30-A M.R.S.A. § 4352 (9) and (10) require the planning board to conduct a public hearing on the proposal before it is scheduled for a vote of the legislative body. When property in the shoreland zone may be considered for designation as part of a Resource Protection District, 38 M.R.S.A. § 438-A (1-B) requires notice to be provided to the affected landowners at least 14 days prior to a vote by the planning board setting a public hearing date. Although the statute doesn't expressly require the planning board to send the notice, it is advisable for the board to familiarize itself with the requirements of this statute and coordinate compliance with it.

Most of the authority which the planning board exercises is vested in the board by one or more local ordinances, rather than by State statutes. General zoning or shoreland zoning ordinances, floodplain management ordinances, site plan review ordinances, and minimum lot size ordinances are some of the most common local ordinances requiring the planning board's approval for a variety of land use activities.

In some communities the planning board is asked by the municipal officers to perform other tasks not required of the board by any statute or local ordinance or charter. Planning boards are often asked to take the lead in preparing new ordinances or amendments. Their help also is sometimes enlisted to conduct studies on various issues. These are functions which the board is not legally required to perform, but it may do so if its workload permits.

## Standing to Apply

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 the 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 property deed, a lease, a written option or contract to purchase the property. 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 permit and prove that he could conduct the proposed use within the restricted areas 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 written evidence sufficient to satisfy the board. 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, variance or other land use approval from a 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 3 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 (comprised of three or more members) 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, take notes, or otherwise make a record of the meeting without first seeking permission, 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 generally 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 Freedom of Access Act 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 of regular meetings and special meetings about a week before the meeting is advisable. If the meeting is an emergency meeting, the Freedom of Access Act 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 Freedom of Access Act in some towns. However, it probably would be safer to post a 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 Freedom of Access Act (FOAA) and the constitutional right to due process, board members should not have discussions with other board members regarding an application or other substantive 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 is adjourned. Any such communications should be limited to non-substantive 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 it is a one-way communication and 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 a 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 in executive session “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 telephone conference call. Section 405 of the Freedom of Access Act only allows the board to conduct a discussion with its attorney in an executive session and only if the board (1) takes a vote to go into executive session during a public meeting which was preceded by public notice, (2) follows the procedures in Section 405 for making the motion and taking that vote, 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 Act) 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 Act'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 planning boards.

## **Common Violations**

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

- polling board members by telephone to vote on or discuss an application;
- 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;
- 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;
- making decisions in a "closed door" meeting or excluding the public when not authorized by law;
- conducting discussions about board business or making decisions by e-mail.

## **Site Visits**

If a majority of the board is going to visit the site of a proposed project, 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 Freedom of Access Act. Site visits conducted by individual board members or by a subcommittee comprised of less than a majority of the full board arguably would be 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, 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. If a site visit is conducted by less than a majority of the full board after the board has closed the record to further public comment, the information gathered during the visit cannot be used by the board unless it reopens the record and allows public comment. *Adams, supra*. See generally, *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148. It is 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 Freedom of Access Act. 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 and provide an opportunity for rebuttal by the applicant or some other interested person who disagrees with the board's description of the site.

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.

Site visits conducted as a board meeting by a majority of the board essentially are using that 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 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.

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 after returning to the meeting room.

### **Additional Information**

For more information about the FOAA, see MMA's "Right to Know Law" information packet online at [www.memun.org](http://www.memun.org).

### **Board Records**

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. § 402. This is true regardless of the form in which they are maintained (paper records, audio or video tapes, CDs, electronic 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](http://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 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 [www.maine.gov/sos/cec/rules/index.html](http://www.maine.gov/sos/cec/rules/index.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 planning board 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" than the "incompatibility of office" rule discussed 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 30-A M.R.S.A. § 2605. The statutory test applies only 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 decision 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 financial conflict of interest as defined in § 2605.

- **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 both categories 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 a subdivision 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 would find that a board member also had a conflict of interest under that test where the board member is a real estate agent trying to sell the property which is the subject of the application and his or her commission on the sale hinges on whether the board grants approval of the proposed use. Likewise, if a board member is a secured creditor of the applicant whose security interest will be affected by the board’s decision on the application or an abutting property owner whose property value will be affected by the board’s action, a court might find that the board member has 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 *Maine Townsman* magazine (“Ethics for Quasi-Judicial Boards” by Douglas Rooks and “Letter to the Editor” by Fred Snow), available on MMA’s website at [www.memun.org](http://www.memun.org). 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 from the board's discussion and vote. This practice will help 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 local charter or ordinance. Even without such an ordinance provision, the courts have recognized that a board has general authority to determine whether one of its members has a legal conflict. 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**

This section discusses a type of conflict that is based on a board member's state of mind or family relationship to a party to the application process.

- ***Bias Based on Blood/Marital Relation to Applicant or Other Party.*** Title 1 M.R.S.A. § 71 (6) 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 quasi-judicial 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, grandnephews/nieces, great grandnephews/nieces). (See chart in Appendix 2)

- ***Bias Against a Party 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 v. Town of Kittery*, 554 A.2d 799, 801, fn. 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 ample record evidence 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 other information in the record 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 an applicable ordinance or statute. *Cf.*, *New England Telephone and Telegraph Co. v. Public Utilities Commission*, 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 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 planning 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 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 Definition 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 may 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 or her financial interest in the matter or any bias which might prevent him or 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 or 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. *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 as a member. If a board member thinks that he or she may have a conflict or bias which would legally disqualify him or her but isn't 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 the process of reviewing an application.

## **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 board's bylaws or in the ordinance or statute which requires the board to review the project, 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. For example, the Municipal Subdivision Law requires that abutters receive notice when a subdivision application is filed with the municipality. 30-A M.R.S.A. § 4403. The board also should give reasonable notice to the public and press, as required by the Freedom of Access Act or relevant local ordinance, charter provisions, or other State law.

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 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.

There is no 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 drinking water source 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](http://www.medwp.com).

Even if the chairperson believes that the board has no jurisdiction over an application that has been submitted for the board’s review and approval, the chairperson still must schedule an initial board meeting on the application in order for the board to make that decision by majority vote. The chair cannot simply refuse to call the meeting, refuse to place the item on the agenda, or require the applicant to withdraw the application.

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 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. Super. 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 difficulties with the English language and who plan to attend the meeting to contact the municipality 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 municipality 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; Applicant's Special Needs**

As long as the applicant has received reasonable notice of the meeting at which his or her application will be discussed, it is not legally required that the applicant or an authorized representative of the applicant 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 his/her 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 approval for lack of sufficient information relating to specific provisions of the relevant ordinance. The board has no legal authority to force an applicant 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 need for reasonable accommodations by the municipality based on a disability or language barriers. The municipality must then determine what is 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 relevant ordinance establishes a different quorum requirement. 1 M.R.S.A. § 71 (3). A member who must abstain due to a conflict of interest or bias may not be counted in determining whether a quorum is present for that issue, absent ordinance language to the contrary. *Fitanides 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 own 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." *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410-411 (Me. 1984); *New England Telephone and Telegraph Co. v. PUC*, 448 A.2d 272, 280 (Me. 1982). 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 Cty., February 7, 1997).

In order for a board member to participate in the board's discussion and voting, he or she must be physically present. A board member should not be allowed to 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".

- ***Use of Alternate Members.*** If alternate board member positions have been 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; the alternate is really no different than a member of the public, since he/she 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, the board ensures 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.
- ***Required Notices Given.*** The chairperson should indicate whether required notices of the meeting have been given to the press, abutters, or anyone else.
- ***Summarize Application.*** If a quorum exists, then the chairperson should summarize for those present the nature of the application and any documents submitted in support of or in opposition to the application.
- ***Jurisdiction.*** He or she also should indicate to the board which provisions of the applicable ordinance or statute give the board jurisdiction over the application.
- ***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 or 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. (See related discussion in this chapter and in Chapter 3.)
- ***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 or by the town, 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. Sample procedures are included in Appendix 2. The Maine Supreme Court has recognized that boards generally have inherent authority to adopt their own rules of procedure. *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 direct cross examination and rebuttals in order to satisfy due process requirements. *Fichter v. Board of Environmental Protection*, 604 A.2d 433 (Me. 1992). The rules should address the effect of a tie vote. *Stevenson v. Town of Kennebunk*, 2007 ME 55, 930 A.2d 1046. Unless an ordinance or the board’s rules say otherwise, the chairperson’s right to vote is not limited to breaking ties.

The Maine Supreme Court has upheld decisions made by planning 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 statutory 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, tape record, film 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 or there may be a local ordinance requiring that the public be given at least a limited opportunity to speak at any planning board meeting. If there is 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 the applicant is given adequate opportunity to address this information. 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 for certain types of projects. (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 or 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 of the 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 extend the hearing to a later date. See sample procedures in Appendix 2.

### **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 in this chapter.) The board should consider seeking technical advice from its regional planning commission, from a State agency (such as the Department of Environmental Protection), or other experts that the board is authorized to consult, and legal advice from the municipality's lawyer or the legal department at Maine Municipal Association, 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 consultants or lawyer, it may be willing to adopt an ordinance provision that requires an applicant to set aside an amount of money in escrow which can be used by the board to hire consultants to help the board review the application. A sample ordinance provision appears in Appendix 5 and Appendix 6. 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, especially if the information is provided 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.

In at least one Maine Supreme Court case, 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 that 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. *Philric Associates v. City of South Portland*, 595 A.2d 1061 (Me. 1991).

### **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 a matter which becomes the subject of an appeal, that attorney probably cannot advise the board of appeals on that matter because of due process considerations. The attorney will make that judgment call. Many 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 State Bar Association seminar entitled "Land Use and Environmental Regulation: Recent Decisions and Practice Pointers" (November 1, 2002).

### **Minutes and Record of the Meeting**

Title 1 M.R.S.A. § 403(2) requires the board to create a record that contains 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 what was said and by whom and any agreements made regarding procedures or other issues at the board meeting. 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). Tape recording the meeting is not legally required. In taping a meeting (either audio tape or video tape), 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 tape. A tape 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. It may be advisable to seek guidance from the attorney who will defend 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 authority 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 it outweighed by conflicting evidence? Is it credible? Is that evidence substantial? Is it relevant to the ordinance requirements?
- f. To what extent does the ordinance/statute authorize the board to impose conditions on its approval?

### **Basis for the Board's Decision**

- **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. *Bruck 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 should 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 constitutional 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 even 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” and “Board Member Discussions/Email” earlier in this chapter under “Freedom of Access Act.”

- **Substantial Evidence.** “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 Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989).
- **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 private 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 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 it 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 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). Even if the board cannot legally resolve some of these issues, if a party to the board's proceedings raises such a challenge, the board should note the challenge and its response in the record of the case so that it is preserved in the event of an appeal.

- ***Overlap with State and Federal Law.*** The planning 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 of anyone personally familiar with the site and conditions surrounding the application and on its own investigations. *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, 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 appearing earlier in this chapter regarding investigations by individual board members.
- ***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 also *Philric Associates v. City of South Portland*, *supra*.

Absent a local charter provision, ordinance or job description to the contrary, the code enforcement officer is not a member of the planning board and has no official role regarding the planning board's proceedings or the custody and care of planning board records. While the code enforcement officer often has valuable information and insights to share with the board, he/she should offer it for the planning 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*.

- ***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 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.).
- ***Participation by Board Members Who Miss Meetings.*** If a board member has not been able to attend every meeting at which the board discussed substantive evidence regarding a particular application, it is arguable that such a board member cannot participate in making the decision on an 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, supra, 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 that 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 once 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 vote 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 it out in the local ordinance which governs a particular decision.
- **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. Super. Ct., Yor. 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, 1292 (Me. 1985). As previously noted, the effect of a tie vote should be spelled out in the board's rules of procedure or applicable local ordinance to avoid confusion.

- **Findings and Conclusions.** When taking a final vote, the board must prepare a written statement of the “findings of fact” which appear in the written record and a written explanation of the “conclusions of law” which it has made as to whether the facts show that the project is in compliance 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 or her relationship to the property, location of the property, basic description of the project, key elements of the proposal (number of lots, size of lots, frontage, setback, type of structures, type of streets, sewage and solid waste systems, water supply, 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 sewage disposal would be: “We conclude that the applicant will provide adequate sewage disposal for the lots in the subdivision as required by 30-A M.R.S.A. § 4404(6). Soils reports have been submitted for each site prepared by a site evaluator showing that at least one spot on each lot could support a subsurface wastewater disposal system which complies with the State Plumbing Code.”

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. The State law pertaining to subdivisions [30-A M.R.S.A. § 4403(6)] requires that the board make “findings” establishing that the project does or does not meet the requirements of the statute or ordinance. The State’s model shoreland zoning guidelines also require that the board make “findings” when preparing a decision. Rule 80B(e) of the Maine Rules of Civil Procedure, which governs appeals from a local board’s decision filed directly 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.) 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 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. *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013. If the planning board's decision is appealed directly to the court, then the court will review the planning board's decision. If the planning board's decision is appealed to the board of appeals and the board of appeals conducts a *de novo* review of the planning board decision rather than an appellate review, the court will review the board of appeals decision.

- ***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 board of appeals or 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 is as follows: The board should use the ordinance or statute which governs the review of the



proposal and the application form 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, or why it can't make a finding either way. 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 or against 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 those conditions in the final vote so that there will be no confusion regarding what conditions are applicable; only those conditions which are adopted by a majority vote on an individual review criterion or which are adopted by the majority of the board in the final vote 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 of law 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 at that meeting 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., one 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.). If the board takes what it considers a "preliminary vote" to be finalized at a subsequent meeting following the preparation and review of a final draft of its findings, then the board should make this clear for the record. See generally, *Beckford v. Town of Clifton*, 2014 ME 156, 107 A. 3d 1124. Several sample written decisions and a number of excerpts from Maine Supreme Court cases indicating the kind of detail that a court expects in a board decision appear in Appendix 3.

Several problems can result if the board delegates the responsibility for 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). Another risk is that if a subcommittee of the board comprised of three or more members is asked to develop tentative findings and conclusions, the subcommittee members may not realize that they must comply with the 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 the 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*.

- **Conditions of Approval.** A planning 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. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBrearty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). (See Appendix 3 for sample language.) 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 time frame, 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 board 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 requirements, 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.)

## **Reviewing Conditional Use/Special Exception Permit Applications**

If a general or shoreland zoning ordinance authorizes the planning board to decide whether to approve conditional use or special exception applications, the board should be guided by the standards of review that the ordinance provides. (Shoreland zoning ordinances usually refer to these as "planning board permits.") 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 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, determine whether the application complies with each of the standards of review, and whether to approve or deny the application.

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 regarding “improper delegation of legislative authority” later in this manual.)

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 other bases for denial. That way, if the denial is appealed, the likelihood that a court will uphold the board’s decision increases, 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).

### **After Making the Decision; Notice of Decision**

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 promptly after the decision is made. The board should check the applicable statute or ordinance to see if it states a deadline. The date on which this notice is sent 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 Maine Freedom of Access Act and can be inspected and copied by any member of the public, whether or not a resident of the municipality.

### **Reconsideration**

There is no statute governing the planning board’s authority to reconsider a decision, as there is for the board of appeals in 30-A M.R.S.A. § 2691. The planning board has the inherent authority to reconsider a decision. *Jackson v. Town of Kennebunk*, 530 A. 2d 717 (Me. 1987); *Cardinali v. Town of Berwick*, 550 A. 2d 921 (Me. 1988). However, it is

advisable either for the board to adopt rules of procedure governing the reconsideration process or for the municipality to adopt an ordinance provision. An ordinance may be legally required in order to impose a deadline by which a person with standing must request a reconsideration.

### **Effect of Decision; Transfer of Ownership After Approval**

It is commonly assumed that a subsequent purchaser of land for which a conditional use or special exception or site plan review 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 Young, *Anderson's American Law of Zoning* (4<sup>th</sup> ed.), § 20.02. 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.

### **Second Request for Approval of Same Project**

Once an application for a land use activity 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). However, an ordinance may provide a different rule regarding subsequent requests which would govern the board's authority.

### **Vague Ordinance Standards; Improper Delegation of Legislative Authority**

It is very important for an ordinance, especially a zoning ordinance, to include 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 interests 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 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 are desirable land use regulations 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), *American Legion, Field Post #148 v. Town of Windham*, 502 A.2d 484 (Me. 1985), *In Re: Spring Valley Development*, 300 A.2d 736 (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 just cited, it generally will hold that a denial of an application by the board under 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. Therefore, 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.

### **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 and other officials involved should take the time to review and understand the procedures outlined in the ordinance before taking action or advising the applicant.

### **Prior Mistakes by the Board**

The fact that a board or its predecessor made mistakes in the issuance of a permit or the interpretation of an ordinance does not have any legally binding, precedent-setting value. "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 Use of Permit**

Generally, once the board has issued a permit or approval, the holder of the permit or approval has an unlimited amount of time within which to complete the work covered by the approval or permit. However, the board should check the applicable ordinance or statute to be sure. 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*, 715 A.2d 930 (Me. 1998) (interpreting meaning of “the work authorized...is suspended or abandoned at any time after the work is commenced...”).

## **Selected Statutes Which Might Affect a Project Being Reviewed**

The following are State laws with which a planning board may want to be familiar as it reviews a land use project:

### **Subdivision Law**

Title 30-A M.R.S.A. § § 4401-4408 (the Municipal Subdivision Law) requires the planning board to review subdivisions using the procedures and performance standards set out in the statute. (If the municipality has not established a planning board, then the municipal officers must perform the review in the absence of some other locally-designated review authority.) The statute also authorizes the board to adopt additional reasonable regulations which are related to the statutory review criteria and procedures where the municipality has not adopted a subdivision ordinance. For a copy of the statute and a number of other materials related to subdivision issues, see Appendix 5.

### **Seasonal Conversion Law**

Title 30-A M.R.S.A. § 4215(2) requires a permit from the local plumbing inspector (LPI) before a seasonal dwelling can be converted to a year-round dwelling in the shoreland zone. A “seasonal dwelling” is defined in 30-A M.R.S.A. § 4201(4) as “a dwelling which existed on December 31, 1981 and which was not used as a principal or year-round residence during the period from 1977 to 1981.” Listing that dwelling as the occupant’s legal residence for the purposes of voting, payment of income tax, or automobile registration or living there for more than 7 months in any calendar year is evidence of use as a principal or year-round dwelling. Before issuing a conversion permit, the LPI must find that the applicant has met one of three conditions outlined in 30-A M.R.S.A. §4215(2).

### **Entrance Permit**

Title 23 M.R.S.A. § 704 requires a permit from the Department of Transportation or from the municipal officers for new entrances on a State or State-aid highway. The permit is issued by the municipal officers if the driveway will be in the “compact” area, which means a section of the highway where structures are nearer than 200 feet apart for at least 1/4 mile. 23 M.R.S.A. § 2.

## **Road Setback**

Title 23 M.R.S.A. § 1401-A requires structures on land adjoining a State or State-aid highway to meet certain setback requirements from the centerline or edge of the right-of-way. Many local ordinances do not clearly state the point from which setbacks must be measured. Title 33 M.R.S.A. § 465 states that a person who owns land abutting a town road owns to the center line of the road, absent a deed or other rule established by 33 M.R.S.A. § § 466-469 to the contrary. It may be advisable for local ordinances to state that setback will be measured from the centerline rather than from the property line or from the right-of-way edge, which also can be hard to establish.

## **Overboard Discharges**

Title 38 M.R.S.A. § 413 and § 464 generally prohibit the issuance of new overboard discharge licenses and establish standards for the renewal or expansion of existing licenses by DEP. An “overboard discharge” is basically a licensed discharge of treated sewage into a water body (usually saltwater), usually from a treatment system serving one residence or business, as opposed to a discharge from a municipal or quasi-municipal sewage treatment plant. A local building inspector cannot issue a permit for any building required to have an overboard discharge license from DEP under § 413 and § 464 until that license is obtained. 30-A M.R.S.A. § 4103.

## **Construction or Expansion of Structure Requiring Subsurface Disposal**

Title 30-A M.R.S.A. § 4211(3) requires any person erecting a structure requiring subsurface disposal to provide documentation to the municipal officers that the system can be constructed in accordance with the State’s Subsurface Wastewater Disposal Rules. Any person expanding a structure using subsurface disposal must provide documentation to the municipal officers that a legal replacement system can be installed in the event of a future malfunction. Notice of that documentation must be recorded in the Registry of Deeds with copies sent to all abutters. Abutters are then prohibited from installing a well in a location which would prevent installation of the replacement system. The landowner also is prohibited from erecting a structure or conducting an activity which would prevent installation of the replacement system. Notice to the public drinking water supplier is also required if the lot is within the source water protection area mapped by the Department of Health and Human Services Public Drinking Water Program. (See Appendix 2 for a sample notice.)

## **Farmland**

Title 7 M.R.S.A. § 56 generally prohibits a municipal official from issuing a building or use permit which would allow “inconsistent development” on land of more than one acre if the development will be within 100 feet of “farmland” which was registered with the

municipality between June 1 and June 15, 1990 or 1991 in accordance with the registration requirements provided in the statute then in effect.

### **Small Gravel Pits**

Title 30-A M.R.S.A. § 3105 requires municipalities to enforce certain minimum standards against “small borrow pits” which do not fall within DEP’s jurisdiction.

### **Maine Endangered Species Act**

Title 12 M.R.S.A. § 12804 authorizes the Department of Inland Fisheries and Wildlife to designate sites which are essential habitat for the conservation of endangered or threatened species and adopt guidelines for their protection. Municipal boards and officials are prohibited from granting any permit or approval for projects that will significantly alter a designated habitat area or violate the Department’s protection guidelines. The Department is required to provide information to municipalities to assist them in their review and may authorize the granting of a variance.

### **Regulation of State, Federal, County, and Municipal Projects**

Title 5 M.R.S.A. § 1742-B requires the State Bureau of General Services in the Department of Administrative and Financial Services to notify the municipality of a proposed State construction project. If the municipality intends to review and issue building permits for the State project, it must notify the Bureau no later than 45 days following receipt of notification from the State. If so requested, the State must comply with local ordinances governing construction and alteration of buildings, if the local codes are as stringent as or more stringent than the State’s code governing State projects. (See later discussion in this manual regarding municipal building codes and the State Uniform Building and Energy Code.)

With regard to zoning ordinances, 30-A M.R.S.A. § 4352(6) requires that State agencies comply with zoning ordinances which are consistent with a comprehensive plan which is consistent with the Growth Management Act in the development of any building, parking facility, or other publicly owned structure. The Governor, or his/her designee, is authorized to waive any use restrictions in a zoning ordinance after giving public notice, notice to the municipal officers, and opportunity for public comment, and making five specific findings relating to the public benefits of the project and available alternatives. Zoning ordinances continue to be advisory to the State if they are not consistent with a comprehensive plan which is consistent with the Growth Management Act. The Maine Supreme Court has held that a private project conducted on land leased from the State may be exempt from municipal zoning regulations if it is shown that the use of the State’s land “furthers a State purpose or governmental function,” that there is a “compelling need” for the exemption and that there is State involvement of a substantial nature in the project. *Senders v. Town of*

*Columbia Falls*, 657 A.2d 93 (Me. 1994). Zoning ordinances are not simply advisory when the municipality or county or a quasi-municipal corporation is conducting the project.

According to Title 40 U.S.C.S. § 3312, federal agencies proposing to construct or alter buildings are required to “consider” the requirements of local zoning and other building ordinances and “consult” with the appropriate local officials. They also are required to submit plans for review by local officials and permit local inspections. Municipalities are prohibited from prosecuting a federal agency for failing to comply with local ordinances or failing to follow local recommendations.

### **Erosion and Sedimentation Control; Stormwater Management**

Title 38 M.R.S.A. § 420-C requires any person who will be conducting an activity which involves filling, displacing or exposing soil or other earthen materials to take measures required by the statute and DEP rules to prevent unreasonable erosion of soil or sediment beyond the project site or into a protected natural resource. Erosion controls must be in place before the activity begins. Measures must remain in place and functional until the site is permanently stabilized. Adequate and timely temporary and permanent stabilization measures must be taken. Where property is subject to erosion because of a human activity involving filling, displacing or exposing soil or other earthen materials before July 1, 1997, special compliance deadlines are established in § 420-C. Agricultural fields are exempt from § 420-C and forest management activities, including roads, are deemed in compliance with § 420-C if they conform to the standards of the Maine Land Use Regulation Commission.

Any person proposing to construct a project that includes one acre or more of disturbed area must receive prior approval from DEP pursuant to 38 M.R.S.A. § 420-D to ensure compliance with stormwater management rules. Certain activities are exempt.

### **Minimum Lot Size**

Title 12 M.R.S.A. § 4807 et seq. establishes a statewide minimum lot size for land use activities which will dispose of waste by means of a subsurface disposal system. The minimum lot size for new single family residential units (including mobile and seasonal homes) is 20,000 square feet. For multi-unit housing and other land use activities, a proportionately greater lot size is required based on a statutory formula. This law is administered and enforced by the Department of Health and Human Services (DHHS). (See Appendix 7 for an explanation of the formula.) Municipalities may establish larger lot size requirements by local ordinance. Many ordinances do not clearly state whether the lot size applies on a per unit, per structure, or per lot basis.

## **Essential Services/Public Utilities**

Title 30-A M.R.S.A. § 4352(4) and a related Public Utility Commission (PUC) rule found in 65-407 CMR Ch. 885 provide a process that a public utility may follow to be exempt from compliance with a local zoning 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.

A utility of any kind may not install services to a lot or dwelling unit in a subdivision or a new structure within the shoreland zone without written authorization from the appropriate local officials attesting to the validity and currency of all local shoreland zoning and subdivision approvals. 30-A M.R.S.A. § 4406(3); 38 M.R.S.A. § 444.

## **Conflict Between Ordinances and the Federal Fair Housing Act Amendments or the Americans With Disabilities Act**

Boards are sometimes asked to grant approval of a land use application on the basis that the municipal ordinance is in violation of the Federal Fair Housing Act Amendments (FFHAA) relating to group homes for individuals with disabilities or that the ordinance violates the Americans with Disabilities Act (ADA). The applicant's position is that the ordinance illegally requires the group home project to undergo a conditional use or special exception review when similar housing for non-disabled individuals and families is not subjected to the same approval process. Often these claims are valid, but they put the board in the position of having to approve something which is contrary to the express language of a local ordinance. Since the municipality could be faced with civil rights liability under federal law if its ordinances do illegally discriminate against people with disabilities, the board should consult with the municipality's attorney when one of these issues is raised. A *Maine Townsman* Legal Note entitled "ADA/Land Use Regulation" (February 1996) can be accessed on MMA's website at [www.memun.org](http://www.memun.org).

The same dilemma will also arise under 30-A M.R.S.A. § 4357-A with regard to group homes. Group homes which are operated essentially as single family homes must be treated the same as single family homes for non-disabled people. If the local ordinance is in conflict with this statute, consult with the municipal attorney before making a decision.



## CHAPTER 3 – Appeals

### Jurisdiction

Generally speaking, if a decision by the planning board is made under a local ordinance, the ordinance will provide for an appeal of the board's decision to the local board of appeals. Where an ordinance or statute does not expressly authorize an appeal to the board of appeals, the person wishing to challenge the planning board's 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). One exception to this rule is when the appeal is from a decision made under a zoning ordinance. This includes appeals brought under a shoreland zoning ordinance as well as a general zoning ordinance. By statute (30-A M.R.S.A. § 4353) the board of appeals is authorized to hear and decide certain types of zoning appeals, unless otherwise provided in the ordinance. If a zoning ordinance authorizes the planning board to hear special exception or conditional use applications, then the ordinance may provide that appeals from those decisions go directly to Superior Court. 30-A M.R.S.A. § 4353. Title 30-A M.R.S.A. § 2691 states that when an 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."

### Enforcement Decisions

When an appeal involves an enforcement decision by a code enforcement officer rather than a decision involving a permit application, the board of appeals will have to study the ordinance provisions carefully to determine whether it has jurisdiction. 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"). However, one Superior Court justice has interpreted the phrase "administration of this ordinance" to include both decisions on permit applications and enforcement orders/stop work orders. *Inhabitants of Levant v. Seymour*, AP-02-26 (Me. Super. Ct., Pen. Cty., June 9, 2003). Other cases which have addressed this issue include: *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991); *Town of Freeport v. Greenlaw*, 602 A.2d 1156 (Me. 1992), and *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); *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 language in the ordinance).

In 2013 the Legislature amended 30-A M.R.S.A. § 2691(4) to address the issues in *Eliot Shores*. The statute now reads as follows: "Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required. 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 non-action may be appealed to the board. Absent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is reviewable on appeal by the board of appeals and in turn by the Superior Court under the Maine Rules of Civil Procedure, Rule 80B. Any such decision that is not timely appealed is subject to the same preclusive effect as otherwise provided by law. Any board of appeals shall hear any appeal submitted to the board in accordance with Title 28-A, section 1054." 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. 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).

## **Appeal of Failure to Enforce**

The court will allow a person with legal standing to file a direct legal challenge in court where a municipality refuses to bring an enforcement action because it believes that the ordinance is not being violated. *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.

## **Deadline for Filing Appeal**

### **Appeal 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*, 325 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. The Maine Supreme Court has held that in the case of the issuance of a building permit by a building inspector, the appeals period begins to run from the date of issuance of the permit, even though there was no formal public decision-making process 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. Super. 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. *Hylar v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990).

### **Appeal to Superior 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. A court may allow a time period for an appeal 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 because there is no local appeal by statute or by ordinance, the appeal deadline is governed by Rule 80B and is 30 days; the question is whether that deadline runs from the date of the vote or date of receipt of a written decision, as noted above. In the case of a subdivision decision, the court has ruled that the deadline runs from the date of the planning board's written order. *Hylar, supra*. 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 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. This must be determined in the context of the municipality's particular ordinance(s) and what approvals are needed under those ordinances before a project may be conducted. Legislation is being proposed during the 2017 legislative session in an effort to clarify when a decision is "final."

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.

### **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 deny 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, supra*; *Keating, supra*; *Gagne, supra*; *Brackett, supra*; *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., Yor. 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 town 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, *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991), and *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998) (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 cases 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 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 Herman*, 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.*, 703 A.2d 844 (Me. 1997); *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 approval or permit 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*, 730 A.2d 673 (Me. 1999). 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 on a public road 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 from the board of appeals 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. 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., Yor. Cty., October 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. This means that 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 not 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 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 or new issues/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 MMA's *Board of Appeals Manual*.

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.

## **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 an 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 (Me. 1991); *Wells v. Portland Yacht Club*, *supra*; *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.

## **Board of Appeals Members Attending Planning Board Meetings**

Whether a board of appeals hears an appeal *de novo* or in an appellate capacity, it probably is not a good practice for board of appeals 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.

## **Authority of Municipal Officers**

The municipal officers do not have the authority to hear appeals and override a decision of the planning board or 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 selectpersons 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 to challenge a board decision 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 the appointed board members for cause after notice and hearing if they feel that board members are ignoring the requirements of an ordinance or State law when making decisions.

## **Role of Code Enforcement Officer (CEO) 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 can be a very valuable resource for the board, the CEO 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 CEO is attempting to offer comments during a public hearing or 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 and the same right to speak as members of the public have.

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 offers it into evidence.

## **Second Appeal of Same Decision/Reconsideration by the Board of Appeals**

### **Second Appeal**

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); *Silby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985). See also, *Toomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563.

## Reconsideration

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 ten 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, supra*. 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 thinks that the board will reject the request, 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 application 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 of appeals to require that the applicant fill out a separate variance appeal application and then advertise a new hearing on the variance request.

## CHAPTER 4 – Variances and Waivers

### Authority to Grant Variances or Waivers

#### 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).

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.

## **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 standards or other 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.

The Maine Supreme Court in the case of *Jarrett v. Town of Limington*, 571 A.2d 814 (Me. 1990), overturned a number of waivers granted by the planning board from various requirements of the town’s subdivision ordinance. The court found that the board had exceeded the authority granted to it under the language of the ordinance. In *Bodack v. Town of Ogunquit*, 2006 ME 127, 909 A.2d 620, the court found that, while the evidence in the record probably would have supported a waiver decision by the board, the board had failed to make required written findings and conclusions, so the court vacated the board’s decision.

## **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. Most 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.

## **Recording Variances/Waivers**

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. In the case of the planning board waiver, where a subdivision plan will be recorded, the required information must be noted on the plan. A sample subdivision variance form is included in Appendix 5. To be valid, these certificates or plans must be recorded within 90 days of the decision on a zoning variance or within 90 days of the final approval of a subdivision plan. If they are not recorded within the stated deadlines, they become 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 or 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*, 715 A.2d 930 (Me. 1998). If the board of appeals 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.

## **Variance vs. Special Exception/Conditional Use**

There is often confusion between variances/waivers and special exceptions/conditional uses. When a board grants a variance or waiver, it is essentially waiving or reducing some requirement of the ordinance which would otherwise prevent a proposed structure or project from being built. Depending on the wording of the local ordinance, variances are sometimes authorized for dimensional requirements (such as lot size, setback, and frontage) as well as to allow uses which are otherwise prohibited by the ordinance. The exact wording of the ordinance governs what variances or waivers may be granted in a particular municipality.

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 planning board or board of appeals (whichever one is authorized by the ordinance) 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. This decision must be guided by specific ordinance standards.

## **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 which the applicant was unable to meet. Without the variance from the board of appeals waiving or modifying the ordinance requirement, the

planning board or CEO would have had no legal authority under the ordinance to approve the application. The variance itself does not constitute a “permit,” however. Generally, once a variance is granted, the applicant must return to the planning board or some other local official for a permit authorizing the project as a whole. 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* (4<sup>th</sup> ed.) § 20.02, pages 412-416; *Inland Golf Properties v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., Yor. 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 probably is 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.

## **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.



## **CHAPTER 5 – 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 granted the approval believes that it should be revoked. Generally, the official or board should not attempt to revoke the approval on the grounds 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 the 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 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* (3<sup>rd</sup> 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 that 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 a local board or official. Parties may raise these issues as part of an application or appeal 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 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 a permit or other approval or by the conduct or statement of a public official. *City of Auburn*

*v. Desgrosselliers*, 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 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 agency, 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 Ordinances 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. 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, 781 (Me. 1989). The fact that an application was delivered to the town office or received and receipted by the board's secretary does not make an application "pending," absent a local ordinance to the contrary. *P.W. Associates v. Town of Kennebunkport*, No. CV-88-716 and CV-89-29 (Me. Super Ct., Yor. Cty, Nov. 20, 1989).

The Maine Supreme Court has made it clear that where several ordinances, each with their own application and review process, govern a project, the fact that a person has a "pending application" under one of those ordinances does not make his application "pending" for all purposes. Any ordinance amendments to other ordinances or other totally new ordinances adopted in the meantime would apply to the project. *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 or a plan is not recorded within a specific 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. 2d 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 does not preclude the board of appeals 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 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) (purchaser of several unimproved subdivision lots unable to build when town subsequently rezoned lots as resource protection). It is advisable for the board to consult with an attorney before deciding

what to do in such situations. See also, *Thomas v. Zoning Board of Appeals of the City of Bangor*, 381 A.2d 643, 647 (Me. 1978), *Fisherman's Wharf, supra*, and *Larrivee v. Timmons*, 549 A.2d 744 (Me. 1988). 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 included in the new ordinance. *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 6 – Ordinance Interpretation

### General Ordinance Interpretation Rules

#### General

If the board is confronted with an ambiguous provision in an ordinance as part of an application review 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 a 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 of appeals' 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 the 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, undefined terms must be given their common and generally accepted meaning unless the context indicates otherwise or there is express legislative intent to the contrary. *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; *Hrouda v. Town of Hollis*, 568 A.2d 824, 825 (Me. 1990); *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*, 712 A.2d 1047 (Me. 1998); *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 Associates*, 594 A.2d 556 (Me. 1991); *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). It is likely that a court would find that the planning board has similar authority.

## Legal Nonconforming (“Grandfathered”) Uses, Structures, and Lots

Provisions dealing with nonconforming lots, structures, and uses legally must be included in a zoning ordinance to avoid constitutional problems with the ordinance. *Inhabitants of the Town of Windham v. Sprague*, 219 A.2d 548 (Me. 1966). 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 does not confer “grandfathered” status by itself. *Cf., Thomas v. Board of Zoning 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*, 698 A.2d 1059 (Me. 1997). *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 do not conform to the ordinance but 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.

See Appendix 4 for a collection of DEP “Shoreland Zoning News” articles related to a number of nonconforming use and structure issues.

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 provision 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 the municipality.

## **Gradual Elimination**

“The spirit of zoning ordinances is to restrict rather than to increase any nonconforming 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, supra*; *Boivin v. Town of Sanford*, 588 A.2d 1197 (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, 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. . (See Appendix 4 for other materials relating to expansion issues.)

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 into a municipality’s local shoreland zoning ordinance. 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* (4<sup>th</sup> 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 evidence 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).



## **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 it 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 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/she 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 the owner plans to construct, he/she probably will be unable to get approval. Since the lot is undersized because of the owner’s action, the owner 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 ordinance and the buildings had all been used for distinct and separate uses prior to that date, the Maine Supreme Court has 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 *Bauer* the court held that a failure of the landowner to obtain a State day care license did not deprive an existing day care 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.

### **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.

## **Lots and Structures Divided by a 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.

## **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., Yor. 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); *Fitanides v. City of Saco*, 2004 ME 32, 843 A.2d 8; *Bagge v. Town of Newfield*, AP-05-40 (Me. Super. Ct., Yor. Cty., June 12, 2006) (analysis of whether deeded rights constituted a road or a driveway). For cases interpreting ordinance provisions related to the

creation of a back lot, 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 a municipal ordinance, the utility must first apply for local 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 weren’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’Alessandro v. Town of Harpswell*, 2012 ME 89, 48 A.3d 786.

## **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.

## **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.



## **CHAPTER 7 – Laws Affecting Municipal Ordinance Authority**

An ordinance is a local law that usually is adopted by the municipality's legislative body (the town meeting or town or city council, depending on the form of government in that municipality). If properly adopted in conformance with applicable procedures, and if carefully drafted to avoid legal problems, an ordinance generally has the same legal weight as a State statute enacted by the Maine Legislature. Some communities have adopted local ordinances that impose additional requirements on a project which is also regulated by a State law. Other municipalities may have no ordinance governing a particular activity, preferring to enforce a State law where empowered to do so (e.g., junkyards and dangerous buildings) or deferring completely to whatever authority a State agency may have to control an activity.

It is absolutely crucial to the successful administration and enforcement of municipal ordinances that they be properly adopted and drafted to avoid conflicts with case law, State statutes or the Maine and United States Constitution, as well as to avoid internal conflicts or conflicts with other ordinances. The discussions that follow outline some of the legal requirements that ordinances must satisfy.

Planning boards, especially in smaller towns, are often asked by the voters or by the municipal officers to take the lead in the preparation of various types of land use ordinances to address particular problems. After drafting a proposed ordinance, the planning board is often expected (and is sometimes required by State law) to shepherd it through the public hearing and adoption process as well. The following discussion provides an overview of the process for adopting ordinances and the legal limits on municipal ordinance authority.

### **Ordinances Generally**

#### **Ordinance Enactment Procedures**

As a general rule, whether a municipality operates under a charter or only under the State statutes, its legislative body must adopt in ordinance form any requirement which the municipality wants to enforce against the general public. The basic procedure for adopting an ordinance at open town meeting is found in 30-A M.R.S.A. § 3002, a detailed discussion of which is included in Maine Municipal Association's "Ordinance Enactment" information packet. (See Appendix 6 for information about how to obtain a copy.) If the municipality is governed by a charter (usually this means a town or city which has a council-manager form of government), ordinance enactment procedures would be spelled out there. In addition to the statutory or charter procedures, there also may be local requirements which the municipality has adopted, such as a requirement that a zoning ordinance be enacted by a 2/3 majority vote of the legislative body.

Special rules governing public hearing requirements for adoption or amendment of zoning ordinances and maps are found in 30-A M.R.S.A. § 4352. See Appendix 6 for a Legal Note discussing these rules. For two cases involving consent decrees and whether they effectively constituted illegal ordinance amendments, see *Pike Industries, Inc. v. City of Westbrook*, 2012 ME 78, 45 A. 3d 707, and *Pike Industries, Inc. v. City of Westbrook*, 2014 ME 85, 96 A. 3d 73.

## **Amendments**

The rules governing ordinance enactment normally will govern amendments to an ordinance. Some ordinances also will contain their own special requirements for adopting amendments. An example of an ordinance amendment format is included in Appendix 6.

## **Form of the Ordinance**

Although a “one-liner” (for example, “No building may be constructed without a permit.”) may seem like an effective, simple to understand kind of ordinance, it would not contain enough detail to make it easy to administer or legally enforceable. In preparing an ordinance, the planning board should use the following checklist to ensure that the ordinance has all the basic provisions:

- Statement of statutory authority
- Statement of purpose
- Definitions section
- Basic requirements/prohibitions
- Designation of person or board to make decision on applications
- Application fees, if any required (30-A M.R.S.A. § 4355)
- Standards to guide the person or board in deciding whether to issue or deny a permit or other necessary approval; standards to guide imposition of conditions of approval
- Right to appeal, to whom and within what time frame; standards to guide the appeals board in reviewing the appeal and reaching a decision; clear statement regarding the nature of the appeals board review of an appeal (*de novo* vs. appellate)
- Designation of who enforces the ordinance and procedures to follow
- Period after which a permit expires if substantial work has not been completed
- Penalty section
- Severability clause explaining what happens to the rest of the ordinance if part is held invalid by a court
- Section dealing with effect of inconsistent ordinance provisions
- Effective date

## **Scope of the Ordinance**

When developing the basic requirements of the ordinance, the board should try to identify all the possible types of activities which the municipality would want to regulate through the ordinance and all of the problems which might be associated with a particular activity. As difficult a job as this will be, it is very important that an ordinance “cover all the bases,” since the municipality will not be able to control an activity through a given ordinance if it is not covered by the provisions of that ordinance. The board should explore the websites of other municipalities and Maine Municipal Association and contact the regional planning commission or council of governments serving the area and the State Planning Office for examples of the kind of ordinance it wants the municipality to adopt.

## **Availability**

According to 30-A M.R.S.A. § 3005, copies of any ordinance adopted by the legislative body must be on file with the municipal clerk and must be accessible to any member of the general public. Copies also must be made available for a reasonable fee to any member of the public requesting them. The clerk must post a notice regarding the availability of ordinances.

## **Constitutional Issues**

### **Standards; Delegation of Legislative Authority**

It is very important for an ordinance to contain fairly specific standards of review if it is an ordinance which 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 that it must take in reviewing an application filed under the ordinance. 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 official or board.

A number of Maine Supreme Court decisions have addressed ordinance review standards that require a board to find that a project will be “compatible with the neighborhood” or “harmonious with the surrounding environment.” *Bizier v. Town of Turner*, 2011 ME 116, 32 A.3d 1048; *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987); *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 (Me. 1973); *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 addressed by the court in *Kosalka v. Town of Georgetown*, 2000 ME 106, 752 A.2d 183, *Conservation Law Foundation, Inc. v. Town of Lincolnville*, 2001 ME 175, 786 A.2d 616, and *The Lincoln Home Corp. v. Inhabitants of Newcastle*, AP-02-002 (Me. Super. Ct., Linc. Cty., Feb. 25, 2004). Compare, *Uliano v. Board of Environmental Protection*, 2009 ME 89, 977 A.2d 400. 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 provision is unconstitutional or has other legal problems, 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/she applied to do, absent some other law or ordinance that 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. Therefore, 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.

### **Reasonableness; Takings Issue**

Another constitutional limitation to keep in mind when drafting an ordinance is that the ordinance must be a reasonable means to protect the public health, safety and welfare. *Warren v. Municipal Officers of the Town of Gorham*, 431 A.2d 624 (Me. 1981); *Crosby v. Inhabitants of Town of Ogunquit*, 468 A.2d 996 (Me. 1983). An ordinance generally cannot totally prohibit a land use unless the use is “ultra-hazardous” (i.e., cannot be safely regulated). See generally, Young, *Anderson’s American Law of Zoning* (4<sup>th</sup> ed.), § 9.16; 83 Am. Jur.2d “Zoning and Planning” § 158. If it is a land use regulation, it cannot be so restrictive that a landowner is deprived of all reasonable use of the property being regulated. Otherwise, the ordinance cannot be enforced unless the municipality compensates the



landowner. Determining whether an ordinance has crossed the line and effected a “taking” in violation of the 5<sup>th</sup> Amendment of the U.S. Constitution and Art. I, § § 6-A and 21 of the Maine Constitution is not an easy task; this issue is for a court to decide, not the planning board. Some State and federal cases addressing the “takings” issue include: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Just v. Marinette County*, 56 Wisc.2d 7, 201 N.W.2d 761 (1972); *Seven Islands Land Co. v. Maine Land Use Regulation Commission*, 450 A.2d 475 (Me. 1982); *Inhabitants of Town of Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Nolan v. California Coastal Commission*, 107 S. Ct. 3141 (1987); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Curtis v. Town of South Thomaston*, 1998 ME 63, 708 A.2d 657; *M.C. Associates v. Town of Cape Elizabeth*, 2001 ME 89, 773 A.2d 439; *Wyer v. Board of Environmental Protection*, 2000 ME 45, 747 A.2d 192; *Drake v. Inhabitants of the Town of Sanford*, 643 A.2d 367 (Me. 1994) [see also the Superior Court decision in a related case regarding the “reasonable return standard” in a variance appeal, *Drake v. Inhabitants of Town of Sanford*, CV-88-679 (Me. Super. Ct., Yor. Cty., November 15, 1990, amended January 9, 1991)]; *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Van Horn v. Town of Castine*, 167 F. Supp. 424 (D. Me. 2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *E. Perry Iron and Metal Co., Inc. v. City of Portland*, 2008 ME 10, 941 A.2d 457.

The Maine Legislature established a program in 1996 for the mediation of “takings” claims arising from the application of State and local land use laws. The process is outlined in 5 M.R.S.A. § 3341.

## **Statutes Which Affect Municipal Ordinance Authority**

As was noted in the first chapter of this manual, the powers and duties of planning boards are governed generally either by State statute or local ordinance provisions. There is no single list of duties which will apply to all boards. The following brief summary of State land use statutes and local ordinances which a municipality may adopt is intended to give board members an idea of the possible range of their authority and of the range of municipal authority to adopt ordinances regulating land use. A planning board will not have authority to administer and enforce these laws unless there is a specific grant of authority to the board contained in the statute or ordinance in question.

## Home Rule

In 1969 the Maine Legislature adopted a statute (30 M.R.S.A. § 1917) which delegated broad “home rule” ordinance powers to towns and cities. This statute was revised and renumbered in 1989 (30-A M.R.S.A. § 3001) to make it clear that the Legislature intended “home rule” to be a very broad grant of authority. In its present form, the “home rule” statute reads as follows:

A municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law, or charter.... The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section, unless the municipal ordinance in question would frustrate the purpose of any State law.

This statute provides a basis for the adoption of local land use ordinances which are neither expressly authorized nor expressly or impliedly prohibited by other statutes. A number of Maine Supreme Court decisions have addressed the issue of whether a subject area has been implicitly preempted by the Legislature. In *Central Maine Power v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990), the court found that a local ordinance relating to herbicide spraying was within the town’s home rule authority because it did not frustrate the State’s regulatory program. The court found no home rule authority to prohibit the disposal of out-of-town waste within the boundaries of the town in *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149 (Me. 1988), holding that the authority to regulate solid waste disposal did not include the authority to totally prohibit certain activities. In contrast, the court upheld an ordinance which totally prohibited land spreading of septage, finding that other legal options were still available for the disposal and utilization of septage, even though more costly and difficult. *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200. See *School Committee of Town of York v. Town of York*, 626 A.2d 935 (Me. 1993), *International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995), *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106, *Sawyer Environmental Recovery Facilities v. Town of Hampden*, 2000 ME 179, 760 A.2d 257, and *State of Maine v. Brown*, 2014 ME 79, 95 A. 3d 82, for other Maine Supreme Court cases analyzing home rule ordinance authority.

One type of ordinance commonly adopted under the authority of home rule is a “Site Plan Review Ordinance,” which is an ordinance used to regulate developments which normally cannot be reviewed as subdivisions. Usually the planning board is authorized by the ordinance to review the projects which the ordinance regulates. The State Planning Office (now part of the Department of Agriculture, Conservation and Forestry) has published a

model site plan review ordinance with accompanying commentary which is available on the State of Maine website ([www.maine.gov](http://www.maine.gov)).

A plantation form of government does not have home rule ordinance powers under Maine law. Plantations may only adopt ordinances where expressly authorized by a specific statute. Plantations generally operate under land use regulations adopted and enforced by the Maine Land Use Planning Commission (LUPC). To adopt a locally enforced zoning ordinance, a plantation must comply with 30-A M.R.S.A. § § 7059 and 4322 and 12 M.R.S.A. § 685-A(4).

### **Adoption of Codes or Standards by Reference**

Title 30-A M.R.S.A. § 3003 establishes certain legal requirements with which a municipality must comply if it wants to adopt a code such as the State Model Uniform Building and Energy Code (MUBEC) by reference or incorporate certain standards (such as traffic engineering standards) by reference into an existing or new ordinance. In order for such a code or standards to be enforceable, it is very important to comply with the provisions of this law.

### **Subdivisions**

Title 30-A M.R.S.A. § § 4401-4408 (the Municipal Subdivision Law) require the planning board to review subdivisions using the criteria set out in the statute. If the municipality has not established a planning board, then the municipal officers must perform the review in the absence of some other locally designated review authority. It also authorizes the board to adopt additional reasonable regulations which are related to and supplement the statutory guidelines. Some municipalities have gone a step further and adopted a subdivision ordinance approved by the legislative body using home rule authority; in those municipalities, the planning board would not have the legal authority to adopt subdivision regulations. The former State Planning Office (now part of the Department of Agriculture, Conservation and Forestry) published a detailed model subdivision ordinance with commentary prepared by Southern Maine Regional Planning Commission which is available on the State of Maine website ([www.maine.gov](http://www.maine.gov)). In 2002 the Legislature enacted 30-A M.R.S.A. § 4401(4)(H-1), which prohibits municipalities from adopting new definitions of “subdivision” which are in conflict with the statutory definition, except as expressly authorized by § 4401(4)(H-1); municipalities are authorized to include multi-unit commercial and industrial structures in a local definition and to exempt 40 acre lots divided from a larger parcel that is entirely outside the shoreland zone. See Appendix 5 for a copy of the statute and a number of other materials relating to the definition of “subdivision” and other subdivision issues.

## General Zoning Ordinance and Comprehensive Plan

In 1988 the Maine Legislature enacted a comprehensive Growth Management Act. 30-A M.R.S.A. § 4301 et seq. This law required every municipality to prepare and adopt a comprehensive plan and a town-wide zoning ordinance. Deadlines and substantive requirements for the plan and related ordinances, including public hearing requirements, were outlined in the law. In 1991 the Legislature made adoption of a plan and ordinances discretionary. However, 30-A M.R.S.A. § 4314 establishes deadlines by which existing zoning, impact fee, and rate of growth ordinances must be made consistent with a comprehensive plan adopted in accordance with the Growth Management Act; the ordinances become invalid to the extent they are inconsistent with a plan after those deadlines. If a municipality chooses to prepare and adopt a plan or plan amendment and fails to comply with required procedures, it may be faced with a suit brought by an affected landowner. *Roop v. City of Belfast*, 2007 ME 32, 915 A.2d 966.

Title 30-A M.R.S.A. § 4352 requires all zoning ordinances to be pursuant to and consistent with a comprehensive plan adopted by the legislative body. “Zoning” is defined as a regulation which applies different requirements to different areas of a municipality. 30-A M.R.S.A. § 4301(15-A); *Benjamin v. Houle*, 431 A.2d 48, 49 (Me. 1981); *LaBay v. Town of Paris*, 659 A.2d 263 (Me. 1995); *Bragdon v. Town of Vassalboro*, 2001 ME 137, 780 A.2d 299. Under this definition, ordinances and maps that regulate only aquifers or floodplains would constitute a type of “zoning.” Aquifer protection ordinances would need to be supported by a comprehensive plan. Floodplain management ordinances do not need to be supported by a comprehensive plan because of an exemption from that requirement in 30-A M.R.S.A. § 4314(2); the same statute exempts minimum shoreland zoning ordinances. See 30-A M.R.S.A. § 4352(2) for a list of other ordinances that do not need to be consistent with a comprehensive plan.

With regard to shoreland zoning ordinances, the Maine Supreme Court has held that a town may enforce its shoreland zoning ordinance even if it has no comprehensive plan. However, if the ordinance regulates more area as “shoreland” than required by the State minimum shoreland zoning statute and guidelines, or if the town already had an adopted comprehensive plan in effect at the time of the adoption of its shoreland zoning ordinance, then the ordinance must be consistent with an adopted comprehensive plan to be enforceable. *Enos v. Town of Stetson*, 665 A.2d 678 (Me. 1995); *F. S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1987).

Title 30-A § § 4352 (9) and (10) establish special public hearing and notice requirements for the adoption and amendment of zoning and shoreland zoning ordinances. See MMA’s “Ordinance Enactment” information packet for a discussion of these requirements.

There is little case law in Maine regarding comprehensive plans and the amount of detail required in order to provide a sufficient legal basis for a zoning ordinance. Most of the cases have upheld the zoning provisions against a challenge of inconsistency with the plan. *Baker v. Town of Woolwich*, 517 A.2d 64, 68 (Me. 1987); *LaBonta v. City of Waterville*, 528 A.2d 1261, 1265 (Me. 1987); *Salvatore Vella and Trician Marine Corp. v. Town of Camden*, 677 A.2d 1051 (Me. 1996); *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 57. Compare the preceding cases with, *Hackett v. City of Auburn*, CV-85-336 (Me. Super. Ct., Andro. Cty, October 29, 1985). See also *Gilliam v. Town of Freeport*, \_\_\_\_ A.2d \_\_\_\_, Decision No. 7077 (Me. 1994). [For a detailed discussion of the facts in *Gilliam*, see the Superior Court decision, CV-92-287 (Me. Super. Ct., Cum. Cty., February 4, 1994).] (Note: The Maine Supreme Court decision in *Gilliam* is a “Memorandum of Decision,” which is not printed in the Atlantic Court Reporter and cannot be used as legal precedent, but it may be helpful in understanding how to determine when an ordinance is not consistent with a plan.) See also *City of Old Town v. Dimoulas*, CV-98-124 (Me. Super. Ct., Pen. Cty., March 28, 2000), in which the court outlined information which it would need to determine whether the plan and ordinance were consistent. (This case was appealed and decided by the Maine Supreme Court in *City of Old Town v. Dimoulas*, 2002 ME 133, 803 A.2d 1018.)

Another important issue related to the adoption and enforcement of a zoning ordinance is the statutory requirement that a map be prepared and adopted as part of the ordinance. 30-A M.R.S.A. § 4352. Failure to adopt a map will render the zoning ordinance unenforceable. *Inhabitants of Town of Camden v. Miller*, CV-89-LU-1 (Me. Dist. Ct. 6, Knox, November 20, 1989). Where a map and the ordinance description of zone boundaries are inconsistent, the depiction on the map will control, absent language in the ordinance establishing a different rule for resolving conflicts. *Coastal Property Associates, Inc. v. Town of St. George*, 601 A.2d 89 (Me. 1992); *Veerman v. Town of China*, CV-93-353 (Me. Super. Ct., Kenn. Cty, April 13, 1994); *Nardi v. Town of Kennebunkport*, AP-00-001 (Me. Super. Ct., Yor. Cty., Feb. 12, 2001). See generally, *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842. Any revisions to an adopted zoning map must be approved by a vote of the legislative body to be effective.

In reviewing a landowner’s challenge to the adoption of an ordinance amendment or decision not to amend the ordinance, a court gives great deference to the decision of the local legislative body. The court’s review is limited to a “determination of whether the ordinance itself is constitutional and whether the zoning...is in basic harmony with the...comprehensive plan.” *Rommel v. City of Portland*, 2014 ME 114, 102 A. 3d 1168; *Friends of the Motherhouse v. City of Portland*, 2016 ME 178, \_\_\_\_ A.3d \_\_\_\_; *Bog Lake Company v. Town of Northfield*, 2008 ME 37, 942 A.2d 700; *F.S. Plummer Co, Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992). The court also will determine whether the procedures required by local and State law have been satisfied. E.g., 30-A M.R.S.A. § 4352(9) and (10) and 38 M.R.S.A. § 438-A(1-B).

## Spot Zoning

According to Young, *Anderson's American Law of Zoning* (4<sup>th</sup> ed.), § § 5.12 – 5.22, “spot zoning” has been defined by the courts in other states as “the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners.” It has been called “the very antithesis of planned zoning.” In the words of an Oregon court which declared a “spot” zoning amendment to be invalid, “arbitrary or ‘spot,’ zoning to accommodate the desires of a particular landowner is not only contrary to good zoning practice, but violates the rights of neighboring landowners and is contrary to the intent of the enabling legislation which contemplates planned zoning based upon the welfare of an entire neighborhood.”

To determine whether a particular zoning amendment constitutes an act of “spot zoning,” a court will consider a number of factors: the size of the area to be rezoned, the classification and the development of adjacent land, the relation of the amendment to existing zoning patterns and objectives, the planning history of the amendment, and the benefits or detriments which may accrue to the owner of the land, his neighbors, and the community, i.e., is it for the exclusive benefit of the landowner making the request, with no relation to the community as a whole? An example of where one court found spot zoning is a zoning amendment which reclassified land to create a small commercial area entirely surrounded by residential use; the court found the amendment to be of benefit to the landowner without any relation to the welfare of the neighborhood or the community at large.

“Spot” zoning also may occur where a small parcel is reclassified to the detriment of the landowner for the purpose of preventing a use which would otherwise be permitted and to which the abutters are objecting.

The reclassification of a small parcel has been upheld where the proposed use is perceived as having a public benefit which outweighs the advantage to the landowner or the potential injury to the immediate neighborhood. For example, a reclassification was upheld where a small parcel was to be used for an apartment building in a medium density residential area where the court found that there was a need for that type of housing in the area. Another example is where a small parcel was rezoned for a small shopping center which the court found necessary to meet the needs of the residents of the surrounding neighborhood, because it was a rapidly developing residential suburban area.

In Maine, State law requires that a zoning ordinance “must be pursuant to and consistent with a comprehensive plan adopted by the municipality’s legislative body.” 30-A M.R.S.A. § 4352. Information should be included in the municipality’s comprehensive plan demonstrating why a particular use should be allowed or prohibited in a particular area. The

type of information which must be included in a comprehensive plan is outlined in 30-A M.R.S.A. § 4326.

In deciding whether a particular rezoning request constitutes “spot zoning,” the board must apply the rules outlined above to the facts of that specific situation and review the provisions of the municipality’s comprehensive plan to determine whether the proposed change would be supported by the policies and data contained in the plan. The Maine courts have upheld zoning amendments against challenges based on “spot zoning” in several cases. *Salvatore Vella and Trician Marine Corp. v. Town of Camden*, 677 A.2d 1051 (Me. 1996); *City of Old Town v. Dimoulas*, 2002 ME 133, 803 A.2d 1018; *Gilliam v. Town of Freeport*, \_\_\_ A.2d \_\_\_ (Me. 1994) (Decis. No. 7077) [For a detailed discussion of the facts, see the Superior Court decision, CV-92-287 (Me. Super. Ct., Cum. Cty., February 4, 1994)]. (Note: *Gilliam* is a ‘Memorandum of Decision’ which is not printed in the Atlantic Court Reporter and should not be cited as precedent. However, the facts and holding may be helpful in understanding spot zoning.) In *Dimoulas*, the court held that spot zoning is illegal only if (1) a single parcel or a limited area is rezoned, usually for the benefit of a specific property owner or special interest, and (2) the rezoning is inconsistent with the comprehensive plan.

## **Shoreland Zoning**

During the early 1970s, most towns and cities in Maine either voluntarily adopted shoreland zoning ordinances or had an ordinance imposed on them by the State Legislature through the Shoreland Zoning Task Force under 12 M.R.S.A. § 4811 et seq. (now 38 M.R.S.A. § 435 et seq.). Shoreland zoning ordinances must regulate lands within 250 feet of the normal high water mark of certain water bodies and wetlands, but they may also regulate land use activities below the normal high water mark if the municipality adopts appropriate amendments. As a general rule, the planning board has authority to review and act upon at least some of the projects covered by shoreland zoning. The shoreland zoning statute states that the planning board may also be designated to enforce the shoreland zoning ordinance.

The State agency that develops minimum shoreland zoning guidelines and that oversees local administration and enforcement of shoreland zoning ordinances is the Maine Department of Environmental Protection (DEP). Local shoreland zoning ordinances must be at least as restrictive as the State’s minimum shoreland zoning guidelines (sometimes called “the model ordinance”). They also must be consistent with the State shoreland zoning statute. As a general rule, it is the town’s existing ordinance that the planning board must follow in reviewing applications, even if it does not conform to the State guidelines or statute. However, where the shoreland zoning statute states that “notwithstanding a local ordinance to the contrary” a certain provision of the statute applies, then it is the statutory provision that the planning board must apply. Examples include the statutory provisions pertaining to expansion of a nonconforming structure (also known as the “30% rule”),

timber harvesting, clearing of vegetation, and the exclusion of recreational boat storage buildings from the definition of “functionally water-dependent use.”

If a shoreland zoning ordinance and town-wide zoning ordinance are in conflict, the “conflicts” section of the ordinance usually dictates that the more restrictive provision controls the proposed use. *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 1998 ME 153, 712 A.2d 1061. Where a town-approved shoreland zoning ordinance included a side line setback requirement and a shoreland zoning ordinance imposed upon the town by the Board of Environmental Protection 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.

Title 38 M.R.S.A. section 438-A(2) requires shoreland zoning ordinances to be pursuant to a comprehensive plan. However, the Maine Supreme Court has held that an adopted comprehensive plan is not a prerequisite to a valid shoreland zoning ordinance. The court interpreted Maine’s Mandatory Shoreland Zoning Law (38 M.R.S.A. § § 435-449) in *Enos v. Town of Stetson*, 665 A.2d 678 (Me. 1995), and concluded that the Legislature intended municipalities to immediately adopt a shoreland zoning ordinance conforming to the State minimum guidelines regardless of whether a comprehensive plan had already been enacted. The language in 38 M.R.S.A. § 438-A(2) directing that municipalities prepare shoreland zoning ordinances “in accordance with a local comprehensive plan” is “mandatory only if a comprehensive plan is already in existence,” in the court’s opinion. The court noted, however, that if a town already has a comprehensive plan in effect and enacts a new shoreland zoning ordinance which is inconsistent with that plan, the shoreland zoning ordinance is invalid [citing *F. S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856, 860 (Me. 1992), and *LaBonta v. City of Waterville*, 528 A.2d 1262 (Me. 1987)].

Any new shoreland zoning ordinance, an amendment to a new or existing ordinance or the repeal of any shoreland zoning provision must be submitted to the Department of Environmental Protection for approval before it becomes effective. The DEP has 45 days within which to act; if it fails to act, the ordinance/amendment is deemed approved. Any application for a shoreland zoning permit submitted to the municipality during the 45-day period is governed by the new ordinance, if approved by the DEP. 38 M.R.S.A. § 438-A.

The adoption of any new shoreland zoning ordinance or amendment to an existing shoreland zoning ordinance or adoption or amendment of a shoreland zoning map must be preceded by a public hearing conducted by the planning board and advertised in accordance with 30-A M.R.S.A. § 4352(9) and (10). If the board is thinking of proposing Resource Protection District classification for land in the shoreland zone, there are additional notice and hearing requirements that the board must satisfy under 38 M.R.S.A. § 438-A(1-B).



DEP periodically publishes “Shoreland Zoning News,” a newsletter devoted to shoreland zoning issues such as expansions of nonconforming structures, changes in the State Shoreland Zoning laws, and other shoreland zoning matters. To receive back issues as well as future issues, contact DEP’s Shoreland Zoning Unit in the Bureau of Land and Water Quality in Augusta. See Appendix 4 of this manual for selected excerpts from past newsletters.

## **Flood Plain Development**

In addition to the regulation of flood plains under a minimum shoreland zoning ordinance, 38 M.R.S.A. § 440 of the Shoreland Zoning Act authorizes municipalities to extend their shoreland zoning ordinances and maps to areas beyond 250 feet of the normal high water mark in order to control problems associated with flood plain development. These ordinances do not have to be part of a general zoning ordinance. The board may have some role to play in the permit system, if authorized by the ordinance. Some municipalities also have adopted flood hazard building ordinances and federal flood hazard maps under the federal Flood Disaster Protection Act of 1973 in order to enable local residents to participate in the Federal Flood Insurance Program. Again, planning boards may be authorized to administer these ordinances and generally are involved in reviewing the maps to determine their accuracy.

Typically, shoreland zoning ordinances zone the 100-year flood plain as a resource protection district, although these ordinances may exclude developed areas from the district. The shoreland zoning performance standards governing structures in the flood plain generally require them to be elevated a certain number of feet above flood level. Generally, new principal structures are not allowed at all. Flood hazard building permit ordinances also tend to impose severe restrictions or prohibitions on new and replacement construction in designated flood areas.

## **Contract and Conditional Zoning**

Title 30-A M.R.S.A. § 4352(8) establishes public hearing and notice requirements in connection with the preparation and adoption of conditional and contract zoning provisions.

“Conditional zoning” is the process whereby the municipal legislative body rezones property to allow its use subject to conditions not generally applicable to other properties with similar zoning. The conditions are imposed by the legislative body as a condition of the rezoning and become part of the ordinance; there is no separate written agreement.

“Contract zoning” is the process involved when a property owner agrees to the imposition of certain conditions or restrictions not imposed on other similarly zoned property in return for the rezoning of his/her property. To use contract zoning, there should be an ordinance

provision in the zoning ordinance establishing a process for contract zoning which provides the springboard for the specific contract zoning agreement entered between the municipality and the property owner. The agreement is approved by the legislative body and should be attached to the zoning ordinance as a type of appendix; the agreement itself does not become part of the ordinance, but rather provides the basis for rezoning a particular parcel of land and depicting the new zone on the official map.

Section 4352(8) lists three factors that must exist in order for the conditional or contract zoning to be legal. This type of zoning is best suited to unique properties or unusual projects with mixed uses. Some communities have chosen not to use it due to concerns that it could be abused or perceived as favoritism for some landowners. Some communities include a provision in the conditions or agreement stating that the property reverts to its original zoning status if conditions of rezoning are violated. Other communities require a “public benefit” in order to consider approving conditional or contract zoning. A contract zone agreement/conditional zoning provision could require payment of money to allow the municipality to hire a professional consultant to assist the municipality in monitoring compliance with the rezoning conditions. Some require performance guarantees and phasing of the project. It is important to work with the municipality’s private attorney to ensure that the rezoning conditions or contract zone agreement provisions are legal. Having a strong professional staff with the time and expertise to monitor compliance with the agreement or conditions greatly increases the effectiveness of this approach to rezoning.

For samples of contract zoning agreements and ordinance provisions related to conditional or contract zoning, contact Maine Municipal Association’s Legal Services Department or the following municipalities: Kennebunk, Yarmouth, Scarborough, Portland, Saco and Bangor. Maine court decisions related to contract or conditional zoning include: *ALC Development Corp. v. Town of Scarborough*, CV-03-498 (Me. Super. Ct., Cum. Cty., Feb. 15, 2005); *McMillan v. City of Portland*, CV-04-784 (Me. Super. Ct., Cum. Cty., Nov. 22, 2005); *Crispin v. Town of Scarborough*, 1999 ME 112, 736 A.2d 241; *Hathaway v. City of Portland*, 2004 ME 47, 845 A.2d 1168; *Golder v. City of Saco*, 2012 ME 76, 45 A.3d 697; *Pike Industries, Inc. v. City of Westbrook*, 2012 ME 78, 45 A. 3d 707; *Pike Industries, Inc. v. City of Westbrook*, 2014 ME 85, 96 A. 3d 73; *Rommel v. City of Portland*, 2014 ME 114, 102 A. 3d 1168.

## **Informed Growth Act**

Title 30-A M.R.S.A. § § 4365-4372, the “Informed Growth Act” (IGA), allows a municipality to apply the requirements of the Act, including the requirement that a developer provide a “comprehensive economic development impact study” as part of an application for a “large scale retail development” (i.e., a “Big Box” store), provided the municipality has adopted the provisions of 30-A M.R.S.A. § § 4365-4372 by reference.

Section 4365-A expressly acknowledges the home rule authority of a municipality to adopt ordinances on the same subject matter as the IGA.

## **Manufactured Housing and Mobile Homes**

A number of Maine statutes authorize municipal ordinances regulating mobile homes, mobile home parks, and manufactured housing but place certain restrictions on the nature and extent of those local regulations, including 30-A M.R.S.A. § 3001 (“home rule”), 30-A M.R.S.A. 4401 (subdivision law), 30-A M.R.S.A. § 4352 (zoning), 30-A M.R.S.A. § 4358 (manufactured housing), and 10 M.R.S.A. § 9006(2) and § 9042(3) (Manufactured Housing Act). “Manufactured housing” as defined in 10 M.R.S.A. § 9002(7) is exempt from the provisions of the State Model Uniform Building and Energy Code (“MUBEC”). 10 M.R.S.A. § 9724(5).

Title 10 M.R.S.A. § 9006 (2) reads: “Manufactured housing which is manufactured, sold, installed or serviced in compliance with this chapter (10 M.R.S.A. chapter 951) shall be exempt from all state or other political subdivision codes, standards or regulations which regulate the same matters.” Section 9042 (3) of Title 10 imposes the following limitations on local ordinances: “Notwithstanding the provisions of Title 25, § 2357 and Title 30-A § 4358, new manufactured housing that is manufactured, brokered, distributed, sold, installed or serviced in compliance with this chapter is exempt from all state and other political subdivision codes, standards, rules or regulations that regulate the same matters. A building permit or certificate of occupancy may not be delayed, denied or withheld on account of any alleged failure of new manufactured housing to comply with any code, standard, rule or regulation from which the new manufactured housing is exempt under this subsection.” “Manufactured housing” is defined in 10 M.R.S.A. § 9002(7) and includes new and old mobile and modular homes that meet certain criteria. To determine whether a particular local ordinance or code is preempted by § 9006 (2) or § 9042 (3), it is necessary to compare the ordinance or code with Title 10, chapter 951 and the provisions of the rules adopted by the Manufactured Housing Board to see if they “regulate the same matters.” Title 10 M.R.S.A. § 9042(5) authorizes municipalities to deny a certificate of occupancy for State-certified manufactured housing under certain conditions.

Title 30-A M.R.S.A. § 4358 (2)(A) prohibits municipal ordinances which require manufactured housing on individual lots to be greater than 14 feet wide, but it allows ordinances which establish “design criteria, including, but not limited to, a pitched shingled roof, a permanent foundation and exterior siding that is residential in appearance,” as long as the requirements do not have the effect of circumventing the purpose of § 4358. Section 4358(1)(D)(1) defines “permanent foundation” for HUD-certified mobile homes constructed after June 15, 1976 (i.e., “newer” mobile homes) to mean “a foundation that conforms to the installation standards established by the Manufactured Housing Board.” Subsection (1)(D)

(2) defines “permanent foundation” for modular homes as one that “conforms to the” 1990 edition of the BOCA National Building Code. Subsection 4358(2)(D) allows municipalities to apply reasonable safety standards to any manufactured home built before June 15, 1976 (i.e., “older” mobile homes) or not built in accordance with certain national standards (i.e., not HUD-certified). It also authorizes municipalities to apply the design standards permitted by § 4358(2)(A) to all manufactured housing, regardless of its date of manufacture. However, 30-A M.R.S.A. § 4358(2)(A)(2) prohibits municipalities from applying design standards to a manufactured home on an individual lot that was legally sited in the municipality as of August 4, 1988 if the design standards would prevent the relocation of that manufactured home, regardless of its date of manufacture.

Section 4358 (2)(E) provides that any “modular home” as defined which meets construction standards for State-certified manufactured homes adopted pursuant to 10 M.R.S.A. § 9042 must be allowed in all zones where other single family homes are allowed. This is an exception to the general rule stated in the opening paragraph of § 4358 (2), which requires only that a municipality allow manufactured housing to be located in a number of locations on undeveloped lots where single-family dwellings are allowed.

Section 4358 also establishes limitations on regulations which a municipality may adopt governing mobile home parks. Restrictions on ordinance authority include lot size requirements, buffer strips, setback requirements, and road construction standards, among others. For an interpretation of § 4358 by the Maine Supreme Court regarding a municipality’s obligation to allow existing mobile home parks to expand in their current location, see *Bangs v. Town of Wells*, 2000 ME 186, 760 A.2d 632. The court found that the right to expand included both density and physical area.

## **Condominium Projects**

Generally, new condominium projects must be reviewed as subdivisions under the Municipal Subdivision Law (30-A M.R.S.A. § 4401). If existing dwelling units are converted to a condominium form of ownership, the change in ownership by itself does not trigger the need for subdivision review. Any local ordinance regulating condominiums must not conflict with the Maine Condominium Act (Title 33, Chapter 31). That statute deals primarily with how condominiums are created and managed, provides certain protections for purchasers, and establishes rules for the conversion of existing buildings to condominiums. Local ordinances may not prohibit the condominium form of ownership.

## **Farmland; Agricultural Uses**

Title 7 M.R.S.A. § § 51-59 establishes 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.

Another statute, 7 M.R.S.A. § § 151-163, protects a “farm operation” and “agricultural composting operations” as defined from being prosecuted by a municipality as a public nuisance or for an ordinance violation if it is a permitted use and is operated in conformity with “best management practices,” as defined by the Maine Department of Agriculture, Conservation, and Forestry. It also cannot be considered a violation of a local ordinance if it is located in an area where agricultural activities are permitted, as long as the method of operation constitutes a “best management practice,” as defined by the Department.

Any proposed municipal ordinance which would impact “farm operations” or “agricultural composting operations” must be submitted to the Department of Agriculture, Conservation and Forestry by the municipal clerk or his or her designee at least 90 days before the meeting of the legislative body or the public hearing at which adoption will be considered. 7 M.R.S.A. § 155. The Commissioner of Agriculture must review the ordinance and advise the municipality if the ordinance would restrict or prohibit the use of “best management practices” as defined by the Department.

In *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, 103 A. 3d 556, the Maine Supreme Court considered whether the Maine Agriculture Protection Act in 7 M.R.S.A. § § 151-163 preempts other local ordinances regulating agricultural uses. The court found that the Arundel Land Use Ordinance was not preempted by the Act and that the Act “does not affect municipal authority to enact ordinances” under section 155.

### **Junkyards, Automobile Graveyards, and Automobile Recycling Businesses**

Title 30-A M.R.S.A. § § 3751-3760 impose an obligation on municipalities (through the municipal officers) to license “junkyards,” “automobile graveyards,” and “automobile recycling businesses,” as defined in the statute, each year and to enforce the law against people who are in violation. These activities also are regulated by the DEP under the Site Location of Development Act (38 M.R.S.A. § 481 et seq.) and to a lesser extent by the Secretary of State (29 M.R.S.A. § § 1101-1112). MMA’s Legal Services Department has prepared an information packet discussing the Title 30-A provisions, which is available on MMA’s website at [www.memun.org](http://www.memun.org).

Section 3755(4) authorizes municipal ordinances that impose additional standards with which proposed “junkyards,” “automobile graveyards,” and “automobile recycling

businesses” must comply in order to receive a permit from the municipal officers. Without such an ordinance, the municipal officers can consider only the statutory requirements. *Spain v. City of Brewer*, 474 A.2d 496 (Me. 1984); *Polk v. Town of Lubec*, 2000 ME 152, 756 A.2d 510. The municipality may restrict the location of these businesses through properly enacted zoning ordinances, which often require planning board review and approval for new or expanded activities. Planning board review and approval would be independent of the approval required under Title 30-A from the municipal officers.

## **Minimum Lot Size**

Title 12 M.R.S.A. § 4807 et seq. establishes a statewide minimum lot size for land use activities which will dispose of waste by means of a subsurface disposal system. The minimum lot size for new single family residential units (including mobile homes and seasonal homes) is 20,000 square feet. For multi-unit housing and other land use activities, a proportionately greater lot size is required based on a statutory formula. In addition to the statutory requirements, the Department of Health and Human Services has adopted agency rules. Municipalities may establish larger minimum lot sizes by ordinance under home rule. 30-A M.R.S.A. § 3001. An article discussing this law appears in Appendix 7 of this manual.

## **Signs**

Municipalities which want to regulate off premise signs must comply with minimum guidelines administered by the Department of Transportation under 23 M.R.S.A. § 1901 et seq. Sign ordinances must also comply with the First Amendment of the U.S. Constitution. They generally may not establish categories of regulations that are based on the content of the sign. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). For further discussion of this issue, see MMA’s “Sign Regulation” information packet.

## **Noise**

Title 38 M.R.S.A. § 484 (3)(C) authorizes municipalities to adopt noise regulations which are stricter than those adopted by DEP under the Site Location Act. See also 30-A M.R.S.A. § 3011 regarding local regulation of sport shooting ranges.

## **Sport Shooting Ranges**

Municipal ordinance authority to regulate sport shooting ranges is addressed in 30-A M.R.S.A. § 3011. Issues covered in that statute include a limit on or elimination of existing sport shooting ranges, expansion of shooting ranges, and their maintenance and improvement.

## Solid Waste, Septage, and Sludge

Solid waste, septage, and sludge disposal and storage are generally regulated by DEP pursuant to Title 38 of the Maine statutes and rules adopted by DEP. Municipalities are prohibited from enacting stricter standards than those contained in Title 38 and in the DEP solid waste management rules “governing the hydrogeological criteria for siting or designing solid waste disposal facilities or governing the engineering criteria related to waste handling and disposal areas of a solid waste disposal facility.” Local ordinances regulating solid waste facilities may include reasonable standards regarding other issues such as: “conformance with state and federal rules; fire safety; traffic safety; levels of noise that can be heard outside the facility; distance from existing residential, commercial or institutional uses; ground water protection; and compatibility of the facility with local zoning and land use controls, provided the standards are not more strict than those contained in [Title 38, chapter 13 (solid waste law) and Title 38, chapter 3, subchapter I, articles 5-A and 6 (Natural Resources Protection Act and Site Location Act)] and the rules adopted thereunder.” Local ordinances must use definitions consistent with those adopted by DEP. Municipal authority to regulate State and regionally-owned solid waste facilities is also restricted. Any ordinance adopted by a municipality regulating solid waste facilities must be filed with the DEP within 30 days. 38 M.R.S.A. § 1310-U. As noted earlier, a municipal ordinance may not totally prohibit privately operated solid waste facilities or the disposal of out-of-town waste. *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149 (Me. 1988). Nor may a local ordinance totally ban new or expanded solid waste facilities. *Sawyer Environmental Recovery Facilities v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. The Maine Supreme Court reached a different conclusion regarding home rule authority to ban septage spreading. In *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200, the court found that under 38 M.R.S.A. § 1305(6), an ordinance banning septage spreading did not frustrate the purpose of the State law because other methods for disposing of septage were still available, even though more costly and difficult. The court noted, without deciding, that a total ban on all methods of septage disposal might have exceeded the town’s home rule authority. The Maine DEP has prepared a guidance document to assist municipalities in drafting these types of ordinances. For a case invalidating an ordinance banning the spread of composted biosolids on town-owned land, see *Town of Brunswick v. New England Organics*, CV-07-71 (Me. Super. Ct., Cum. Cty., May 29, 2007).

Prior to approving an application for land application or storage of sludge, the DEP is required by 38 M.R.S.A. § 1305(9) to consult with the municipal officers of the municipality in which the sludge will be stored or spread. If DEP doesn’t impose conditions on a permit that have been suggested in writing by the municipal officers, DEP must provide a written explanation to the municipal officers. If a generator requests a change in the terms or conditions of a permit, the DEP is also required to consult with the municipal officers. The municipality may ask for a review of the generating facility’s testing protocol for sludge and if the Commissioner agrees, he or she may order the applicant to conduct an additional test

at the applicant's expense. A copy of the test results must be provided to the municipal officers. Title 38 M.R.S.A. § 1310-N(2-G) establishes setback requirements for sludge land application sites and sludge storage sites and facilities which are near certain kinds of water bodies and also a setback from abutting property boundaries.

Title 38 M.R.S.A. § 1305(6) of the Maine statutes requires an applicant for a septage disposal permit to obtain approval from both DEP and the municipality in which the site will be located, unless the site is in a Resource Protection District under the jurisdiction of the Maine Land Use Planning Commission (LUPC). The municipality (presumably through the municipal officers) may decide whether the applicant must seek DEP or local approval first. The municipal officers hold a hearing and then conduct a review of the application. If they find that the site complies with local ordinances, they must approve it. If the municipality lacks applicable ordinances, then the municipal officers' approval must be based on a finding of compliance with the siting and design standards in the DEP septage management rules. For a discussion of which DEP standards the municipal officers may apply, see *Hutchinson v. Cary Plantation*, 2000 ME 129, 755 A.2d 494.

### **Hazardous Waste; Radioactive Waste**

Title 38 M.R.S.A. § 1319-P authorizes municipal ordinances regulating hazardous waste disposal, storage and generation as long as those ordinances are not less stringent than the statutes and agency rules administered and enforced by DEP. However, provisions governing "commercial hazardous waste facilities" cannot be more restrictive than or duplicative of State law. The DEP is required to incorporate all applicable local requirements to the fullest extent possible in conducting an application review. Municipalities are authorized to enact an ordinance levying a fee on a commercial hazardous waste facility. 38 M.R.S.A. § 1319-R. "Commercial" facilities are defined as "a waste facility for hazardous waste which handles wastes generated off the site of the facility; or a facility which in the handling of a waste generated off the site, generates hazardous waste." See also 38 M.R.S.A. §§ 1497 and 1464 relating to radioactive waste disposal.

### **Coastal Management Policies**

According to 38 M.R.S.A. § 1801, all coastal municipalities on tidal waters, in regulating, planning, developing, or managing coastal resources, are required to conduct their activities affecting the coastal area consistent with the following policies to:

- **Port and harbor development.** Promote the maintenance, development and revitalization of the State's ports and harbors for fishing, transportation and recreation;
- **Marine resource management.** Manage the marine environment and its related resources to preserve and improve the ecological integrity and diversity of marine



communities and habitats, to expand our understanding of the productivity of the Gulf of Maine and coastal waters and to enhance the economic value of the State's renewable marine resources;

- **Shoreline management and access.** Support shoreline management that gives preference to water-dependent uses over other uses, that promotes public access to the shoreline and that considers the cumulative effects of development on coastal resources;
- **Hazard area development.** Discourage growth and new development in coastal areas where, because of coastal storms, flooding, landslides or sea level rise, it is hazardous to human health and safety;
- **State and local cooperative management.** Encourage and support cooperative state and municipal management of coastal resources;
- **Scenic and natural areas protection.** Protect and manage critical habitat and natural areas of state and national significance and maintain the scenic beauty and character of the coast even in areas where development occurs;
- **Recreation and tourism.** Expand the opportunities for outdoor recreation and encourage appropriate coastal tourist activities and development;
- **Water quality.** Restore and maintain the quality of our fresh, marine and estuarine waters to allow for the broadest possible diversity of public and private uses; and
- **Air quality.** Restore and maintain coastal air quality to protect the health of citizens and visitors and to protect enjoyment of the natural beauty and maritime characteristics of the Maine coast.

This means that local ordinances affecting land use in coastal areas must contain review standards which will promote these coastal policies.

### **Gravel Pits and Other Excavation Activities**

Title 30-A M.R.S.A. § 3105 requires municipalities to incorporate certain minimum standards into any local ordinance regulating borrow pits that do not fall within the jurisdiction of DEP. If there is no local ordinance, the statute authorizes the municipal officers to enforce the statutory standards. Title 38 M.R.S.A. 490-I(1) expressly acknowledges municipal home rule ordinance authority relating to the regulation of borrow pits and removal of clay, topsoil and silt.

## **Pesticide Use**

Title 22 M.R.S.A. § 1471-U requires a municipality to give notice and a copy of the proposed ordinance to the State Board of Pesticide Control at least seven days prior to the date of the meeting at which the adoption of an ordinance regulating pesticide storage, use or distribution will be considered. Once adopted, the clerk has 30 days to notify the Board of that fact. Ordinances already in existence also must be filed with the Board. Failure to file and/or comply with the notice requirements makes the ordinance invalid to the extent that it regulates the storage, distribution and use of pesticides.

## **Timber Harvesting**

Any municipality attempting to regulate timber harvesting activities must use definitions of forestry terms in their ordinances which are consistent with those found in 12 M.R.S.A. § 8868 and those adopted by the Commissioner of the Department of Agriculture, Conservation and Forestry. A municipal timber harvesting ordinance adopted before September 1, 1990 must meet this requirement by January 1, 2001. Municipal ordinances may not be less stringent than the minimum standards established by the statute and agency rules. A municipality may not adopt a new timber harvesting ordinance or amend an existing one unless it follows the procedures outlined in 12 M.R.S.A. § 8869 and § 8867-B for the development and review of the ordinance. This includes:

A licensed professional forester must participate in the development of the ordinance; A meeting must take place in the municipality during the development of the ordinance between representatives of the Department and municipal officials involved in developing the ordinance. Discussion at the meeting must include, but is not limited to, the forest practices goals of the municipality;

The municipality shall hold a public hearing to review a proposed ordinance at least 45 days before a vote is held on the ordinance. The municipality shall post and publish public notice of the hearing in accordance with 30-A M.R.S.A. § 4352(9) (zoning ordinance hearing notices); and

It also must mail notices to all landowners at least 14 days before the hearing unless the ordinance will only apply to certain areas, in which case only the landowners in or immediately abutting those areas receive mailed notice. Mailed notice isn't required where the purpose of the amendment is to conform an existing ordinance to the minimum guidelines required by 38 M.R.S.A. § 439-A or the definition in 12 M.R.S.A. § 8868.

See § 8869 for additional requirements regarding notice to and comments by the Department and a procedure for reimbursement of municipal costs of providing notice to landowners.

After the legislative body has adopted the ordinance, the municipal clerk must file a copy of the ordinance with the Department within 30 days.

Regarding timber harvesting within the shoreland zone generally and within the Resource Protection District specifically, 38 M.R.S.A. § 439-A requires municipalities to regulate timber harvesting in the shoreland zone and prohibits local standards which are less restrictive than those outlined in § 439-A(5). For rules governing shoreland zoning ordinance timber harvesting provisions, see 38 M.R.S.A. § 438-B.

### **Housing for Individuals with Disabilities**

Title 42 U.S.C. §§3600-3620 (Federal Fair Housing Act) preempt local land use regulations which illegally discriminate on the basis of disability or family status. Local ordinances which attempt to regulate group homes for people with physical or other disabilities in a manner different from comparable housing for non-disabled people may be in violation of this federal law. Consult with an attorney to determine whether an ordinance violates this law in order to avoid potential federal civil rights liability. Title 30-A M.R.S.A. § 4357-A defines a “community living arrangement” as a State-approved housing facility for eight or fewer persons with disabilities and states that such a facility is a single-family use for zoning purposes. For an article discussing the relationship between the Americans with Disabilities Act (ADA) and local ordinances, see a February 1996 *Maine Townsman* Legal Note available on MMA’s website at [www.memun.org](http://www.memun.org).

### **Groundwater Protection; Groundwater Extraction; Public Drinking Water Supply**

Title 38 M.R.S.A. § 401 expressly acknowledges municipal home rule authority to “enact ordinances...to protect and conserve the quality and quantity of groundwater.” As was noted in the discussion of “zoning” ordinances earlier in this chapter, separate groundwater protection or aquifer protection ordinances may constitute a type of zoning ordinance that must be supported by a comprehensive plan. In addition, the municipal officers have some limited authority to regulate surface uses of a public water supply and uses of the land overlying public water supply aquifers and their recharge areas. 22 M.R.S.A. § 2642.

Title 38 M.R.S.A. § § 1391-1399 establish a “wellhead protection zone” program enforced by the DEP. The zones surround public and private drinking water wells in which certain activities are prohibited. For private wells, the protected zone is 300 feet from the well. For public wells, the protected area is the greater of 1,000 feet from the well or the area of a mapped “source water protection area.” (Contact the Public Drinking Water program at the Department of Health and Human Services for more information about source water protection area maps.) Section 1399 authorizes municipalities to adopt siting restrictions that are more stringent than the prohibitions in the wellhead protection statute and agency rules.

For a detailed discussion of municipal ordinance authority to regulate groundwater extraction, see a July 2009 *Maine Townsman* article by Leah Rachin, Esq. entitled “Large-Scale Water Extraction,” which is available on MMA’s website ([www.memun.org](http://www.memun.org)). For Maine court cases interpreting some of those ordinances and local decisions made pursuant to those ordinances, see: *Nestle Waters North America, Inc. v. Town of Fryeburg*, 2009 ME 30, 967 A.2d 702; *Griswold v. Town of Denmark*, 2007 ME 93, 927 A.2d 410; *Fryeburg Water Co. v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618; *Buker v. Town of Sweden*, 644 A.2d 1042 (Me. 1994). See also *Rangeley Crossroads Coalition v. Maine Land Use Regulation Commission*, 2008 ME 115, 955 A.2d 223.

Title 22, section 2642 of the Maine statutes authorizes the municipal officers to adopt regulations governing surface uses of sources of public water supply and land overlying ground water aquifers and their recharge areas used as sources of public water supply located within the municipality. Regulations adopted by the municipal officers become void after one year from adoption unless ratified before expiration by vote of the legislative body.

### **Regulation of Water Levels**

Title 30-A M.R.S.A. § 4455 expressly authorizes municipal ordinances which regulate water levels or minimum flow on an impounded body of water. The ordinance must include certain provisions and be reviewed and approved by the Commissioner of DEP.

### **Airports**

Title 6 M.R.S.A. §§ 241-246 authorize municipalities to zone areas surrounding an airport in order to regulate uses, height of structures, and permissible vegetation. The statute expressly addresses nonconforming uses, variances, permit procedures, and appeals. See 30-A M.R.S.A. § 4402(4) regarding the applicability of the Municipal Subdivision Law to airport plans. (A copy of the Subdivision Law appears in Appendix 5.)

### **Antennas, Towers, and Satellite Dishes**

Certain municipal ordinance provisions regulating satellite dishes, wireless communications towers, and amateur radio towers have been preempted by federal statute and agency rules adopted by the FCC. For a detailed discussion of this issue, see MMA’s “Telecommunications Facilities” information packet, which is available on MMA’s website at [www.memun.org](http://www.memun.org).

Title 30-A M.R.S.A. § 3012 provides that “(a) municipality may not adopt or enforce any ordinance or regulation that is preempted by a Federal Communications Commission regulation that states that local regulations that involve placement, safety or aesthetic considerations must be crafted to reasonably accommodate amateur radio communications

and to represent the minimum practicable regulation to accomplish the municipality's legitimate purpose."

The Maine Supreme Court has held that a satellite dish is a "structure" for the purposes of shoreland zoning setback requirements. *Brophy v. Town of Castine*, 534 A.2d 663 (Me. 1987). A Superior Court decision interpreting a specific municipal zoning ordinance upheld an appeals board finding that a 180-foot cellular telecommunications tower was a "public utility" which required approval as a special exception subject to certain conditions since it would exceed the general 35-foot height restriction for structures under the town's ordinance. *Means v. Town of Standish*, CV-92-1365 (Me. Super. Ct., Cum. Cty., October 8, 1993). For other court cases involving local board decisions regarding tower applications, see: *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577; *Banks v. Maine RSA #1*, 1998 ME 272, 721 A.2d 655; and *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86.

A federal law called the "Middle Class Tax Relief and Job Creation Act of 2012 (26 USC § 6419) imposes some restrictions on a municipality's authority to deny approval for a wireless tower or base station. It states in part: "Local governments may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." It defines "eligible facilities request" as a request to modify an existing wireless tower or base station that involves (A) co-location of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.

## **Rental Housing**

Title 14 M.R.S.A. § 6021(6) expressly authorizes municipal ordinances which establish standards for the habitability of rental dwelling units, as long as the local standards are more stringent than the specific standards for habitability included in § 6021. Section 6021 deals primarily with the temperature of the dwelling unit. Unless a municipality has an ordinance regulating rental housing, a municipality probably will be unable to help a tenant resolve a problem with a rented dwelling unit. The statutes and court-made rules governing the rights of tenants are enforceable in a civil lawsuit by the tenant against the landlord. Low income tenants may be able to obtain assistance from such legal aid groups as Pine Tree Legal Assistance or the Legal Aid Clinic at the University of Maine, School of Law.

## **Erosion and Sedimentation**

Title 38 M.R.S.A. § 420-C expressly acknowledges municipal home rule authority to adopt ordinances which establish stricter standards relating to erosion and sedimentation control than those contained in § 420-C.

## **Storm Water Management**

Title 38 M.R.S.A. § 420-D expressly provides that the storm water management standards found in that section do not preempt local home rule ordinances which attempt to establish stricter standards.

## **Building and Energy Codes**

Title 10 M.R.S.A. § 9724 expressly limits a municipality's home rule ordinance authority regarding building and energy codes. Municipalities with a population over 4,000 must now administer and enforce the State's Model Uniform Building and Energy Code (MUBEC) if the municipality had adopted a local building code by August 1, 2008. After July 1, 2012, all municipalities with a population over 4,000 must administer and enforce the model code. No local adoption of the model code by those municipalities is required. In municipalities with a population of 4,000 and under, no State building code is automatically in effect. The model code must be adopted by reference by the municipal legislative body in order to govern activity in those municipalities. The municipality may choose not to adopt any building or energy code and if that is the case, then there will be no building or energy code regulating activity in that community. If the municipality chooses to adopt a code, it may not adopt a building or energy code that differs from the State model code, except as authorized by State law. Municipalities with a population of 4,000 and under may adopt only the model building code, only the model energy code, or both. At present, the model code has not replaced various State fire safety, electrical, plumbing, and other codes listed in 10 M.R.S.A. § 9725. In addition the model code does not apply to specific activities listed in 10 M.R.S.A. § 9724(5)(A) and (B).

## **Chimneys, Fireplaces, Vents, and Solid Fuel Burning Appliances**

Title 25 M.R.S.A. § 2465(5) expressly acknowledges that a municipal ordinance regulating the materials, installation, and construction of chimneys, fireplaces, vents, and solid fuel burning appliances may exceed the requirements of rules adopted by the Commissioner of Public Safety.

## **Moratoria**

Title 30-A M.R.S.A. § 4356 establishes minimum requirements for a municipal ordinance which proposes a moratorium on certain types of land use activity while the municipality develops ordinances to regulate those activities. The Maine Supreme Court has held that an ordinance that limits the number of building permits that may be issued each year for residential development does not constitute a "moratorium" for the purposes of § 4356. *Home Builders Association of Maine, Inc. v. Town of Eliot*, 2000 ME 82, 750 A.2d 566. A "Moratorium" information packet is available on MMA's website at [www.memun.org](http://www.memun.org).

## **Rate of Growth Ordinances**

Title 30-A M.R.S.A. § 4360 requires a municipality that adopts a rate of growth ordinance to review and update it at least every three years. The ordinance may distinguish between rural and growth areas. Title 30-A § 4314 requires rate of growth ordinances to be supported by a comprehensive plan. For recent Maine court cases discussing this type of ordinance, see: *Inland Golf Properties, Inc. v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000); *Home Builders Assoc. of Maine v. Town of Eliot*, 2000 ME 82, 750 A.2d 566; *Currier Builders v. Town of York*, 146 F. Supp.2d 71 (D. Me. 2001); and *York v. Town of Limington*, U.S. District Court Docket No. 03-99-P-H, decided October 7, 2003 and November 13, 2003.

## **Transfer of Development Rights Program**

Title 30-A M.R.S.A. § 4328 authorizes the adoption of a transfer of development rights program within the municipality's boundaries and also between municipalities if they have entered an interlocal agreement.

## **Impact Fees**

Title 30-A M.R.S.A. § 4354 establishes minimum guidelines which a municipal ordinance must meet if the municipality wants to establish development "impact fees." Impact fees are used by municipalities as a way to recover some of the infrastructure costs incurred to meet the needs of the new development (roads, sewers, schools, recreation, etc.). Several *Maine Townsman* articles discussing impact fees can be accessed on MMA's website at [www.memun.org](http://www.memun.org): "An Update on the Use of Impact Fees" (October 2007) and "Impact Fees" (July 2000).

## **Religious Institutions and Activities**

The federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq., prohibits any governmental entity from enacting or enforcing any land use regulation that imposes a "substantial burden" on the exercise of religion by any person, including religious assemblies and institutions, unless the government can show that the regulation furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest. For a copy of the law and information about court cases interpreting it, go to [www.rluipa.org](http://www.rluipa.org) ([www.rluipa.com](http://www.rluipa.com)).

## **Underground Oil Storage Tanks**

Title 38 M.R.S.A. § 570-C expressly acknowledges the home rule authority of municipalities to adopt siting standards for underground oil storage tanks, provided the ordinance is not in direct conflict with Title 38, chapter 3, subchapter 2-B or any rule or order of the DEP or Board of Environmental Protection.

## **Utilities in Historic District**

Title 35-A M.R.S.A. § 2312 provides that, when a municipality has designated an historic district by ordinance, the “governing body” (i.e., the municipal officers) may demand that a utility connect its facilities at the rear of a structure, if access is reasonably available, or underground.

## **Wind Energy**

Wind energy projects of various sizes are regulated by the Maine DEP pursuant to 38 M.R.S.A. § 484 and 35-A M.R.S.A. § 3454 and by the Maine Land Use Planning Commission (LUPC) pursuant to 12 M.R.S.A. § 685-B and 35-A M.R.S.A. § 3454 in the unorganized territories. Municipal ordinance authority over wind energy projects is expressly acknowledged in PL 2007 chapter 661, Part E, § E-1: “This Act is not intended to limit a municipality’s authority to regulate wind energy development.” Municipal ordinance authority over ocean energy projects is limited by 30-A M.R.S.A. § 4361. Municipal ordinances may not prohibit siting of renewable ocean energy projects and their associated facilities. A local ordinance may only regulate such a project unless the project is located within the boundaries of the municipality as established by its charter prior to the effective date of § 4361 (April 7, 2010). Municipalities that want to follow the status of projects being reviewed by DEP and LURC may find information on the websites for those agencies. For an overview of the types of ordinances that a municipality may adopt to regulate wind power, see “Municipal Regulation of Wind Power” by James Katsiaficas, Esq. in the March 2010 *Maine Townsman*. For more information, see the “Wind Energy” information packet on MMA’s website at [www.memun.org](http://www.memun.org).

For a case discussing the “tangible benefits” and “community benefits package” and “community benefit agreement” provisions in the statutes regulating wind energy projects, see *Friends of the Boundary Mountains v. LURC*, 2012 ME 53, 40 A.3d 947. The issues of noise level and visual impact of a wind project are addressed in *Friends of Maine’s Mountains v. Board of Environmental Protection*, 2013 ME 25, 61 A. 3d 689. For a case involving municipal review of a wind energy project under a local ordinance, see *Beckford v. Town of Clifton*, 2014 ME 156, 107 A. 3d 1124.

## **Air Pollution Control; Outdoor Wood Boilers**

Title 38 M.R.S.A. § 597 expressly authorizes municipalities to study air pollution and adopt and enforce air pollution control and abatement ordinances, if the ordinances are not less stringent than State or federal standards. This authority includes the local regulation of outdoor wood boilers, though they are also regulated by the DEP pursuant to 38 M.R.S.A. § 610-B and agency rules found in 06-96 CMR ch. 150.



## **Essential Services; Public Utilities**

Title 30-A M.R.S.A. § 4352(4) and a related agency rule in the Code of Maine Rules adopted by the Maine Public Utilities Commission (PUC) (65-407 CMR ch. 885) establish a procedure pursuant to which a public utility may seek an exemption from compliance with a local zoning ordinance.

## **Natural Gas Pipelines and Terminals**

Municipal ordinance authority over the siting, construction, expansion, and operation of liquefied natural gas (LNG) terminals and related pipelines is severely limited by provisions of the federal Energy Policy Act of 2005, the Natural Gas Act, and regulations adopted by the Federal Energy Regulatory Commission (FERC). If such projects are proposed within a municipality, the officials should consult with the municipality's private attorney to determine what aspects of the project may be subject to municipal regulation and what aspects are subject only to the FERC review process. To the extent that the project is subject only to FERC review, it is important for the municipality to participate in the FERC process in order to ensure that its concerns regarding safety and other issues are addressed. In some cases, the developer will voluntarily undergo some State and/or local review to demonstrate its environmental responsibility and its intention to be a "good neighbor." For a discussion of the FERC review process, see "Natural Gas Pipelines" by Geoff Herman, *Maine Townsman*, September 1996, available on MMA's website ([www.memun.org](http://www.memun.org)).

## **Residence of a Sex Offender**

Municipalities are authorized by 30-A M.R.S.A. § 3014(2)(B) to adopt an ordinance regulating the places where a sex offender may reside. The ordinance may prohibit a sex offender from living closer than 750 feet from the real property that comprises a public or private elementary, middle or secondary school or that comprises a municipally-owned or state-owned property that is leased to a nonprofit organization for a park, athletic field or recreation facility that is open to the public where children are the primary users.

## **Medical Marijuana Dispensaries; Retail Marijuana Stores and Social Clubs; Methadone Clinics**

Title 22 M.R.S.A. § 2428(10) expressly acknowledges municipal zoning authority to limit the number of medical marijuana dispensaries operating in the municipality and to enact reasonable regulations applicable to dispensaries. Ordinance provisions are prohibited if they duplicate or are more restrictive than State law. Some municipalities have enacted a moratorium ordinance in order to give themselves some time to determine how best to regulate this type of use and what amendments to existing ordinances or what new ordinances should be adopted.

In contrast to the law governing the regulation of medical marijuana, a new law (7 M.R.S.A. § § 2441-2454) enacted by a statewide referendum vote in 2016 (effective January 30, 2017) authorizes municipalities to regulate the number, location, and operation of retail marijuana stores, marijuana cultivation, manufacturing and testing facilities, and marijuana social clubs. As an alternative to local regulation, municipalities may totally prohibit some or all of those activities by ordinance. The law also authorizes ordinances establishing a local licensing requirement. Many municipalities are considering or have adopted a moratorium on marijuana retail activities and social clubs until they have a better idea of what will be included in the regulations that will be adopted by the Maine Department of Agriculture, Conservation, and Forestry. There is also a possibility that the Legislature will amend the law that was enacted by the voters. A sample ordinance prohibiting retail marijuana activities and a sample moratorium ordinance are available from MMA. Plantation authority to regulate retail marijuana activities under this statute may be more limited than for towns and cities if the plantation is under the jurisdiction of the Maine Land Use Planning Commission.

Regarding methadone clinics, municipalities may not totally ban them, as that generally would violate the Constitution and the Americans with Disabilities Act. Municipalities may adopt reasonable local zoning or other land use regulations permitting the activity subject to certain performance standards, just as they do with other types of medical facilities. *Fuller-McMahan v. City of Rockland*, 2005 U.S. Dist. LEXIS 13956 (D. Me. July 12, 2005).

## **Regulation of State and Federal Projects**

- **Applicability of Building Codes to State Projects.** Title 5 M.R.S.A. § 1742-B requires a municipality to notify the State Bureau of Public Improvements if the municipality intends to require State compliance with its building code. If so requested, the State must comply, if the local code is as stringent as or more stringent than the State's building code governing State projects.
- **Applicability of Zoning Ordinances to State, County, Municipal and Quasi-Municipal Projects.** With regard to zoning ordinances, 30-A M.R.S.A. § 4352(6) requires State agencies to comply with zoning ordinances that are consistent with a comprehensive plan that is consistent with the Growth Management Act in the development of any building, parking facility, or other publicly owned structure. The Governor, or his/her designee, is authorized to waive any use restrictions in a zoning ordinance after giving public notice, notice to the municipal officers, and opportunity for public comment as required by § 4352(6) and making five specific findings relating to the public benefits of the project and available alternatives. Zoning ordinances continue to be advisory to the State if they are not consistent with a comprehensive plan that is consistent with the Growth Management Act. Zoning ordinances are not merely advisory

when the municipality or county or a quasi-municipal corporation is conducting the project.

- **Project on Land Leased from the State.** The Maine Supreme Court has held that a private project conducted on land leased from the State may be exempt from municipal zoning regulations if it is shown that the use of the State's land "furthers a state purpose or governmental function," that there is a "compelling need" for the exemption, and that there is state involvement of a substantial nature in the project. *Senders v. Town of Columbia Falls*, 657 A.2d 93 (Me. 1994).
- **Federal Projects.** According to Title 40 U.S.C.S. § 3312, federal agencies proposing to construct or alter buildings are required "to consider" the requirements of local zoning and other building ordinances and "consult" with the appropriate local officials. They also are required to submit plans for review by local officials and permit local inspections. Municipalities are prohibited from prosecuting a federal agency for failing to comply with local ordinances or failing to follow local recommendations.



## CHAPTER 8 – Enforcement

If the planning board has been named as the board responsible for enforcing a particular ordinance or statute, the board members should obtain a copy of MMA's *Manual for Municipal Code Enforcement Officers: A Legal Perspective* for a general discussion of code enforcement procedures, issues, and forms. To determine whether the board has authority to enforce a particular ordinance or statute, the members must look at that ordinance or statute to see who is authorized to send notices to people in violation of the law or take similar preliminary enforcement steps. If no one is specifically authorized to give notice of violation, the person authorized to approve projects or issue permits under the ordinance or statute probably has implicit preliminary enforcement power.

Planning boards should be aware that if they have been given the power to enforce an ordinance, State law (30-A M.R.S.A. § 4451) requires the board members to be certified by the Department of Economic and Community Development in their area of enforcement responsibilities. Since this is something that most board members would not want to undertake, a board which has been given enforcement powers should talk to the municipal officers about having the ordinance amended to transfer that power to the local code enforcement officer.



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## **Appendix 1 – Planning Board Ordinance and Statute**

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## Sample Establishment of Municipal Planning Board Ordinance

[Warrant article should read:

“Shall an ordinance entitled ‘Establishment of \_\_\_\_\_ Planning Board’ be enacted?” (must either be followed by text of proposed ordinance or a separate copy must be attested and posted next to warrant)]

1. Establishment. Pursuant to Art. VIII, pt. 2, Section 1 of the Maine Constitution and 30-A M.R.S.A. § 3001, the Town of \_\_\_\_\_ hereby establishes a Planning Board.
2. Appointment.
  - A. Board members shall be appointed by the municipal officers and sworn by the clerk or other person authorized to administer oaths. (Note: This section may be modified to provide for the election of board members.)
  - B. The board shall consist of \_\_\_\_\_ 5 \_\_\_\_\_ members and \_\_\_\_\_ 2 \_\_\_\_\_ associate members.
  - C. The term of each member shall be \_\_\_\_\_ 3 \_\_\_\_\_ years, except the initial appointments which shall be (1 for 1 year, 2 for 2 years, and 2 for 3 years) \_\_\_\_\_ respectively. The term of office of an associate member shall be \_\_\_\_\_ 3 \_\_\_\_\_ years.
  - D. When there is a permanent vacancy, the municipal officers shall within 60 days of its occurrence 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, or fails to attend at least 75% of all meetings during the preceding twelve (12) month period. When a vacancy occurs, the chairperson of the board shall immediately so advise the municipal officers in writing. The board may recommend to the municipal officers that the attendance provision be waived for the cause, in which case no vacancy will then exist until the municipal officers disapprove the recommendation. The municipal officers may remove members of the planning board by unanimous vote, for cause, after notice and hearing. (Note: This section may be modified, in the case of elected board members, to indicate that the person appointed by the municipal officer serves only until the next annual meeting (or some other time specified).)
  - E. A municipal officer may not be a member or associate member.

### 3. Organization and Rules.

- A. The board shall elect a chairperson and vice chairperson from among its members. The board may either elect a secretary from among its members or hire a non-board member to serve as secretary. The term of all offices shall be 1 year(s) with eligibility for re-election.
- B. 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 associate member to sit in that member's place.
- C. An associate 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.
- D. Any question of whether a member is disqualified from voting on a particular matter shall be decided by a majority vote of the members except the member who is being challenged.
- E. The chairperson shall call at least one regular meeting of the board each month, provided there is business to conduct. Special meetings may 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.
- F. No meeting of the board shall be held without a quorum consisting of 3 members or associate members authorized to vote. The board shall act by majority vote of the full board/of the members present and voting (choose one).
- G. The board shall adopt rules for transaction of business and the secretary shall keep a record of its resolutions, transactions, correspondence, findings and determinations. All records shall be deemed public and may be inspected at reasonable times.

### 4. Duties; Powers

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

B. The board may obtain goods and services necessary to its proper function within the limits of appropriations made for the purpose.

C. (Other) \_\_\_\_\_



**Sample Language for Use in “Reestablishing” a Board Which was not Legally Established When Created**

1. Establishment; Reestablishment. Pursuant to Art. VIII, Pt. 2, Sec. 1 of the Maine Constitution and 30-A M.R.S.A. § 3001, the Town of \_\_\_\_\_ hereby establishes a planning board. The board which has been acting as a planning board is hereby reestablished as the legal planning board. 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 that board took prior to the adoption of this ordinance are hereby declared to be the acts of the legally constituted planning board of the Town of \_\_\_\_\_.

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





## **Old Planning Board Statute (30 M.R.S.A. Sections 4952, 4957, 4964)**

### Section 4952 Planning Board

1. Establishment. A municipality may establish a planning board.
  - A. Appointments to the board shall be made by the municipal officers.
  - B. The board shall consist of 5 members and 2 associate members.
  - C. The term of office of a member is 5 years, but initial appointments shall be made for 1, 2, 3, 4, and 5 years, respectively. The term of office of an associate member is 5 years.
  - D. A municipal officer may not be a member or associate member of the board.
  - E. When a member is unable to act because of interest, physical incapacity,—(absence from the State—deleted in 1969), or any other reason satisfactory to the chairman, the chairman of the planning board shall designate an associate member to act in his stead. When there is a permanent vacancy, the municipal officers shall appoint a person to serve for the unexpired term. (Amended PL 1969, c,334, § 1)
  - F. An associate member may attend all meetings of the board and participate in its proceedings, but may vote only when he has been designated by the chairman to act for a member.
  - G. The board shall elect a chairman and secretary from its own membership.
  - H. (Repealed PL 1965, c. 513, § 67) 1961, c. 395, § 32; 1963, c. 123
  - I. In the event that the total number of legally appointed members and associate members is reduced by resignation, death or expiration of terms, a total of 4 legally appointed members and associate members shall constitute a legal body to conduct the business of the board, pending appointments by the municipal officers. The municipal officers shall fill such vacancies within 60 days of their occurrence. (Added by PL 1971, c. 309)
2. Plans. The board shall prepare, adopt and may amend a comprehensive plan containing its recommendations for the development of the municipality.

- A. Among other things, the plan may include the proposed general character, location, use, construction, layout, extent, size, open spaces and population density of all real estate, and the proposed method for rehabilitating blighted districts and eliminating slum areas.
  - B. The board shall hold a public hearing on its tentative proposals, before it adopts the plan or an amendment of it.
  - C. Once adopted by the board, the plan becomes a public record. It shall be filed in the office of the clerk.
  - D. After the board has adopted the plan, an ordinance or official map authorized by this subchapter may not be enacted, adopted or amended; and public property may not be established or modified in location or extent, until the board has made a careful investigation and reported its pertinent recommendations which are consistent with the plan. The board shall make its official report at the next meeting of the legislative body which is held not less than 30 days after the proposal has been submitted to the board. The failure of the board to issue its report constitutes approval of the proposal. A proposal which has been disapproved by the board may be enacted only by a 2/3 vote of the legislative body.
- 3. Appropriations. A municipality which has a planning board may raise or appropriate money and may contract with the State and Federal Governments for the purpose of the comprehensive planning authorized by this subchapter.
  - 4. Personnel and services. The board may hire personnel and obtain goods and services necessary to its proper function within the limits of appropriations made for the purpose. 1957, c. 405, § 1; 1961, c. 395, § 32; 1963, c. 123.

#### Section 4957. Savings Provision

In a municipality which does not have a planning board, an ordinance enacted under repealed sections 137 to 144 of chapter 5 of the Revised Statutes of 1930 as amended, and repealed sections 93 to 97 of chapter 91 of the Revised Statutes of 1954, remains effective, and may be amended in accordance with those sections until it is repealed or superseded by an ordinance authorized by this subchapter. In a municipality which has a planning board, an ordinance enacted under the repealed sections which is consistent with this subchapter remains effective and an ordinance which is inconsistent with this subchapter is void. (1957, c. 405, § 1; 1963, c. 193)

#### Section 4964. Savings Provisions

Any planning board or district established and any ordinance or map adopted under a prior, inconsistent and repealed statute shall remain in effect until abolished, amended, or repealed.  
(eff. 9/22/71)



## **Appendix 2 – Sample Forms, Bylaws and Procedures**

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## Sample SMRPC Model Application Form

Town of \_\_\_\_\_ Subdivision Application

Subdivision Name: \_\_\_\_\_

Application Number: \_\_\_\_\_

### APPLICANT INFORMATION

Name of Property Owner: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_

Name of Applicant: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_

If applicant is a corporation, check if licensed in Maine ☐ Yes ☐ No and attach a copy of State's Registration.

Name of applicant's authorized agent: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_

Name of Land Surveyor, Engineer, Architect or others preparing plan:

\_\_\_\_\_  
\_\_\_\_\_

Address: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_ Registration # \_\_\_\_\_

Person and Address to which all correspondence regarding this application should be sent:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

What legal interest does the applicant have in the property to be developed (ownership, option, purchase and sales contract, etc.)? \_\_\_\_\_

What interest does the applicant have in any abutting property? \_\_\_\_\_

### LAND INFORMATION

Location of Property (Street Location) \_\_\_\_\_

(from County Registry of Deeds): Book \_\_\_\_\_ Page \_\_\_\_\_

(from Tax Maps): Map \_\_\_\_\_ Lot(s) \_\_\_\_\_

Current zoning of property: \_\_\_\_\_

Is any portion of the property within 250 feet of the high water mark of a pond, river or salt water body?

☐ Yes

☐ No

Total Acreage of Parcel: \_\_\_\_\_

Acreage to be developed: \_\_\_\_\_

Indicate the nature of any restrictive covenants to be placed in the deeds:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Has this land been part of a prior approved subdivision? ☐ Yes ☐ No

Or other divisions within the past 5 years? ☐ Yes ☐ No

Identify existing use(s) of land (farmland, woodlot, etc.) \_\_\_\_\_

Does the parcel include any water bodies? ☐ Yes ☐ No

Does the parcel include any wetlands? ☐ Yes ☐ No

Is any portion of the property within a special flood hazard area as identified by the Federal Emergency Management Agency? ☐ Yes ☐ No

List below the names and mailing addresses of abutting property owners and owners across the road:

Name

Address

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**GENERAL INFORMATION**

Proposed name of development: \_\_\_\_\_

Number of lots or units: \_\_\_\_\_

Anticipated date for construction: \_\_\_\_\_

Anticipated date of completion: \_\_\_\_\_

Does this development require extension of public infrastructure? ☐ Yes ☐ No

_____ roads	_____ storm drainage	_____ other
_____ sidewalks	_____ water lines	
_____ sewer lines	_____ fire protection equipment	



Estimated cost for infrastructure improvements \$ \_\_\_\_\_

Identify method of water supply to the proposed development:

- \_\_\_\_\_ individual wells
- \_\_\_\_\_ central well with distribution lines
- \_\_\_\_\_ connection to public water system
- \_\_\_\_\_ other, please state alternative

Identify method of sewage disposal to the proposed development:

- \_\_\_\_\_ individual septic tanks
- \_\_\_\_\_ central on site disposal with distribution lines
- \_\_\_\_\_ connection to public sewer system
- \_\_\_\_\_ other, please state alternative

Identify method of fire protection for the proposed development:

- \_\_\_\_\_ hydrants connected to the public water system
- \_\_\_\_\_ dry hydrants located on an existing pond or water body
- \_\_\_\_\_ existing fire pond
- \_\_\_\_\_ other, please state alternative

Does the applicant propose to dedicate to the public any streets, recreation or common lands?

street(s)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Estimated Length _____
recreation area(s)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Estimated Acreage _____
common land(s)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	Estimated Acreage _____

Does the applicant intend to request waivers of any of the subdivision submission requirements? If yes, list them and state reasons for the request.

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To the best of my knowledge, all the above stated information submitted in this application is true and correct.

\_\_\_\_\_  
(signature of applicant)

\_\_\_\_\_  
(date)



## Town of Falmouth Shoreland Zoning Permit Application

### GENERAL INFORMATION

1. APPLICANT	2. APPLICANT'S ADDRESS	3. APPLICANT'S TEL. #
4. PROPERTY OWNER	5. OWNER'S ADDRESS	6. OWNER'S TEL. #
7. CONTRACTOR	8. CONTRACTOR'S ADDRESS	9. CONTRACTOR'S TEL. #
10. LOCATION/ADDRESS OF PROPERTY	11. TAX MAP/PAGE & LOT # AND DATE LOT WAS CREATED	12. ZONING DISTRICT
13. DESCRIPTION OF PROPERTY INCLUDING A DESCRIPTION OF ALL PROPOSED CONSTRUCTION, (E.G. LAND CLEARING, ROAD BUILDING, SEPTIC SYSTEMS, AND WELLS - PLEASE NOTE THAT A SITE PLAN SKETCH IS REQUIRED ON PAGE 3).		
14. PROPOSED USE OF PROJECT	15. ESTIMATED COST OF CONSTRUCTION	
<b><u>SHORELAND AND PROPERTY INFORMATION</u></b>		
16. LOT AREA (SQ. FT.)	17. FRONTAGE ON ROAD (FT.)	

18. SQ. FT. OF LOT TO BE COVERED BY NON-VEGETATED SURFACES	19. ELEVATION ABOVE 100 YR. FLOOD
20. FRONTAGE ON WATERBODY (FT.)	21. HEIGHT OF PROPOSED STRUCTURE
22. EXISTING USE OF PROPERTY	23. PROPOSED USE OF PROPERTY

Note: Questions 24 & 25 apply only to expansions of portions of existing structures which are less than the required setback.

<p>24. A) TOTAL FLOOR AREA OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK AS OF 1/1/89:</p> <p>_____ SQ. FT.</p> <p>B) FLOOR AREA OF EXPANSIONS OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK FROM 1/1/89 TO PRESENT:</p> <p>_____ SQ. FT.</p> <p>C) FLOOR AREA OF PROPOSED EXPANSION OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK:</p> <p>_____ SQ. FT.</p> <p>D) % INCREASE OF FLOOR AREA OF ACTUAL AND PROPOSED EXPANSIONS OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK SINCE 1/1/89:</p> <p>(% INCREASE = <math>\frac{B+C}{A} \times 100</math>)</p> <p>_____ %</p>	<p>25. A) TOTAL VOLUME OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK AS OF 1/1/89:</p> <p>_____ CUBIC FT.</p> <p>B) VOLUME AREA OF EXPANSIONS OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK FROM 1/1/89 TO PRESENT:</p> <p>_____ CUBIC FT.</p> <p>C) VOLUME OF PROPOSED EXPANSION OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK:</p> <p>_____ CUBIC FT.</p> <p>D) % INCREASE OF VOLUME OF ACTUAL AND PROPOSED EXPANSIONS OF PORTION OF STRUCTURE WHICH IS LESS THAN REQUIRED SETBACK SINCE 1/1/89:</p> <p>(% INCREASE = <math>\frac{B+C}{A} \times 100</math>)</p> <p>_____ %</p>
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NOTE: IT IS IMPERATIVE THAT EACH MUNICIPALITY DEFINE WHAT CONSTITUTES A STRUCTURE, FLOOR AREA, AND VOLUME AND APPLY THOSE DEFINITIONS UNIFORMLY WHEN CALCULATING EXISTING AND PROPOSED SQ. FT. AND CU. FT.

### **SITE PLAN**

PLEASE INCLUDE: LOT LINES; AREA TO BE CLEARED OF TREES AND OTHER VEGETATION; THE EXACT POSITION OF PROPOSED STRUCTURES, INCLUDING DECKS, PORCHES, AND OUT BUILDINGS WITH ACCURATE SETBACK DISTANCES FROM THE SHORELINE, SIDE AND REAR PROPERTY LINES; THE LOCATION OF PROPOSED WELLS, SEPTIC SYSTEMS, AND DRIVEWAYS; AND AREAS AND AMOUNTS TO BE FILLED OR GRADED. IF THE PROPOSAL IS FOR THE EXPANSION OF AN EXISTING STRUCTURE, PLEASE DISTINGUISH BETWEEN THE EXISTING STRUCTURE AND THE PROPOSED EXPANSION.

NOTE: FOR ALL PROJECTS INVOLVING FILLING, GRADING, OR OTHER SOIL DISTURBANCE YOU MUST PROVIDE A SOIL EROSION CONTROL PLAN DESCRIBING THE MEASURES TO BE TAKEN TO STABILIZE DISTURBED AREAS BEFORE, DURING AND AFTER CONSTRUCTION (see attached guidelines).

SCALE: \_\_\_\_ = \_\_\_\_ FT.

### **FRONT OR REAR ELEVATION**

**SIDE ELEVATION**

DRAW A SIMPLE SKETCH SHOWING BOTH THE EXISTING  
AND PROPOSED STRUCTURES WITH DIMENSIONS

**ADDITIONAL PERMITS, APPROVALS, AND/OR REVIEWS REQUIRED**

CHECK IF REQUIRED:

- ☐ PLANNING BOARD REVIEW APPROVAL  
(e.g. Subdivision, Site Plan Review)
- ☐ BOARD OF APPEALS REVIEW APPROVAL
- ☐ FLOOD HAZARD DEVELOPMENT PERMIT
- ☐ EXTERIOR PLUMBING PERMIT  
(Approved HHE 200 Application Form)
- ☐ INTERIOR PLUMBING PERMIT
- ☐ DEP PERMIT (Site Location,  
Natural Resources Protection Act)
- ☐ ARMY CORPS OF ENGINEERS PERMIT  
(e.g. Sec. 404 of Clean Waters Act)

OTHERS:

- ☐ \_\_\_\_\_
- ☐ \_\_\_\_\_
- ☐ \_\_\_\_\_
- ☐ \_\_\_\_\_

NOTE: APPLICANT IS ADVISED TO CONSULT WITH THE CODE ENFORCEMENT OFFICER AND APPROPRIATE STATE AND FEDERAL AGENCIES TO DETERMINE WHETHER ADDITIONAL PERMITS, APPROVALS, AND REVIEWS ARE REQUIRED

I CERTIFY THAT ALL INFORMATION GIVEN IN THIS APPLICATION IS ACCURATE. ALL PROPOSED USES SHALL BE IN CONFORMANCE WITH THIS APPLICATION AND THE \_\_\_\_\_ SHORELAND ZONING ORDINANCE.

I AGREE TO FUTURE INSPECTIONS BY THE CODE ENFORCEMENT OFFICER AT REASONABLE HOURS.

\_\_\_\_\_  
APPLICANT'S SIGNATURE

\_\_\_\_\_  
DATE

\_\_\_\_\_  
AGENT'S SIGNATURE (if applicable)

\_\_\_\_\_  
DATE

**APPROVAL OR DENIAL OF APPLICATION**  
(For Office Use Only)

\_\_\_\_\_ MAP \_\_\_\_\_ LOT #

THIS APPLICATION IS: \_\_\_\_\_ APPROVED \_\_\_\_\_ DENIED

IF DENIED, REASON FOR DENIAL:

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IF APPROVED, THE FOLLOWING CONDITIONS ARE PRESCRIBED:

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NOTE: IN APPROVING A SHORELAND ZONING PERMIT, THE PROPOSED USE SHALL COMPLY WITH THE PURPOSES AND REQUIREMENTS OF THE SHORELAND ZONING ORDINANCE FOR THE TOWN OF \_\_\_\_\_

\_\_\_\_\_  
CODE ENFORCEMENT OFFICER

\_\_\_\_\_  
DATE

INSPECTION CHECK LIST	
<input type="checkbox"/>	Prior to Clearing and Excavation
<input type="checkbox"/>	Prior to Foundation Pour
<input type="checkbox"/>	Prior to Final Landscaping
<input type="checkbox"/>	Prior to Occupancy

PERMIT #
FEE AMOUNT

NOTE: THIS CHECKLIST IS INTENDED TO ASSIST THE CEO IN TRACKING A SHORELAND ZONING PERMIT THROUGH THE REVIEW PROCESS

Appendix 1



## **STANDARD CONDITIONS OF APPROVAL FOR ALL PROJECTS**

1. A copy of this permit must be posted in a visible location on your property during development of the site, including construction of the structures approved by this permit.
2. This permit is limited to the proposal as set forth in the application and supporting documents, except as modified by specific conditions adopted by the Planning Board or Code Enforcement Officer in granting this permit. Any variations from the application or conditions of approval are subject to prior review and approval by the Planning Board or Code Enforcement Officer. Failure to obtain prior approval for variations shall constitute a violation of the ordinance.
3. A substantial start (30% of project based on estimated cost) of construction activities approved by this permit must be completed within one (1) year of the date of issue. If not, this permit shall lapse, and no activities shall occur unless and until a new permit is issued.
4. The water body and wetland setbacks for all principal and accessory structures, driveways, and parking areas must be as specified in the application, or as modified by the conditions of approval.
5. In the event the permittee should sell or lease this property, the buyer or leasee shall be provided with a copy of the approved permit and advised of the conditions of approval.
6. Once construction is complete, the permittee shall notify the Code Enforcement Officer that all requirements and conditions of approval have been met. Following notification, the Code Enforcement Officer may arrange and conduct a compliance inspection.



# City of Ellsworth Land Development Permit Application

April 11, 2011 revision

## **TYPE OF DEVELOPMENT/APPLICATION:** (Check all that apply)

☐ Pre-app/Sketch      ☐ Preliminary Subdivision Plan      ☐ Final Plan      ☐ Revisions  
☐ Minor Subdivision      ☐ Minor Conditional Use      ☐ Campground  
☐ Major Subdivision      ☐ Major Conditional Use      ☐ Mobile Home Park

## **APPLICATION INFORMATION:**

Development Name: \_\_\_\_\_

Development Address: \_\_\_\_\_

Property Owner: \_\_\_\_\_

Property Owner Address: \_\_\_\_\_

Applicant: \_\_\_\_\_

Applicant Address: \_\_\_\_\_

Applicant Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ Email: \_\_\_\_\_

Is applicant a corporation? \_\_\_\_\_ Yes \_\_\_\_\_ No.      If yes, licensed in which state? \_\_\_\_\_ \*

*\* If the corporation license is outside of Maine, please attach a copy of the registration.*

Applicant's Authorized Agent: \_\_\_\_\_

Agent Address: \_\_\_\_\_

Agent Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ Email: \_\_\_\_\_

Design Professional: \_\_\_\_\_ Title: \_\_\_\_\_

Preparer's Address: \_\_\_\_\_

Preparer's Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ Registration # \_\_\_\_\_

Name and Address of person to receive all correspondence with regard to this application:

Application Contact: \_\_\_\_\_

Contact Address: \_\_\_\_\_

Contact Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_ Email: \_\_\_\_\_

**LAND INFORMATION:** (You may attach additional information if more space is needed)

1. The proposal is located on which City Tax Map/Lot #(s)? \_\_\_\_\_
2. How large is the subject property (in acres or square feet)? \_\_\_\_\_
3. What is the current zoning of the property to be developed? \_\_\_\_\_
4. What are the existing use(s) of the property? \_\_\_\_\_
5. Is the property in the designated Ellsworth Downtown Area? \_\_\_\_\_ In the Urban Core? \_\_\_\_\_
6. What water bodies does the parcel abut? \_\_\_\_\_
7. Is any portion of the property within 250' of the normal high-water mark of a pond, river, or salt water body? Yes \_\_\_\_\_ No \_\_\_\_\_ ; or in Stream Protection? Yes \_\_\_\_\_ No \_\_\_\_\_
8. Is any portion of the property within a special flood hazard area as identified by the Federal Emergency Management Agency (FEMA): \_\_\_\_\_ Yes \_\_\_\_\_ No \_\_\_\_\_
9. What legal interest does the applicant have in the subject property? (*Attach evidence thereof*)  
\_\_\_\_\_ ownership, \_\_\_\_\_ option, \_\_\_\_\_ purchase and sales contract, \_\_\_\_\_ other = \_\_\_\_\_
10. What legal interest does the applicant have in any abutting property? \_\_\_\_\_

➔ **Attach a list of the owners of all properties that abuts the subject property.**

11. When was the last time that the subject property was subdivided? \_\_\_\_\_
12. What was the nature of the last subdivision? \_\_\_\_\_ building units \_\_\_\_\_ division of land
13. Indicate if property is in the following classifications for property tax assessment purposes:  
\_\_\_\_\_ Tree Growth, \_\_\_\_\_ Farm Use, \_\_\_\_\_ Open Space \_\_\_\_\_ Working Waterfront

*NOTE: Contact the City Assessor prior to receiving subdivision approval or change of use approval to determine if there will be a withdrawal penalty from any of the above programs.*

**DEVELOPMENT INFORMATION:** (Attach additional information if more space is needed)

*Definitions of terms used herein may be found in the Ellsworth Land Use Ordinance.*

14. Proposed use(s) of development: \_\_\_\_\_
15. Number of existing lots \_\_\_\_\_ Number of lots to be developed: \_\_\_\_\_  
Number of existing buildings \_\_\_\_\_ No. of buildings to be developed: \_\_\_\_\_  
Number/type of existing units \_\_\_\_\_ No./type of units to be developed: \_\_\_\_\_
16. Existing structure footprint area: \_\_\_\_\_ Proposed structure footprint area: \_\_\_\_\_  
Existing building gross floor area: \_\_\_\_\_ Proposed building gross floor area: \_\_\_\_\_  
Existing impervious surface area: \_\_\_\_\_ Proposed impervious surface area: \_\_\_\_\_  
Existing developed surface area: \_\_\_\_\_ Proposed developed surface area: \_\_\_\_\_  
Size of disturbed area to be produced during project construction \_\_\_\_\_

**DEVELOPMENT INFORMATION: (continued)**

17. Does the proposed building area include 75,000 s. f. or more of retail? \_\_\_\_\_ Yes \_\_\_\_\_ No

If "yes" above, the Informed Growth Act (Sec. 1 30-A M.R.S.A. c. 187, sub-c.3-A.) regarding large-scale retail development may apply and a Comprehensive Impact Analysis must be submitted with the final application. Contact the City Planner with any questions.

18. What is the estimated cost of the proposed development or changes? \_\_\_\_\_

19. What is the intended start and completion dates of the proposal? \_\_\_\_\_ to \_\_\_\_\_

20. Does the development require extension of public infrastructure? \_\_\_\_\_ Yes \_\_\_\_\_ No

21. What is the estimated cost for public infrastructure improvements needed to serve the project?  
Water \$ \_\_\_\_\_ Wastewater \$ \_\_\_\_\_ Stormwater \$ \_\_\_\_\_ Other (\_\_\_\_\_) \$ \_\_\_\_\_

22. Identify method of water supply for the proposed development:

\_\_\_\_\_ Individual wells \_\_\_\_\_ Central well with distribution lines  
\_\_\_\_\_ Connection to public water \_\_\_\_\_ Other = \_\_\_\_\_

23. Identify method of sewage disposal for the proposed development:

\_\_\_\_\_ Individual septic systems \_\_\_\_\_ Central on-site disposal with distribution lines  
\_\_\_\_\_ Public sewer connection \_\_\_\_\_ Other = \_\_\_\_\_

24. What is the design flow increase for public water and/or sewer usage? \_\_\_\_\_

25. Identify method of fire protection for the proposed development:

\_\_\_\_\_ Building Sprinklers \_\_\_\_\_ Hydrants connected to the public water system  
\_\_\_\_\_ Existing fire pond \_\_\_\_\_ Dry hydrants located on existing water body  
\_\_\_\_\_ Other = \_\_\_\_\_

26. Does the applicant propose to dedicate to the public any streets, recreation areas, or common land:

\_\_\_\_\_ Yes \_\_\_\_\_ No. If answered yes, please specify all applicable:

Description of Street(s) \_\_\_\_\_ Est. length: \_\_\_\_\_

Description of Recreation Area(s) \_\_\_\_\_ Est. acreage: \_\_\_\_\_

Description of Common Land(s) \_\_\_\_\_ Est. acreage: \_\_\_\_\_

27. Indicate the nature of any restrictive covenants to be placed in the deeds:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

28. Does the applicant intend to request permissible waivers of any City ordinance provisions?

\_\_\_\_\_ Yes \_\_\_\_\_ No (*If yes, please list requests and state reasons for the request*)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**PERFORMANCE CRITERIA NARRATIVES:** *Please provide descriptions of how the proposal will meet the following ordinance provisions: (Attach more paper if space is needed)*

29. **Preserve natural, historic and/or visual elements** of the site and its vicinity in compliance with LUO § 12.08 A, F, G, H, M, N, O, R & T and/or Subdivision Ord. § 1.1 & 1.8.

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30. **Conserve soil, minimize erosion, manage stormwater and protect from flooding** in compliance with LUO § 12.08 F & I and/or Subdivision Ordinance § 1.4, 1.13, 1.16 & 1.18.  
See also Chapter 56, Article 10 Stormwater and Article 33 Floodplain Management.

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31. **Protect drinking water quality and supply** within the site and its vicinity in compliance with LUO § 12.08 J & K and/or Subdivision Ordinance § 1.1, 1.2, 1.3, 1.11, 1.12, 1.14, 1.15, 1.17 & 1.18.  
See also Chapter 55 Public Water Supply Protection regarding Branch Lake.

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32. **Provide safe vehicular & pedestrian access to, circulation within and adequate parking** in compliance with LUO § 12.08 B, C, D & Q, Ch. 56, Art. 9 & 11 and/or Subdivision Ord. § 1.5 & 1.19. See also Chapter 56, Article 9 Streets and Article 11 Parking.

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33. **Provide solid waste and wastewater disposal** in compliance with LUO § 12.08 L & S and/or Subdivision Ordinance § 1.6 & 1.7.

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34. **Provide exterior lighting** for the site in compliance with Chapter 56, § 812 Exterior Lighting, LUO § 12.08 P, § 12.09 and/or Subdivision Ord. § 13.7.C.

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35. **Comply with Ch. 54 Development Fee Ordinance** if in Beckwith District. [Sub.O. § 1.9]

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36. **Demonstrate Financial and technical ability** to meet these requirements. [Sub.O. § 1.10]

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*To the best of my knowledge, all of the information submitted in this application is true and correct.*

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Printed Name

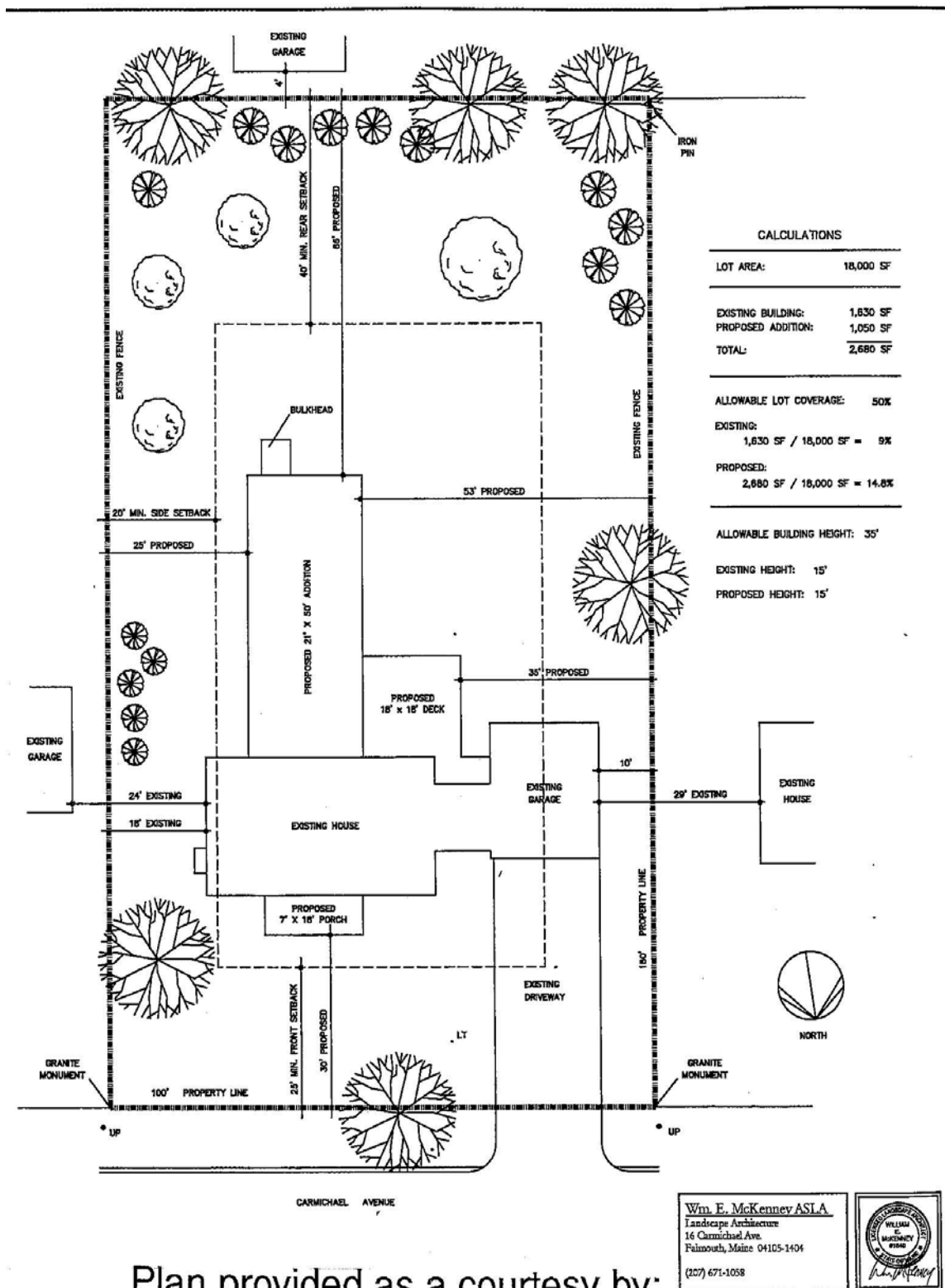
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Signature of Applicant's Authorized Agent

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Date

## Sample Site Plan for Conditional Use Application – Town of Falmouth







## **Sample Notice of Public Hearing—Planning Board**

**Town of** \_\_\_\_\_

The \_\_\_\_\_ Planning Board will hold a  
(town)  
public hearing on an application for a (state type of land use approval sought) as requested by

\_\_\_\_\_  
(insert applicant's name and address)  
\_\_\_\_\_  
\_\_\_\_\_

Date of Public Hearing: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

The application requests that (insert specifics): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Chairperson, Planning Board

-----  
(For Newspaper Use Only)

Publish the above notice on the following dates:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

and charge to:

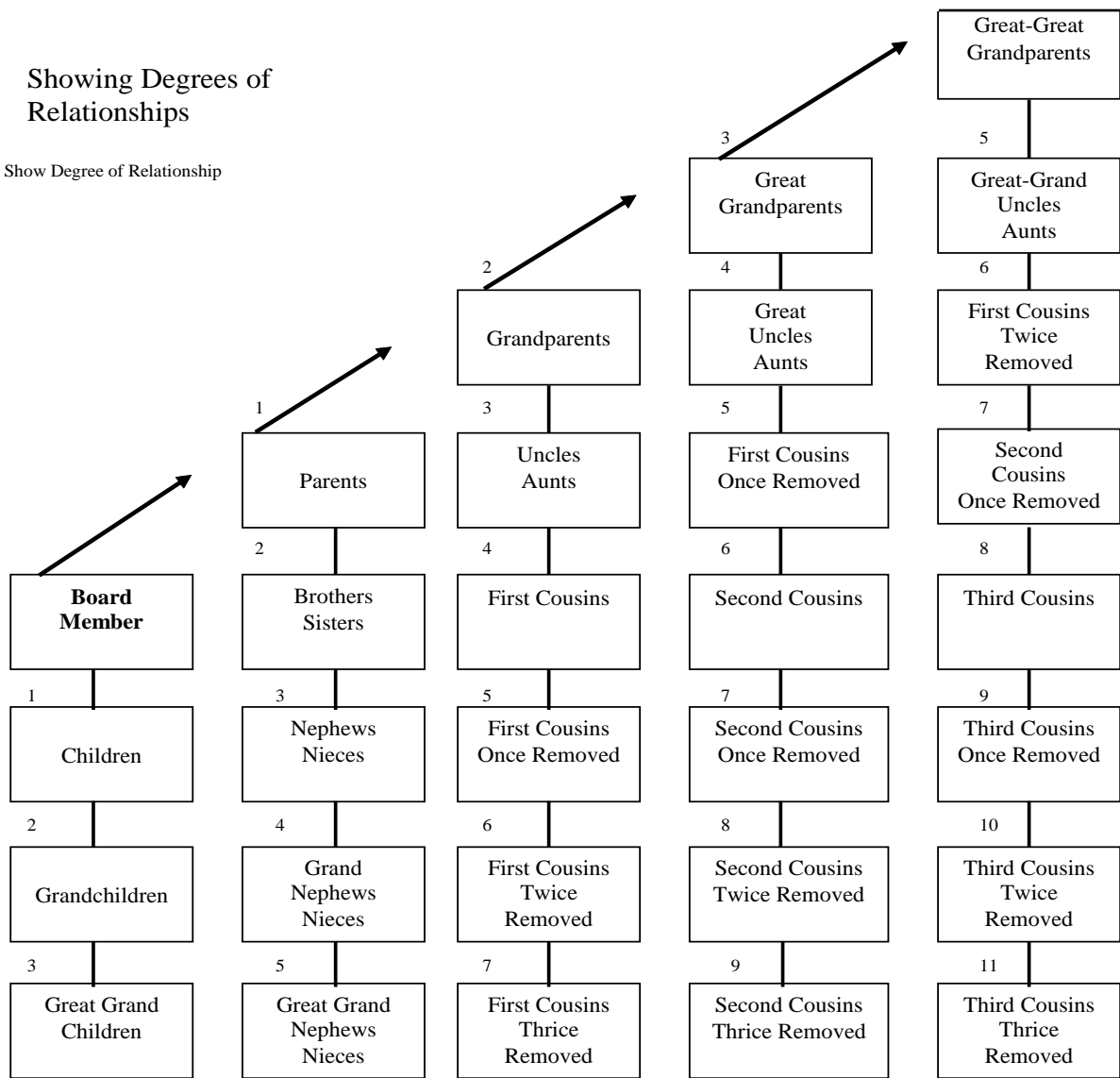
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



## Table of Consanguinity

Showing Degrees of Relationships

Figures Show Degree of Relationship



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



## **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 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. The board must decide to reconsider any decision, notify all parties and make any change in its original decision within \_\_\_\_\_ days of its prior decision. 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 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 statutes, such as 30-A M.R.S.A. § 4403 regarding subdivisions, 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 application.
5. The Board decides whether the applicant has the right to appear before the Board.



6. The applicant 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 applicant 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 applicant 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 facts, 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.



## **Sample Planning Board Rules, November 1989–Town of Gorham**

**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<sup>1</sup>**

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

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<sup>1</sup> As amended June 5, 1995

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 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 planning board 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 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.*



### **Appendix 3 – *Sample* Minutes and Decisions**

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## Town of Scarborough Planning Board Minutes, January 28, 2008

### Members Present

Mr. Callahan  
Mr. Chamberlain  
Mr. Fellows  
Mr. Maynard  
Mr. Paul  
Mr. Shire

### Staff

Mr. Bacon, Town Planner  
Mr. Chace, Assistant Town Planner  
Mrs. Logan, Recording Secretary  
Mr. Vaniotis, Town Attorney

#### 1. Call to Order

Mr. Paul called the meeting to order at 7:00 P. M.

#### 2. Roll Call

The Recording Secretary called the roll; Ms. Littlefield was absent. Mr. Paul authorized Mr. Shire to vote.

#### 3. Approval of Minutes (January 10, 2008)

Mr. Callahan moved to approve the minutes of January 10, 2008; Mr. Fellows seconded.

Voted 5-0

#### 4. The Planning Board will hold a public hearing to receive input regarding an amendment to the Contract Zone to add 53 acres to the Larrabee Farms Wetland Mitigation Project off Beech Ridge Road

Mr. Bacon stated that there were no staff comments at this stage; he stated that the Town Engineer would make comments before the Town Council's second reading and the Board would then review the site plan and the Town Attorney would review the revised contract. He stated that there was a memo from Tom Gorrill, of Gorrill-Palmer, dated January 24, 2008, with recalculated impact fees.

Mr. Rich Jordan, of Boyle Associates, gave a Power Point presentation and a brief history of the site. He stated that there were two mitigation projects now completed on the site, the Cabela's project and the DOT Gorham Bypass project. Mr. Jordan showed their site at Beech Ridge Road and Route 114 and stated that most of the site was near the Nonesuch River and in the preservation area. He stated that the Grondin property was 268 acres with an added 53 acres from Scarborough Fish and Game; he stated that this had been farmland, mineral extraction, forestry and then an informal dump prior to being acquired by the Grondins.

Mr. Jordan explained that the original plan was for extraction and residential development but the site was now used for a wetland creation mitigation site; he explained that wetland mitigation replaced impacted wetlands on other sites. He stated that they started the Contract Zone process in 2001/2002 and received approval in 2006.

He stated that Contract Zone 8, on the new 53 acres, would allow wetlands mitigation, associated work and passive recreation. He displayed the overall site plan showing wetlands, uplands and mitigation areas. He stated that this new area was for the Haigis Parkway project for which they had submitted an application to the DEP. Mr. Jordan explained that the DOT mitigation project consisted

of wetland creation, uplands and vernal pools and that they had provided a culvert for drainage of Sweetbrier Lane. He stated that the Cabela's mitigation site was a total of 31 acres.

Mr. Jordan stated that they had nine amendments and wanted to deal with them all at once; he stated that there were three changes to the contract and six changes to the site plan. He stated that they wanted to add 53 acres that were currently owned by Inland Fish and Game, and wanted to allow aggregate material processing and importation of mineral materials such as stone, which would allow trucks to enter the site and leave the site full. Mr. Jordan stated that they would amend the language in the contract to allow Grondin to complete the project in 10 years rather than the original 20 years; he stated that they would amend the traffic impact with more peak time truck flow on Payne Road and place an informational sign at the entrance. He stated that they wanted permission to have a Quonset hut for storage of dry materials. Mr. Jordan stated that they wanted to combine two areas on the wetlands plan to one area. He stated that the traffic requirements from the original plan would remain.

Mr. Paul opened the public hearing and asked people to keep their comments to five minutes; he stated that if someone wanted to speak a second time, he or she should limit those comments to three minutes.

Mr. Randy Thibault, of 6 Marr Farm Road, asked how many acres of standing timber would be cut; Mr. Jordan replied that there would be only one acre of timber cut near the road. Mr. Ken Grondin stated that the area was toward the southwest and over the hill from Marr Farm Road; he stated that he would be happy to show the area to the neighbors. Mr. Thibault stated that he could hear the gunshots from the Fish and Game site and was concerned that the sound barrier of the trees would be removed. He stated that their concern was their backyard impact and quality of life. He asked whether it would be in writing that only one acre would be cut. Mr. Grondin replied that every acre of creation had a certain area of preservation and in that area only one acre of trees would be cut. Mr. Jordan showed the protection areas around the completed projects and stated that the conservation easements spelled out what could and could not be done. Mr. Thibault asked whether there would be blasting or quarry work; Mr. Grondin stated that there would be no blasting with the 53 acre area. He stated that the plans had stayed the same since the beginning. Mr. Thibault stated that they hear a lot of backing up of trucks.

Ms. Shari Edgecomb, of 17 Barley Lane, stated that her concern was that the other side of Clover-leaf Estates would be impacted by this new section; she stated that her concern was the humming of trucks that echoed throughout and the tailgates clanging as well as the blasting. She stated that her dishes rattle and the blasting scared her children; she stated that she had an issue with the frequent trucks on Holmes Road and this would bring more trucks. Mr. Grondin stated that they made their own gravel onsite for the large projects; he stated that in three years the blasting would end. He stated that they alleviated blasting issues by not blasting on cloudy days when sound stayed close to the ground. He stated that they would call people two hours in advance if they wanted to be on a list. Ms. Edgecomb stated that hers was a quality of life issue.

Mr. David Bergeron, of 19 Barley Lane, stated that he agreed with Ms. Edgecomb that blasting was the major issue and asked whether the amount of blasting would change if the length of the project were 10 years instead of 20. Mr. Grondin stated that the cubic yards of material removed would speed

up the activity and shorten the lifespan; he stated that there would be no ledge removal from the new parcel. He stated that they would not expand the blasting but the process would be sped up by removing more. Mr. Bergeron asked about the Payne Road Impact Fee and whether there would be an impact fee for Holmes Road or Beech Ridge Road. Mr. Grondin stated that they were required to turn right only onto Beech Ridge Road but if they had local deliveries in the Dunstan area they were allowed to use Holmes Road but their trucking associated with the new project had nothing to do with this Contract Zone. He stated that they would access the 53 acres for a preservation project with vernal pools and very little trucking would be associated with it. Mr. Paul stated that part of the Contract Zone commitment when the site was complete was that the road would be resurfaced. He noted that impact fees were dedicated to certain roads and Holmes and Beech Ridge Roads were not included. Mr. Bergeron stated that he hoped they would not lose any sound protection barrier. Mr. Jordan reiterated that there would be no cutting or blasting in the Haigis Parkway mitigation area, which was now an existing habitat.

To a question from Ms. Tracy Palm, of 3 Marr Farm Way, Mr. Grondin replied that a reassessment could be done on their home to determine whether the blasting had done any harm. To a question from Ms. Palm, Mr. Jordan replied that the Town owned the land across the street. Mr. Bacon explained that as part of the Contract Zone, 20 acres of land was given to the town for a possible school or recreation use; he stated that the Town Manager could be contacted for more information on that parcel.

Mr. Kevin McKee, of 15 Independence Way, noted that the pavement quality was poor at the intersection of Route 114 and Beech Ridge Road; Mr. Grondin stated that they had completed widening the intersection but did have to grind and pave 28 feet of Beech Ridge Road to the intersection from their entrance. To a question from Mathew Thees, of 21 Barley Lane, Mr. Jordan replied that the land near his lot was in forest preservation where no work would be done. Mr. Jordan stated that he would like to invite the Planning Board, the Town Council and the neighbors to a site walk in the spring.

Mr. Bergeron asked the future use of the property; Mr. Jordan replied that the Army Corps of Engineers and the DEP approvals guaranteed that this property would remain in preservation in perpetuity. Mr. Jordan stated that ten years after the project was finished, it would be monitored and the land would be transferred to the town or the Scarborough Land Trust. To a question from Mr. Bergeron, Mr. Grondin replied that they had already been building roads within the site and the noise would be less than previously because they would be working 20 to 30 feet lower.

Ms. Palm asked whether Marr Farm Road would be used for access; Mr. Grondin replied that, because of the large project which was now complete, they would not have to use Marr Farm Road; he stated that the Fish and Game access would be used for the lower area. Mr. Thibault asked whose job it was to determine how much land was being cleared; Mr. Bacon replied that the DEP, the Army Corps and the Code Enforcement Officer would inspect the site in terms of wetland creation and clearing. Mr. Grondin stressed that creating a 320 acre preserve was bound to cause a few ripples in the construction stage and the abutters now used the site for passive activities; he stated that he was before the Board tonight for their annual review which was a requirement of the Contract Zone. Mr. Grondin stated that they were adding 53 acres with very low impact.

Mr. Paul closed the public hearing.

Mr. Fellows stated that he appreciated the applicant's willingness to work with the neighbors. He asked the size of the sign; Mr. Grondin replied that it was a 3 by 5 foot sign and he would include a rendering in the contract. Mr. Callahan stated that allowing onsite processing made sense for better efficiency in transporting material. Mr. Chamberlain asked how much wetland mitigation would be involved with the 53 acre section; Mr. Jordan replied that three vernal pools did more than just preservation because more credit was given for an area that was enhanced in some way. Mr. Chamberlain asked where there was access to the open areas; Mr. Jordan replied that South Coast Community Church had parking and trails that connected to this site and there was parking at the end of Larrabee Farm Road. Mr. Chamberlain stated that it made a lot of sense when development disturbed wetlands, it could acquire property for mitigation in one contiguous piece. To a question from Mr. Chamberlain, Mr. Jordan replied that there were two completed projects and the future Haigis Parkway project and there were two areas, one of three acres and the other 20 acres remaining for mitigation. Mr. Grondin stated that they were almost half completed with the site because of the two large clients.

Mr. Paul asked about construction times; Mr. Jordan replied that they were allowed to work from 7:00 A. M. to 5:30 P. M., Monday through Saturday. Mr. Grondin stated that they were abiding by those hours, but they could access the site for sand at night in the event of an emergency. Mr. Paul noted that there would be another public hearing with the Town Council.

5. Darling Bedworks, David Darling requests site plan amendment for site at 582 U.S. Route One

Mr. Bacon stated that this amendment was for outside display and a follow-up to the approval for filling the land. He stated that there were signed drainage and maintenance easements from the previous approval, but Mr. Wendel needed a performance guarantee. Mr. Bacon stated that there was a staff report indicating that the Board should consider what constituted accessory outside display and the amount of landscaping and screening the site should have along Route One.

Mr. Darling stated that he wanted to expand the parking area slightly and make it safer; he stated that he would add landscaping and trees as shown on the site plan. Mr. Darling stated that he would also like to expand the outdoor display area. He stated that when he purchased the property in May 2002 there was outdoor display being done by the previous owner. Mr. Darling stated that he wanted to expand his outdoor display from the current 3,000 square feet to 10,000 square feet for the display of play sets. He stated that they did not sell play sets from the display area and they were ordered from a catalog.

Mr. Darling stated that the performance guarantee needed only to be finalized by Mr. Wendel, who would accept a letter of credit. Mr. Darling displayed the site plan and stated that he wanted to change the angled parking to 90° and add five spaces for overflow and employee parking. He showed the foundation plantings and the trees along Route One. Regarding outdoor display, Mr. Darling stated that Section 9.D. of the Performance Standards indicated that, "In any district a retail sales or service business, which operates principally within a building, may display merchandise or render services outside the building, provided such display or service is incidental and secondary to the business



conducted within the building.” Mr. Darling stated that the business operated within the building and the display is incidental.

To a question from Mr. Callahan, Mr. Darling stated that he had the letter of credit but it was not yet signed. Mr. Chamberlain stated that the issue was whether or not outdoor display was incidental; he stated that he had a problem with this because increasing the display area threefold did not seem incidental. He stated that he would like to see a lot more than three trees in front of the display.

Mr. Paul read definitions of the word “incidental,” including the words “subordinate, inessential, casual and chance, secondary, second in range, value or occurrence, bring to a later stage of development, coming after the primary.”

Mr. Darling stated that he wanted to challenge whether outdoor display was allowable; he noted that the Ordinance stated that if the approval was prior to 1994 the outdoor display was allowed as long as another site plan was not required. Mr. Paul noted that a site plan had to be submitted to expand the parking. Mr. Darling stated that he did not change the site. Mr. Darling reiterated that the sale of play sets took place inside the building, not outside.

To a question from Mr. Paul, Mr. Darling replied that catalogs were handed out inside the building and ordering was done at the computer inside the building. Mr. Fellows stated that he shared the concern that size did not necessarily equal importance. He stated that it was hard to reconcile the applicant asserting that it was not of primary importance when he was proposing to expand it significantly. Mr. Fellows stated that it missed the point when the applicant said the business occurred inside and that did not negate what took place outside. Mr. Fellows asked whether the photos presented represented the landscaping; Mr. Darling replied that he planted immature plants that were shown in the photos. Mr. Fellows stated that the Board should see a true landscaping plan showing how the site would look.

Mr. Darling stated that the overall site was two acres with a 3,600 square foot building and a 10,000 square foot mulched display area and he did not feel he was asking for anything extra in relation to other businesses that have outdoor display. Mr. Fellows stated that it would be helpful to see an improved area instead of the existing topography. To a question from Mr. Shire, Mr. Darling replied that the photos showed the landscaping at the sign. Mr. Shire stated that the Board should see the actual proposal of plantings and signage.

Mr. Maynard asked why the applicant wanted to make the display area larger; Mr. Darling replied that there were about 50 different models of play sets and he would like to show more than a few of them. Mr. Maynard stated that this looked like a flat spot with stuff on it and asked whether it could be made to look nicer with landscaping. He stated that it was not offensive but it was also not attractive and this was a prime piece of property. Mr. Darling stated that he had struggled with the ditch and did not want to do anything substantial before the ditch was put in. He stated that Route One was to be widened and he did not want to have to tear any landscaping out.

Mr. Paul noted that the applicant indicated the building would be “essentially unchanged;” Mr. Darling stated that it would not be changed at all. Mr. Darling stated that he had thought about a

cupola and wanted to paint the building but would come back to the Board for that. Mr. Paul stated that if the building were to be changed, the Board would like to deal with it all at once and not piecemeal. Mr. Darling stated that he had no plans to change the building at this time. Mr. Paul stated that he did not agree with the notion that a display area three times the size of the building where the business was conducted could be secondary or was incidental. He stated that he was struggling with the fact that the area was to be increased three times; he stated that the Board had talked about shielding the display area or placing it behind the building so it would be less noticeable from Route One. Mr. Paul stated that the size was a problem for him and asked that if the applicant returned to the Board with the landscaping plan, he should provide more detail on the display area with regard to traffic and pedestrian safety. Mr. Darling stated that Pinkham & Greer provided a traffic statement and customers would cross the driveway which was seldom used. Mr. Paul stated that the Board should see that on the site plan. Mr. Paul stated that he did not think the Ordinance gave the right to expand the display threefold.

Mr. Callahan noted that the Board had dealt with outdoor display with a couple of large projects and the Ordinance allowed outdoor displays as long as their locations were shown on the site plan. Mr. Paul noted that they were not three times the size of the buildings but were secondary.

Mr. Bacon stated that, on site plans approved since 1994, outdoor display was allowed only in locations designated by the Planning Board. He stated that the Board was concerned that this needed to be incidental and size was an issue here because the other displays were much smaller than the buildings with which they were associated. Mr. Callahan noted that it did help to see a product before it was purchased and this was the nature of the business. Mr. Darling stated that it helped when the children could play on the play sets.

To a question from Mr. Chamberlain, Mr. Bacon replied that outdoor display was allowed on Route One if it met all the standards, but the Board discouraged it. Mr. Darling stated that to get an accurate representation of the products, he needed the larger display area to be effective and it gave customers the chance to visualize the play sets in their yards. He stated that people would buy only what they saw. Mr. Paul stated that the concern was the visual corridor on Route One and the display should not be visible.

Mr. Paul called a recess at 9:00 P. M.; the meeting resumed at 9:10 P. M.

6. Marie Brazil requests determination by the Planning Board that the setback requirement is met to the greatest practical extent for renovations to her home at 12 Virdap Street in the Shoreland Zone. Mr. Bacon stated that it was a provision of the Shoreland Zoning Ordinance that when expanding or raising a foundation in the Shoreland Zone the Planning Board needed to make sure the renovations met the setback requirements to the greatest practical extent. He stated that there were no staff issues.

Ms. Rebecca Dillon, of Gawron Architects, stated that Ms. Brazil wanted to elevate her structure three feet and put in a new foundation. She displayed the existing setbacks where the structure met three of them with a small portion over the fourth setback line. Ms. Dillon stated that the house could not go closer to the east because of the wetlands; she stated that they would remove some of the building but would still have a nonconforming section on the rear of the garage.

Mr. Fellows stated that he appreciated the fact that the structure would be slightly less non-conforming and had no issues. Mr. Maynard and Mr. Chamberlain had no issues. To a question from Mr. Callahan, Ms. Dillon replied that the house would be put on pillars which would allow water to flow through. Mr. Paul stated that he thought they were doing as much as possible to not impose on the Shoreland Zone; he stated that the applicant should coordinate with the Code Officer.

Mr. Paul moved to approve the request for a determination that the setbacks were met to the greatest practical extent; Mr. Shire seconded.

Voted 5-0

7. Eastern Village, Ballantyne Development LLC requests final subdivision approval for traditional neighborhood development off Commerce Drive and Old Eastern Road

This item was tabled at the request of the applicant.

8. McDonald's requests site plan approval for 4,000 square foot restaurant on Lot 9 at Scarborough Gallery

Mr. Bacon stated that there were comments in response to the peer review comments regarding the ponding of water near the property line; he stated that a formal grading plan was needed. He stated that there were comments from the staff regarding the Fire Department's concern about the turning radius at the entrance; he stated that there was a new site plan for the Fire Department but he did not yet have a copy.

Mr. John Kucich, of Bohler Engineering, stated that they now showed 60° parking spaces at the front but the spaces on the Spring Street side would remain at 75° because people would not want to turn the wrong way to exit because it would be longer around the building. Mr. Kucich stated that they added landscaping between the building and the sidewalk at the Spring Street side. He stated that they had made a sidewalk connection to Gallery Boulevard and the crosswalks would have Duro Therm striping. Mr. Kucich showed the identification sign. He stated that they had lost two parking spaces by changing the configuration and would now have 41 spaces.

Mr. Kucich stated that they had stopped the contour lines because the Wal-Mart site was not finished and the contours were not connected to those plans. He stated that they had changed the plan slightly to accommodate the Fire Department's request for a 50 foot outside radius which required the building to be two feet closer to Spring Street, made the walkway three feet, rather than five feet wide, and the drive-through lane would be 11 feet rather than 12 feet, which would cause no impact on the landscaping. Mr. Kucich stated that the walkway along the drive-through lane would be eliminated but there would still be full pedestrian access to the side door from Gallery Boulevard.

Mr. Kucich stated that they had added brick along the drive-through windows and a trellis. He stated that they had added a raised parapet on the front and around the sides of the building to add prominence to the front of the building; he stated that all the colonial features would remain. He showed the elevation and stated that they were proud of the building and thought it would fit in quite well with the theme of the development; he stated that this was a one-of-a-kind McDonald's building.

Mr. Callahan confirmed that the original sidewalk along the outside of the drive-through lane would disappear; he asked how one would access the building. Mr. Kucich replied that it would be a straight shot into the side door from across Gallery Boulevard. Mr. Chamberlain stated that he felt the building had been enhanced; he stated that the current height limit on light poles was 16 feet but the applicant showed 20 foot poles. Mr. Kucich stated that the sidewalk poles were 16 feet high but they did not want more than four light poles in the parking lot so they made them taller. Mr. Chace stated that the Ordinance indicated that the maximum height shall not exceed 25 feet and shall be reduced to 16 feet where sidewalks are present. To a question from Mr. Chamberlain, Mr. Kucich replied that the drive-through would be open 24 hours but the restaurant itself would not be open all night.

Mr. Chamberlain and Mr. Fellows stated that they appreciated the changes made to address the Board's concerns. Mr. Fellows stated that the revised architecture was an improvement. He asked about the sight line from Spring Street; Mr. Kucich replied that at the corner of Spring Street there was no room for a berm and they proposed a thick row of shrubs in that area. Mr. Shire thanked the applicant for making a serious effort with the building. Mr. Maynard stated that he was not convinced that the design was what the Board was looking for; he stated that his problem was what to tell the next developer who presented a square building.

Mr. Paul also thanked the applicant for listening to the Board. To a question from Mr. Paul, Attorney Robert Danielson replied that Wal-Mart had not responded to their correspondence regarding the sidewalk and they had no control over that site. Mr. Paul asked the rationale for the 75° parking spaces at Spring Street; Mr. Kucich replied that that angle was McDonald's standard and they were bound with a lease agreement for a certain number of parking spaces and would lose more spaces if they put in 60° spaces.

Mr. Paul stated that he would like to move this project along but would like to make the site slightly better with the following suggestions. 1. That the updated grading plan be submitted. 2. That the Fire Department and staff approve the site plan. 3. He stated that he was concerned about pedestrian traffic through the site, especially from Wal-Mart; he stated that the area reduced from five to three feet could become a four foot wide sidewalk by reducing the 28 foot drive aisle. Mr. Kucich stated that they wanted to have a pass-by lane for the one way driveway, hence the 28 foot wide aisle. Mr. Bacon stated that the other sidewalk could be reduced from six feet to five feet. Mr. Kucich stated that the issue there was the well lighting which could not be done on a slope. He stated that they could create 19 foot long parking spaces if the town allowed a parking overhang and the building could be pulled closer to Spring Street. 4. Mr. Paul stated that he would like to see more trees on Spring Street. Mr. Kucich stated that they could provide four more trees but wanted to maintain visibility to the building.

Mr. Paul stated that he understood the concern about a pitched roof and if this building were on Route One he would be 100% behind the pitch roof. He stated that this building had been brought a long way toward conformance with the design standards and he felt the Board was trying to uphold the standards to the highest extent possible to make projects work; he stated that some diversity was good. To a question from Mr. Callahan, Mr. Bacon replied that all comments from SYT Design had been addressed except for the grading plan.

Mr. Paul moved to approve the site plan with the following conditions:

1. That the updated grading plan and how it would match the rest of the development be approved by staff;
2. That the Fire Department and staff approve the site plan with respect to the turning radius;
3. That there be a four foot walkway between the drive-through area and the parking area on the Wal-Mart side of the building, with its associated crosswalk;
4. That there be four additional trees planted along Spring Street;
5. That a waiver for 19 foot long parking stalls be allowed on the Spring Street side;
6. That the traffic impact fee as indicated in Mr. Bray's memo of January 5, 2008 be paid;

Mr. Chamberlain seconded the motion.

Voted 5-0

9. Scarborough Donuts LLC, continued site plan review and final action for 5,000 square foot building, to include Dunkin' Donuts, at 560 U. S. Route One

At 9:55 P. M., Mr. Paul moved to go into executive session, pursuant to 1 M.R.S.A. Section 405(6)(E), for consultation with the Town Attorney concerning the legal rights and duties of the Board with respect to the site plan application of Scarborough Donuts, LLC and with regard to the pending litigation of David Parker vs. Town of Scarborough. Mr. Chamberlain seconded.

Voted 5-0

The meeting was reconvened at 10:20 P. M.

Mr. Paul stated that the two new Board members could participate, but should refrain from voting on this item because they did not have all the background information.

Mr. Bacon explained that this was a pending item on the December 10, 2007 agenda but was tabled because the subdivision which would have enabled a site plan was denied at that meeting. He stated that, given pending litigation on this item, staff recommended that it be put back on the agenda. He stated that there was a letter from Attorney Dan Desmond, of Lambert Coffin, requesting a reconsideration of the Board's vote on the subdivision plan.

Attorney Paul Bolger, of Lambert Coffin, stated that he would be representing both the subdivision applicant and Cafua and Scarborough Donuts LLC. He stated that Mr. Bacon had requested additional information regarding the contract between the parties. He stated that he was before the Board on procedural matters; he stated that there could not be a site plan approval with no subdivision or the site plan could be conditioned on subdivision approval. He stated that the site plan approval could be tabled until the matter was remanded back to the Board from the court. Mr. Bolger stated that he agreed the site plan should be tabled until the court made a decision, in which case there would be no sense in going forward this evening; he noted that they were not prepared for an architectural review. He stated that they did not want to withdraw the application but wanted action on it pending the appeal.

Mr. Bolger stated that, under the Board's rules, "When a vote is passed, it shall be in order for any members 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 or special meeting, but not afterwards; and when a motion of reconsideration is decided, that vote shall not be reconsidered." Mr. Bolger stated that there were complications with the previous decision because no written decision was available until January 9, 2008 so, in fairness, it would be appropriate to make a request for reconsideration.

Mr. Paul stated that at this point there was no item on the agenda for reconsideration and it was the Board's desire to stick with the agenda. Mr. Bolger stated that, in accordance with the rules, a party could move to request a new decision; he stated that there would be a conundrum whether this matter was reconsidered or the proceedings were stayed with respect to the site plan review. He stated that they would need to return with architectural drawings. He stated that if the Board was not prepared to reconsider the vote, he would like to table this matter until the court made its decision.

Mr. Paul stated that a member of the Board who voted against the subdivision plan had to make a motion to reconsider and he was that person since the other two who voted against the item were no longer Board members. He stated that he spoke strongly against approval in terms of safety issues and those concerns had not been alleviated so he did not anticipate reconsideration. Mr. Bolger stated that since the Board had changed, he would ask that it be carefully considered to have the new Board reconsider rather than litigate a decision that could be made by the Board.

Mr. Vaniotis stated that because there is an appeal pending, the Board could not take action to reconsider without an order or remand. He noted that there was a process for getting on the Planning Board agenda and this request did not come in and was not on the agenda. Mr. Vaniotis stated that the time had passed for reconsidering and the Board would have to vote to waive that rule. He stated that he thought it was fair to let the applicant know the chairman was not willing to make the motion and the issue for the Board was what to do with the site plan application. Mr. Vaniotis stated that he would have concerns tabling this item indefinitely pending the outcome of the appeal which could be a year or more.

Mr. Bolger stated that he had discussed this with Mr. Vaniotis and suggested that all of this could be avoided by consideration by the new Planning Board; he stated that he had concerns about the manner in which the decision was made with a lot of hand wringing without specific findings of fact. Mr. Bolger stated that he would rather save the time and have the Board make a reconsideration this evening or at an appropriate time. He stated that boards were permitted to make their own rules of procedure and the only guiding principle was fair play. Mr. Bolger stated that the findings of fact and decision were not available when he had to file the appeal and he could have asked for reconsideration at that point if he had the findings of fact.

Mr. Paul stated that he understood the concern, but it was clear the denial was specifically related to this site with the implication of traffic and trip ends as the driving issues. He stated that the record showed the Board talked with the applicant regarding the concerns and indicated that low volume traffic generators would be very desirable and would most likely lead to approval. He stated that the Board's concern about subdivision approval clearly had to do with the traffic being driven by Dunkin' Donuts.

Mr. Bolger reiterated that they were prepared to review the site plan but did not have the architectural renderings. Mr. Bacon stated that the application submitted prior to the December meeting was complete regarding traffic and the Board's issues were site access and safety which was a big component of the site plan, and the Board and the staff found the application to be sufficient on December 10, 2007; he stated that he did not think the design had changed since then.

Mr. Bolger stated that the MDOT had issued a permit for the right turn in and out access and for the three-quarter access. He stated that they had submitted William Bray's traffic study which was found to be complete by the town's peer reviewer, Tom Gorrill. He stated that the applicant's traffic engineer was at the December 10, 2007 meeting but no questions were asked of him.

Mr. Vaniotis stated that the Board needed to make the determination of whether or not to go ahead with review; he stated that he thought Mr. Bolger was requesting tabling until the architectural plans were submitted. Mr. Vaniotis stated that, assuming the Board had the same concerns about traffic, they should go ahead tonight and make a decision about traffic as with the subdivision, or wait until next month. Mr. Paul asked what the next steps would be for the Board or the applicant if the Board proceeded with a discussion of traffic and it was the consensus of the Board to have the same traffic concerns.

Mr. Vaniotis stated that if the Board felt the application did not meet traffic standards, a motion could be made or the Board could express its view but not make a decision until all information was submitted. He stated that the practical issue was whether the Board dealt with traffic or the applicant did more work and came back to the Board. Mr. Paul stated that it would be prudent to have the discussion on traffic to get it out in the open to see where everyone stood. He stated that he would not want the applicant to spend the money on architectural renderings if there were problems because of traffic. Mr. Bacon noted that the submission on November 26, 2007 included architectural renderings and a landscape plan. Mr. Paul suggested hearing the item.

Mr. Jim Fisher, of Northeast Civil Solutions, stated that he would focus on the Board's questions. He stated that traffic was the only significant issue still outstanding. He stated that they were requesting full access in the beginning but the Board was not amenable, especially with southbound traffic turning left into the site. He stated that they had met with the DOT repeatedly and were allowed the three-quarter and right turn in and out accesses. He stated that they returned to the Board with that design and it was determined that turning left would be a problem even though the DOT thought it would work. He stated that they went back to the drawing board and presented a right in and right out only access for which they had the DOT permit. Mr. Fisher stated that they added a deceleration lane to pull the traffic off the highway to pull enter the site; he stated that they also showed an acceleration lane for the right turn out. He stated that the deceleration lanes were well received by the DOT. He stated that the studies and reports and permits had never changed with regard to the volume of traffic in the two and a half years they had been working on the project so he would ask the Board to realize that they had done everything they could to get the traffic into the site and had gone twice as far as required to make it safe.

Mr. Chamberlain stated that it may be subjective, but the Board saw what happened in the traffic corridors where it may work on paper but people cut across traffic all the time to turn left and there

was no turning lane in this area for safety. He stated that he was talking from practical observation. He stated that the deceleration lanes were a huge attribute but people would make U-turns or cross to turn left. He stated that he saw a lot of unnecessary turning lanes and people doing a lot of things they should not be doing; he stated that he was challenged by human nature.

Mr. Fisher stated that he understood subjective opinions, but his quandary was where to go from here. He stated that there was a statute indicating what had to be done and they had met and gone beyond those statutes, but the Board was still not comfortable. He asked what more they could do if they had met the letter of the law. He stated that it made it impossible to meet the criteria. Mr. Fisher stated that Dunkin' Donuts commissioned their own state-wide traffic study which showed a preponderance of traffic as pass-by traffic, so the stores were not traffic generators. He stated that the majority of the traffic was already on the road and they were not creating traffic.

Mr. Paul stated that it was more than that; he stated that he believed the traffic study presented to the Board, which had peer review, was a quantitative study which looked at statistics, but if one looked at the Site Plan Ordinance he would find it to be qualitative; he read Section IV. B. "Vehicle access to and from the site shall be safe and convenient, shall minimize conflict with the existing flow of traffic, and shall be from roads that have adequate capacity to accommodate the additional traffic generated by the development." He stated that that was a qualitative statement and the concerns of the Board were qualitative, though he was not disputing the quantitative findings of the engineers. He stated that the Board's concern was the fact that people do what they were not supposed to do and in this area that put a lot of people at risk. Mr. Paul stated that other locations in town may not create that same concern. He stated that the study was quantitative based on a 35 MPH speed limit and it would be safer if people actually did that speed; he stated that he continually saw vehicles going into right-out-only exits. He stated that the concern was that speed was a problem in this area and people would take U-turns and cut across lanes as well as back into Route One trying to go in the opposite direction and there was a variety of safety issues that go well beyond the quantitative study that the MDOT was approving. He stated that some common sense needed to be imposed in terms of what was safe and convenient.

Mr. Fisher stated that he agreed, but as an engineering company they needed to meet the standards and if there were no standards they did not know what to do. He noted that Mr. Bacon indicated the site would be more acceptable if there were low volume users, but there is no definition of low volume traffic. Mr. Paul stated that statutes could not be written to meet every situation so that had to be addressed; he stated that the Board needed to do its best to make the qualitative decision for which they were being asked and to uphold the ordinance. He stated that the Board had to make the best decision on each individual site.

Mr. Vaniotis stated that the ordinance was not an engineering ordinance so the standard is not an engineering standard but what Mr. Paul read above from Section IV. B.; he stated that the last phrase was answered by the engineers but the issue for the Board was a judgment call from their own knowledge and common sense for safety. Mr. Vaniotis stated that the courts had indicated that Planning Boards may apply their knowledge of the site and other case law. He stated that the Board was not bound to accept the decision of the experts on traffic safety.



Mr. Fellows stated that if the Board were compelled to go with what the experts said, there would be no need for a Planning Board and one of the reasons for the Board was that we can use our own perspective on such issues. He stated that the Board was not dismissive of the experts and valued their input which was factored into the decision making process, but the Board was not compelled to do what they said. Mr. Fellows stated that he understood the frustration but it was inherent in the process that there was turnover on the Board as well as subjective and qualitative analysis, but no one had done so in an arbitrary or capricious way. He stated that his opinion had not changed since the vote.

Mr. Maynard stated that the one comment not addressed by the experts was that people would do whatever they needed to do to get into a Dunkin' Donuts; he stated that tourist traffic had to be added in; he stated that the people problem was much larger than the traffic problem and he had a tough time with this.

Mr. Paul stated that he believed there was a consensus that traffic was a stopper and he saw real difficulties and would hate to see the applicant continue to spend money to have a project that may not fly. Mr. Paul stated that he thought it should be put to a vote to see where the Board stood. Mr. Bacon stated that, given the past decision, he worked with Mr. Vaniotis to draft findings and conclusions and the Board should go through them as part of a motion. Mr. Vaniotis stated that a simple motion to approve or deny based on traffic was satisfactory and the Board could then go through the findings and determine whether they addressed the reasoning. He stated that the draft findings had been written for denial based on the decision on the subdivision plan.

Mr. Bolger stated that he heard many comments from the Board but noted that the court indicated an applicant for a permit was entitled to know how he was to obtain approval and he had no idea how to get approval. He stated that low trip users were desirable. He stated that he had heard a lot of complaints about how people drove throughout this community and he thought it was discriminatory and unfair to single out this site. He stated that the ordinance should change but there were the existing ordinance standards and the applicant had bent over backwards to meet them for the past three years.

Mr. Bacon noted that the 2006 Comprehensive Plan called for alternative zoning and drive-through restaurants would not to be appropriate for this stretch of Route One and that zoning has been changed since November 2007 and did not allow high traffic users so the town was taking steps to address the issues along Route One. Mr. Bolger reiterated that this project had been in process for three years. Mr. Vaniotis stated that the standard in the ordinance said "...shall be safe..." and the Planning Board could make a determination whether a proposal was safe or not. He stated that this was not an engineering standard and the court said that the ordinance standard was an adequate standard so the question was whether this access was safe.

Mr. Paul moved to deny the site plan for a 5,000 square foot building to include Dunkin' Donuts, based on the issue of traffic safety at the site; Mr. Chamberlain seconded.

Voted 4-1 - to deny

To a question from Mr. Paul, Mr. Vaniotis stated that the findings of fact were a draft so the Board could make changes; he suggested putting the findings of fact on the next agenda so the Board would have time to review them and then vote to accept them. Mr. Paul stated that there was a workshop on February 11, 2008 and the Board could address them at that time.

10. Administrative Amendment Report

Mr. Chace stated that Texas Roadhouse requested an amended site plan to locate a Central Maine Power Co. transformer within a landscaped area which would eliminate one tree that would be planted elsewhere on the site. He stated that the Chairman had approved this administratively.

11. Town Planner's Report

Mr. Bacon stated that he had provided the Board with a letter on behalf of Hannaford Bros. who had purchased the Orion Center and wanted a transfer of approval on that site. He stated that their intent was to follow through on the original approval and they had until August 2008 to do so; he stated that the performance guarantee needed to be renewed in May 2008. He stated that the plan had been extended once and that was all the Ordinance allowed, so Hannaford would have to return for review and re-approval if construction was not begun by August 2008.

Mr. Bacon noted that there was a workshop tentatively planned for Tuesday, February 26, 2008 with the Town Council to consider a new Contract Zone application for an elderly housing project off Elmwood Avenue. Mr. Bacon stated that another workshop was planned for Monday, February 11, 2008 with the Town Attorney to focus on Planning Board's legal duties and rights.

12. Planning Board Comments

Mr. Paul noted that the Board often received a mailing of information at the last minute that the Board was being asked to review. He suggested that, in an effort to provide a vehicle for staff to help prevent that in the future, the Board adopt a policy that would allow applicants to submit material that was not ready for the original package because an item was tabled at the previous meeting or for answers to questions or peer review. Mr. Bacon stated that he did not want to discourage applicant from revising their plans and did want to encourage responses, but did want to discourage handouts at meetings.

Mr. Paul read the following policy regarding plan submissions subsequent to Planning Board discussion: "The Planning Board hereby establishes the policy that in order to be in a position to approve a development project, all revisions to the site plans and architectural plans requested by the Planning Board are required to be provided to the Town Planner by the Tuesday prior to the Planning Board. The Planning Board may waive this requirement for minor site plan revisions submitted in response to planning staff and peer review comments."

Mr. Vaniotis stated that anything mailed to the Board should be addressed to Mr. Bacon, with copies to the Board members. Mr. Fellows stated that this policy gave the Board a leg to stand on. Mr. Maynard stated that he wanted any mail to come from the staff and not directly from the applicant. The Board agreed.

Mr. Paul moved to adopt the above policy; Mr. Fellows seconded.

Voted 5-0

13. Adjournment

The meeting was adjourned at 11:55 P. M.



## **Town of Scarborough Planning Board Minutes-Special Meeting & Workshop-February 11, 2008**

### Members Present

Mr. Shire  
Mr. Callahan  
Mr. Chamberlain  
Mr. Fellows  
Mr. Maynard  
Ms. Littlefield  
Mr. Paul

### Staff

Mr. Bacon, Town Planner  
Mr. Chace, Assistant Town Planner  
Mr. Vaniotis, Town Attorney

#### 1. Call to Order

Mr. Paul called the meeting to order at 7:00 P. M.

#### 2. Roll Call

Mr. Bacon called the roll; all members were present.

#### 3. Scarborough Donuts LLC, discussion and approval of the findings and conclusions for the denial of the site plan review application for a 5,000 sq. ft. building to include a Dunkin Donuts at 560 US Route One.

Mr. Paul led the discussion on the draft findings and conclusions provide by staff and the Town Attorney. Mr. Callahan, Ms. Littlefield and Mr. Fellows all expressed that the findings and conclusions were thorough and appropriate. Mr. Paul proposed three amendments to the findings and conclusions, under findings 1 and 6 and under conclusion 1.

The Board then discussed the letter from Lambert Coffin attorneys at law dated February 11, 2008. Mr. Chamberlain asked if the applicant had explored a traffic signal or other improvements within the Route One right-of-way. Mr. Bacon replied that a traffic signal had not been mentioned by the applicant or MDOT as a potential.

Mr. Paul moved the Findings, Conclusions and Decision as amended. Mr. Fellows seconded.

Voted 5-0 in favor

The Findings, Conclusions and Decision as amended reads:

### FINDINGS

1. Applicant Scarborough Donuts LLC has applied for approval under the Scarborough Site Plan Review Ordinance to develop and operate a Dunkin Donuts shop with drive-through window on property located at 560 U.S. Route One, Tax Map U35, Lot 2. The proposal is to construct a 5,000-square-foot building, with about half the building to be leased for general office space and half to be occupied by Dunkin Donuts.

2. The property which the applicant seeks to develop is currently owned by David Parker, and the applicant proposes to develop only a portion of the Parker property.
3. The portion which the applicant seeks to develop is identified as Lot 3 on a proposed three-lot subdivision plan submitted by David Parker to the Scarborough Planning Board. On December 10, 2007, the Planning Board voted to deny preliminary approval for the Parker subdivision plan on the grounds that the proposed subdivision would cause unreasonable highway congestion and unsafe conditions. See Scarborough Subdivision Ordinance Section 4.E and 30-A M.R.S.A. § 4404(5). Mr. Parker has appealed that decision to the Cumberland County Superior Court.
4. In his application for subdivision approval, Mr. Parker made it clear that the intended use of Lot 3 was for a Dunkin Donuts shop and drive-through window to be operated by Scarborough Donuts LLC, which had filed its site plan application roughly contemporaneously with the filing by Mr. Parker of the subdivision plan.
5. Materials submitted by Mr. Parker, including traffic studies and traffic analysis, all assume the use of Lot 3 by Scarborough Donuts LLC.
6. The subdivision proposed only one driveway for public access into the subdivision, located on Lot 3, which would be the access point for the Dunkin Donuts shop and drive-through window. An existing driveway would be gated and used only for private deliveries to Lot 2.
7. The property is located on the easterly side of U.S. Route One. The entrance point to the Dunkin Donuts shop and drive-through would be located on a four-lane stretch of the highway, with no median and no center turning lane, and at a point where the speed limit for southbound traffic has just been reduced from 50 miles per hour to 35 miles per hour and where northbound traffic tends to increase speed as it approaches the 50-mile-per-hour zone.
8. Early on in the subdivision review process, the Planning Board, in consultation with the traffic engineers engaged by the Town to review the project, Gorrill-Palmer Consulting Engineers, Inc., advised the applicant that the location of the proposed entrance was such that left turns into the site and left turns out of the site would be a problem.
9. Accordingly, the proposed Parker preliminary subdivision plan and the Scarborough Donuts LLC site plan were designed to discourage such left turns, with the access designed to accommodate right turns in and right turns out only.
10. In a memorandum to the Planning Board dated December 5, 2007, the Town Planner expressed reservations that the proposed entrance design would create unsafe conditions and impede the flow of traffic on Route One. The Planner commented:

Planning staff have concerns about the right-in, right-out only design to access the site and its effect on surrounding properties and intersections. The Dunkin Donuts, the existing business on lot 2 and the future use on lot 1 will draw customers and employees arriving via Route One southbound and leaving to travel Route One southbound despite these turning restrictions. With this design, motorists will either inappropriately take left turns in and out -or- will travel beyond the site to turn around at a surrounding property or intersection to travel in the needed or desired direction. This side effect has the potential to create unanticipated conflicts at other driveways, curb cuts and intersections in this area that are not easily quantified.

11. In his memo, the Planner also noted that the entrance design does not meet the standards of the Scarborough Fire Department for access to the property because it is less than 20 feet wide, and the proposed delta island in the entrance could not be mounted by emergency vehicles.
12. In addition, the Planner relayed the comments of the Public Works Department that the design of the proposed right-turn slip lane and its termination at the delta island create a hazard for plowing operations.
13. During the subdivision review, members of the Planning Board expressed concerns about sudden lane changes that could occur as motorists attempted to negotiate into or around the proposed entrance to the site, and Board members commented that traffic in the area routinely exceeded the speed limit, making sight distances at the entrance to the property questionable.
14. Members of the Planning Board also expressed the concern that attempting to limit motorists to right-turn-in and right-turn-out only would prompt motorists to make u-turns, creating a traffic hazard, particularly in light of the very heavy trip generation predicted from a Dunkin Donuts shop with a drive-through window.
15. Considering those problems with the proposed subdivision plan, the Planning Board concluded that the subdivision plan did not meet the traffic review standard of the Scarborough Subdivision Ordinance and state subdivision statute.
16. The site plan now before the Board presents exactly the same configuration for access to the property as did the preliminary subdivision plan which was denied by the Board.
17. In order to approve the site plan application, the Board must find that “[v]ehicle access to and from the site shall be safe and convenient, shall minimize conflict with the existing flow of traffic, and shall be from roads that have adequate capacity to accommodate the additional traffic generated by the development.” Scarborough Site Plan Review Ordinance, Section IV.B.

18. In considering that site plan review standard, the Board finds that the site plan of Scarborough Donuts LLC presents the same traffic flow and traffic safety problems as the preliminary subdivision plan which the Board denied and, in fact, is the primary cause of those problems.
19. The Board recognizes that the subdivision applicant attempted to address those problems through traffic engineering and that both the subdivision applicant's traffic engineer and the Town's consulting traffic engineer concluded that the proposed right-in, right-out only configuration could meet quantitative traffic engineering criteria.
20. Nevertheless, the Board finds that, from a practical, qualitative perspective, serious traffic flow and traffic safety issues remain unresolved.
21. The Board is familiar with this heavily utilized stretch of Route One and with the behavior of motorists utilizing this stretch.
22. Members of the Board have observed that southbound traffic approaching this site, having just come across the Scarborough Marsh at speeds of 50 miles per hour and greater, does not reduce speed immediately at the 35-mile-per-hour sign and typically is traveling by this site at a much higher rate than the posted speed.
23. Members of the Board have also observed that northbound traffic headed by the site is speeding up as it approaches the 50-mile-per-hour zone on the Scarborough Marsh and is typically proceeding past this site at greater than the posted speed.
24. The Board is not convinced that the right-in, right-out design will deter motorists from making illegal maneuvers to enter and exit the site.
25. The Board is concerned that southbound motorists who wish to patronize the Dunkin Donuts store will ignore signage and make a left turn in. Because of the width of Route One, such a left-turn maneuver – amounting essentially to a U-turn across Route One – will be physically possible, but extremely hazardous.
26. Similarly, the Board is concerned that motorists exiting the Dunkin Donuts site and wanting to proceed south on Route One will also ignore the right-turn only configuration and cut across oncoming traffic to make a left turn and head south.
27. In addition, southbound motorists who do obey the no-left-turn signage (whether entering or exiting the Dunkin Donuts site) will need to find other ways to reverse direction in order to patronize the site. Because this area of Scarborough is not laid out in a grid pattern of lots, motorists will not have the option of simply going around the block in order to reverse direction. Therefore, southbound motorists who wish to patronize Dunkin Donuts are most



likely to make illegal U-turns or to utilize private driveways or parking lots of other businesses to reverse direction.

28. The Board anticipates that the attempt to limit access for a high traffic volume business to northbound traffic only is likely to create dangerous confusion, as motorists trying to figure out how to get into the site slow unexpectedly or make sudden lane changes when they discover that driveway design is at odds with their expectations of being able to access the site.
29. The Planning Board also finds that the attempt to encourage right-in, right-out only has resulted in an entrance design which does not meet the requirements of the Scarborough Fire Department for a 20-foot-wide travel lane and an island which can be traversed by emergency vehicles.
30. The Planning Board further finds that the proposed design creates a hazard for plowing operations and is not acceptable to the Director of Public Works.

### CONCLUSIONS

1. Based on the foregoing findings, the Board concludes that vehicular access to and from the site will not be safe and convenient and will not minimize conflict with the existing flow of traffic, but rather will create conflicts with existing flow of traffic.
2. The Board concludes that the risk of motorists ignoring the right-in, right-out limitations coupled with the risk of unpredictable maneuvers by confused motorists create a safety hazard which the Board considers unacceptable.
3. The Board therefore concludes that the site plan application does not meet the standard of Section IV.B of the Site Plan Review Ordinance that “[v]ehicle access to and from the site shall be safe and convenient” and “shall minimize conflict with the existing flow of traffic....”

### DECISION

For the foregoing reasons, the site plan application of Scarborough Donuts LLC is denied.

Dated: February 11, 2008

SCARBOROUGH PLANNING BOARD

4. Workshop with the Town Attorney to focus on the Planning Board’s legal duties and rights. The Town Attorney and Board discussed this item for which no minutes were taken.
5. Adjournment      The meeting adjourned at 9:20PM



## **Town of Bar Harbor Planning Board Minutes-November 4, 2009**

**Council Chambers – Municipal Building  
93 Cottage Street**

### **I. CALL TO ORDER — 6:00 p.m.**

*Members Present: Kevin Cochary, Chair; Buck Jardine, Secretary. Also present: Anne Krieg, Planning Director; Brian Madigan, Staff Planner; Lee Bragg, Town Attorney.*

### **II. EXCUSED ABSENCES**

*Mr. Jardine moved to excuse Ms. Williams. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.*

### **III. ADOPTION OF THE AGENDA**

Mr. Cochary stated that he would like to amend Agenda item A under Regular Business to discuss his upcoming absence.

*Mr. Jardine moved to amend the Agenda and make a discussion of Kevin's upcoming absence as Item A under Regular Business. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.*

### **IV. APPROVAL OF MINUTES**

#### **October 21, 2009 Minutes**

Review of the October 21, 2009 minutes was deferred to the November 18, 2009 Planning Board meeting.

### **V. REGULAR BUSINESS**

Mr. Cochary stated he would be absent for the next two and one half months due to job related commitment which will require him to be out of the state. Ms. Krieg stated the Planning Department will look into teleconferencing or video conferencing as a means to allow Mr. Cochary to continue to participate in the meetings.

Ms. Steven-Rosa stated she felt it would be important for Mr. Cochary to continue to participate in the meetings. Mr. Jardine stated he had concerns regarding Mr. Cochary's ability to review project related information that is presented visually during meetings. Ms. Meader stated there would be no legal issues which would preclude Mr. Cochary from continuing to participate via teleconference or video provided that Mr. Cochary is able to achieve the same level of participation as if he were present. Ms. Krieg stated that the Planning Department will work on a resolution.

**A. Continuation of Public Hearing – SP-09-02 – West Street Hotel Project Location:**

West Street, Bar Harbor Tax Map 104, Lots 113-118, 122, 123, 143, 144, 146, 147, 149

**Applicant:** North South Construction Inc.

**Application:** Hotel and Accessory Uses

Mr. Salvatore introduced John Theriault, the traffic engineer who prepared the traffic study associated with this project. Mr. Theriault provided an overview of how he conducted the traffic study and arrived at the conclusions stated in the report. He reviewed the intersection turning counts and trips generated both under the current conditions (a no-build scenario) and with the addition of the hotel (build scenario). He stated that because the proposed hotel will replace existing businesses, the actual number of trips added as a result of the hotel is quite low. Mr. Theriault then reviewed his analysis of the intersection and turning movement counts. The level of service at all intersections would operate at Level of Service B or better even with the addition of the proposed hotel.

Mr. Theriault and Mr. Hamilton then discussed the relevant traffic review standards that apply from the Land Use Ordinance. Mr. Theriault stated that in his opinion, the project would comply with the Land Use Ordinance. He added that another positive result of the project would be the elimination of three curb cuts on West Street which would increase safety for pedestrians.

Ms. Krieg reviewed the results of the October 28, 2009 Parking and Traffic Committee meeting. She stated that at this meeting the committee amended a previous motion which recommended Rodick Street be a partial two-way street. The motion was amended to recommend that Rodick Street be kept a one-way street. Ms. Krieg stated that the traffic study should be modified to analyze a scenario where Rodick Street will remain a one-way street with the addition of the hotel. Mr. Hamilton stated that he does not believe the Planning Board is in the position to take this recommendation because Ms. Krieg made the motion at the Parking and Traffic Committee meeting. He stated that he believes that the fact Ms. Krieg made the motion presents a fundamental bias.

Ms. Krieg stated that as a professional planner, she cannot recommend making Rodick Street a partial two-way street. She added that this is not good planning practice and stated that she has many concerns with the safety of a partial two-way street. Ms. Krieg reiterated that she is trying to help the project move forward through the review process as ultimately the change in direction proposed by the applicant would need to go before the Parking and Traffic Committee. She added that if the Planning Board would like a second opinion, the Board is empowered to request a peer review of the traffic study.

Mr. Cochary and Ms. Stevens-Rosa iterated their support for Ms. Krieg and her role as Planning Director.

Mr. Hamilton reiterated concern for Ms. Krieg's duality of office in this matter.

Mr. Theriault read a verbal response to the Parking and Traffic Committee's comments he received at the October 28, 2009 meeting. Mr. Theriault stated that he would submit a written copy of his statement tomorrow.

Ms. Krieg and the Board discussed the regulatory permitting process involved with making changes to Town right-of-way and the role of the Planning Board, Parking and Traffic Committee, and Town Council.

Mr. Jardine asked Mr. Theriault to explain "peak hour" and its importance in relation to this review. Mr. Jardine asked if there is a peak hour for hotels and if that coincides with the peak hour Mr. Theriault found for this particular project. Mr. Theriault said he analyzed both peak hour with the development and peak hour for the town to present a conservative estimate.

Mr. Cochary commented that he had concerns with traffic queuing on to West Street. Mr. Salvatore stated that additional parking added at the rear of the hotel would alleviate the possibility of cars stacking on to West Street.

Mr. Cochary asked if the traffic study accounts for the arrival of a bus and the impact this would have on traffic. Mr. Salvatore stated that if a bus is checking in, then other cars checking in would have to use bypass lane. Mr. Walsh commented on the merits of the project. He stated that he feels he has done all he can do to meet the concerns of the Town.

Mr. Cochary asked the Board to comment on the need for third-party review of the traffic study. Ms. Stevens Rosa stated she is comfortable with the explanation received. Mr. Jardine agreed.

Mr. Moore provided his interpretation of the definition of a front yard, side yard, and rear yard. He stated that it is important to consider that a yard extends across a lot. He added that every part of the yard that is in front of the building should be considered as the front yard. He described his reasoning for counting the greenspace areas within the "nooks and crannies" of the façade. Ms. Meader rebutted stating that she stands behind her interpretation of the definition of a front yard.

***Mr. Jardine moved to continue the project to the November 18, 2009 Planning Board meeting. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.***

**B. Continuation of Public Hearing – SP-09-05 – Proposed Verizon Wireless Telecommunications Facility**

**Project Location:** 854 State Highway 3, Bar Harbor Tax Map 202, Lot 061

**Applicant:** Verizon Wireless

**Application:** Construct a wireless telecommunications facility at 854 State Highway 3 (also known as the Sweet Pea Farm)

Mr. Anderson, the project representative, provided an overview of the status of the project. He noted that the applicant submitted a proposed branch layout and that they had followed up with John Kelly at the Park Service on his requests. Mr. Anderson gave an explanation of the branch diagram that was submitted to the record. He also explained the terms of the lease agreement which describes a “no cut zone” around the tower.

Mr. Anderson noted that he has worked in good faith to complete the tasks asked by the Board and Mr. Kelly. He asked that the Board make a decision on the project.

Mr. Kelly, Planner for Acadia National Park, read a statement of support for the proposed tower into the record. He added that he hopes the proposed tower design will serve as a model for the rest of Bar Harbor.

Ms. Krieg stated that she would be comfortable with granting a modification of standard with respect to the driveway width because it would be used so infrequently. Mr. Cochary asked the Planning Department to develop a category in LUO for infrequently used driveways.

*Ms. Stevens-Rosa moved to allow the modification of standards requested to address the particular site characteristics. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

Mr. Anderson stated he would like the detail of the tower base to be made a condition of approval.

Ms. Krieg reviewed the ordinance provisions that apply to the proposed project from Section 125-69(T) of the Land Use Ordinance.

*Mr. Jardine moved to close the public hearing. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.*

*Ms. Stevens Rosa moved to conditionally approve the project with the modification standards already granted and provided the applicant submits performance guarantees and a monitoring plan to the Code Enforcement Officer. Mr. Jardine added a detail of the tower base also be made a condition of the motion. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

**C. Continuation of Public Hearing – SD-08-04 – Vicki Hall Subdivision**

**Project Location:** Eagle Lake Road (near the entrance of MDI High School),  
Bar Harbor Tax Map 224, Lot 15

**Applicant:** Vicki Hall

**Application:** Project proposes to divide one lot into two parcels.

Mr. Cochary recused himself and exited the chambers.

Mr. Musson, the project representative, gave an explanation of the proposed project. He stated that he had spoken with the Park about their concerns on the project. Mr. Musson stated that he revised the proposed buildable area and removed a portion of the buildable area from development. Mr. Musson also presented a proposed shared driveway agreement to further maintain wetland areas.

Mr. Jardine asked what would happen if the culvert were not maintained. Mr. Musson stated the wetlands would cease to connect via the culvert. Mr. Jardine asked Mr. Musson to further explain the buildable area limitations. Mr. Musson stated that the recorded deed would reflect that the small area on the second lot that is buildable from a setback stand point, would no longer be buildable due to its proximity to the wetland.

Mr. Kelly stated the definition of a wetland and argued that without the driveway the wetlands would be connected. Ms. Krieg stated that the building envelope would be part of the Board's approval. The CEO would then have to make sure the structures are put inside those building envelopes.

*Ms. Stevens-Rosa moved to close the public hearing. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion. Ms. Stevens-Rosa moved to approve the application with the revised driveway agreement added to the plan. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

**D. Continuation of Completeness Review – SP-09-07 – Proposed AT&T**

**Mobility Wireless Telecommunications Facility**

**Project Location:** 286 State Highway 3, Bar Harbor Tax Map 209, Lot 106

**Applicant:** AT&T Mobility

**Application:** Construct a wireless telecommunications facility at 286 State Highway 3.

*Since the Applicant had not had sufficient time to prepare his proposal following the Site Visit, Mr. Jardine moved to continue the completeness review to the November 18 Planning Board meeting. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.*

## **E. OTHER BUSINESS**

### **a. June 2010 Land Use Ordinance amendment update and discussion.**

Ms. Krieg stated that she will be looking for some agenda time to review the streets ordinance in December. Mr. Madigan stated he would be reviewing the Village Residential and Village Historic Districts with the Board at their November 18, 2009 meeting.

## **F. PLANNING DIRECTOR'S REPORT**

### **a. Follow up on status of joint meeting with Planning Board and Town Council for Town Hill Mini Plan.**

Ms. Krieg stated that she has scheduled the joint workshop with the Council and Planning Board for December 9.

## **G. BOARD MEMBER COMMENTS AND SUGGESTIONS FOR THE NEXT AGENDA**

## **H. ADJOURNMENT**

*Ms. Stevens Rosa moved to adjourn the meeting. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion. The meeting was adjourned at 8:25pm.*

Minutes prepared by Staff Planner Brian Madigan for Planning Board Review at their November 18, 2009 meeting

*Signed as approved:*

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Clyde L. Jardine, Jr., Secretary  
Planning Board, Town of Bar Harbor

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Date



# **Town of Bar Harbor Planning Board Minutes-December 2, 2009 (as amended December 16, 2009)**

**Council Chambers – Municipal Building  
93 Cottage Street**

## **I. CALL TO ORDER — 6:00 p.m.**

*Members Present: Lynn Williams, Vice Chair; Buck Jardine, Secretary; Kay Stevens-Rosa, Member. Also present: Anne Krieg, Planning Director; Brian Madigan, Staff Planner; Lee Bragg, Town Attorney.*

## **II. ADOPTION OF THE AGENDA**

*Ms. Stevens-Rosa moved to adopt the agenda. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

## **III. APPROVAL OF MINUTES**

November 18, 2009 Minutes

*Mr. Jardine moved to approve the minutes from the November 18, 2009 meeting. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.*

## **IV. REGULAR BUSINESS**

### **A. Continuation of Public Hearing – SP-09-02 – West Street Hotel**

**Project Location:** West Street, Bar Harbor Tax Map 104, Lots 113-118, 122, 123, 143, 144, 146, 147, 149

**Applicant:** North South Construction Inc.

**Application:** Hotel and Accessory Uses

Mr. Hamilton, the applicant's attorney, described the dwelling unit lease agreement and deed covenants. Mr. Bragg commented that the documents submitted do not yet meet all the applicable requirements of Section 125-69(R).

Ms. Krieg then reviewed the outstanding issues that need resolution prior to a decision, or will be required as conditions of approval.

Mr. Hamilton reviewed the applicant's position regarding the Town's assertion that the project review now requires subdivision review. Mr. Hamilton stated that he would object to the subdivision review process if it would add additional time to the lengthy review process the project has already been subjected to. Mr. Bragg clarified that the additional

findings required for subdivision review would not in itself add to the applicant's review time.

Ms. Stevens-Rosa provided an overview of her interpretation of the applicant's height argument. She stated that she spent time reviewing facts with respect to height and habitable space. While she did not believe the Board had any qualms with the applicant's interpretation of mean original grade, she stated that she personally has several issues with the applicant's logic with respect to the height of the building. Ms. Stevens-Rosa questioned why the applicant had changed the name of the bottom level of the hotel from first floor to basement. Mr. Salvatore responded that in reading the definition of basement, he believed the bottom floor should in fact be termed as a basement instead of a first floor. Mr. Jardine added that the building is clearly five stories, and that he would not support the applicant's assertion that the building is four stories plus a basement instead of five stories as the architectural plans indicate.

Ms. Stevens-Rosa and Mr. Hamilton debated the definition of habitable space at length. Mr. Hamilton stated that he objected to the fact that Ms. Stevens-Rosa had done research outside the Bar Harbor Land Use Ordinance and International Building Code. Ms. Stevens-Rosa reviewed the definition of "inhabit" and "habitable" as defined in the dictionary. She stated that she referred to the dictionary definition because she felt the IBC definition is silent on what a gym area might be defined as. She added that she had spoken verbally to the State Fire Marshall to gain his opinion of habitable space and she gave no reference to a specific project. She stated that the Fire Marshall indicated that he would consider gym space as habitable because people will ultimately occupy the space.

Mr. Hamilton emphatically objected to Ms. Stevens-Rosa's logic as well as the fact that she had done what he termed as "research outside of the Bar Harbor Land Use Ordinance and IBC."

Due to the escalating tension associated with the discussion between Ms. Stevens-Rosa and Mr. Hamilton, Mr. Bragg reminded the Board that they could go into deliberations to discuss these issues without interruption from the applicant, and then reopen the public hearing at a later time.

Mr. Jardine and Ms. Williams stated that they supported Ms. Stevens-Rosa actions as well as her logic. Mr. Jardine added that Board members are empowered to interpret the Ordinance as well as the Comprehensive Plan and the relationship between the two.

Mr. Moore stated that when reading the ordinance as a whole the term “dwelling unit” affirms the IBC definition of habitable space as a place where cooking and sleeping must take place.

Mr. Bragg suggested the Board deliberate on the definition of habitable space. He noted that this definition is important because it informs the calculation of space dedicated to dwelling units. Mr. Bragg added that it is fair for the Board to refer to dictionary definitions and for them to investigate the intent of the language outside of the Bar Harbor Land Use Ordinance and IBC. He added that common sense interpretation is also adequate to support the Board’s understanding of issues.

Ms. Krieg described the intent of the ordinance at the time it was drafted. She stated that the Board’s intent at the time was to provide an incentive to developers so that residential units would be added to the core business district of Bar Harbor. She added that the ordinance did not anticipate a fourth floor would be below 35 feet, or that a fifth floor would even be possible.

Mr. Bragg commented on the applicant’s floor area calculation of square footage devoted to dwelling space. He asked the Board to consider the following: If the Board concluded that the 5th floor is not habitable space, could the applicant still use the floor area of the 5th level as the basis for the square footage of dwelling space needed? Or, would they drop to the 4<sup>th</sup> level and this square footage as the basis for dwelling space area? Mr. Bragg raised the point that if the height of the fourth floor was below 35 feet, and the application sought approval for four levels that rose to a height of 43 feet, but the floor area of the fourth level was 32 or 33 feet high, the applicant’s logic would lead to a nonsensical resolution. This is because there would be no floor area above 35 feet to measure the space that should be dedicated to dwelling units. Therefore, no dwelling space would be required as is illustrated in the ordinance.

Mr. Hamilton stated that he believes the Board has not provided reasonable or definitive feedback to the applicant throughout the review process. He stated that no matter the applicant’s changes to the plan and their attempt to comply with the Board’s requests, the Board continues to find reasons to deny the project.

Ms. Krieg stated that staff would prepare draft findings for the Board to review at their next meeting. She then reviewed the list of outstanding items the applicant needs to provide, or that will be included as conditions of a decision.

Ms. Krieg stated that the applicant needs to supply an approval from DEP with respect to wastewater. She reminded the applicant that he needs to also supply an access easement

to show the abutting property owner accepts that cars will pass over his property. Furthermore, the loading zone and land swap issues should be resolved with the Leiser's as part of the decision. She stated that the Public Works Director has indicated he will not sign the Capacity Statement due to the Town's loss of right-of-way as defined by prescriptive easement on Lennox Place. She also asked the applicant to revise the traffic study to show that there will not be cars exiting Lennox Place in a build scenario. Ms. Krieg added that it is up to the Board to require the project obtain approval from the Fire Marshall.

Ms. Krieg requested a Planning Board meeting on December 16, 2009 to hear the West Street project and various zoning amendments.

***Mr. Jardine moved to have special Planning Board meeting on December 16th for West Street and proposed ordinance amendments. Ms. Stevens Rosa seconded the motion and the Board voted unanimously to approve the motion.***

Mr. Bearor commented that common sense needs to prevail when reviewing this application. With respect to Exhibit 9.1.7 he commented that the applicant is counting parking spaces toward queuing and toward its parking requirement and is therefore "double dipping." He stated concern that parking spaces could not be used by guests if they were also used by the valet. He encouraged the Board to review his interpretation of habitable space. Mr. Bearor also stated that the dwelling lease terms should be for more than 90 days and long term residents.

Mr. Bearor requested that the traffic report supply the truck traffic turning movements.

***Mr. Jardine moved to continue the project to their December 16<sup>th</sup> special meeting. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.***

## **V. OTHER BUSINESS**

### **Conservation Commission Work Plan Review**

Ms. Weber, the chair of the Conservation Commission, gave an overview of the tasks the Commission planned to work on during this fiscal year. Ms. Weber stated that this year the Commission was focusing on solid waste reduction. She also stated that the commission would be working on the open space plan identified as midterm project in the Comp Plan. Mr. Jardine stated that he believes the minimum lot size should be increased in certain areas of town to preserve greenspace.

**June 2010 Land Use Ordinance amendments**

Ms. Krieg stated that she would review ordinance amendments at the December 16, 2009 meeting.

**VI. PLANNING DIRECTOR'S REPORT**

**Request for Special Meeting December 16, 2009**

A motion in favor of this meeting was made during the Board's discussion of the West Street Hotel.

**VII. BOARD MEMBER COMMENTS AND SUGGESTIONS FOR THE NEXT AGENDA**

There were none.

**VIII. ADJOURNMENT**

*Mr. Jardine moved to adjourn the meeting and Ms. Stevens-Rosa seconded the motion. The Board voted unanimously to adjourn the meeting at 8:00pm.*

Minutes prepared by Staff Planner Brian Madigan, and Secretary Clyde Jardine for Planning Board Review at their December 16, 2009 meeting

*Signed as approved:*

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Clyde L. Jardine, Jr., Secretary  
Planning Board, Town of Bar Harbor

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Date



# **Town of Bar Harbor Planning Board Minutes-Special Meeting-December 16, 2009**

**Council Chambers – Municipal Building  
93 Cottage Street**

## **I. CALL TO ORDER — 4:00 p.m.**

*Members Present: Kevin Cochary, Chair; Lynne Williams, Vice Chair; Buck Jardine, Secretary; Kay Stevens-Rosa, Member.*

*Others Present: Anne Krieg, Planning Director; Lee Bragg, Town Attorney; Brian Madigan, Staff Planner.*

## **II. ADOPTION OF THE AGENDA**

*Ms. Williams moved to reverse the order of Item A and Item B on the agenda. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

*Ms. Williams moved to adopt the amended agenda. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

## **III. APPROVAL OF MINUTES**

### **November 4, 2009 Minutes**

The Board had no changes on these minutes.

### **December 2, 2009 Minutes**

Ms. Stevens-Rosa clarified that on page two of four she in fact stated she, “Asked the Fire Marshall his opinion of habitable space, and that she gave no reference to a specific project.”

Mr. Cochary abstained from the vote but noted he had watched the DVD’s from all meetings in his absence.

*Ms. Williams moved to approve the minutes from November 4, 2009 and December 2, 2009 meetings with the amendments noted above. Ms. Stevens-Rosa seconded the motion and the Board voted unanimously to approve the motion.*

#### **IV. REGULAR BUSINESS**

##### **A. Continuation of Public Hearing – SP-09-02 – West Street Hotel**

**Project Location:** West Street, Bar Harbor Tax Map 104, Lots 113-118, 122, 123, 143, 144, 146, 147, 149

**Applicant:** North South Construction Inc.

**Application:** Hotel and Accessory Uses

Mr. Cochary emphasized that all exchanges between the Board and the applicant need to be made through the chair.

Mr. Hamilton, the applicant's attorney, stated that he and Mr. Moore are in the process of revising plans and documents to comply with some of the outstanding items noted in the Draft Decision. In light of this, Mr. Hamilton requested that the Board review several items from the Draft Decision that they disagree with, or wish to clarify with the Board.

Starting on page two, Item C of the draft Decision, Mr. Hamilton stated he feels the proposed plan meets the height requirement of the ordinance.

Mr. Moore stated that he did not feel the greenspace credits should be removed from the site plan. Ms. Krieg clarified that the Board never offered a formal opinion on these credits. She also stated that in order to settle the greenspace credit issue, the Board would need to return to the definition of a front lot line.

Mr. Moore stated that he does not agree with Item E, Parking areas and driveways, but will revise the site plan to comply with this requirement.

Mr. Salvatore stated that he is working with abutting landowner Rick Leiser to resolve the outstanding property issues.

Mr. Theriault, the applicant's traffic engineer, noted several corrections to the previously revised traffic study. Mr. Theriault responded to item C page 7 of the Draft Decision. He stated that he performed an updated analysis for the build scenario and determined that the Level of Service (LOS) for West Street and Lennox Street would continue to perform as A. He also noted that Rodick Street would perform at LOS A. Only the intersection of Rodick and West Street would operate at LOS C, which is still an acceptable LOS under the Land Use Ordinance. Mr. Theriault submitted a revised report detailing these results.

The applicant requested planning staff clarify its basis for finding that Lennox Place has the potential to create queuing issues on West Street. Mr. Hamilton noted there is no evidence from the traffic study to support this finding.

Regarding Finding Q, Mr. Salvatore and Mr. Moore stated that they felt that washing streets once a day was an excessive and unnecessary requirement.



Mr. Hamilton requested that staff relay a copy of the Downtown Master Plan and Comprehensive Plan references used to support Finding FF. He also stated that he feels the court's ruling in the "Nestle Waters Case" would not support this finding.

Mr. Hamilton also requested the Board provide a clear ruling of its understanding of the definition of habitable space.

Mr. Hamilton and Mr. Moore stated that they disagree with Finding MM. Both stated that they do not feel this finding was applied appropriately because it is intended to apply to more rural areas. Ms. Krieg stated that if the Board does not agree they can make that finding. Ms. Stevens-Rosa stated that she felt the shadow created by the addition of the building could be grounds to support the finding. Mr. Cochary stated that he did not find a strong connection.

Mr. Hamilton and Mr. Salvatore took issue with Item 3B under Additional Considerations. Mr. Hamilton stated that he did not feel it was appropriate for the Planning Board to micromanage the project at this level. He added that the Code Enforcement officer should be the responsible party in making this determination.

Mr. Salvatore stated that Additional Finding 2B is incorrect and that there is adequate space between the pool and fourth level. Mr. Salvatore added that the elevator to the roof labeled as a penthouse is not a mistake.

Ms. Krieg clarified that Mr. Reeves, the Public Works Director, has not signed the capacity statement because of reduction in right of way width on Lennox Place.

Ms. Krieg clarified that the applicant will need to go to Council after a decision is rendered by the Planning Board to gain Council approval of the changes proposed to the right's-of-way. She stated that if the Council rejects the road alignments proposed, the project would have to come back to the Planning Board.

Mr. Bearor stated that at some point the applicant needs to present a plan that the Planning Board can act on.

Ms. Rasmussen, an abutter to the proposed project, stated that she feels the Board and applicant accomplished a great deal at the last two meetings. She stated that she had reviewed the draft decision and was concerned with Finding FF because it is difficult to plan a project when it is not always clear if it complies with the intent of a previously adopted plan.

***Ms. Williams moved to continue the public hearing to the January 6, 2010 meeting. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.***

**B. Completeness Review – SD-09-01 – Robert R. Rechholtz**

**Project Location:** 25 White Spruce Road, Tax Map 110 Lot 038

**Applicant:** Robert R. Rechholtz

**Application:** Subdivision

Mr. Cochary reviewed the application.

*Ms. Stevens Rosa moved to find application complete and schedule public hearing on January 6, 2010. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

**V. OTHER BUSINESS**

**A. June 2010 Land Use Ordinance amendments**

The Board had no comments on this item. However, Ms. Krieg reminded the Board that they will be holding a Public Workshop on January 6, 2010 to discuss various Land Use Ordinances for the June Town Meeting.

**B. Town Hill Mini-Plan discussion**

Ms. Krieg stated that the Council decided to keep the maximum footprint square footage at 15,000 square feet with the stipulation that buildings with a footprint above 15,000 square feet be required to submit to a commercial PUD permitting process. The Council recommended that the PUD process include requirements for monument signage, LEED Certification, good neighbor planning, and include uses that Town wants to see out in this area such as arts and recreation.

The Board requested Ms. Krieg outline the scope of a wastewater feasibility study. The Board suggested this study consider the current water quality issues that face Town Hill, and what problems greater density might create.

Several members of the public presented their concerns with the Council's recommendations. Their concerns focused around maximum building square footage and footprint.

*Ms. Williams moved to ask Town Council to reconsider its vote in recognition that the Planning Board had understood its motion was to regulate a commercial PUD for total square footage of 15,000 square feet, and not just for footprint size. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion.*

**C. Scheduling Meetings for 2010**

Ms. Krieg noted that under the presented schedule, the Board will not hold a second meeting in February and April.

*Mr. Jardine moved to approve the meeting schedule presented. Ms. Williams seconded the motion and the Board voted unanimously to approve the motion.*

**VI. PLANNING DIRECTOR'S REPORT**

Ms. Krieg had no comments.

**VII. BOARD MEMBER COMMENTS AND SUGGESTIONS FOR THE NEXT AGENDA**

There were none.

**VIII. ADJOURNMENT**

*Ms. Williams moved to adjourn the meeting. Mr. Jardine seconded the motion and the Board voted unanimously to approve the motion. The meeting was adjourned at 6:38pm.*

Minutes prepared by Staff Planner Brian Madigan, and reviewed by Secretary Jardine, for Planning Board Review at their January 6, 2010 meeting

*Signed as approved:*

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Clyde L. Jardine, Jr., Secretary  
Planning Board, Town of Bar Harbor

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Date



## **Town of Turner Planning Board Site Plan Review Decision-March 10, 2010**

**11 Turner Center Road  
Turner, Maine 04282**

\* **Findings of Fact**  
\* **&**  
\* **Conclusion of Law**

\* **Hannaford Bros. Co.**  
\* **Hannaford Supermarket &**  
\* **Pharmacy**

### **Project Overview**

The applicant proposed to construct a 36,000 square foot supermarket and pharmacy in Turner, Maine. The project site is approximately 7.8 acres in size and comprised of Lots 21, 26 and 27 as depicted on Tax Map 40. Approximately 5.6 acres of the project site will be altered for structures, access, parking, stormwater systems, subsurface wastewater disposal and landscaping. The project site is currently comprised of undeveloped forest land, pasture, two residential structures with associated lawns and a barn. Existing structures on the site will be removed to allow for development.

Access to the development will be via the Snell Hill Road which is a paved town road. There will be a primary entrance/exit located approximately 210' west of the Route 4/Snell Hill Road intersection and a pharmacy drive up window and delivery entrance approximately 420' west of the Route 4/Snell Hill Road intersection. The project is forecast to generate 107 trip ends in the AM peak hour, 416 trip ends in the PM peak hour and 456 trip ends during the Saturday peak hour.

The proposed building would be 220' x 160' with a flat roof except on the east elevation. The maximum height of the building would be 24' at the entrance area and 21' all other sides. The east and portions of the south roof lines will have pitched roofs. The pitch of the two main roof slopes (covered walkway and entry) would be 14/12 and the front gables roof pitches would be 6/12. Gable elements have been designed into the colonnade. There will be pitched roof over the drive through pharmacy window. Werzalit clapboards will be used on all sides of the building with bricks on a portion of the east elevation. The horizontal siding will be painted Sherwin Williams Downing Straw, trim and columns will be painted Sherwin Williams Roycroft Suede, exterior exit doors will be painted Sherwin Williams Downing Straw, window frames to be medium bronze, entrance door brushed aluminum, brick wainscot Morin Brick-Hannaford Smooth (red) and pitched roofs are to be covered by asphalt Certainteed Woodscape Shingles/Driftwood.

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Off-site improvements associated with the development include the installation of a traffic signal at the intersection of Route 4 and Snell Hill Road, a south bound turning lane on Route 4 to the Snell Hill Road, a turning lane on Snell Hill Road onto Route 4 south and Snell Hill Road improvements.

The Planning Board received a sketch plan on May 13, 2009 and conducted an onsite inspection on May 27, 2009. On July 8, 2009 the Planning Board received the Site Plan Review Application. Public hearings were conducted on July 9, 2009 and October 7, 2009, and the Planning Board continued to receive both written and oral public comment at subsequent meetings. On August 18, 2009 the applicant signed an Agreement to Extend the Site Plan Review Period to October 14, 2009. The Planning Board voted to find the Site Plan Review application complete on October 14, 2009. The applicant verbally agreed to extend the site plan review period beyond the October 14, 2009 time period on October 14, 2009.

On February 10, 2010 the Planning Board completed its preliminary review of the standards contained in Section 5.E and F. of the Town of Turner, Maine Zoning Ordinance.

On March 10, 2010 the Planning Board considered the standards contained in Section VII of the Town of Turner, Maine Street Construction Ordinance. On that same date the planning Board voted to approve the Site Plan Review application with conditions.

## **Findings and Conclusions**

### **General Review Standards/Section 5.E Town of Turner Zoning Ordinance**

#### **Standard**

**1. Preservation of Landscape.** The landscape will be preserved in its natural state, insofar as practical, by minimizing tree and soil removal, retaining existing vegetation where desirable, and keeping any grade changes in character with the general appearance of neighboring areas. If the site contains a scenic site and/or view as identified in the Town of Turner Comprehensive Plan, special attempts should be made to preserve the natural environment of the skyline and view.

Environmentally sensitive areas which include wetlands, significant wildlife habitat, areas of two or more contiguous acres with sustained slopes greater than 20 percent, unique natural features and archaeological sites as identified in the Town of Turner Comprehensive Plan shall be conserved to the maximum extent.

The Board shall assess the proposed activities impact upon scenic areas and views as identified in the Town of Turner Comprehensive Plan. Where the Board finds that the proposed activity would have an undue adverse effect on identified scenic views, the Board shall require the applicant to minimize such effects.

#### **Findings/Minimizing Tree and Soil Removal, Retaining Existing Vegetation and Grade Changes**

**The project site is approximately 7.8 acres in size. The site is currently comprised of undeveloped forest land, pasture, two residential structures with associated lawns and a barn. At the present time the site contains approximately 0.2 acres of impervious surface, 3.0 acres of lawn/pasture and 4.6 acres of woodland. Existing structures on the site will be removed to allow for site development. The applicant proposes to utilize 5.6 acres of the overall site for project development. This would include approximately 3.2 acres of impervious area for the buildings, parking and in internal site movement and 2.4 acres of lawn and stormwater systems. Approximately 2.7 acres of forest land would be removed to provide for site development. Portions of the site located within 250 feet, horizontal distance, of the Nezinscot River within the Resource Protection District are proposed to be preserved.**

**The project site will require filling to prepare it for development. The amount of fill ranges from 2' to 5' in the location of the building and from 5' to 8' in the parking lot area.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the landscape will be preserved in its natural state, insofar as practical, by minimizing tree and soil removal, retaining existing vegetation where desirable, and keeping any grade changes in character with the general appearance of neighboring areas.**

**Vote: Yes 6                      No 0                      Abstain 0**

#### **Findings/Wetlands**

**The applicant proposes to fill approximately 27,700 square feet of forested wetlands. The filled area is to be used for parking and access drives. The filled area of wetlands represents approximately 27% of the new impervious surface area needed for access and parking.**

**The applicant engaged Stantec Consulting (Stantec) to delineate wetlands and conduct vernal pool surveys. Wetlands were determined using the technical criteria established by the Army Corps of Engineers and the Maine Department of Environmental Protection. The applicant**

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submitted, as supplemental information, the NRPA Permit-By-Rule Application and NRPA Tier 2 Wetland Permit Application dated July 2009, including an Alternatives Analysis describing the applicant's efforts to avoid and minimize wetland impacts on the site. Stantec described the wetlands to be filled as a palustrine forested wetland with well-developed shrub and herbaceous layers.

The applicant provided information that the Maine Department of Inland Fisheries and Wildlife and the Maine Department of Environmental Protection determined that wetlands to be filled did not meet the criteria to be designated as Wetlands of Special Significance.

In the NRPA Tier 2 Wetland Permit application the applicant initially proposed to compensate wetland filling by paying \$95,348.00 to the Maine Department of Environmental Protection under the Department of Environmental Protection's In Lieu Fee Compensation Program. The money paid to the Department of Environmental Protection would be used in some other location for wetland mitigation.

In supplemental information dated September 23, 2009 the applicant proposed as an alternative to the in lieu fee to secure the rights to purchase and preserve a 20-acre parcel in Buckfield adjacent to Jersey Bog and conserve approximately 0.5 acres of land on the project site through deed restrictions prohibiting future development. The Buckfield parcel would be transferred to the Androscoggin Land Trust. This proposal will replace the compensation plan filed with the original application and the NRPA Tier two Wetland Permit application. The 0.5 acres proposed to be conserved on the project site is currently zoned Resource Protection.

At the October 7, 2009 public hearing the applicant was asked to consider the impact to the wetland area that lies north of the proposed parking lot and east of the stormwater pond's outlet control structure. Comments question whether this wetland area could be affected by a reduction of water to maintain wetland characteristics.

In supplemental information dated October 14, 2009 the applicant provided additional information on the potential impact on this portion of the wetland. In that information Stantec reported that the wetland is primarily groundwater fed and impacts to up gradient wetland area should not significantly affect the hydrology of the wetland.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

To permit development and other land use activities only upon or in soils which are suited for such use, unless technological advances remove the possibility of any environmental harm and such activities which are permissible under the Department of Environmental Protection criteria.



**To conserve the integrity of wetlands so that their overall benefits and values are maintained.**

**To maintain wildlife travel corridors, along streams, rivers, ponds and wetlands.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that wetlands will be conserved to the maximum extent.**

**Vote :                      Yes   6                      No   0                      Abstain   0**

#### **Findings/Significant Wildlife Habitat**

**Based on the material submitted by the applicant, four vernal pools were identified and mapped that are located in the area to be disturbed by the project. These vernal pools were identified and assessed by Stantec to determine if they met the criteria for designation as significant vernal pools. Significant vernal pools are considered significant wildlife habitat. Stantec reported that three of the vernal pools were man-made and one was a natural pool. Using the criteria included in the Natural Resource Protection Act for determining if a vernal pool is a significant vernal pool, Stantec reported none of the four pools met that criteria.**

**The Maine Department of Inland Fisheries and Wildlife has identified high/moderate waterfowl and wading bird habitat within 250', horizontal distance, of the Nezinscot River. This is considered to be significant wildlife habitat. Land owned by the applicant includes areas within 250', horizontal distance, of the Nezinscot River. The portion of the applicant's property within 250', horizontal distance, from the River is designated Resource Protection under the Town of Turner Zoning Ordinance, and is proposed by the applicant to be preserved.**

**Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)**

**To maintain wildlife resources through habitat conservation and/or enhancement.**

**To maintain wildlife travel corridors, along streams, rivers, ponds and wetlands.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the area of site development does not contain significant wildlife habitat.**

**Vote: Yes 6                      No   0                      Abstain   0**

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**Findings/Unique natural features and archaeological sites**

**The review of the Town of Turner Comprehensive plan resulted in no identification of unique natural features or archaeological sites within the project area.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To assure that before archaeological sites/areas are disturbed their values are fully assessed and preserved where appropriate.**

**Conclusion**

**Based on the above information and information in the record the Planning Board finds that this criteria is not applicable.**

**Vote: Yes 6                      No 0                      Abstain 0**

**Findings/Sustained slopes greater than 20 percent.**

**Based on the review of site plans provided as part of the application there are no areas of two or more contiguous acres with sustained slopes greater than 20 percent.**

**Conclusion**

**Based on the above information and information in the record the Planning Board finds that this criteria is not applicable.**

**Vote: Yes 6                      No 0                      Abstain 0**

**Findings/Scenic Views**

**Based on the initial review of the Town of Tuner Comprehensive Plan as adopted on April 8, 2006 the proposed project site was determined to be not located in a scenic view location.**

**In a letter dated September 30, 2009 and testimony received at the October 7, 2009 public hearing the Turner Village Preservation Committee questioned if the project site is in fact located in a scenic view location.**

**Based on the reexamination of the Scenic Areas Map as contained in the Turner Comprehensive Plan the project site is within a scenic view area. Based on a preliminary visual**

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inspection by John Maloney on September 24, 2009 the proposed structure would not be visible from Lower Street from the scenic view area.

In supplemental information dated October 14, 2009 the applicant provided information that the proposed project would not impact the scenic view.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To recognize identified scenic views as a significant natural resource.**

**To minimize the loss of the values of significant scenic areas and sites by encroaching development.**

### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed activity would not have an undue adverse effect on identified scenic views**

**Vote: Yes 6                      No 0                      Abstain 0**

### **Standard**

**2. Relation of Proposed Buildings to Environment.** Proposed structures should be related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed structures so as to have a minimally adverse effect on the environmental and aesthetic qualities of the developed and neighboring areas. The Planning Board shall consider the following criteria.

### **Criteria**

Architectural style is not restricted. Evaluation of the appearance of a project should be based on the quality of its design and relationship to surroundings.

### **Findings**

**The applicant proposes to construct a 36,000 square foot building to house a supermarket and pharmacy drive-through. The proposed building was initially proposed to be 220' x 160' with a flat roof. The maximum height of the building would be 29' at the peak of the vestibule roof on the east elevation. The east elevation that faces Route 4 will be 220' wide and have an 80' x 15' vestibule. The vestibule will contain entrance doors and four windows. The remainder of the**

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east elevation will have one window and a door. The vestibule will have a gable roof. The south elevation visible from both Route 4 and the Snell Hill Road will be 160' wide and contain the pharmacy drive-up window and door. The west elevation will contain service entrances and the north elevation will have a door.

In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior design of the building. The changes included a redesign of the east and south roof lines similar to a pitched roof. The pitch of the two main roof slopes (covered walkway and entry would be 14/12 and the front gables roof pitches would be 6/12. Gable elements have been designed into the colonnade. A pitched roof has been added over the drive through pharmacy window. As described above, the revised design includes horizontal clapboards on all sides of the building, with bricks on a portion of the east elevation, and a historic color palette. Pitched roofs are to be covered by asphalt shingles.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

That the architectural design of new commercial development and characteristics of advertising features including signs are compatible with the community and surrounding area.

### **Conclusion**

Based on the above information and information in the record including that the applicant revised the exterior design of the structure in response to the Planning Board's requests to minimize the visual impression of a "Big Box Store" the Planning Board finds that this criteria will be met.

**Vote: Yes 6                      No 0                      Abstain 0**

### **Criteria**

Buildings should have good scale and be in harmonious conformance with permanent neighboring development.

### **Findings**

The applicant proposes to construct a 36,000 square foot building to house a supermarket and pharmacy drive-through. The proposed building was initially proposed to be 220' x 160' with a flat roof. The maximum height of the building would be 29' at the peak of the vestibule roof on the east elevation. Buildings in the vicinity of the proposed site on the Snell Hill Road west of

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Route 4 include: a 40' x 28' raised ranch structure currently used as an insurance office and six residential structures approximately 40' x 28' with typical residential accessory structures. Buildings in the vicinity of the proposed site on the east side of Route 4 include the following. B & A Variety is a 70' x 50' one and one half story structure with gas pumps. This building is used as a convenience store. It has a gable roof with asphalt shingles and is sided with residential style clapboards. Village Crossing, a commercial structure, is an L-shaped single story structure 60' x 54' at the widest points with a total floor area of 3,300 square feet. The exterior is covered by shingle/clapboard type siding earth tone in color. The structure has gable type roof with a 6/12 pitch covered with asphalt architect series shingles. The Village Farm is a single story gable roof structure with residential type siding 50' x 30' in size with accessory structures. RJB & Son includes a single family home and structures for automobile repair and sales. Structures have gable and gambrel roofs and siding is of residential character.

In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior design of the building. The changes included a redesign of the east and south roof lines similar to a pitched roof. The pitch of the two main roof slopes (covered walkway and entry) would be 14/12 and the front gables roof pitches would be 6/12. Gable elements have been designed into the colonnade. A pitched roof has been added over the drive through pharmacy window. As described above, the revised design includes horizontal clapboards on all sides of the building, with bricks on a portion of the east elevation, and a historic color palette. Pitched roofs are to be covered by asphalt shingles.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

That the architectural design of new commercial development and characteristics of advertising features including signs are compatible with the community and surrounding area.

## **Conclusion**

Based on the above information and information in the record including that this standard does not establish a size standard, that the applicant attempted to create harmony by use of exterior siding, colors and roof design and that the character of the area will not be destroyed the Planning Board finds that this criteria will be met.

**Vote: Yes 6                      No 0                      Abstain 0**

## **Criteria**

Materials should have good architectural character and shall be selected for harmony of the building with adjoining buildings.

## **Findings**

**Primary materials on the east and south elevations, those elevations primarily visible from public roads, were initially proposed to include horizontal composite siding with 8" exposure and ivorene in color, vertical composite siding with 6" exposure and bone white in color and concrete masonry medium mortar pigment. The vestibule roof will be standing seam metal roofing and mushroom cap color. The west and north elevations will be covered with vertical concrete panels.**

**In supplemental information dated September 23, 2009 the applicant proposed to cover all sides of the structure with composite clapboard siding.**

**In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior materials of the building. Werzalit clapboards will be used on all sides of the building with bricks on a portion of the east elevation. The horizontal siding will be painted Sherwin Williams Downing Straw, trim and columns will be painted Sherwin Williams Roycroft Suede, exterior exit doors will be painted Sherwin Williams Downing Straw, window frames to be medium bronze, entrance door brushed aluminum, brick wainscot Morin Brick-Hannaford Smooth (red) and pitched roofs are to be covered by asphalt Certainteed Woodscape Shingles/Driftwood.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That the architectural design of new commercial development and characteristics of advertising features including signs are compatible with the community and surrounding area.**

## **Conclusion**

**Based on the above information and information in the record including that the applicant attempted to create harmony by use of exterior siding and colors and roof design the Planning Board finds that this criteria will be met.**

**Vote: Yes            6        No            0        Abstain    0**

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## **Criteria**

Materials should be selected for suitability to the type of buildings and the design in which they are used. Buildings shall have the same materials, or those that are architecturally harmonious, used for all building walls and other exterior building components wholly or partly visible from public ways.

## **Findings**

**Primary materials on the east and south elevations, those elevations primarily visible from public roads, were initially proposed to include horizontal composite siding with 8" exposure and ivorene in color, vertical composite siding with 6" exposure and bone white in color and concrete masonry medium mortar pigment. The vestibule roof will be standing seam metal roofing and mushroom cap color. The west and north elevations will be covered with vertical concrete panels. The water supply building will utilize the same siding and colors as the supermarket building.**

**In supplemental information dated September 23, 2009 the applicant proposed to cover all sides of the structure with composite clapboard siding.**

**In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior materials of the building. Werzalit clapboards will be used on all sides of the building with bricks on a portion of the east elevation. The horizontal siding will be painted Sherwin Williams Downing Straw, trim and columns will be painted Sherwin Williams Roycroft Suede, exterior exit doors will be painted Sherwin Williams Downing Straw, window frames to be medium bronze, entrance door brushed aluminum, brick wainscot Morin Brick-Hannaford Smooth (red) and pitched roofs are to be covered by asphalt Certainteed Woodscape Shingles/Driftwood.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That the architectural design of new commercial development and characteristics of advertising features including signs are compatible with the community and surrounding area.**

## **Conclusion**

**Based on the above information and information in the record including use of same materials on all wall elevations and extensive use of landscaping the Planning Board finds that this criteria will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

### **Criteria**

Materials should be of durable quality.

### **Findings**

**The applicant provided information on exterior building components. No specific specifications for those components were submitted.**

**At the October 7, 2009 public hearing the applicant provided the Planning Board with samples of the materials proposed for exterior finishes.**

**In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior materials of the building. Werzalit clapboards will be used on all sides of the building with bricks on a portion of the east elevation. The horizontal siding will be painted Sherwin Williams Downing Straw, trim and columns will be painted Sherwin Williams Roycroft Suede, exterior exit doors will be painted Sherwin Williams Downing Straw, window frames to be medium bronze, entrance door brushed aluminum, brick wainscot Morin Brick-Hannaford Smooth (red) and pitched roofs are to be covered by asphalt Certainteed Woodscape Shingles/Driftwood.**

### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this criteria will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

### **Criteria**

Building components, such as windows, doors and eaves, should have good proportions and relationships to one another.

### **Findings**

**The five windows on the east elevation are of the same size, design and proportions. Metal doors and frames are similar.**

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**In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior building design. The five window systems on the east elevation are located under dormers. Window frames to be medium bronze in color. Exterior exit doors will be painted Sherwin Williams Downing Straw.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this criteria will be met.**

**Vote: Yes            6        No            0        Abstain    0**

#### **Criteria**

Colors should be harmonious and shall use compatible accents.

#### **Findings**

**The applicant provided an exterior materials finish schedule for the east elevation of the building. Primary colors for that elevation were initially proposed to include ivorene, bone white and mushroom cap.**

**In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior materials of the building. Werzalit clapboards will be used on all sides of the building with bricks on a portion of the east elevation. The horizontal siding will be painted Sherwin Williams Downing Straw, trim and columns will be painted Sherwin Williams Roycroft Suede, exterior exit doors will be painted Sherwin Williams Downing Straw, window frames to be medium bronze, entrance door brushed aluminum, brick wainscot Morin Brick-Hannaford Smooth (red) and pitched roofs are to be covered by asphalt Certainteed Woodscape Shingles/Driftwood.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this criteria will be met.**

**Vote: Yes 6                      No            0        Abstain    0**

## **Criteria**

Mechanical equipment or other utility hardware on roof, ground or buildings shall be screened from public view with materials harmonious with the building, or they shall be located so visibility from any public way is minimized.

## **Findings**

Mechanical equipment to be located on the roof of the supermarket building includes exhaust fans, condensing units and fluid coolers. At the rear of the supermarket building will be located a trash compactor, LP gas tanks, and standby generator. The applicant initially proposed to erect a 10' high solid wooden fence along the entire westerly side of it property. This fence will screen the site from the residential properties located along Jordan Lane. The applicant proposes to erect an 8' high wood fence at its southwest property line for approximately 30' easterly along Snell Hill Road. Exposed machinery installations, service areas, truck loading areas, utility buildings setback range from 100' to 190' from the centerline of the Snell Hill Road. Sheet C-5.0 of the application indicates the proposed plantings that include three balsam fir tree 6'-7' in height and three red sunset red maple 2.5"-3" in cal. along the Snell Hill Road side of the property in the area of exposed machinery installations, service areas, truck loading areas, utility buildings. There is proposed a berm along the Snell Hill Road that is approximately three feet higher than the final grade of the area where exposed machinery installations, service areas, truck loading areas, utility buildings will be located. The applicant did not provide information as to the visibility of roof mounted mechanical equipment from public ways.

In supplemental information dated September 23, 2009 the applicant revised screening of the truck loading and utility areas from the Snell Hill Road. The revised landscape plan includes staggered rows of evergreen trees 6' to 7' feet in height and Red Maples. There will be a 6' high solid wooden fence around the above ground LP tanks. The applicant stated roof top screening would be provided to screen fluid coolers at the rear of the building. The screening panels would be the same color as the siding on the building. In supplemental information dated December 21, 2009 and February 10, 2010 the applicant revised the buffering plan on the westerly and northerly portions of the project site. Rather than a 10' high solid wood fence along Jordan Lane the applicant proposed an 8' wooden fence on a 2' berm along Jordan Lane and along the property line north of the stormwater retention pond. Within the area in front of the fence area white cedar, hemlock, white pine and spruce trees ranging in height from 5' to 7' would be planted to screen the wooden fence.

In supplemental information dated December 21, 2009 the applicant revised the plans to add a building screen to the left corner of the structure to provide further screening of the vendor

receiving area and the location of the transformer and generator was moved adjacent to the water supply building.

**Condition(s)**

*Exposed machinery installations, truck loading areas, utility buildings and structures, and similar accessory structures shall be screened as to prevent them from being incompatible with the existing or contemplated environment and the surrounding properties in all seasons of the year.*

**Conclusion**

Based on the above information, information in the record and condition the Planning Board finds that this criteria will be met.

**Vote: Yes            6        No            0        Abstain    0**

**Criteria**

Exterior lighting shall be part of the architectural concept. Fixtures, standards and all exposed accessories shall be harmonious with building design.

**Findings**

The applicant proposes to install both pole-mounted and building-mounted lighting fixtures. All fixtures will be of full cutoff design. The parking area will be illuminated with five back-back 400-watt high pressure sodium fixtures placed on 30' tall poles. The primary entrance, the pharmacy entrance and southwest portion of the site will be illuminated with single 250-watt high pressure sodium fixtures placed on 20' tall poles. The exterior of the structure will have nine wall mounted 70-watt high pressure sodium fixtures placed at 18' above the finished grade. The truck loading area will have one wall mounted 250-watt high pressure sodium fixtures placed 18' above the finished grade.

The applicant indicated that pole mounted lights except at the primary entrance will be turned off one hour after store closing.

The applicant provided a Site Lighting Photometric Plan dated June 18, 2009 prepared by Hubbell Lighting, Inc. That Plan indicates foot-candles produced by the proposed lighting on and adjacent to the project site. That Plan indicates no new foot-candles on adjacent residential properties.

**In supplemental information dated January 11, 2010 that applicant indicated that recessed light cans with 100-watt high pressure sodium light fixtures at 20' intervals would be located beneath the front canopy to provide downward illumination of the side walk.**

## **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this criteria will be met.**

**Vote: Yes 6                      No                      0                      Abstain                      0**

## **Criteria**

Refuse and waste removal areas, service yards, storage yards, and exterior work areas shall be screened from view from public ways, using materials as stated in criteria for equipment screening.

## **Findings**

**The applicant initially proposed to erect a 10' high solid wooden fence along the entire westerly side of it property. This fence will screen the site from the residential properties located along Jordan Lane. The applicant proposes to erect an 8' high wood fence at its southwest property line for approximately 30' easterly along Snell Hill Road. Exposed machinery installations, service areas, truck loading areas, utility buildings setbacks range from 100' to 190' from the centerline of the Snell Hill Road. Sheet C-5.0 of the application indicates proposed plantings that include three balsam fir tree 6'-7' in height and three red sunset red maple 2.5"-3" in caliper along the Snell Hill Road side of the property in the area of exposed machinery installations, service areas, truck loading areas, utility buildings. There is proposed a berm along the Snell Hill Road that is approximately 3' higher than the final grade of the area where exposed machinery installations, service areas, truck loading areas, utility buildings will be located.**

**In supplemental information dated September 23, 2009 the applicant revised screening of the truck loading and utility areas from the Snell Hill Road. The revised landscape plan includes staggered rows of evergreen trees 6' to 7' feet in height and Red Maples. There will be a 6' high solid wooden fence around the above ground LP tanks. The applicant stated roof top screening would be provided to screen fluid coolers at the rear of the building. The screening panels would be the same color as the siding on the building.**

**In supplemental information dated December 21, 2009 and February 10, 2010 the applicant revised the buffering plan on the westerly and northerly portions of the project site. Rather**

than a 10' high solid wood fence along Jordan Lane the applicant proposed an 8' wooden fence on a 2' berm along Jordan Lane and along the property line north of the stormwater retention pond. Within the area in front of the fence area white cedar, hemlock, white pine and spruce trees ranging in height from 5' to 7' would be planted to screen the wooden fence.

In supplemental information dated December 21, 2009 the applicant revised the plans to add a building screen to the left corner of the structure to provide further screening of the vendor receiving area and the location of the transformer and generator was moved adjacent to the water supply building.

### Conclusion

Based on the above information and information in the record the Planning Board finds that this criteria will be met.

Vote: Yes            6      No            0      Abstain    0

### Criteria

Monotony of design in single or multiple building projects shall be avoided. Variation of detail, form and siting shall be used to provide visual interest. In multiple building projects, viable siting or individual buildings may be used to prevent a monotonous appearance.

### Findings

The applicant initially proposed an 80' x 15' vestibule on the east elevation of the building. The three remaining elevations will be similar except the west and north elevations will have vertical concrete panel siding.

In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior design of the building. The changes included a redesign of the east and south roof lines similar to a pitched roof. The pitch of the two main roof slopes (covered walkway and entry would be 14/12 and the front gables roof pitches would be 6/12. Gable elements have been designed into the colonnade. A pitched roof has been added over the drive through pharmacy window.

## Conclusion

Based on the above information and information in the record including that the applicant redesigned the exterior of the building to break up design monotony and provide landscaping, the Planning Board finds that this criteria will be met.

Vote: Yes            6        No            0        Abstain    0

## Overall Conclusion:

Based on the above information and information in the record the Planning Board finds that proposed structures will be related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed structures so as to have a minimally adverse affect on the environmental and aesthetic qualities of the developed and neighboring areas.

Vote: Yes 6                      No 0                      Abstain 0

## Standard [those applicable]

**3. Vehicular Access:** The proposed development shall provide safe vehicular access to and from public and private streets. When conflicts exist between this section and a Driveway Permit or Entrance Permit onto Route 4 issued by the Maine Department of Transportation, the most stringent or restrictive shall apply.

## Overview

The applicant proposes to construct a 36,000 square foot building to house a supermarket and pharmacy drive-through on a site located at the corner of Route 4 and the Snell Hill Road. The project is forecast to generate 107 trip ends in the AM peak hour, 416 trip ends in the peak PM hour and 456 trip ends during the Saturday peak hour. The applicant first proposed three points of access to the site. These were a right-in and a right-out from Route 4 approximately 260' north of the Route 4/Snell Hill Road intersection, a 27' wide entrance and exit approximately 210' west of the Route 4/Snell Hill Road intersection and a 50' wide entrance and exit approximately 420' west of the Route 4/Snell Hill Road intersection. As the result of action by the Maine Department of Transportation associated with the issuance of the Traffic Movement Permit and the Turner Planning Board not granting a waiver to Section 5.E.3.g of the Town of Turner Zoning Ordinance the right-in and right-out access from Route 4 was eliminated from the proposal. The other two access points remain the same.

The applicant retained Gorrill-Palmer Consulting Engineers, Inc to prepare a Traffic Impact Study. That analysis considered among others trip generation, trip distribution, trip composition, trip assignment, study area (Route 4 at Snell Hill Road, Route 4 at Route 117 and Main Street at Route 117), capacity analysis, queuing analysis, traffic signal warrant analysis, crash data, sight line analysis.

Based on the results of the Traffic Impact Study the applicant proposed to install a fully actuated traffic signal at the Route 4/Snell Hill Road intersection, construct a separate right-turn lane for south bound traffic on Route 4 at the intersection with Snell Hill Road, construct a dedicated left turn lane on Snell Hill Road eastbound at the Route 4 intersection, improvement to the Snell Hill Road for access to the project site and signage.

Due to the traffic volumes associated with the project a Traffic Movement Permit issued by the Maine DOT is required. On August 11, 2009 the Maine DOT issued that Permit and on August 25, 2009 a revised Permit was issued that eliminated Route 4 access. The Maine DOT permit required off-site mitigation measures including fully actuated traffic signal at the Route 4/Snell Hill Road intersection, the construction a 170' southbound right turn lane on Route 4, provide a dedicated right turn lane on the eastbound approach of the intersection, provide a through/left turn lane for the eastbound approach of the intersection and pay an impact fee of \$35,000 toward a future improvement of the Route 4 and 117 intersection.

The Turner Village Preservation Committee provided for the record a report prepared by William Bray, P.E. that addressed traffic issues related to the project.

In supplemental information dated September 23, 2009 the applicant provided further information on the reasons for the design of the westerly entrance to the project site as well as the easterly entrance. The applicant also provided information concerning the impact of the project on the movement into and out of the B&A Convenience Store. It was the opinion of the applicant that the benefits of the traffic signal to B&A customers far outweigh any perceived inconvenience to B&A customers that currently use the Route 4 curb cut to enter and/or exit the store.

In supplemental information dated October 2, 2009 the Turner Village Preservation Committee provided information on traffic movement and entrance design.

In addition to receiving testimony on September 9, 2009 from Maine DOT Traffic Engineer Gene Uhuad, the Planning Board retained the services of Sebago Technics to conduct a peer review of the applicant's Traffic Impact Study. In a letter dated November 23, 2009 Sebago Technics reported that the level of service standards will be met for post development for all intersections studied, that the queue analysis provided by the applicant is correct, that

expected queues on the Route 4 north bound approach to Snell Hill Road intersection will block the B & A Convenience Store access to Route 4 at times, that the Route 4/117 intersection does not warrant a traffic signal at this time and would not likely be warranted in the future, and that increase traffic on Main Street as the result of the project would not likely be significant.

In supplemental information dated December 8, 2009 the applicant provided additional information on the traffic impact of the project on the B & A Convenience Store's driveways. Based on a SimTraffic analysis the level of service for both B & A driveways would be A for post development. The average queue for the peak PM north bound traffic would reach the B & A Route 4 driveway. The 95<sup>th</sup> percentile queue would extend the Route 4 B & A driveway. The applicant reported blockage at the Route 4 B & A driveway would be about 15% of the time during the PM peak hour and 8% during the Saturday peak hour and that it is anticipated to operate acceptable without any reassignment.

### **Standard**

The applicant for a development to be located on a parcel of land of ten (10) acres or greater or five hundred (500) feet or more of frontage on a public street shall file a conceptual Access Master Plan with the Planning Board. The conceptual Access Master Plan shall address the overall use of the parcel, the overall vehicular circulation system within the parcel, and the coordination of access into and out of the site. The conceptual Access Master Plan shall demonstrate how the requirements for access as contained in this section will be met.

### **Findings**

The project site is less than 10 acres but does have approximately 560' of frontage on the Snell Hill Road. Sheet C-2.0 of the application indicates the overall use of the parcel, vehicular circulation system within the parcel and the coordination into and out of the site.

### **Conclusion**

Based on the above information and information in the record the Planning Board finds that this standard will be met.

**Vote: Yes 5                      No 1                      Abstain 0**



## **Standard**

Vehicular access to the site shall be on roads which have adequate capacity to accommodate the additional traffic generated by the development. Intersections on major access routes to the site within one half (1/2) mile of any entrance road which are functioning at a Level of Service of C or better prior to the development must function at a minimum at Level of Service C after development. If any intersection is functioning at a Level of Service D or lower prior to the development, the project must not reduce the current level of service.

## **Findings**

All access to the project site will be via the Snell Hill Road a town maintained paved road with a travel width of approximately 24'. Snell Hill Road intersects with Route 4, a State highway, with a pavement width of approximately 45'. Direct access to the site will be from a 27' wide entrance and exit approximately 210' west of the Route 4/Snell Hill Road intersection and a 50' wide entrance and exit approximately 420' west of the Route 4/Snell Hill Road intersection. Intersections on major access routes within ½ mile of the entrance road include Snell Hill Road/Route 4, Route 4/117 and Route 4/Main Street south. The applicant provided Level of Service Analysis for three intersections, Route 4/Snell Hill Road, Route 4/117 and Main Street/Route 117. The Route 4/Main Street south intersection was not analyzed as the result of discussion at the Maine DOT Traffic Movement Permit Scoping meeting at which participants agreed that the proposed project would not significantly impact that intersection.

The analysis conducted by the applicant indicates that all the intersections studied, with the installation of a traffic signal at the Route 4/Snell Hill Road intersection, will function overall at a Level of Service of C or better under post development conditions.

The Route 4/Route 117 intersection is considered as a High Crash Location by Maine DOT based on the most recent reporting period (2006-2008). The Route 4/Snell Hill Road intersection had six crashes in the 2006-2008 period, but is not considered a high crash location because the threshold of eight crashes was not reached. Verbal communications with Maine DOT found that the Route 4/Route 117 intersection is approaching warranting the placement of a traffic signal. If placed it would result in two traffic signals within 2,000' along Route 4. Additional verbal communications with Maine DOT found that it would allow for the placement of a second signal at this intersection. In a letter dated December 7, 2009 from Gene Uhuad, P.E. Maine DOT Region 3 Traffic Engineer to Peter Hedrich, P.E., Gorrill-Palmer, Uhuad stated that Maine DOT would support the granting of a waiver for the minimum spacing requirement between traffic signals.

**A 95<sup>th</sup> Percentile Queues Analysis submitted by the applicant indicates that with the signalization of the Route 4/Snell Hill Road intersection that left in and left out traffic movement to the B & A Varsity Store will be impacted during peak hour periods.**

**In supplemental information dated December 8, 2009 the applicant provided additional information on the traffic impact of the project on the B & A Convenience Store's driveways. Based on a SimTraffic analyses the level of service for both B & A driveways would be A for post development. The average queue for the peak PM north bound traffic would reach the B & A Route 4 driveway. The 95<sup>th</sup> percentile queue would extend the Route 4 B & A driveway. The applicant reported blockage at the Route 4 B & A driveway would be about 15% of the time during the PM peak hour and 8% during the Saturday peak hour and that it is anticipated to operate acceptable without any reassignment.**

**Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)**

**Require the developers of new or redeveloped projects which will exceed existing public roadway and intersection capacity to make improvements necessary for anticipated traffic volumes.**

**That new development or redevelopment does not create or aggravate high crash locations.**

**That new developments or redevelopments along Routes 4, 117 and 219 and other important travel corridors will maintain traffic carrying functions and minimize congestion and crash potential.**

**Condition(s)**

*Within a time period no sooner than six months and no later than 12 months from the date of store opening, the applicant shall conduct traffic counts at the intersection of Main Street and Route 117. Should such traffic counts indicate that the intersection functions at a Level of Service of less than C due to increased traffic as the result of the overall Hannaford project, the Planning Board reserves the right to reopen the application for the reconsideration of this standard.*

**Conclusion**

**Based on the above information, information in the record and condition the Planning Board finds that this standard will be met.**

**Vote: Yes 5                      No 1                      Abstain 0**  
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## Standard

The geometrics of intersections that will serve the proposed development shall be of such design to provide for safe turning movements.

Any exit driveway or driveway lane shall be so designed in profile and grading and so located as to provide the following minimum sight distance measured in each direction.

Posted Speed Limit	Sight Distance (Standard Vehicle)	Sight Distance (Larger Vehicle)
35 mph	305'	455'

## Findings

**All exits from the project site will be onto the Snell Hill Road that has a posted speed limit of 35 MPH. The project site will provide for two exits. The primary exit will be approximately 220' west of the Route 4/Snell Hill Road intersection and secondary exit will be approximately 420' west of the Route 4/Snell Hill Road intersection. The sight distance to the west exceeds the required distances. The sight distance to the east from the secondary exit exceeds the required distances. The speed of vehicles at the primary exit will be less than 35 MPH.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That new development or redevelopment does not create or aggravate high crash locations.**

**That new developments or redevelopments along Routes 4, 117 and 219 and other important travel corridors will maintain traffic carrying functions and minimize congestion and crash potential.**

## Conclusion

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

The grade of any exit driveway or proposed street for a distance of fifty (50) feet from its intersection with any existing street shall be a maximum of three (3) percent.

## **Findings**

**The grades of all exit drives for 50' from their intersection with the Snell Hill Road are less than 3%.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That new development or redevelopment does not create or aggravate high crash locations.**

## **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

The intersection of any access drive or proposed street must function at a Level of Service of C following development if the project will generate 400 or more vehicle trips per 24-hour period or a level which will allow safe access into and out of the project if less than 400 trips are generated.

## **Findings**

**The analysis conducted by the applicant indicates that all the intersections studied, with the installation of a traffic signal at the Route 4 Snell Hill Road intersection, will function at an overall Level of Service of C or better under post development conditions.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**Require the developers of new or redeveloped projects which will exceed existing public roadway and intersection capacity to make improvements necessary for anticipated traffic volumes.**

**That new development or redevelopment does not create or aggravate high crash locations.**

**That new developments or redevelopments along Routes 4, 117 and 219 and other important travel corridors will maintain traffic carrying functions and minimize congestion and crash potential.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

#### **Standard**

Projects generating 400 or more vehicle trips per 24-hour period must provide two or more separate points of vehicular access into and out of the site.

#### **Findings**

**The proposed project will generate more than 400 vehicle trips per 24-hour period. Two separate points of vehicular access into the site have been provided.**

#### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

#### **Standard**

Where a proposed development is to be located at the intersection of Route 4, and a minor or collector road, entrance(s) to and exit(s) from the site shall be located only on the minor or collector road provided that this requirement maybe waived where the applicant demonstrates that existing

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site conditions preclude the location of a driveway on the minor or collector road, or that the location of the driveway on the minor or collector road would interfere with a predominately residential neighborhood.

### **Findings**

**The project site has frontage on both Route 4 and the Snell Hill Road. Snell Hill Road is considered a minor or collector road. All entrance and exits from the project site will be from the Snell Hill Road.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That new developments or redevelopments along Routes 4, 117 and 219 and other important travel corridors will maintain traffic carrying functions and minimize congestion and crash potential.**

### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

### **Standard**

Curb cuts or access points shall be limited to one per lot for all lots with less than 200 linear feet or less of road frontage. For lots with greater than 200 feet of frontage, a maximum of one curb cut per 200 feet of frontage shall be permitted to a maximum of three, provided the Planning Board makes a finding that (a) the driveway design relative to the site characteristics and site design provides safe entrance and exit to the site and (b) no other practical alternative exists.

### **Findings**

**The project site has approximately 580' of frontage on the Snell Hill Road. The applicant has proposed two curb cuts.**

## Conclusion

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

## Standard

No medium or high volume traffic generator shall have more than two two-way accesses or three accesses in total onto a single roadway.

## Findings

**The proposed project is a high volume traffic generator. The project does not have more than two two-way accesses or three accesses in total onto a single roadway.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That new developments or redevelopments along Routes 4, 117 and 219 and other important travel corridors will maintain traffic carrying functions and minimize congestion and crash potential.**

## Conclusion

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

## Standard

Curb cut widths and design shall conform to the following standards:

Median volume driveways with more than 50 vehicle trips/day but fewer than 200 peak hour vehicle trips, based on the latest edition of the Institute of Traffic Engineers' Trip Generation Report, as the same may be amended from time to time, and generally including all land uses not in the low or high volume groups, shall:

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have either two-way or one-way operation;

intersect the road at an angle as close to 90 degrees as site conditions permit, but at no less than 60 degrees;

not require a median;

slope upward from the gutter line on a straight slope of 3 percent or less for at least 50 feet and a slope of no more than 6 percent thereafter, with the preferred grade being a 4 1/2 percent, depending on the site; and

comply with the following geometric standards:

NOTE: The Planning Board may vary these standards due to unique factors such as a significant level of truck traffic.

Item	Desired Value (ft.)	Minimum Value (ft.)	Maximum Value (ft.)
<u>ONE WAY</u>			
R1 (radius)	30	25	40
R2 (radius)	5	5	10
W (drive width)	20	20	24
<u>TWO WAY</u>			
R	30	25	40
WD	26-36*	24	30-40*

\*Where separate left and right exit lanes are desirable.

## Findings

**The pharmacy drive through and delivery/service entrance is considered a medium volume driveway. The proposed driveway will provide two-way operation in that it is expected the most delivery/service vehicles will exit from it. Based on Sheet C-2.0 of the application it appears that the driveway has an angle of less than 60 degrees. The grade of the driveway for 50' from their intersection with the Snell Hill Road is less than 3%. The width of the driveway is approximately 45'. Because of the truck traffic that will use this driveway the 45' width is acceptable. Because of the truck traffic that will use this driveway the radii are acceptable which is allowed by the note above. [NOTE: Section 5.E.3.j.2 of the Town of Turner Zoning Ordinance states: The Planning Board may vary these standards due to unique factors such as a significant level of truck traffic.]**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)



**That new development or redevelopment does not create or aggravate high crash locations.**

## **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

High volume driveways defined as driveways with more than 200 peak hour vehicle trips shall:

have two-way operations separated by a raised median of 6 to 10 feet in width and a 50 to 100 feet length depending upon necessary storage length for queued vehicles;

intersect with the road at an angle as close to 90 degrees as possible, but at no less than 60 degrees;

be striped for 2 to 4 lanes with each lane 12 feet wide;

slope upward from the gutter line on a straight slope of 3 percent or less for at least 75 feet and a slope of no more than 5 percent thereafter;

have a “STOP” sign control and appropriate “Keep Right” and “Yield” sign controls for channelization; signalization may be required. Level of service and traffic signal warrants should be conducted for all high volume driveways; and comply with the following geometric standards:

NOTE: The Planning Board may vary these standards due to unique factors such as a significant level of truck traffic.

<b>Item</b>	<b>Desired Value (ft.)</b>	<b>Minimum Value (ft.)</b>	<b>Maximum Value (ft.)</b>
<u>W/O</u> <u>CHANNELIZATION</u>			
R (Radii)	50	30	50
R (Width of Access lanes)**	24	20	26
W (Median width)***	6	6	10
<u>W/CHANNELIZATION</u>			
R	100	75	100
WD	24	20	26
M	6	6	10
WR	20	16	20

\* For industrial developments with a high percentage of truck traffic maximum values are required.

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**\*\* The table contained in Section 5.E.3.j.3, R should be W meaning lane width.  
[JAM 01.08.2010]**

**\*\*\* The table contained in Section 5.E.3.j.3, W should be M meaning median width.  
[JAM 01.08.2010]**

## **Findings**

The primary driveway is considered to be a high volume driveway. The proposed primary driveway will be of two-way operation with a total width of 27' with two 13.5' travel lanes. A 4" solid yellow line would separate the entrance and exit lanes. This design does not comply with Section 5.E.3.j.3) of the Zoning Ordinance. The proposed design does not have two-way operations separated by a raised median of 6' to 10' in width.

In supplemental information dated December 21, 2009 the applicant revised the design of the primary driveway. The driveway width is 40' with a 17.5' wide entrance lane, a 6' wide raised median island and a 15' wide exit lane. The primary driveway has a throat length of 65'. In supplemental information dated January 8, 2010 the applicant provided additional information concerning the primary driveway design. The applicant indicated that the primary driveway will meet all design criteria except for the driveway width standard which is 20' minimum and 26' maximum. The applicant proposes a 17.5' wide entrance lane, and a 15' wide exit lane.

Section 5.G of the Town of Turner Zoning Ordinance allows the Planning Board to waive certain standards based on the following. Where the Board makes written findings of fact that due to special circumstances of a particular application, certain required improvements or standards of this section are not necessary to provide for the public health, safety or welfare, or are inappropriate because of inadequate or lacking connecting facilities adjacent to or in proximity of the proposed development, it may waive the requirement for such improvements, subject to appropriate conditions, provided the waivers do not have the effect of nullifying the intent and purpose of the comprehensive plan or this ordinance and further provided the performance standards of this ordinance have been or will be met. In granting waivers, the Planning Board shall require such conditions as will assure the purpose of these regulations are met. On January 13, 2010 the Planning Board voted to waive the 20' wide lane width standard. In voting to waive that standard the Planning Board found that most vehicles will enter and exit the project site from single directions and separate right and left turning lanes in the entrance and exit lanes are not required for safety and the applicant provided diagrams of Autoturn Vehicle Path Simulation that indicated acceptable vehicle movement into and out of the project site utilizing the 17.5' entrance and 15' wide exit. Additionally in voting to waive the 20' minimum lane requirement the Planning Board found that the reduced lane widths would reduce traffic conflicts, the standards of the Ordinance would be met, the public, health,

safety and welfare would be protected, and the intent of the Comprehensive Plan would be met and the performance standards of the ordinance have been or will be met.

### Conclusion

Based on the above information, information in the record and condition the Planning Board finds that this criteria will be met.

Vote: Yes 6                      No 0                      Abstain 0

### Standard

Driveway Spacing: Distance from edge of driveway comer (point of tangency) to edge of intersection comer (point of tangency) by type of driveway should be as follows:

Driveway	Minimum Corner Clearance (feet)	
	Intersection Signalization	Intersection Unsignalization
Medium Volume >50-100 trips/day <200 trips/hour	150	50
High Volume >200 trips/hour	500	250

### Findings

The applicant proposed to locate a high volume primary driveway on the Snell Hill Road 130' as measured from the edge of that driveway corner (point of tangency) to edge of the Route 4 intersection corner (point of tangency). The standard is 500'. Hannaford requested, in a letter dated July 7, 2009 to John Maloney, that Section 5.E.3.k of the zoning ordinance be waived to reduce for a minimum corner clearance from 500' to 130' from the primary driveway on the Snell Hill Road as measured from the edge of the driveway corner (point of tangency) to edge of intersection corner (point of tangency). Section 5.G of the Town of Turner Zoning Ordinance allows the Planning Board to waive certain standards based on the following. Where the Board makes written findings of fact that due to special circumstances of a particular application, certain required improvements or standards of this section are not necessary to provide for the public health, safety or welfare, or are inappropriate because of inadequate or lacking connecting facilities adjacent to or in proximity of the proposed development, it may waive the requirement for such improvements, subject to appropriate conditions, provided the waivers do not have the effect of nullifying the intent and purpose of the comprehensive plan or this ordinance and further provided the performance standards of

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this ordinance have been or will be met. In granting waivers, the Planning Board shall require such conditions as will assure the purpose of these regulations are met. On August 12, 2009 the Planning Board voted to waive the 500' corner clearance standard and allow a 130' corner clearance. In voting to waive that standard the Planning Board found that the Maine DOT Highway and Entrance Rules define corner clearance as the minimum distance, measured parallel to a highway, between the nearest curb, pavement or shoulder line of an intersecting public way and the nearest edge of a driveway excluding its radii, the Maine DOT Highway and Entrance Rules requires a minimum of 125 feet of corner clearance, Hedrich in a letter dated July 6, 2009 to DeLUCA HOFFMAN stated that the edge to edge of driveway functional separation is approximately 220 feet based on the angle of the intersection at Route 4, and Hedrich in a letter dated July 24, 2009 stated that queues from the primary driveway onto Snell Hill Road to the Route 4 intersection are to remain in their storage area. The Planning Board also found the Maine DOT Traffic Movement Permit allowed the proposed corner clearance, that the Androscoggin Transportation Resource Center reviewed the proposed corner clearance, the reduced corner clearance would not affect traffic safety, the standards of the Ordinance would be met, the public, health, safety and welfare would be protected, the intent of the Comprehensive Plan would be met and the performance standards of the ordinance have been or will be met.

The minimum corner clearance for the pharmacy drive through and delivery/service entrance will comply with standards.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

That new developments or redevelopments along Routes 4, 117 and 219 and other important travel corridors will maintain traffic carrying functions and minimize congestion and crash potential.

#### **Conclusion**

Based on the above information and information in the record the Planning Board finds that this standard will be met.

**Vote: Yes 5                      No 1                      Abstain 0**

#### **Standard**

Minimum distances between driveways serving the same parcel, measured from point of tangency to point of tangency by type of driveway, should be as follows:

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Driveway Type	Minimum Spacing to Adjacent Driveway by Driveway Type		
	Medium (feet)	High w/o RT (feet)	High w/RT (feet)
Medium Volume	75		
High Volume W/O RT (without right-turn channelization)	75	150	
High Volume W/RT (with right-turn channelization)	75	250	500

### Findings

Minimum distances between driveways serving the parcel, measured from point of tangency to point of tangency will be met.

### Conclusion

Based on the above information and information in the record the Planning Board finds that this standard will be met.

Vote: Yes 6                      No 0                      Abstain 0

### Standard

The minimum distance between driveway to property line, as measured from point of tangency, should be:

Driveway Type	Minimum Spacing to Property Line (ft.)
Medium Volume	20
High Volume (without right-turn channelization)	75
High Volume (with right-turn channelization)	75

### Findings

The minimum distance between driveway to property line, as measured from point of tangency, will be met.

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## **Conclusion**

**Based on the above information and information in the record the Planning Board finds that this standard will be met.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

**4. Pedestrian and Trail Access.** The proposed development shall provide safe pedestrian access within the project parcel and interconnection with existing facilities on abutting properties including connection and/or preservation of existing snowmobile trails with easements to maintain a multi-use trail system within the Town of Turner. To preserve these opportunities, the Planning Board may require the applicants to record easements or require conditions of approval which define future access rights between properties to accomplish the goals of the Zoning Ordinance.

## **Findings**

**Pedestrian movement within the project site will involve customers moving from their vehicle to and from the supermarket. As customary pedestrian will move through the parking lot and then use one of three proposed 6 foot wide painted cross walks to the concrete side walk in front of the supermarket.**

**At the present time there are no existing facilities on abutting properties that require interconnections.**

**The Androscoggin Land Trust owns property that abuts the applicant's property to the north. Information submitted states that the applicant and the Land Trust have reached an agreement where the applicant will provide four designated parking spaces located in the applicant's parking lot and provisions for a trail head across the applicant' property to provide access to the Land Trust property. Site plans indicate a 5-foot wide trail corridor to the Land Trust property. The site plans indicate that an easement or other right of use will be granted to the Land Trust.**

**At the present time there are no off-site pedestrian facilities/sidewalks in the vicinity of the project site. The Comprehensive Plan does not identify a need for sidewalks in the vicinity of the project site. Current and future development characteristic in the vicinity of the project site do not indicate a need for off-site pedestrian facilities.**

**The Planning Board received a written request dated September 1, 2009 from the Turner Village Preservation Committee that a cross walk be installed to allow for pedestrian traffic to cross Route 4 to reach the project site. Bicycle lanes were also recommended.**

**In supplemental information dated September 23, 2009 the applicant provided a cross walk design for pedestrian movement across Route 4 to the project parking lot.**

**The Town of Turner Road Commissioner provided the Planning Board with a Memo dated September 24, 2009 that it is the policy of Maine DOT to not allow cross walks in areas with a posted speed limit of greater than 35 MPH.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**Provide for pedestrian and bicycle transportation systems in densely developed areas.**

**Condition(s)**

*Prior to granting a building permit the applicant shall provide the Planning Board a copy of the easement granted to the Androscoggin Land Trust for use of the trail head.*

*Should Maine DOT policies relating to crosswalks locations change to allow a crosswalk and/or the posted speed limit is reduced to 35 MPH within a five year time period from the date of any final application approval that applicant shall install a crosswalk meeting Maine DOT specification.*

**Conclusion**

**Based on the above information, information in the record and conditions the Planning Board finds that the proposed development shall provide safe pedestrian access within the project parcel and interconnection with existing facilities on abutting properties.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

### **5. Off-Street Parking**

A use shall not be extended and no structure shall be constructed or enlarged unless sufficient off-street automobile parking space is provided. The location of parking to the side or rear of buildings is encouraged.

Parking areas with more than two parking spaces on all nonresidential uses shall be arranged so that it is not necessary for vehicles to back into the street.

Where the development will abut an existing or potential parking area provisions shall be made for internal vehicular connections.

Required off-street parking for all land uses shall be located on the same lot as the principal building or facility.

The joint use of a parking facility by two or more principal buildings or uses may be approved by the Planning Board where it is clearly demonstrated that said parking facilities would substantially meet the intent of the requirements by reason of variation in the probable time of maximum use by patrons or employees of such establishments.

Access to parking stalls should not be from major interior travel lanes, and shall not be immediately accessible from any public way.

Parking areas shall be designed to permit each motor vehicle to proceed to and from the parking space provided for it without requiring the moving of any other motor vehicles.

Parking aisles should be oriented perpendicular to stores or businesses for easy pedestrian access and visibility.

In paved parking areas, painted stripes shall be used to delineate parking stalls. Stripes should be a minimum of 4 inches in width. Where double lines are used, they should be separated a minimum of 1' 0" on center.

In aisles utilizing diagonal parking, arrows should be painted on the pavement to indicate proper traffic flow.



Bumpers or wheel stops shall be provided where overhang of parked cars might restrict traffic flow on adjacent through roads, restrict pedestrian movement on adjacent walkways, or damage landscape materials.

Off-street parking spaces shall comply with the following standards:

Except as provided below, each parking space shall contain a rectangular area at least eighteen (18) feet long and nine (9) feet wide. Lines demarcating parking spaces may be drawn at various angles in relation to curbs or aisles, so long as the parking spaces so created contain within them the rectangular area required by this section.

Up to twenty (20) percent of required parking spaces may contain a rectangular area of only eight (8) feet in width by fifteen (15) feet in length. If such spaces are provided, they shall be conspicuously designated as reserved for small or compact cars only.

Off-street parking spaces shall be provided to conform with the number required in the following schedule.

## **Findings**

**The applicant proposes 161 off-street parking areas that exceed the number required by the Town of Turner Zoning Ordinance. The parking area will be located in front of the structure.**

**Parking areas are arranged so that it is not necessary for any vehicle to back into a street.**

**The development does not abut an existing or potential parking area.**

**All off-street parking is located on the same lot as the building.**

**No joint use of parking facilities is necessary.**

**Parking stall access are not from major interior travel lanes. No parking stalls are directly accessible from a public street.**

**Parking areas are designed to permit each motor vehicle to proceed to and from the parking space provided for it without requiring the moving of any other motor vehicles.**

**Parking aisles are oriented perpendicular to building.**

**Site plans indicate 4" wide yellow stripes delineating parking stalls.**

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**Diagonal parking is not proposed.**

**Site plan C.5 indicates a 2' vehicular overhang in appropriate locations.**

**Site plans indicate 9' x 19 foot' parking stalls except the nine barrier free stalls are design to comply with ADA standards.**

**The Town of Turner Zoning Ordinance in Section 5.E.5.m requires a minimum of 144 off-street parking spaces. The applicant has proposed 152 standard spaces and nine barrier free spaces.**

### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed development will comply with the standards for off-street parking**

**Vote: Yes            6            No    0            Abstain    0**

### **Standard**

**6. Surface Water.** The proposed activity will not result in undue surface water pollution. In making this determination, the Board shall at least consider the elevation of land above sea level and its relation to the floodplains, the nature of soils and subsoils and, if necessary, their ability to adequately support waste disposal and/or any other approved licensed discharge; the slope of the land and its effect on effluent.

### **Findings**

**The applicant submitted information on Sheet C-2.0 of the application that the portion of the parcel to be developed is not located within a 100-year floodplain. The applicant provided information prepared by Haley & Aldrich, Inc. (geotechnical engineers) and Albert Frick, Certified Soil Scientist relating to soils and subsoils within the project site. Information presented indicates soils are adequate for wastewater disposal.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To maintain and improve the quality of surface waters in Turner.**

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**That all activities adjacent to surface waters will be directed so the cumulative effects of those activities do not bring water quality below state standards as in Title 38, M.R.S.A. Sec. 464.**

### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed development will comply with the standards for surface water.**

**Vote: Yes 6                      No 0                      Abstain 0**

### **Standard**

**7. Conservation, Erosion and Sediment Control.** Erosion of soil and sedimentation of water-courses and water bodies shall be minimized. The following measures shall be included, where applicable, as part of any Site Plan Review and approval.

Stripping of vegetation, regrading or other development shall be done in such a way as to minimize erosion.

Development shall keep cut-fill operations to a minimum and ensure conformity with topography so as to create the least erosion potential and so as to adequately handle surface water runoff.

The disturbed area and the duration of exposure of the disturbed area shall be kept to a practical minimum.

Disturbed soils shall be stabilized as quickly as practical.

Temporary vegetation or mulching shall be used to protect exposed critical areas during development.

The permanent (final) vegetation and mechanical erosion control measure shall be installed as soon as practical on the site.

Until the disturbed area is stabilized, sediment in the runoff water shall be trapped by the use of debris basins, sediment basins, silt traps or other acceptable methods.

Whenever sedimentation is caused by stripping vegetation, regrading or other development, it shall be the responsibility of the developer causing such sedimentation to remove it from all adjoining

surfaces, drainage systems and watercourses and to repair any damage at his or her expense as quickly as possible.

Maintenance of drainage facilities or watercourses originating and completely on private property is the responsibility of the owner to the point of open discharge at the property line or at a communal watercourse within the property.

The standards set forth in the Maine Erosion and Sediment Control Handbook for Construction, Best Management Practices (March 1991 and as amended) shall be employed.

**Findings**

**The applicant submitted and Erosion and Sediment Control Plan as identified on Sheets C-6.0-C-6.3 of the application. In addition Attachment N of the application contained an Erosion and Sedimentation Control Report.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To maintain and improve the quality of surface waters in Turner.**

**That all activities adjacent to surface waters will be directed so the cumulative effects of those activities do not bring water quality below state standards as in Title 38, M.R.S.A. Sec. 464.**

**Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed development will comply with the standards for conservation, erosion and sediment control.**

**Vote: Yes                      6      No      0                      Abstain      0**

**Standard**

**8. Phosphorous Export.** Projects proposed within the direct watershed of a lake or pond listed below shall be designed to limit phosphorus runoff to the levels defined below. The Board shall keep an accurate record of permits issued by watershed using an appropriate record keeping system, and shall review actual development rates and recommend adjustments to the table at five year intervals, subject to a reasonable appropriation by the Town to conduct such a reassessment, or the availability

of adequate State or regional grant programs or technical assistance programs. Adjustments shall be made by amendment of this ordinance and the town’s comprehensive plan.

**Findings**

**The project site is not located within a direct watershed listed as requiring a phosphorous export analysis in the Town of Turner Zoning Ordinance.**

**Conclusion:**

**Based on the above information and information in the record the Planning Board finds that is standard is not applicable.**

**Vote: Yes                      6                      No    0                      Abstain    0**

**Standard**

**9. Site Conditions**

During construction, the site shall be maintained and left each day in a safe and sanitary manner. Site area shall be regularly sprayed with an environmentally safe product to control dust from construction activity.

Developed areas shall be cleared of all stumps, litter, rubbish, brush, weeds, dead and dying trees, roots and debris, and excess or scrap building materials shall be removed or destroyed immediately upon the request and to the satisfaction of the Code Enforcement Officer prior to issuing an occupancy permit.

Changes in elevation. No significant change shall be made in the elevation or contour of any lot or site by the removal of earth to another lot or site other than as shown on an approved Site Review Plan. Any non-permitted removal of greater than 1,000 cu. yds. in a 12-month period must be approved by the Code Enforcement Officer or Planning Board according to Section 3.G.

**Findings**

**On Sheet C-1.1 of the application General Note 8 requires the contractor to collect, transport and dispose all construction and demolition wastes in accordance with Department of Environmental Protection Rules.**

The applicant submitted an erosion and sediment control plan. Section 9.0 of that plan includes provisions to apply dust control measures on a daily basis except on those days where precipitation exceeds 0.25" and to take measures to control fugitive dust emissions.

On Sheet C-1.1 of the application Grading and Drainage Note 5 requires all stumps to be removed for the work limits. Stumps are to be removed from the site or chipped/ground onsite.

**Condition(s)**

*Prior to the issuance of an occupancy permit the Code Enforcement Officer shall find that all litter, rubbish, brush, weeds, dead and dying trees, roots and debris, and excess or scrap building materials have been removed from the site.*

*Any non-permitted removal of greater than 1,000 cubic yards of earth in a 12-month period will be approved by the Code Enforcement Officer or Planning Board according to Section 3.H of the Town of Turner Zoning Ordinance.*

**Conclusion**

Based on the above information, information in the record and conditions the Planning Board finds that the proposed development will comply with the standards for site conditions.

Vote: Yes            6        No        0            Abstain        0

**Standard**

**10. Signs:** All signs shall comply with standards set forth within this Ordinance.

**Findings**

The applicant proposes to place one freestanding sign adjacent to Route 4 and one wall mounted sign on the eastern wall of the building. In addition, traffic related signs will be placed at various location within the project site. The application included the design and location of the proposed signs. Section 4.S of the Town of Tuner Zoning Ordinance contains the standards for signs including location height and size. The Code Enforcement Officer issues permits for signs.

**Condition(s)**

*All signs shall comply with Section 4.S of the Town of Turner Zoning Ordinance.*

## Conclusion

Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for signs.

Vote: Yes            6                    No    0                    Abstain    0

## Standard

**11. Special Features.** Exposed storage areas, exposed machinery installations, service areas, truck loading areas, utility buildings and structures, and similar accessory areas and structures, shall be subject to such setbacks, plantings or other screening methods as shall reasonably be required to prevent their being incompatible with the existing or contemplated environment and the surrounding properties.

## Findings

The applicant proposes a truck unloading dock at the rear of the building, three exposed machinery installations (trash compactor, standby generator and transformer pad) at the rear of the building and two accessory type structures a (30'x 30') water storage building and a (45'x25') area for LP tanks at the rear of the building.

The applicant proposes to erect a 10' high solid wooden fence along the entire westerly side of its property. This fence will screen the site from the residential properties located along Jordan Lane. The applicant proposes to erect an 8' high wood fence at its southwest property line for approximately 30' easterly along Snell Hill Road. Exposed machinery installations, service areas, truck loading areas, utility buildings setbacks range from 100' to 190' from the centerline of the Snell Hill Road. Sheet C-5.0 of the application indicates proposed plantings that include three balsam fir trees 6'-7' in height and three red sunset red maple 2.5"-3" in caliper. Along the Snell Hill Road side of the property in the area of exposed machinery installations, service areas, truck loading areas, utility buildings there is proposed a berm along the Snell Hill Road that is approximately 3' higher than the final grade of the area where exposed machinery installations, service areas, truck loading areas, utility buildings will be located.

In supplemental information dated September 23, 2009 the applicant revised screening of the truck loading and utility areas from the Snell Hill Road. The revised landscape plan includes staggered rows of evergreen trees 6' to 7' feet in height and Red Maples. There will be a 6' high solid wooded fence around the above ground LP tanks. The applicant stated roof top screening

would be provided to screen fluid coolers at the rear of the building. The screening panels would be the same color as the siding on the building.

In supplemental information dated December 21, 2009 the applicant revised the plans to add a building screen to the left corner of the structure to provide further screening of the vendor receiving area and the location of the transformer and generator was moved adjacent to the water supply building.

In supplemental information dated December 21, 2009 and February 10, 2010 the applicant revised the buffering plan on the westerly and northerly portions of the project site. Rather than a 10' high solid wood fence along Jordan Lane the applicant proposed an 8' wooden fence on a 2' berm along Jordan Lane and along the property line north of the stormwater retention pond. Within the area in front of the fence area white cedar, hemlock, white pine and spruce trees ranging in height from 5' to 7' would be planted to screen the wooden fence.

#### Condition(s)

*Exposed machinery installations, truck loading areas, utility buildings and structures, and similar accessory structures screened as shall to prevent them for being incompatible with the existing or contemplated environment and the surrounding properties in all seasons of the year.*

#### Conclusion

Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for special features.

Vote: Yes            6        No    0            Abstain    0

#### Standard

**12. Exterior Lighting.** All exterior lighting shall be designed to encourage energy efficiency, to ensure safe movement of people and vehicles, and to minimize adverse impact on neighboring properties and public ways. Adverse impact is to be judged in terms of hazards to people and vehicle traffic and potential damage to the value of adjacent properties. Lighting shall be arranged to minimize glare and reflection on adjacent properties and the traveling public.

#### Findings

The applicant proposes to install both pole-mounted and building-mounted lighting fixtures. All fixtures will be of full cutoff design. The parking area will be illuminated with five back-back 400-watt high pressure sodium fixtures placed on 30' tall poles. The primary entrance,

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the pharmacy entrance and southwest portion of the site will be illuminated with single 250-watt high pressure sodium fixtures placed on 20' tall poles. The exterior of the structure will have nine wall mounted 70-watt high pressure sodium fixtures placed at 18' above the finished grade. The truck loading area will have one wall mounted 250-watt high pressure sodium fixtures placed 18' above the finished grade. The applicant provided information that lighting will have a Color Rendering Index value of 22. This value is suitable for commercial locations expect downtown commercial areas.

The applicant indicated that pole mounted lights except at the primary entrance will be turned off one hour after store closing.

The applicant provided Site Lighting Photometric Plan dated June 18, 2009 prepared by Hubbell Lighting, Inc. That Plan indicates foot-candles produced by the proposed lighting on and adjacent to the project site. That Plan indicates no new foot-candles on adjacent residential properties.

In supplemental information dated January 11, 2010 that applicant indicated that recessed light cans with 100-watt high pressure sodium light fixtures at 20' intervals would be located beneath the from canopy to provide downward illumination of the side walk.

**Conclusion**

Based on the above information and information in the record the Planning Board finds that the proposed development will comply with the standards for exterior lighting.

Vote: Yes            6        No        0                            Abstain        0

**Standard**

**13. Emergency Vehicle Access.** Provisions shall be made for providing and maintaining convenient and safe emergency vehicle access to all buildings and structures.

**Findings**

The project site is accessed from two points on the Snell Hill Road. There is a designated No Parking/Fire Lane across the entire front of the building. The applicant submitted information that on May 6, 2009 a meeting was held with the Fire and Rescue Department and at that meeting Chief Arsenault indicated that the proposed access to the site was acceptable. The Planning Board has not received any testimony to the contrary.

**Condition(s)**

**Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed development will comply with the standards for emergency vehicle access.**

**Vote: Yes            6        No       0                   Abstain       0**

**Standard**

**14. Municipal Services.** The development will not have an unreasonable adverse impact on the municipal services including municipal roads systems, fire protection, police department, emergency medical unit, solid waste disposal, schools, open spaces, recreational programs and facilities and other municipal services and facilities. The Planning Board shall consider the input from the Town's Department Heads and Superintendent of Schools in making a determination of an unreasonable adverse impact. If the Board makes a finding of unreasonable adverse impacts, the Planning Board, as a condition of approval, may require the applicant to make or pay for required upgraded municipal services necessitated by the development.

**Findings**

**The Planning Board did not receive any written or verbal comments from the Superintendent of Schools. The Fire and Rescue Department attended the public hearing and other meetings. Fire and Rescue provided testimony concerning the operation of the traffic signal during emergency calls and the suitability of the stormwater pond for the placement of a dry hydrant. The applicant submitted information that on May 6, 2009 a meeting was held with the Fire and Rescue Department and at that meeting Chief Arsenault indicated that the proposed access to the site was acceptable. The applicant provided information that solid waste for the project will not be disposed of at the Turner solid waste facility.**

**The applicant was requested to provide information concerning calls for law enforcement assistance at similar stores to that proposed for Tuner. The applicant provided information prepared by the Buxton Police Department for a 19 month period. Other than motor vehicle violations there were nine calls relating to suspicious activity, eight calls or shoplifting, larceny, and liquor law violations, and four calls for medical emergencies. The traffic signal proposed for the Route 4/Snell Hill Road intersection would be the only signal in Androscoggin County located in a community without a local police department. During any periods of signal traffic control would be required.**

**The Planning Board received a letter dated July 15, 2009 from the Road Commissioner that stated that it is the Road Commissioner recommendation that the required improvements as outlined in the Traffic Impact Study Proposed Hannaford Supermarket Turner, Maine have no financial impact to the Town of Turner for the installation or maintenance of any devices. The Road Commissioner also indicated looking now or to the future would also include a close study of Urban Compact Zones and the cost of maintenance responsibilities and that they also have no financial impact to the Town of Turner.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To assure that new growth and development does not exceed the capacity of public safety services.**

**That future growth does not over burden the town's ability to provide high quality municipal services at reasonable cost.**

**Condition(s)**

*It shall be the responsibility of the applicant to pay the cost for operation, maintenance and repair of the traffic signal at the Route 4/Snell Hill Road intersection.*

**Conclusion**

**Based on the above information, information in the record and condition the Planning Board finds that the proposed project will not have an unreasonable adverse impact on municipal services including municipal roads systems, fire protection, police department, emergency medical unit, solid waste disposal, schools, open spaces, recreational programs and facilities and other municipal services and facilities.**

**Vote: Yes            6        No       0                   Abstain       0**

**Standard**

**15. Water Supply.** The development has sufficient water available for the intended use. When the location of the water supply source will be a public water supply as defined in Title 22 M.R.S.A. Section 2601, its location shall not restrict the location of a subsurface sewage disposal system on adjacent parcels. If subsurface sewage disposal will be restricted, the applicant shall obtain an easement.

## **Findings**

The applicant provided information that the project will use approximately 3,000 gallons of water per day. In addition, the applicant proposed to construct a 40,000-gallon fire suppression water storage tank. The applicant installed a well on adjacent property that is a bedrock well approximately 340' deep. A 48-hour pump test and recovery test was conducted by Goodwin Well and Water. The well was pumped at 15 gallons per minute or 21,000 gallon per day. The pump test drew water down 150' from the ground surface and the well recovered after 8 hours of the stopping of the pump test.

The water supply well is considered a non-transient, non-community water supply well by the Maine Department of Human Services and defined in Title 22 M.R.S.A. 2601. Sheet C.2. of the application indicated a 300 foot radius water supply well setback area. This area is located on land owned by the applicant, Androscoggin Land Trust and State of Maine.

In supplemental information dated September 24, 2009 the applicant provided an estimate of the magnitude of the draw down that could occur in nearby wells after the Hannaford well is operational. Haley & Aldrich constructed a model using MODFLOW 2000 with the processor Visual MODFLOW Pro v.4.3. The model input variables included a pumping rate of 2.1 gpm, extent of fracture zone, the hydraulic conductivity of the bedrock fracture zone and width of the bedrock fracture zone. Haley & Aldrich concluded that the Hannaford well will not impact the well yield or water quality of nearby bedrock or dug wells.

The applicant provided a letter dated October 6, 2009 from the Maine Center for Disease Control and Prevention granting conditional final approval for a new water supply well. Conditions of approval included the collection of a combined radium sample, satisfactory results for the Carbamate test pending analysis and copies and plans for proposed chlorination & de-chlorination treatment.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To protect the quality and quantity of ground water resources for current and future use.**

## **Condition(s)**

*Prior to granting a building permit the applicant shall provide the Planning Board with easements that restrict subsurface sewage disposal within the well head protection area on land not owned by the applicant.*

## Conclusion

**Based on the above information, information in the record and the condition the Planning Board finds that the proposed development will comply with the standards for water supply.**

**Vote: Yes 6                      No 0                      Abstain 0**

## Standard

**16. Ground Water.** The proposed development shall not result in undue effect of the quality or quantity of ground water. In making this determination, the Board shall consider the location of aquifers and aquifer recharge areas, the nature of the proposed development and its potential threat to ground water resources. The Board may place conditions upon an application to minimize potential impacts to the Town's ground water resources.

The development will not result in the existing ground water quality becoming inferior to the physical, biological, chemical, and radiological levels for raw and untreated drinking water supply sources specified in the Maine State Drinking Water Regulations, pursuant to 22 M.R.S.A., Section 601. If the existing ground water quality is inferior to the State Drinking Water Regulations, the development will not degrade the water quality any further.

For above ground tanks used for storage of fuels, hazardous substances, chemicals, industrial wastes and flammable or combustible liquids or other potentially harmful raw materials, an impermeable diked area shall be provided; the diked area must be sized to contain 110 percent of the volume of the largest tank; roofed to prevent accumulation of rainwater in the diked area and shall be properly vented. There shall be no drains in the facility. All concrete, whether walls or pads, shall be reinforced concrete and shall be designed by a Professional Engineer Registered in the State of Maine when required by the Planning Board.

All above or below ground storage tank(s) used for the storage of fuels, hazardous substances, chemicals, industrial wastes and flammable or combustible liquids shall be designed and installed in accordance with all applicable rules or standards set by the State of Maine, Maine State Fire Marshal's Office or the Maine Department of Environmental Protection.

## Findings

**The Sand and Gravel Aquifer Map prepared by the Maine Geological Survey labeled Map 16 and identified as Open-File Report No. 85-82d, Plate 3 of 5 indicates that the project site is located on a sand and gravel aquifer (10-50 gallons per minute).**

Potential threats to groundwater quality include the subsurface wastewater disposal system, and spills of hazardous or petroleum products in the structure and on the project site. The quantity of ground water could be altered by the 3.2 acres of impervious area changing recharge characteristics.

The applicant provided information prepared by Haley & Aldrich relating to geologic site conditions including if the site was covered by a sand and gravel aquifer. The applicant reported that more than 30 exploration holes were drilled on site that indicated that portions of the site are underlain by alluvial or marine deposits consisting of silty sand. The surficial alluvial deposits are underlain by marine deposits consisting of stiff to soft clay. The Planning Board received testimony from Haley & Aldrich that surficial geology of the site does not meet the criteria for significant sand and gravel aquifer.

The applicant retained R.W. Gillespie & Associates, Inc. to prepare a Septic Effluent Rate Analysis (nitrate loading). The analysis considered nitrate impacts on groundwater quality. Gillespie used a modified Domenico and Palciauskas model to estimate the maximum contamination level down gradient from leach fields. Gillespie conclude that designed to State of Maine standards, the wastewater disposal system would not adversely affect any existing private or public drinking water supplies.

The Planning Board received testimony concerning nitrate plume impacts on ground water from the proposed leach field and the possibility of impacts on nearby water wells. Commenters were concerned about impacts on nearby water well quality and quantity as the result of the wastewater disposal system and water demands by the proposed project.

In supplemental information September 23, 2009 the applicant addressed groundwater elevations and flow directions, leach field mounding and groundwater contamination. The applicant provided a letter dated October 16, 2009 from the Maine Center for Disease Control and Prevention for the approval of the proposed subsurface waste disposal system.

In supplemental information dated September 23, 2009, October 16, 2009 and November 3, 2009 the applicant provided information relating to the types of hazardous material on site and the procedures to respond to spills of such materials in store and outside of the store.

In supplemental information dated September 24, 2009 the applicant provided an estimate of the magnitude of drawdown that could occur in nearby wells after the Hannaford well is operational. Haley & Aldrich constructed a model using MODFLOW 2000 with the processor Visual MODFLOW Pro v.4.3. The model input variables included a pumping rate of 2.1 gpm, extent of fracture zone, the hydraulic conductivity of the bedrock fracture zone and width of

the bedrock fracture zone. Haley & Aldrich concluded that the Hannaford well will not impact the well yield or water quality of nearby bedrock or dug wells.

In supplementary information the applicant provided a letter dated October 13, 2009 from R.W. Gillespie & Associates relating to the existence of a significant sand and gravel aquifer on the project site. Gillespie reported that the combination of low hydraulic conductivity and thin saturated thickness indicate yields of 10 GPM are unlikely and are unsupportable for extended durations for all but a small area at the southeastern extremities of the site.

In supplemental information dated October 14, 2009 and November 3, 2009 the applicant provided the effects of the project on the hydrology of undisturbed wetlands. Stantic Consulting stated that while the proposed development will slightly alter the hydrology of wetland it should not affect the overall species composition and functions and values.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To protect the quality and quantity of ground water resources for current and future use.**

**Condition(s)**

*On annual basis Hannaford shall submit to the Town of Turner Code Enforcement Officer copies of Septic Tank Pumping/Inspection Report (Form # 6) and Annual Septic Tank System Summary Report (Form #7).*

*Prior to any site disturbance the applicant shall provide to the Planning Board a predevelopment evaluation of the 12 wells of the abutters.*

**Conclusion**

Based on the above information, information in the record and the conditions the Planning Board finds that the proposed development will comply with the standards for groundwater supply.

**Vote: Yes 6                      No 0                      Abstain 0**

**Standard**

**17. Air Emissions.** No emission of dust, ash, smoke or other particulate matter or gases and chemicals shall be allowed which can cause damage to human or animal health, vegetation or

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property by reason of concentration or toxicity, which can cause soiling beyond the property boundaries, or which fail to meet or cannot meet the standards set by the Maine Department of Environmental Protection.

### **Findings**

**The applicant provided information that the project does not require an air emissions license issued by the Maine Department of Environmental Protection. During the construction phase dust may be created. The applicant submitted an erosion and sediment control plan. Section 9.0 of that plan includes provisions to apply dust control measures on a daily basis except on those days where precipitation exceeds 0.25" and to take measures to control fugitive dust emissions.**

### **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed development will comply with the standards for air emissions.**

**Vote: Yes            6            No    0            Abstain    0**

### **Standard**

**18. Odor Control.** The proposed development shall not produce offensive or harmful odors perceptible beyond their lot lines either at ground or habitable elevation. For the purpose of this subsection, when land of the applicant is divided by a public way, the lot line shall not be considered to be the edge of the right-of-way.

### **Findings**

**The applicant proposed no activities or processes that normally produce offensive or harmful odors. The applicant stated that a self-enclosed compactor located to the rear of the building is used to contain solid waste and there is limited odor generated by the short term storage and handling of solid waste on the site.**

### **Condition(s)**

***Should the Code Enforcement Officer receive creditable complaints relating to odor from the self-contained compactor and upon his investigation determines that offensive odors exist the applicant shall be required to alter the time frames for removal of solid waste from the compactor to minimize odor.***



## Conclusion

**Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for odor control.**

**Vote: Yes            6                    No    0                    Abstain    0**

## Standard

**19. Noise.** The proposed development shall not raise noise levels to the extent that abutting or nearby residents are adversely affected.

The maximum permissible sound pressure level of any continuous, regular or frequent or intermittent source of sound produced by any activity shall be limited by the time period and land use which it abuts listed below. Sound levels shall be measured at least 4 feet above ground at the property boundary of the source.

Sound Pressure Level Limits Using the Sound Equivalent Level of One Minute (Leq 1) (measured in dB(a) scale)

	7 a.m.10 p.m.	10 p.m.-7 a.m.
Residential	55	45
Commercial	65	55
Industrial	70	60

Noise shall be measured by a meter set on the A-weighted response scale, fast response. The meter shall meet the American National Standards Institute (ANSI 81 4-1961) "American Standard Specification for General Purpose Sound Level Meters."

## Findings

**Stationary equipment associated with the project that will generate noise at ground level includes a compressor room located at the southwest corner of the building, self-contained compactor and emergency generator. On the roof of the building will be located five exhaust fans, six condensing units and four fluid cooler units. Mobile noise producers will include delivery trucks, refrigeration compressors and snow removal equipment.**

**The applicant retained Cavanaugh Tocci Associates to prepare an Environmental Sound Evaluation. In a report dated June 17, 2009 Cavanaugh Tocci provided data of background sound levels at four locations adjacent to the project site. Cavanaugh Tocci provided**

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additional information in a letter dated July 21, 2009. Sound control measures for facility mechanical equipment identified by Cavanaugh Tocci include sound control attenuating enclosure for the compressor room at the southwest corner of the building, sound control attenuating enclosure for the emergency generator, the use of low speed fans (550 RPM) for rooftop fluid cooler racks and careful placement of rooftop condensers to obtain shielding to sensitive receptor levels.

Cavanaugh Tocci employed CadnaA sound modeling software to estimate sound levels that would be produced by the project. The model predicted that “worst case” facility sound levels to range from 36 dBA and 44 dBA at various abutting property lines. The applicant did not provide data on ambient sound levels.

Adjacent residential property owners may perceive an increase in noise levels.

**Condition(s)**

*Within six months, or other time period determined to be appropriate, from the date of opening the Town at the expense of the applicant shall conduct an environmental sound evaluation to determine the compliance with this standard.*

*The Code Enforcement Officer shall monitor and enforce the standards for sound pressure limits contain in Section 5.E.19 of the Town of Turner Zoning Ordinance.*

**Conclusion**

Based on the above information, information in the record and conditions the Planning Board finds that the proposed development will comply with the standards for noise control.

Vote: Yes            6                    No    0                    Abstain    0

**Standard**

**20. Sewage Disposal.** The development shall provide for a suitable sewage disposal.

All individual on-site systems will be designed by a licensed soil evaluate in full compliance with the Maine Subsurface Wastewater Disposal Rules.

The Planning Board may require an analysis and evaluation including nitrate-nitrogen concentrations of the impacts of the subsurface sewage disposal system on ground water. The Planning Board shall

base its determination for the need for an analysis and evaluation on density, designed flows and nature of wastewater.

## **Findings**

The applicant proposes to install a subsurface wastewater disposal system. Soils suitability for subsurface wastewater disposal was determined by Albert Frick, CSS# 66, LSE #163. The engineered system was designed by Joseph Laverriere, P.E. The applicant indicated that the design utilized soil classifications and limiting as reported by Frick with groundwater mounding and nitrate analysis prepared by R.W. Gillespie & Associates, Inc. Prior to wastewater reaching the disposal field waste will be pretreated through a grease trap, septic tanks, equalization tank, Bioclere tanks and settling tank.

Frick identified areas of soil suitable for subsurface wastewater disposal. Due to the limiting factor being within 24 inches in the area of the proposed disposal fields the applicant identified a second location for a replacement system.

Based on Sheet C-4.0 of the application setback distances for the components of the sewage disposal system comply with the requirements of Table 700.2 as contained in the State of Maine Subsurface Wastewater Disposal Rules.

The applicant retained R.W. Gillespie & Associates, Inc. to prepare a Septic Effluent Fate Analysis (nitrate loading). The analysis considered nitrate impacts on groundwater quality. Gillespie used a modified Domenico and Palciauskas model to estimate the maximum contamination level down gradient from leach fields. Gillespie conclude that designed to State of Maine standards, the wastewater disposal system would not adversely affect any existing private or public drinking water supplies.

In supplemental information dated September 23, 2009 and November 3, 2009 the applicant provided additional information relating to wastewater effluent strength, performance of wastewater pretreatment, fill requirements beneath the disposal field, groundwater mounding and nitrates.

The applicant provided a letter dated October 16, 2009 from the Maine Center for Disease Control and Prevention for the approval of the proposed subsurface waste disposal system.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

To protect the quality and quantity of ground water resources for current and future use.

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**That all activities over significant aquifers be directed so that the cumulative effect of those activities do not bring water quality below state drinking water standards.**

**Condition(s)**

*The reserved areas for the second wastewater disposal areas shall not be altered in any way that makes the area unsuitable for a wastewater disposal system, unless an alternate site is designated and approved by the Planning Board*

*On annual basis Hannaford shall submit to the Town of Turner Code Enforcement Officer copies of Septic Tank Pumping/Inspection Report (Form # 6) and Annual Septic Tank System Summary Report (Form #7).*

**Conclusion**

**Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for sewage disposal.**

**Vote: Yes 6                      No    0                      Abstain    0**

**Standard**

**21. Waste Disposal.** The proposed development will provide for adequate disposal of solid wastes and hazardous wastes.

All solid waste will be disposed of at a licensed disposal facility having adequate capacity to accept the project's wastes.

All hazardous waste will be disposed of at a licensed hazardous waste disposal facility and evidence of a contractual arrangement with the facility shall be submitted.

**Findings**

**The applicant will contract with Casella Waste Systems, Inc. for the hauling and disposal of all solid waste. The applicant stated that the project will generate approximately 15 tons of non-recyclable solid waste per month. Solid waste and recyclables will not be disposed at the Town of Turner solid waste facility but at another licensed facility. Sheet C-1.1 General Note 8 of the application requires the contractor to collect, transport and dispose all construction and demolition wastes in accordance with Department of Environmental Protection Rules. The applicant provided no information if the project would generate hazardous waste products.**

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**In supplemental information date November 3, 2009 the applicant provided information that floor stripping chemicals will be disposed of by Environmental Projects, Inc. of Auburn, Maine.**

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**That future growth does not over burden the town's ability to provide high quality municipal services at reasonable cost.**

### **Conclusion**

**Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for waste disposal.**

**Vote: Yes 6                      No 0                      Abstain 0**

### **Standard**

**22. Buffer Areas.** No industrial or commercial buildings or uses shall be established in, or adjacent to, a residential use, or an existing agricultural use unless a landscaped buffer strip is provided to create a visual screen between the uses. Where no natural vegetation can be maintained or due to varying site conditions, the landscaping screen may consist of fences, walls, tree plantings, hedges or combinations thereof. The buffering shall be sufficient to minimize the impacts of any kind of potential use such as: loading and unloading operations, outdoor storage areas, vehicle parking, mineral extraction, waste collection and disposal areas. Where a potential safety hazard to small children would exist, physical screening or barriers shall be used to deter entry to such premises. The buffer areas shall be maintained and vegetation replaced to insure continuous year-round screening.

### **Findings**

**Residential property adjacent to the site include three single family homes to the west, two single family homes to the south, on the opposite side of the Snell Hill Road and one single family home to the north. There is no existing natural vegetation that creates a visual screen between residential properties along Jordan Lane and the project site. Instead of creating a buffer area of living materials the applicant initially proposed to erect a 10' high solid wooden fence along the entire westerly side of the property. This fence will screen the site from the residential properties located along Jordan Lane. The applicant proposes to erect an 8' high wood fence at its southwest property line for approximately 30' easterly along Snell Hill Road. Sheet C-5.0 of the application indicates the proposed plantings that include three balsam fir trees 6'-7' in height and three red sunset red maple 2.5"-3" in caliber along the Snell Hill Road**

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side of the property in the area of exposed machinery installations, service areas, truck loading areas, utility buildings. There is proposed a berm along the Snell Hill Road that is approximately three feet higher than the final grade of the area where exposed machinery installations, service areas, truck loading areas, utility buildings will be located. The applicant proposed no landscaped buffer to provide a visual screen between the project site and the residential structure to the north.

In supplemental information dated September 23, 2009 the applicant revised screening of the truck loading and utility areas from the Snell Hill Road. The revised landscape plan includes staggered rows of evergreen trees 6' to 7' feet in height and Red Maples. There will be a 6' high solid wooden fence around the above ground LP tanks. The applicant stated roof top screening would be provided to screen fluid coolers at the rear of the building. The screening panels would be the same color as the siding on the building.

In supplemental information dated December 21, 2009 and February 10, 2010 the applicant revised the buffering plan on the westerly and northerly portions of the project site. Rather than a 10' high solid wood fence along Jordan Lane the applicant proposed an 8' wooden fence on a 2' berm along Jordan Lane and along the property line north of the stormwater retention pond. Within the area in front of the fence area white cedar, hemlock, white pine and spruce trees ranging in height from 5' to 7' would be planted to screen the wooden fence.

In addition a building screen was added to the left corner of the structure to provide further screening of the vendor receiving area and the location of the transformer and generator was moved adjacent to the water supply building.

**Condition(s)**

*The project owner shall be responsible for maintaining all buffers in a healthy condition as to maintain them for the purposes designed.*

**Conclusion**

Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for buffer areas.

Vote: Yes            5        No            1        Abstain    0

**Standard**

**23. Financial and Technical Capacity.** The applicant has adequate financial and technical capacity to meet these standards.

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## Findings

The applicant indicated project cost to be approximately \$6.3 million. In the application dated June 24, 2009 the applicant stated that Hannaford Bros. has adequate funds to complete and operate the project. An excerpt from the 2008 Annual Report of Delhaize Group was provided. The applicant provided supplemental information in a letter dated July 23, 2009 from Delhaize America. That letter stated that Hannaford Bros. has the financial resources to undertake and complete the project. Delhaize America allocates Hannaford Bros. funds to complete a number of large projects each year and funds may not be specifically allocated until a project is fully permitted. Hannaford Bros. operates and maintains over 140 supermarkets in the northeastern United States.

The applicant retained the services of a number of consulting firms to prepare the application. They include DeLuca-Hoffman Associates (civil engineering and landscape design), Gorrill-Palmer Consulting Engineers (traffic engineering), Owen Haskell, Inc. (surveying), Haley & Aldrich, Inc. (geotechnical and water supply), Stantec Consulting, Inc. (wetlands), Albert Frick Associates (soils), R.W. Gillespie & Associates (hydrogeologic) and Cavanaugh Tocci Associates (noise).

## Condition(s)

*Prior to any onsite or off site construction that does or does not require a permit issued by the Town of Turner the applicant shall provide a written statement, acceptable by the Planning Board, that a specific dollar amount has been dedicated to complete the project as approved.*

## Conclusion

Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for adequate financial and technical capacity.

Vote: Yes            6        No        0            Abstain        0

## Standard

**24. Comprehensive Plan.** The proposed activity is in conformance with the comprehensive plan.

## Findings

Under each review standard relevant comprehensive plan statement(s) related that specific standard were identified.

## Conclusion

Based on the above information, information in the record including that the Planning Board considered each relevant comprehensive plan statement pertaining to the review standard and the right of both the applicant and abutting property owners the Planning Board finds that the proposed development will comply with the standard for conformance with the comprehensive plan.

Vote: Yes            5      No            1      Abstain      0

## Standard

**25. State and Federal Permits.** Prior to issuance of a Building Permit by the Code Enforcement Officer of any project which has received Site Plan Review approval, the applicant shall provide proof to the Code Enforcement Officer that all necessary permits required by the Natural Resource Protection Act, Site Location of Development Act and Section 404 of the Federal Water Pollution Control Act have been obtained. Such proof of permits shall be placed in the Planning Board application record.

## Findings

The proposed project requires permits under the Natural Resource Protection Act, Site Location of Development Act, Section 404 of Clean Water Act, Traffic Movement Permit Law, Maine State Plumbing Code, Subsurface Wastewater Disposal Rules and Safe Drinking Water Act.

As of February 10, 2010 the applicant has submitted applicable approvals for traffic movement, drinking water, subsurface wastewater disposal, Natural Resource Protection Act, and Site Location of Development Act.

## Condition(s)

*The Code Enforcement Officer shall not issue any required permits until the applicant provides copies of all applicable State permit approvals. Should the project, as may be approved by the Planning Board, require changes as the result of such State permits the applicant shall submit such changes for review and approval by the Planning Board.*

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## **Conclusion**

**Based on the above information, information in the record and condition the Planning Board finds that the proposed development will comply with the standards for State and Federal permits.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

### **26. Specific Standard/Sand and Gravel Pits**

## **Conclusion**

**Based on the above information and information in the record the Planning Board finds that the proposed development is not a sand and gravel pit and thus this standard is not applicable.**

**Vote: Yes 6                      No 0                      Abstain 0**

## **Standard**

### **27. Specific Standard/Groundwater Protection**

In addition to the standards contained in Section 5. E. 16., the following standards shall be utilized by the Planning Board for reviewing development applications located on a mapped sand and gravel aquifer.

The boundaries of sand and gravel aquifers shall be as delineated on the Sand and Gravel Aquifer Map prepared by the Maine Geological Survey labeled Map 16 and identified as Open-File Report No. 85-82d, Plate 3 of 5.

When the boundaries of the sand and gravel aquifer are disputed due to lack of sufficient detail on available maps, the applicant or agent may submit hydrogeologic evidence prepared by a geologist certified in the State of Maine which identifies actual field locations of the aquifer boundaries within the project area. The Planning Board may require actual field identification if they believe the Maine Geological Survey Maps are incorrect.

**Hydrogeologic Study.** Based on the size, location, surrounding uses or other characteristics of the proposed use or site to determine compliance with the requirements of this section and the water quality criteria of the Site Plan Review, the Planning Board may require submittal by the

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applicant of a hydro geologic impact study. The impact study shall be prepared by a State of Maine Certified Geologist with experience in hydrogeology. The study shall contain the following components unless waived by a specific vote of the Board.

A map showing: (1) soil types; (2) surficial geology on the property; (3) the recommended sites for individual subsurface wastewater disposal systems and wells in the development; and (4) direction of groundwater flow. (The Planning Board expects the detail of this study to vary with the intensity of the development.)

The relationship of surface drainage conditions to groundwater conditions.

Documentation of existing groundwater quality for the site.

A nitrate nitrogen analysis or other contaminant analysis as applicable including calculation of levels of the property line(s) and well(s) on the property.

A statement indicating the potential sources of contamination to groundwater from the proposed use and recommendations on the best technologies to reduce the risks.

For water intensive uses, analysis of the effects of aquifer drawdown on the quantity and quality of water available for other water supplies or potential water supplies.

The Planning Board may require installation and regular sampling of water quality monitoring wells for any use or proposed use deemed to be a significant actual or potential source of pollutants or excessive drawdown. The number, location and depth of monitoring wells shall be determined as part of the hydrogeologic study, and wells shall be installed and sampled in accordance with "Guidelines for Monitoring Well Installation and Sampling" (Tolman, Maine Geologic Survey, 1983). Water quality sample results from monitoring wells shall be submitted to the Code Enforcement Officer with evidence showing that contaminant concentrations meet the performance standard for pollution levels.

A list of assumptions made to produce the required information.

### **Conditions/Standards**

In addition to the standards contained in Section 5.D. 16, the following standards shall be met:

No use including home occupations shall dispose of other than normal domestic wastewater on-site without approval of the permit granting authority. Disposal of wastewater shall be in

strict compliance with the Maine Subsurface Wastewater Disposal Rules and other relevant State and local laws, rules and ordinances.

Indoor use or storage facilities where hazardous materials, wastes or other liquids with the potential to threatened groundwater quality are used or stored shall be provided with containment which is impervious to the material being stored and have the capacity to contain 10 percent of total volume of the containers, or 110 percent of the volume of the largest container, whichever is larger.

Petroleum and Other Hazardous Material or Waste Transfer. A Spill Control and Countermeasure Plan shall be submitted and approved by the Planning Board.

In those areas identified as sand and gravel aquifers as defined in Section 5.F.2.b. the following land uses are prohibited unless the Planning Board finds that no discharges will occur such that water quality at the property line will fall below State Drinking Water Standards and all provisions of this ordinance are met.

- dry cleaners
- photo processors
- printers
- auto washes
- Laundromats
- meat packers/slaughter houses
- salt piles/sand-salt piles
- wood preservers
- leather and leather products
- electrical equipment manufacturers
- plastic/fiberglass fabricating
- chemical reclamation facilities
- industrial waste disposal/impoundment areas
- landfills/dumps/transfer stations
- junk and salvage yards
- graveyards
- chemical manufacturing

#### **Findings:**

**The Sand and Gravel Aquifer Map prepared by the Maine Geological Survey labeled Map 16 and identified as Open-File Report No. 85-82d, Plate 3 of 5 indicates that the project site is located on a sand and gravel aquifer (10-50 gallons per minute). Potential threats to groundwater quality include the subsurface wastewater disposal system, and spills of hazardous or petroleum products in the structure and on the project site. The quantity**

of groundwater could be altered by the 3.2 acres of impervious area changing recharge characteristics.

The applicant provided information prepared by Haley & Aldrich relating to geologic site conditions including if the site was covered by a sand and gravel aquifer. The applicant reported that more than 30 exploration holes were drilled on site that indicated that portions of the site are underlain by alluvial or marine deposits consisting of silty sand. The surficial alluvial deposits are underlain by marine deposits consisting of stiff to soft clay. The Planning Board received testimony from Haley & Aldrich that surficial geology of the site does not meet the criteria for significant sand and gravel aquifer. In supplementary information the applicant provided a letter dated October 13, 2009 from R. W. Gillespie & Associates relating to the existence of a significant sand and gravel aquifer on the project site. Gillespie reported that the combination of low hydraulic conductivity and thin saturated thickness indicate yields of 10 GPM are unlikely and are unsupportable for extended durations for all but a small area at the southeastern extremities of the site.

The applicant retained R.W. Gillespie & Associates, Inc. to prepare a Septic Effluent Fate Analysis (nitrate loading). The analysis considered nitrate impacts on groundwater quality. Gillespie used a modified Domenico and Palciauskas model to estimate the maximum contamination level down gradient from leach fields. Gillespie conclude that designed to State of Maine standards, the wastewater disposal system would not adversely affect any existing private or public drinking water supplies. The proposed subsurface wastewater disposal system will dispose of other than normal domestic wastewater. In supplemental information September 23, 2009 the applicant addressed groundwater elevations and flow directions, leach field mounding and groundwater contamination. The applicant provided a letter dated October 16, 2009 from the Maine Center for Disease Control and Prevention for the approval of the proposed subsurface waste disposal system.

In supplemental information dated September 23, 2009 and October 16, 2009 the applicant provided information relating to the types of hazardous material on site and the procedures to respond to spills of such materials in store and outside of the store.

In supplemental information dated September 24, 2009 the applicant provided an estimate of the magnitude of drawdown that could occur in nearby wells after the Hannaford well is operational. Haley & Aldrich constructed a model using MODFLOW 2000 with the processor Visual MODFLOW Pro v.4.3. The model input variables included a pumping rate of 2.1 gpm, extent of fracture zone, the hydraulic conductivity of the bedrock fracture zone and width of the bedrock fracture zone. Haley & Aldrich concluded that the Hannaford well will not impact the well yield or water quality of nearby bedrock or dug wells.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

**To protect the quality and quantity of groundwater resources for current and future use.**

**Condition(s)**

*On annual basis Hannaford shall submit to the Town of Turner Code Enforcement Officer copies of Septic Tank Pumping/Inspection Report (Form # 6) and Annual Septic Tank System Summary Report (Form #7).*

**Conclusion**

**Based on the above information, information in the record and condition(s) the Planning Board finds that this standard will be met. In voting to find that this standard will be met the Planning Board also approves the subsurface wastewater disposal system that will dispose of other than normal domestic wastewater.**

**Vote: Yes            6      No            0      Abstain    0**

**Street Construction Standards/ Section VIII Town of Turner Maine Street Construction Ordinance**

**Section III.B of the Town of Turner, Maine Street Construction Ordinance requires that alterations, widening and improvements to roads be consistent Section VII, Street Construction Standards. The applicant proposes to reconstruct approximately 500' of the Snell Hill Road to serve the project. The Snell Hill Road is a 20' wide paved town road. Based on site plans submitted by the applicant it has a right-of-way of 33'. The applicant proposes to construct turning lanes and widen portions of the Snell Hill Road. The portions to be improved will meet the standards of Section VII. The applicant has verbally stated an interest in deeding to the Town property to extend the right-of-way to the north of the current right-of-way of the Snell Hill Road.**

**Condition(s)**

*At least five days prior to commencing reconstruction of Snell Hill Road construction the applicant shall provide the Town of Turner with the performance guarantee in the type and the amount approved by the Road Commissioner.*

*At least five days prior to commencing reconstruction of Snell Hill Road the applicant shall provide the Town of Turner with a check for the amount of 2% of the estimated cost road construction and improvements to pay for the cost of inspection.*

*It shall be the responsibility of the applicant to maintain any road and drainage improvements not located in the existing right- of- way for the Snell Hill Road until such time that any additional Snell Hill Road right-of-way may be accepted by the Town of Turner.*

## **Conclusion**

**Based on the above information, information in the record and conditions the Planning Board finds that the proposed development will comply with the standards of the Street Construction Ordinance.**

**Vote: Yes            6        No    0            Abstain**

Based upon the foregoing Findings and Conclusions, the Planning Board finds that the applicant has satisfied each of the review criteria for approval and therefore the Planning Board approves the Site Plan Review Application of Hannaford Bros. Co. for a Hannaford Supermarket and Pharmacy on Lots 21, 26 and 27, as depicted on Tax Map 40, subject to the following conditions:

## **Conditions of Approval**

- 1.        The project is carried out as approved and as set forth in the application, site plans and verbal testimony.*
- 2.        If any of the supporting data or representations for which this approval is based changes in any way or is found to be incorrect and/or inaccurate, the applicant shall request in writing from the Town of Turner Planning Board a decision of what impacts those changes will have on the approval. The applicant will then be required to submit those changes for review and approval and mitigation as a result of those changes may be required at the expense of the applicant.*
- 3.        Exposed machinery installations, truck loading areas, utility buildings and structures, and similar accessory structures shall be screened as to prevent them from being incompatible with the existing or contemplated environment and the surrounding properties in all seasons of the year.*
- 4.        Within a time period no sooner than six months and no later than 12 months from the date of store opening, the applicant shall conduct traffic counts at the intersection of*

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*Main Street and Route 117. Should such traffic counts indicate that the intersection functions at a Level of Service of less than C due to increased traffic as the result of the overall Hannaford project, the Planning Board reserves the right to reopen the application for the reconsideration of this standard.*

5. *Prior to granting a building permit the applicant shall provide the Planning Board a copy of the easement granted to the Androscoggin Land Trust for use of the trail head.*
6. *Should Maine DOT policies relating to crosswalks locations change to allow a crosswalk and/or the posted speed limit is reduced to 35 MPH within a five year time period from the date of any final application approval that applicant shall install a crosswalk meeting Maine DOT specification.*
7. *Prior to the issuance of an occupancy permit the Code Enforcement Officer shall find that all litter, rubbish, brush, weeds, dead and dying trees, roots and debris, and excess or scrap building materials have been removed from the site.*
8. *Any non-permitted removal of greater than 1,000 cubic yards of earth in a 12-month period will be approved by the Code Enforcement Officer or Planning Board according to Section 3.H of the Town of Turner Zoning Ordinance.*
9. *All signs shall comply with Section 4.S of the Town of Turner Zoning Ordinance.*
10. *It shall be the responsibility of the applicant to pay the cost for operation, maintenance and repair of the traffic signal at the Route 4/Snell Hill Road intersection.*
11. *Prior to granting a building permit the applicant shall provide the Planning Board with easements that restrict subsurface sewage disposal within the well head protection area on land not owned by the applicant.*
12. *On annual basis Hannaford shall submit to the Town of Turner Code Enforcement Officer copies of Septic Tank Pumping/Inspection Report (Form # 6) and Annual Septic Tank System Summary Report (Form #7).*
13. *Prior to any site disturbance the applicant shall provide to the Planning Board a predevelopment evaluation of the 12 wells of the abutters.*
14. *Should the Code Enforcement Officer receive creditable complaints relating to odor from the self-contained compactor and upon his investigation determines that offensive odors*

*exist the applicant shall be required to alter the time frames for removal of solid waste from the compactor to minimize odor.*

- 15. Within six months, or other time period determined to be appropriate, from the date of opening the Town at the expense of the applicant shall conduct an environmental sound evaluation to determine the compliance with this standard.*
- 16. The Code Enforcement Officer shall monitor and enforce the standards for sound pressure limits contain in Section 5.E.19 of the Town of Turner Zoning Ordinance.*
- 17. The reserved areas for the second wastewater disposal areas shall not be altered in any way that makes the area unsuitable for a wastewater disposal system, unless an alternate site is designated and approved by the Planning Board*
- 18. The project owner shall be responsible for maintaining all buffers in a healthy condition as to maintain them for the purposes designed.*
- 19. Prior to any onsite or off site construction that does or does not require a permit issued by the Town of Turner the applicant shall provide a written statement, acceptable by the Planning Board, that a specific dollar amount has been dedicated to complete the project as approved.*
- 20. The Code Enforcement Officer shall not issue any required permits until the applicant provides copies of all applicable State permit approvals. Should the project, as may be approved by the Planning Board, require changes as the result of such State permits the applicant shall submit such changes for review and approval by the Planning Board.*
- 21. At least five days prior to commencing reconstruction of Snell Hill Road construction the applicant shall provide the Town of Turner with the performance guarantee in the type and the amount approved by the Road Commissioner.*
- 22. At least five days prior to commencing reconstruction of Snell Hill Road the applicant shall provide the Town of Turner with a check for the amount of 2% of the estimated cost road construction and improvements to pay for the cost of inspection.*
- 23. It shall be the responsibility of the applicant to maintain any road and drainage improvements not located in the existing right- of- way for the Snell Hill Road until such time that any additional Snell Hill Road right-of-way may be accepted by the Town of Turner.*



**Vote: Yes            5            No            1    Abstain    0**

Dated in Turner, Maine this 10<sup>th</sup> day of March, 2010.

Turner Planning Board

By: \_\_\_\_\_  
Chair

*JAM 02.17.10*  
*Revisions*

*03.02.10.*

*03.03.10.03.04.10*



## Town of Freeport Planner's Memo to Design Review Board-May 12, 2010



### Planning Department

**TO: Freeport Project Review Board**  
**FROM: Donna Larson, Town Planner**  
**RE: Staff Report**  
**DATE: Wednesday, May 12, 2010**

#### **Greystone Freeport Living Retirement Community – Renewal of Approval**

The applicant is seeking a renewal of the approval for a retirement community off Stagecoach Road / Pine Street as construction of the project has not started and the approval is set to expire in June. The proposal includes 155 living units in a variety of housing types including a lodge, assisted living building, and independent cottages. This project requires both Subdivision and Site Plan Review. The location of the Retirement Community Overlay District was approved by the Freeport Town Council in October 2006.

The phasing plan will remain the same with the applicant requesting two years to complete each phase, for a total of ten years. The breakdown is as follows:

- Phase I: portion of the main road, independent apartment building along with associated parking and infrastructure, and 4 cottages
- Phase II: assisted living building and associated parking, sky-bridge, service building
- Phase III: 16 cottages
- Phase IV: 24 cottages and infrastructure on the main road
- Phase V: 19 cottages and infrastructure on Ridge Road

As with the original approval, the applicant would be required to substantially complete one phase before moving on to the next. A performance guarantee and associated fees would be required for each phase, with cost estimates to be reviewed and approved by the Town Engineer prior to the start of any site work for each of the phases. The applicant will also be required to establish an inspection account for each phase. In addition, the applicant would be required to pay any and all required permit fees based upon the permits and fees required at such time that construction commences.

If for some reason regulations change prior to the phase commencing, the applicant may be required to return to the Town for approval and get any additional permits as necessary. This would apply for changes required to the plan by State agencies or other governing bodies. As long as the phases are

done within the time frame approved by this Board, the Town's approval would still be valid and any changes to town regulations would not require changes to the plan.

The same conditions of approval as from the original approval are applicable.

**Proposed Findings of Fact:** (Section 602.F. of the Freeport Zoning Ordinance)

**a. Preservation of Landscape.**

*The proposed development will have a variety of building types from cottage style condominium units to an independent apartment building and assisted living buildings. After careful consideration of the placement, the location of the two larger buildings has been established in a way that will minimize the view from abutting properties, the Interstate, and US Route One. The building closest to Pine Street is a cottage and will be similar in size and use to other nearby properties which are also residential. The layout has been designed with sensitivity to abutting residential properties, incorporates buffers, and retains existing vegetation where possible. Building designs were completed by Gawron Turgeon Architects.*

**b. Relation of Proposed Buildings to the Environment.**

*The two large buildings which include assisted living facilities, apartments, and common facilities are located on the shortest section of road in the Commercial I District with a main access drive being located nearby off of US Route One. The buildings have been situated to minimize the impact from the roads and abutting residential properties. Since these buildings are located in the Commercial District there are other large buildings nearby. The applicant has considered the architectural features of the buildings and designed them to be compatible with the other buildings on the property and to minimize the appearance of the large facades. This development is not located within the Freeport Design Review District. The plans incorporate buffers and additional landscaping to screen the facilities from the abutting properties.*

**c. Vehicular Access.**

*Primary vehicular access will be off of US Route One with a new entrance proposed. The applicant will be required to obtain a Driveway Entrance Permit from the Freeport Department of Public Works prior to any sitework.*

*A portion of this property does abut Stagecoach Road. There is an existing access easement connecting from Stagecoach Road to the water tank. This easement will remain so that those who have rights can continue to access the tank. This easement may provide back-up emergency access to the site should the main roadway be blocked in an emergency situation and public safety personnel need to access the site. This access easement will not be used to provide regular day-to-day access to the site.*

*Traffic Generation Rates for the project were completed by John Kennedy, Sevee and Maher Engineers in 2006. Gorrill-Palmer Consulting Engineers, Inc. also conducted a traffic review for the project. In a letter dated February 28, 2007, Randall Dunton, P.E., PTOE, Gorrill-Palmer concludes that the site distance at the proposed entrance exceeds MDOT standards,*

*there are no high crash locations in the area, and the number of trips generated will not meet the threshold to require a Maine Department of Transportation Traffic Movement Permit.*

**d. Parking and Circulation.**

*Access to the site will be off of US Route One. The roadways within the development will be private. There will be sidewalks throughout the development along one side of the road. There will also be pedestrian trails on the property with one providing a connection to Pine Street. Site plans including road design were completed by Sevee and Maher Engineers.*

*Based upon the number of units, the parking requirement is as follows:*

*cottages (elderly housing dwelling unit) = 63 spaces*

*apartments in the independent apartment building (elderly housing unit) = 31spaces*

*assisted living building (care beds) = 10 spaces*

*employees (based upon the largest shift) = 40 spaces*

*Total required parking = 144*

*For the assisted living and independent apartment building and the various uses within those buildings, 96 parking spaces are being provided. Of the total, 8 are garage spaces and the other 88 are in paved lots. The parking is distributed in multiple locations to provide better access to each of the buildings and to break-up the visual impact of a large surface parking lot. For the cottages, 22 units have a one-car garage, 36 units have a two-car garage, and there are 13 stall spaces. Each unit will also have room for additional parking in their driveway. The parking requirements of the Freeport Zoning Ordinance have been met.*

**e. Surface Water Drainage.**

*The applicant has submitted stormwater management and erosion control plans which were engineered by Sevee and Maher Engineers. The applicant was required to submit plans to the Maine Department of Environmental Protection for review and approval of a Site Location of Development Permit. Approval of that permit was granted on May 25, 2008. As a condition of that approval, the applicant is required to incorporate stormwater management buffer protection easements into the deeds for the properties so that these areas remain protected. The applicant will have to comply with the DEP requirement pertaining to the installation, care, maintenance, and inspection of vegetated soil filters.*

*In addition, the Town Engineer has reviewed the plans (memo dated June 4, 2008) and recommended that the applicant enter into a Maintenance Agreement for a Stormwater Management System with the Town of Freeport, to be recorded in the Cumberland County Registry of Deeds. The applicant will also be required to submit written inspection and maintenance reports to the Town of Freeport about the various stormwater systems on the property annually, even though the DEP only requires this every 5 years.*

*Due to the fact that some of the drainage from the site drains into the Concord Brook Watershed, which is a watershed for an urban impaired stream, the DEP requires that the developer participate in either a stormwater compensation project or establish a compensation utilization plan (CFUP) to fund a stormwater project within the watershed). The applicant has developed a CFUP which was approved by the DEP. Funds in the amount of \$11,650.00 have been deposited into this account and will be used as outlined in the approved CFUP (letter dated 04/10/08 from Donald T. Witherhill, Director, Division of Watershed Management, Bureau of Land and Water Quality, MDEP).*

*The area of development is categorized as Zone C (areas of minimal flooding) on the 1995 Federal Emergency Management Agency Flood Insurance Rate Maps.*

**f. Utilities.**

*Due to the location of the property, there are portions of the development within each of the service areas of both the Freeport Water District and the South Freeport Water District. In an email dated September 14, 2008, Rick Knowlton of Aqua Maine states his approval to allow the Freeport Water District to serve all units including those located in the area typically served by the South Freeport Water District (as described in a letter dated August 30, 2007). In a letter dated March 8, 2007, Ron Seaman, Superintendent of the Freeport Water District states that they have the capacity to serve all of the units. Aqua Maine granted written approval of the water utility plans and stated that they have capacity to serve the project in a letter dated May 13, 2008 from Stephen Cox, PE at Aqua Maine.*

*The project will be served by the Freeport Sewer District. In letters dated September 26, 2006 and June 3, 2008, Tom Allen, Superintendent of the Freeport Sewer District states that the utility has the capacity to serve the project. In a letter dated June 4, 2008, Mr. Allen stated that he has reviewed the final plans and they will be accepted with one change being made which the applicant has agreed to.*

*Drainage facilities and some of the sewer pipe for the project will be located in part of the Route One right-of-way. The Town of Freeport will need to apply for a MDOT Utility Location Permit on behalf of the applicant so that these improvements can be made in the public right of way.*

**g. Advertising Features.**

*The applicant will install a granite sign with sand blasted letters and a stone base. The sign face will be 12 feet long and two feet in height. The location of the sign will be near the entrance on US Route One.*

**h. Special Features.**

*The location of dumpster and utility pads are shown on the plans. The areas will be screened with a 6-foot wooden screening fence.*

**i. Exterior Lighting.**

*Photometric Plans were prepared and submitted by Gawron Turgeon Architects and the illumination levels are within the standards set by Section 521: Lighting of the Freeport Zoning Ordinance. All fixtures will be full cut-off. A cut sheet has been submitted for the site lighting, sign lighting and building sconces.*

**j. Emergency Vehicle Access.**

*All Public Safety Department Heads have reviewed and approved the plans. The Fire Chief has required that all of the units and buildings have sprinklers. Emergency access to the development will be via the main entrance off of US Route One. This parcel does abut Stagecoach Road and the Town of Freeport does have an access easement off of this road and over the land within this development. This easement may provide back-up emergency access to the site should the main roadway be blocked in an emergency situation and public safety personnel need to access the site. This access easement will not be used to provide regular day-to-day access to the site. The road names of Sky Drive, Wildflower Drive, and Treehouse Drive have been approved by Clinton Swett, the Town of Freeport E-911 Addressing Officer.*

**k. Landscaping.**

*The applicant will retain existing vegetation where possible and supplements as needed with a variety of trees and shrubs. This will help to minimize the impact of the development on neighboring properties. The applicant has maintained an undisturbed forested buffer to screen the properties from Winston Hill Road. There are areas of under-drained soil filter that will provide additional plantings and buffers throughout the site. Within the development street trees in accordance with those listed in the Freeport Village Design Standards are proposed. There will also be terraced walls with landscaping worked into the topography of the site. Additional plantings will be located around the buildings.*

**l. Environmental Consideration.**

*This project is not within the Marine Waterfront District of the Shoreland Zone. The development will be connected to the Public Water System. Site Location of Development Permit was issued by the Maine Department of Environmental Protection on May 25, 2008. The Maine Historic Preservation Commission has reviewed the project and in a letter dated May 30, 2006 from Earle Shettleworth, Jr., stated that there are no historic properties within or adjacent to this development. Wetlands were delineated by Woodlot Alternatives in November 2006 (letter dated December 13, 2006) and the location of the wetlands is shown on the recording plan. In a letter dated June 6, 2006, Eugenie Francine from Woodlot Alternative states that two vernal pools were identified on the site. The location of these two vernal pools is shown on the recording plan. The applicant is altering 4,069 s.f. of wetlands and a Natural Resources Protection Act Permit is not required. In a letter dated June 1, 2006 Brian Lewis of the Maine Department of Inland Fisheries and Wildlife (IF&W) states that there are no known threatened or endangered fish species, habitat, or fisheries resources in the area of the project. In a letter from Kendall Marden of IF&W, it is stated that there are no known essential or significant wildlife habitats or threatened or endangered species on the property.*

**Conclusion:** Based on these facts the Board finds that this project meets the criteria and standards of Section 602 Site Plan Review.

**Proposed Findings of Fact:**

**11.1 Pollution**

*A Class B High-Intensity Soil Survey was completed by Norman Scott in early 2007. The development will be connected to the public sewer and public water systems. The area of development is categorized as Zone C (areas of minimal flooding) on the 1995 Federal Emergency Management Agency Flood Insurance Rate Maps. A portion of the parcel is in an area identified as a potential bedrock aquifer in a report entitled "Town of Freeport Bedrock Aquifer Study" prepared by Robert Gerber, Inc. in July 30, 1986. This portion of the property is zoned Resource Protection II which is intended to provide protection for the aquifer; however, development is allowed by the Ordinance. The applicant is not proposing any development within this portion of the property and the area will be protected by a deed restriction and conservation easement.*

**11.2 Sufficient Water**

*Due to the location of the property, there are portions of the development within each of the service areas of both the Freeport Water District and the South Freeport Water District. In an email dated September 14, 2008, Rick Knowlton of Aqua Maine states his approval to allow the Freeport Water District to serve all units including those located in the area typically served by the South Freeport Water District (as described in a letter dated August 30, 2007). In a letter dated March 8, 2007, Ron Seaman, Superintendent of the Freeport Water District states that they have the capacity to serve all of the units. Aqua Maine granted written approval of the water utility plans and stated that they have capacity to serve the project in a letter dated May 13, 2008 from Stephen Cox, P.E. at Aqua Maine.*

**11.3 Impact on Existing Water Supplies**

*Due to the location of the property, there are portions of the development within each of the service areas of both the Freeport Water District and the South Freeport Water District. In an email dated September 14, 2008, Rick Knowlton of Aqua Maine states his approval to allow the Freeport Water District to serve all units including those located in the area typically served by the South Freeport Water District (as described in a letter dated August 30, 2007). In a letter dated March 8, 2007, Ron Seaman, Superintendent of the Freeport Water District states that they have the capacity to serve all of the units. Aqua Maine granted written approval of the water utility plans and stated that they have capacity to serve the project in a letter dated May 13, 2008 from Stephen Cox, P.E. at Aqua Maine.*

**11.4 Soil Erosion.**

*A Class B High-Intensity Soil Survey was completed by Norman Scott in early 2007.*

*The applicant has submitted stormwater management and erosion control plans which were engineered by Sevee and Maher Engineers. The applicant was required to submit plans to the Maine Department of Environmental Protection for review and approval of a Site*



*Location of Development Permit. Approval of that permit was granted on May 25, 2008. As a condition of that approval, the applicant is required to incorporate stormwater management buffer protection easements into the deeds for the properties so that these areas remain protected. The applicant will have to comply with the DEP requirement pertaining to the installation, care, maintenance, and inspection of vegetated soil filters.*

*In addition, the Town Engineer has reviewed the plans (memo dated June 4, 2008) and recommended that the applicant enters into a Maintenance Agreement for a Stormwater Management System with the Town of Freeport, to be recorded in the Cumberland County Registry of Deeds. The applicant will also be required to submit written inspection and maintenance reports to the Town of Freeport about the various stormwater systems on the property annually, even though the DEP only requires this every 5 years.*

#### **11.5 Traffic Conditions**

*Primary vehicular access will be off of US Route One with a new entrance proposed. The applicant will be required to obtain a Driveway Entrance Permit from the Freeport Department of Public Works prior to any sitework.*

*A portion of this property does abut Stagecoach Road. There is an existing access easement connecting from Stagecoach Road to the water tank. This easement will remain so that those who have rights can continue to access the tank. This easement may provide back-up emergency access to the site should the main roadway be blocked in an emergency situation and public safety personnel need to access the site. This access easement will not be used to provide regular day-to-day access to the site.*

*Traffic Generation Rates for the project were completed by John Kennedy, Sevee and Maher Engineers in 2006. Gorrill-Palmer Consulting Engineers, Inc. also conducted a traffic review for the project. In a letter dated February 28, 2007, Randall Dunton, P.E., PTOE, Gorrill-Palmer concludes that the site distance at the proposed entrance exceeds MDOT standards, there are no high crash locations in the area, and the number of trips generated will not meet the threshold to require a Maine Department of Transportation Traffic Movement Permit.*

#### **11.6 Sewage Disposal**

*The project will be served by the Freeport Sewer District. In letters dated September 26, 2006 and June 3, 2008, Tom Allen, Superintendent of the Freeport Sewer District states that the utility has the capacity to serve the project. In a letter dated June 4, 2008, Mr. Allen stated that he has reviewed the final plans and they will be accepted with one change being made which the applicant has agreed to.*

#### **11.7 Solid Waste**

*As required by the Freeport Solid Waste Ordinance, the applicant and/or homeowners will be required to contract with a private solid waste hauler.*

**11.8 Impact on Natural Beauty, Aesthetics, Historic Sites, Wildlife Habitat, Rare Natural Areas, or Public Access to the Shoreline**

*Site Location of Development Permit was issued by the Maine Department of Environmental Protection on May 25, 2008. The Maine Historic Preservation Commission has reviewed the project and in a letter dated May 30, 2006 from Earle Shettleworth, Jr., stated that there are no historic properties within or adjacent to this development. Wetlands were delineated by Woodlot Alternatives in November 2006 (letter dated December 13, 2006) and the location of the wetlands is shown on the recording plan. In a letter dated June 6, 2006, Eugenie Francine from Woodlot Alternative states that two vernal pools were identified on the site. The location of these two vernal pools is shown on the recording plan. The applicant is altering 4,069 s.f. of wetlands and a Natural Resources Protection Act Permit is not required. A portion of the property is zoned Resource Protection II which is intended to provide protection for the aquifer however development is allowed by the Ordinance. The applicant is not proposing any development within this portion of the property and the area will be protected by a deed restriction and conservation easement to the Freeport Conservation Trust. In a letter dated June 1, 2006 Brian Lewis of the Maine Department of Inland Fisheries and Wildlife (IFW) states that there are no known threatened or endangered fish species, habitat, or fisheries resources in the area of the project. In a letter from Kendall Marden of IFW, it is stated that there are no known essential or significant wildlife habitats or threatened or endangered species on the property.*

**11.9 Conformance with Zoning Ordinance and Other Land Use Ordinances.**

*This parcel is located in the Commercial I District, Resource Protection II District, Rural Residential I District, and Medium Density Residential II District. The development complies with the applicable space and bulk standards as set forth by the Freeport Zoning Ordinance. In addition, this development complies with the requirements of the Freeport Subdivision Ordinance. The Freeport Town Council approved a Retirement Community Overlay District for this property in October 2006 and the development complies with the standards set forth by that section of the Freeport Zoning Ordinance.*

**11.10 Financial and Technical Capacity**

*The final submission was prepared by Terrance DeWan and Associates. Sevee and Maher completed the engineered plans and reports. The recording plan was prepared by Royal River Survey Company. Gawron Turgeon Architects designed the buildings. In a letter dated May 6, 2008, the Senior Vice President from Bank of America states their interest in financing this joint project between Greystone and Co. Inc. and Freeport Living, LLC.*

**11.11 Impact on Water Quality or Shoreline**

*This development is not within the watershed of a great pond, lake, or river.*

**11.12 Impact on Ground Water Quality or Quantity**

*A portion of the parcel is in an area identified as a potential bedrock aquifer in a report entitled "Town of Freeport Bedrock Aquifer Study" prepared by Robert Gerber, Inc. in July 30, 1986. This portion of the property is zoned Resource Protection II which is intended to*

*provide protection for the aquifer; however, development is allowed by the Ordinance. The applicant is not proposing any development within this portion of the property and the area will be protected by a deed restriction and conservation easement. There will be no private wells on the property. The entire project will be connected to the public sewer system.*

**11.13 Floodplain Management**

*The area of development is categorized as Zone C (areas of minimal flooding) on the 1995 Federal Emergency Management Agency Flood Insurance Rate Maps.*

**11.14 Identification of Freshwater Wetlands**

*Wetlands were delineated by Woodlot Alternatives in November 2006 (letter dated December 13, 2006) and the location of the wetlands is shown on the recording plan. The applicant is altering 4,069 s.f. of wetlands and a Natural Resources Protection Act Permit is not required.*

**11.15 Rivers, Streams, and Brooks**

*No rivers, streams, or brooks have been identified on the plan.*

**11.16 Stormwater Management**

*The applicant has submitted stormwater management and erosion control plans which were engineered by Sevee and Maher Engineers. The applicant was required to submit plans to the Maine Department of Environmental Protection for review and approval of a Site Location of Development Permit. Approval of that permit was granted on May 25, 2008. As a condition of that approval, the applicant is required to incorporate stormwater management buffer protection easements into the deeds for the properties so that these areas remain protected. The applicant will have to comply with the DEP requirement pertaining to the installation, care, maintenance, and inspection of vegetated soil filters.*

*In addition, the Town Engineer has reviewed the plans (memo dated June 4, 2008) and recommended that the applicant enter into a Maintenance Agreement for a Stormwater Management System with the Town of Freeport, to be recorded in the Cumberland County Registry of Deeds. The applicant will also be required to submit written inspection and maintenance reports to the Town of Freeport about the various stormwater systems on the property annually, even though the DEP only requires this every 5 years.*

*Due to the fact that some of the drainage from the site drains into the Concord Brook Watershed, which is a watershed for an urban impaired stream, the DEP requires that the developer participate in either a stormwater compensation project or establish a compensation utilization plan (CFUP) to fund a stormwater project within the watershed. The applicant has developed a CFUP which was approved by the DEP. Funds in the amount of \$11,650.00 have been deposited into this account and will be used as outlined in the approved CFUP (letter dated 04/10/08 from Donald T. Witherhill, Director, Division of Watershed Management, Bureau of Land and Water Quality, MDEP).*

*The area of development is categorized as Zone C (areas of minimal flooding) on the 1995 Federal Emergency Management Agency Flood Insurance Rate Maps.*

**11.17 Spaghetti Lots**

*No spaghetti lots are proposed with this development.*

**11.18 Phosphorus Impacts on Great Ponds**

*The development is not within the watershed of a great pond.*

**11.19 Impacts on Adjoining Municipalities**

*This development is not within or does not border an adjoining municipality.*

**Conclusion: Based on these facts the Board finds that this project meets the criteria and standards of the Subdivision Ordinance.**

**Proposed Motion:** Be it ordered that the Freeport Project Review Board renew the approval of the proposed Greystone/Freeport Living Retirement Community on Stagecoach Road/Pine Street, to be built substantially as proposed, subdivision recording plan dated 05-30-08 finding that it meets the standards of the Freeport Subdivision Ordinance and Section 602 of the Freeport Zoning Ordinance, with the following Conditions of Approval:

- 1) This approval incorporates by reference all supporting plans that amend the previously approved plans submitted by the applicant and his/her representatives at Project Review Board meetings and hearings on the subject application to the extent that they are not in conflict with other stated conditions.
- 2) The Board approves the five phases as presented by the applicant and each phase is approved for two years, for a total of ten years. Construction of each phase must be substantially completed as presented, before moving to the next phase. If during such time prior to construction, rules and regulations of the State or other governing bodies besides the Town change and require changes to the plan, the applicant may be required to return to the Town for approval of such changes.
- 3) Prior to any site work, the applicant do the following:
  - A. Obtain approval from the Freeport Department of Public Works for a Driveway Entrance Permit.
  - B. The applicant is responsible for obtaining permits and paying all applicable fees associated with such permits from the Freeport Codes Enforcement Department.

- C. The applicant enters into a Maintenance Agreement for a Stormwater Management System with the Town of Freeport, to be recorded in the Cumberland County Registry of Deeds.
- 4) Prior to any site work for each phase of the buildout, the applicant shall do the following:
- A. Pay a Pavement Maintenance Impact Fee based upon the road lengths of 950 feet (Sky Drive), 2,650 feet (Wildflower Drive), and 1,010 feet (Treehouse Drive) and the current impact fee effective when the building permit is issued. Applicants for building permits will also be required to pay the Impact Fee, at the time a building permit is issued and based upon the size of the structure and the current impact fee effective at such time that the permit is issued.
  - B. The applicant establishes a performance guarantee, before beginning each phase, in the amount to cover the cost of all site work and approved by the Town Engineer, in a form acceptable to the Town Attorney. The performance guarantees shall cover the cost of all site work, including the driveway, parking areas, landscaping, erosion control, and stormwater management for the phase to be started. Along with the performance guarantees, a non-refundable administrative fee of 2% of the performance guarantee, in the amount of be paid prior to construction. The final cost estimated for each phase is to be reviewed and approved by the Town Engineer at such time that the applicant is to begin each phase.
  - C. Establish an inspection account, in the amount to be determined by the Town Engineer, for inspection of the site improvements for each phase.
- 5) The foundation for the building which contains units 27 and 28 must be established by a Land Surveyor after the footings are poured. Any projections from the building, including overhangs, must meet the setbacks. Written documentation of this being done and the building meeting required setbacks must be submitted to the Freeport Codes Enforcement Officer.
- 6) The project roads and infrastructure will remain private and the Town of Freeport is not assuming any responsibility for repair or maintenance thereof. The owner of the property, their successors or assigns, will be responsible for all maintenance and repair of the project roads and project infrastructure. Vegetated emergency access off Pine Street shall be provided.
- 7) Stormwater drainage facilities shall be maintained in accordance with the requirements of the Maine Department of Environmental Protection as outlined in the Stormwater Maintenance Plan.

- 8) The owner of the property, their successors or assigns, will assume responsibility over undeveloped lands to maintain safety.
- 9) Specific details on maintenance and associated costs will be detailed in the cooperative documents and supplied to the Freeport Planning Office prior to building permits being issued.

### **Freeport Village Station – Project Identification Signs**

The applicant is seeking approval of a Design Review Certificate for new Project Identification Signs and exterior alterations at Freeport Village Station. The exterior alteration will be the addition of an architectural canopy over the entrance on the corner of Depot and Mill Street which will be the entry to the theatre. The design is typical of that which is often seen over a theatre entrance as it is a flat canopy with lights proposed around the border. The canopy will be made of steel. A sign will be installed on the front face of the canopy. It will be reverse channel letters with exposed bulbs.

Additional signage for the theatre is proposed. There will be a building mounted sign on the Mill Street façade. The sign will be made of metal with white letters and will be halo lit. The sign will be 20' x 6'. The last component of the theatre signage is posters for showings. Eight total posters are proposed with 4 along each of the front facades. The posters will obviously change depending on what is playing; however, the cases will remain the same with a glass front and lighting inside. Although the applicant is seeking approval for 8, they may not actually install all 8. All of the proposed theatre signs will count towards the signage totals for the development. Fred Reeder, CEO has reviewed them for their compliance for the size limitations of the Freeport Sign Ordinance.

The applicant is also seeking approval for new signs at the entrances. This will replace existing signage which is not working for the development. The following signs are proposed:

*Main Street* – “Freeport Village Station” arch sign which will be reverse channel letters with exposed lights. The letters will be attached to metal arches. The arch will connect to a light on either side. The light will have a brick base (a/k/a pier) which will also have name plates for the tenants. “Freeport Village Station” will also be added in small letters along the existing concrete wall.

*Mill Street* – Two piers with tenant signs are proposed. There will be one on either end of the steps and abutting the sidewalk. There will also be two “Freeport Village Station” signs; one on either side of the Mallet Building and hung on arches connected to the abutting buildings. The arch signs will also be reverse channel letters with exposed lights.

*Depot Street* – A brick pier with tenant name plates will be added.

*Bow Street* – A brick pier with tenant name plates will be added as a new base to the existing sign.

The piers with tenant names are considered ground signs and count towards the overall signage totals. It should also be noted that these signs will also be illuminated on each side with angled-down lights. Each of the piers will most likely have signs on all four sides. The bases of the Main Street piers will be granite; the others will be concrete.

#### **Design Review Ordinance: Chapter 22 Section VII.C.**

1. **Scale of the Building.** The scale of a building depends on its overall size, the mass of it in relationship to the open space around it, and the sizes of its doors, windows, porches and balconies. The scale gives a building “presence”; that is, it makes it seem big or small, awkward or graceful, overpowering or unimportant. The scale of a building should be visually compatible with its site and with its neighborhood.

*The scale of the building will not be altered.*

2. **Height.** A sudden dramatic change in building height can have a jarring effect on the streetscape, i.e., the way the whole street looks. A tall building can shade its neighbors and/or the street. The height of buildings should be visually compatible with the heights of the buildings in the neighborhood.

*The height of the overall building will not be altered.*

3. **Proportion of Building’s Front Facade.** The “first impression” a building gives is that of its front facade, the side of the building, which faces the most frequently used public way. The relationship of the width to the height of the front facade should be visually compatible with that of its neighbors.

*The entrance located at the corner of Mill Street and Depot Street will be altered with the addition of a canopy. The canopy will help to break up the height of the façade.*

4. **Rhythm of Solids to Voids in Front Facades.** When you look at any facade of a building, you see openings such as doors or windows (voids) in the wall surface (solid). Usually the voids appear as dark areas, almost holes, in the solid and they are quite noticeable, setting up a pattern or rhythm. The pattern of solids and voids in the front facade of a new or altered building should be visually compatible with that of its neighbors.

*No new windows are proposed.*

5. **Proportions of Opening within the Facility.** Windows and doors come in a variety of shapes and sizes; even rectangular window and door openings can appear quite different depending on their dimensions. The relationship of the height of windows and doors to their width should be visually compatible with the architectural style of the building and with that of its neighbors.

*No new openings are proposed.*

6. **Roof Shapes.** A roof can have a dramatic impact on the appearance of a building. The shape and proportion of the roof should be visually compatible with the architectural style of the building and with those of neighboring buildings.

*The roof shape will not change.*

7. **Relationship of Facade Materials.** The facades of a building are what give it character, and the character varies depending on the materials of which the facades are made and their texture. In Freeport, many different materials are used on facades—clapboards, shingles, patterned shingles, brick—depending on the architectural style of the building. The facades of a building, particularly the front facade, should be visually compatible with those of other buildings around it.

*The canopy will be made of aluminum.*

8. **Rhythm of Spaces to Building on Streets.** The building itself is not the only thing you see when you look at it; you are also aware of the space where the building is not, i.e., the open space which is around the building. Looking along a street, the buildings and open spaces set up a rhythm. The rhythm of spaces to buildings should be considered when determining visual compatibility, whether it is between buildings or between buildings and the street (setback).

*The site is already developed and the signs are being added near the existing entrances.  
No other changes to the building are proposed.*

9. **Site Features.** The size, placement and materials of walks, walls, fences, signs, driveways and parking areas may have a visual impact on a building. These features should be visually compatible with the building and neighboring buildings.

*The site is already developed and the signs are being added near the existing entrances.*

10. In addition to the requirements of the Freeport Sign Ordinance, **signs** in the Freeport Design Review District shall be reviewed for the following: materials, illumination, colors, lettering style, location on site or building, size and scale. Minor changes that do not alter the dimensions or lettering style of an existing



**sign need not be reviewed, i.e. personal name changes for professional offices, or changes in hours of operation. See Special Publication: “Sign Application Requirements”.**

*The applicant is proposing project identification signs at the Main Street and Mill Street entrances to the development. The signs will be reverse channel letters with exposed bulbs. A total of six new piers will be added with tenant signs. These signs will be located along the street sides of the building and are considered ground signs and count towards the total signage for the building. The piers will be made of either brick and granite or brick and concrete. The tenant signs will be all one size and reflect the colors and logos of the tenants. Two new “Nordica Theatre” signs will be installed; one on the building and one on the canopy. The one on the building will be channel letters and halo lit. The sign on the canopy will be reverse channel letters with exposed bulbs. There will be up to 8 poster signs on the front facades of the building. The posters will be in glass enclosures and will be illuminated.*

Proposed Motion: Be it ordered that the Freeport Project Review Board approve the printed Findings of Fact and a Design Review Certificate exterior alterations and signage at Freeport Village Station, to be built substantially as proposed, submission dated 28 April 2010, finding that it meets the standards of the Freeport Design Review Ordinance with the following Conditions of Approval:

- 1) This approval incorporates by reference all supporting plans that amend the previously approved plans submitted by the applicant and his/her representatives at Project Review Board meetings and hearings on the subject application to the extent that they are not in conflict with other stated conditions.
- 2) The applicant must obtain any applicable permits from the Freeport Codes Enforcement Officer.

#### **Bow Street Realty – Courtyard Kiosk – Design Review District I – Class C**

The applicant is presenting conceptual plans to add a 400 s.f. building with deck to use for restaurant carry-out. Site Plan Review and Design Review are required. The building will be located on the side of the property abutting the pedestrian plaza which connects to Freeport Village Station. The building will have space for up to four separate tenants.

The use is restaurant carry-out (see letter from C.E.O. dated 05/05/10) and will require that the applicant lease 6 parking spaces based upon the square footage, the number of employees, and a reduction for shared parking. The use would operate most likely from May to November. Although the use is seasonal in nature, the applicant will still be required to provide the parking (through lease in this case) for the entire year as do other existing establishments that close in the winter. The only case where the parking requirement has been reduced in the Village has been for outdoor seating only, and not for the actual use.

The building will be open in the front when in use and there will be roll down (most likely fabric) when the businesses are closed and during the winter. The building will be 10' x 40' and single story. It will be sided with cement siding to match the main building on the property. Details on the inside of the building and what will be visible when the businesses are open, still needs to be provided. The building does show potential location for signage; details still need to be submitted. The applicant is looking for feedback on the design so they may proceed with the final plans.

#### **Freeport Campground – Site Plan Amendment**

The applicant originally obtained site plan approval for a 15 site campground in 1998. Since that time, an additional 18 units have been added after-the-fact, bringing the total up to 33 sites. Access to the site remains unchanged. Since the additional units were after-the-fact there is an outstanding violation and the applicant cannot use the additional 18 sites until approval is granted by this Board. The applicant is presenting conceptual plans at this time so that they may proceed with the development of final plans.

The campground is a public water supplier and therefore the applicant will need to contact the State to see if their approval is required for the expansion. With the previous approval, the applicant did obtain a Tier One permit from the DEP. There is some conflicting information about the wetlands and how much was previously filled and actually defined as wetlands. That being the case, the applicant will need to submit a copy of the new wetlands report and contact the DEP to see if their approval will also be needed for the expansion.

The applicant will need to update stormwater management and erosion control plans as information was not included with the conceptual submission.

The plan does depict one campsite (pad) encroaching in the setback; this site needs to be moved and the plan needs to be revised.

The plans do not include any information on new signage or lighting. If any has been added since the original approval, this should also be included with the final submission. The applicant will also need to include information on the septic systems on site, so it can be reviewed by the local plumbing inspector to determine that it can adequately handle the waste from the site. The plan does not show any dumpsters.

#### **Freeport Housing Trust – Contract Zone**

The applicant is presenting conceptual plans for an application for a contract zone at their Oak Leaf Terrace senior housing property on South Street. The applicant presented the application to the Council in April and the Council determined that the application was an appropriate use of contract zoning and referred the application to the Project Review Board for review. The Council did identify concern with the project such as the building design, compatibility, buffering and traffic.

As far as the process (per Section 204 of the Freeport Zoning Ordinance), the ultimate decision for the contract zone and the details of the agreement are up to the Town Council. This Board's responsibility is to hold a public hearing and then make a recommendation to the Town Council (in the form of a possible contract) on the request.

The proposal includes a building with a footprint of 7,100 s.f.; the standards for the VMU-II would allow for a 2,500 s.f. footprint. The building would provide an additional 22 units of affordable senior housing. The development would also include a parking area and expanded driveway. The building would be three stories and only partially visible from South Street and therefore the applicant is also requesting that the Contract Zone provide a waiver from Design Review.

The Board can give the applicant general feedback on the project at this time, but ultimately they are trying to determine if the application would be an appropriate use of contract zoning. If the zone is approved, the applicant would then return to the Board for Site Plan Review, Design Review, Subdivision Review, and review for compliance with the standards of the Freeport Village Overlay District.

Before this Board can make their decision, an advisory opinion from the Planning Board is required. A June 2<sup>nd</sup> site walk with the Planning Board and Project Review Board at 5:00 p.m. is suggested. The item would then be on the Planning Board's June 2<sup>nd</sup> agenda for an advisory opinion.



**Readfield Planning Board - Findings of Fact and Conclusion of Law dtd.  
May 20, 2004**

**Findings of Fact and  
Conclusions of Law**

**In the Matter of: Kent's Hill Lumber Co.**  
P.O. Box 285  
Kent's Hill, Maine

Application for the construction of a self-  
storage facility on Rt. 17

**Findings of Fact**

The applicant has proposed to construct a 25 unit, 30 foot by 120 foot self-storage warehouse facility off Rt. 17 in Kent's Hill. The applicant has proposed that storage space at the facility would be available for rental to the public for storage of various types of personal property on a cash/credit basis. The structure was proposed to be constructed on a parcel of land identified on Assessor's Map 8 as Lot 21, and was proposed to be set back 75 feet from Rt. 17. The parcel is owned by Kent's Hill Lumber Co. ("KHL") and is adjacent to a separate parcel upon which the KHL lumber business is located. The lot in question abuts Kent's Hill Orchard on its eastern side. The applicant submitted a Land Use Permit Application signed by Stephen Monsulick, Jr. (President, KHL) and dated March 30, 2004.

Map 8 Lot 21 is located in the Rural Residential District as designated on the "Land Use Map of Readfield, Maine" and as defined in the Town of Readfield's Land Use Ordinance. The proposed use of the parcel, from the Table of Uses in the Land Use Ordinance (Article 7, Section 5, Table 1) was identified by the Board as "Warehousing and Storage", based upon the description of the proposed use provided by the applicant and described above. The Kent's Hill Lumber Co. business, located on an adjacent parcel, is also within the Rural Residential District and exists in that district as a non-conforming use. The existing use of that parcel from the Table of Uses, as identified by the Board, is as a "retail business" (lumber and building materials).

The above described land use application was initially presented to the Planning Board on April 6, 2004. The Board found the application complete on that date. A site visit and a public hearing were held on April 20, 2004. No members of the public provided comment or asked questions at the hearing. The application was again considered by the Board on May 4, 2004. Following extended discussion of the provisions of Article 3, Section 5 (Non-Conforming Uses) of the Land Use Ordinance the Board unanimously voted to deny the application of Kent's Hill Lumber Co. to construct a self-storage warehouse.

## **Conclusions of Law**

Based upon the above Findings of Fact the Readfield Planning Board makes the following conclusions:

- The proposed use of Lot 21 of Map 8 is “Warehousing and Storage” as presented in Article 7, Section 5, Table 1 of the Town of Readfield Land Use Ordinance. This conclusion is based upon the applicant’s description of the proposed facility as one at which storage space would be available for rental to the public for the storage of various types of personal property on a cash/credit basis.
- New “Warehousing and Storage” Uses are not permitted in the Rural Residential District in accordance with Article 7, Section 5, Table 1 of the Town of Readfield Land Use Ordinance.
- Expansions of existing non-conforming commercial and industrial uses are permitted under certain circumstances pursuant to Article 3, Section 5(B) of the Land Use Ordinance. Article 3, Section 5(B) states that: “Non-conforming commercial and industrial uses, legally in existence as of June 11, 1998, located within the Village, Village Residential, Rural and Rural Residential Districts may be allowed to expand up to 100% of their existing developed area provided such expansion takes place on the existing lot or on land contiguous to the existing lot.” This section specifically references commercial and industrial uses, **legally in existence as of June 11, 1998** (emphasis added). The construction of a new self-storage facility, although adjacent to an existing non-conforming retail lumber/building materials business, is not found to be an expansion of an **existing** non-conforming commercial or industrial use. As described above, the Board has concluded that the proposed use is “Warehousing and Storage”, a land use that is separate and distinct from the existing use as a lumber/building materials retail business.
- Article 3, Section 5(D) of the Land Use Ordinance states: “An existing non-conforming use may be changed to another non-conforming use provided that the proposed use has no greater adverse impact on the subject and adjacent properties and resources than the former use, as determined by the Planning Board.” The construction of a new self-storage facility, although adjacent to an existing non-conforming retail lumber/building materials business, is not found to constitute a change from an existing use to another non-conforming use because: 1) it involves construction of a new structure and 2) it constitutes a new land use that is separate and distinct from the existing land use of lumber/building materials retail business which will continue.
- The proposed use does not fit within the scope of the existing non-conforming use and does not constitute a change of use but constitutes an additional use. The proposed use does not reflect the nature and purpose of the use prevailing when the ordinance took effect and creates a use different in quality and character than the original use.

- The Maine courts have supported the principle that zoning regulation provisions concerning the continuation of non-conforming uses should be strictly construed and that provisions concerning limitations on non-conforming uses should be liberally construed.

**THEREFORE**, the Town of Readfield Planning Board denies the application of Kent's Hill Lumber Co. to construct a self-storage facility on Rt. 17 in Kent's Hill as described in the above Findings of Fact.

Dated at Readfield, Maine the 20<sup>th</sup> day of May 2004.

READFIELD PLANNING BOARD

BY: \_\_\_\_\_  
Paula M. Clark, Chair





# **Town of Bar Harbor Planning Board Land Use Ordinance / Site Plan Decision-May 19, 2010**

93 Cottage Street, Suite I  
Bar Harbor, Maine 04609-1400  
Tel. 207-288-3329 Fax 207-288-3032

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## **DECISION**

**Project Number:** SP-09-02

**Project Name:** West Street Hotel

**Project Location:** West Street (Tax Map 104, Lots 113, 114, 115, 116, 117, 118, 122, 123, 143, 144, 146, 147, and 149).

**Applicant:** North-South Corp.

**Application:** This applicant proposed to construct a 102 room hotel which will contain six dwelling units, two of which will be dedicated to affordable housing, as well as a 72 space parking deck.

**Zoning District:** Downtown Business I

### ***To the Code Enforcement Officer:***

Under the authority and requirements of Land Use Ordinance Article V, Section 125-61.F, at the properly noticed public hearing on March 3, 2010, the Planning Board voted to deny the proposed project on the grounds that the proposed hotel did not meet the height requirements of Section 125-21(G). The Planning Board signed and issued its written decision on March 17, 2010. The applicant appealed the denial of the project to the Bar Harbor Board of Appeals. The Appeals Board held public hearings on April 13, 2010 and April 22, 2010 to review the appeal. The Appeals Board overturned the decision of the Planning Board on the grounds that the project would meet the height requirements of Section 125-21(G). The Appeals Board, by a 3-2 vote, concluded that the Planning Board misinterpreted Section 125-21(G) and voted to reverse the decision and remand the application with instructions to approve the project and issue a permit. The Board of Appeals issued its written decision on May 3, 2010. The Findings and Conclusions of Law in Section I of this decision are based upon the following submitted plans and documents:

1. "Proposed Site Plan, Exhibit 9.1.9" prepared by Moore Companies with a revision date of January 13, 2010.
2. "Subdivision Plan" prepared by Plisga and Day Land Surveyors, dated November 25, 2009.
3. "Grading and Drainage Plan, Exhibit 9.2.1" prepared by Moore Companies and stamped by Andrew McCullough with a date of January 22, 2010.
4. "Existing Site Plan" prepared by Moore Companies with a date of July 13, 2009.

5. "Sketch of Properties to be combined for Creation of West Street Hotel" prepared by Plisga and Day Surveyors and stamped by Patrick Donovan with a date of July 8, 2009.
6. "Proposed Landscape Plan, Detail Plantings, Exhibit 11.2.1" prepared by Moore Companies with a date of January 20, 2010.
7. "Proposed Landscape Plan, Street Trees Exhibit 11.1.1" prepared by Moore Companies with a date of January 20, 2010.
8. "Proposed Landscape and Buffering Plan, Exhibit 11.0" prepared by Moore Companies with a date of March 4, 2009.
9. "Topographic Site Plan" prepared by Plisga and Day Land Surveyors, and stamped by Patrick Donovan with a date of August 18, 2009.
10. "Site Preparation and Erosion Control Plan, Exhibit 17.0" prepared by the Moore Companies and stamped by Andrew McCullough with a date of September 30, 2009.
11. "Architectural Plans, Drawing Numbers A2.00, A2.01, A3.00" prepared by Eliopoulos Architecture, Inc. with a preparation date of January 18, 2010, January 15, 2010, and September 29, 2010 respectively.
12. "Parking Deck Floor Plans, Exhibits 20.A.1.5 and 20.B.1.5" prepared by the Moore Companies and stamped by Andrew McCullough with a date of January 22, 2010.
13. "Proposed Lighting Plan, Exhibit 21.1.2" prepared by the Moore Companies with a date of January 22, 2010.
14. "Changes to Traffic Review for Ocean Properties" prepared by Sewall Company with a date of November 17, 2009.
15. "Amended Affordable Housing Covenant to Address Items 1 and 4 in the Staff memo dated December 2, 2009" prepared by Eaton Peabody and submitted with a packet of materials received by the Planning Department on January 27, 2010.

## **I. FINDINGS AND CONCLUSIONS OF LAW WHICH SUPPORT THE DECISION OF THE PLANNING BOARD:**

Based upon the documents received, and accepting the work of the professionals who have prepared the documents, the Planning Board makes the following findings with respect to the requirements of Section 125-67 of the Bar Harbor Land Use Ordinance as noted below:

- A. The proposed hotel is a Transient Accommodation 8, which is a permitted use in the Downtown Business I neighborhood district.
- B. Once the underlying lots are combined, the development will comply with the minimum lot size, road frontage, lot width, lot coverage, and the side setback requirements. Evidence of recorded deeds that accomplish this land combination must be submitted and received by the Town Assessor prior to issuance of building permits.
- C. Pursuant to a decision and findings made by the Town of Bar Harbor Board of

Appeals, (AB-10-02) the project will comply with the height requirements of the Downtown Business I neighborhood district.

- D. The Board finds that the development will supply 81 real physical parking spaces as indicated on Site Plan Exhibit 9.1.9. The Board grants a total of 21 green space credits. Together, the applicant has a total of 102 parking spaces which is equal to the number of guest suites as required for a Transient Accommodation of this size.
- E. The Board finds that the development would supply adequate space for parking areas and driveways.
- F. The Board finds that the development would meet the requisite loading standards.
- G. The Board finds that the development will meet the street, sidewalk, and access requirements subject to the review of the Town Council and the conditions noted in Section III of this Decision under Additional Considerations C and F.
- H. The Board finds that the development will provide adequate buffering and screening as indicated on Exhibits 11.0, 11.1, and 11.2.
- I. The Board finds that there is adequate water supply to support the development. However, all water services to be abandoned or demolished related to this project must be disconnected at the water main. The disconnection of these water services shall be coordinated with the Town Water Division.
- J. The Board finds that the proposed development will not cause an unreasonable burden on the municipal water supply.
- K. The Board finds that the groundwater will not be adversely affected by the development.
- L. The Board finds that the development will meet the stormwater standards. However, a plan depicting all utilities (power, telephone, water, and sewer) has not yet been provided. The applicant shall supply a utility plan as described in Section III, Additional Considerations C, prior to issuance of building permits.
- M. The Board finds that the development will comply with municipal wastewater standards. However, it is noted that the applicant is required to change the existing impellers and seals, and shall bear any cost associated with this change out.
- N. The Board finds that the site plan demonstrates the proposed development will provide for adequate sewage waste disposal.
- O. The Board finds that the soils are suitable for the development.
- P. The Board finds that landscaping is provided to enhance the development as shown on Exhibits 11.0, 11.1, and 11.2. The property owner would be responsible for replacement and maintenance of all vegetated areas.
- Q. The Board finds that adequate measures will be implemented to prevent undue erosion and control of sediment and dust during construction for this development pursuant to Exhibit 17. It is noted that the streets bounding the site would be required to be swept as needed and washed down to prevent siltation in the storm water system, and the harbor, as well as dust accumulation on neighboring properties and on the right of ways in order to meet this requirement.

- R. The Board finds that the development is outside the flood zone as shown on the Federal Emergency Management Agency's Flood Boundary and Floodway Maps for this area.
- S. The Board finds that the development will meet the requisite air quality standards.
- T. The Board finds that refuse disposal is adequately provided.
- U. The Board finds that the development does not anticipate the use or generation of dangerous or hazardous waste.
- V. The Board finds that the development does not anticipate activities which would generate vibrations that may be transmitted beyond the lot lines.
- W. The Board finds that the effects to wildlife habitat are minimized or not applicable.
- X. The Board finds that the effects on aesthetic quality have been adequately mitigated.
- Y. The Board finds that there is little or no radiant heat from the development as proposed.
- Z. The Board finds that development would meet the light and glare requirements as shown on Exhibit 21.1.2.
- AA. The Board finds that the applicant will comply with the Town noise standards and that the development shall comply with the quiet hours as found in the Town Code.
- BB. The Board finds that signage is not part of this current application.
- CC. The Board finds that the development does not anticipate outdoor storage or display of merchandise.
- DD. The Board finds that all new utilities for this development would be installed underground.
- EE. The Board finds that the development would supply adequate provisions for fire protection provided the entrance to York Street will be at least 25' wide with turndown curbs at the corners. Additionally, a water curtain shall be installed between buildings with Fire Marshall and Fire Chief's approval. Finally, note that the development has not been submitted to Fire Marshall for approval. A permit from the Fire Marshall must be obtained prior to issuance of a building permit.
- FF. The Board makes no determination regarding the compatibility of the project or the Land Use Ordinance with the Comprehensive Plan.
- GG. The Board finds that the applicant has the financial and technical capacity to construct and operate the facility.
- HH. The Board finds that the site contains no registered farmland.
- II. The Board finds that the Town is able to provide municipal services.
- JJ. The Board finds that there are no outstanding ordinance violations on the property.
- KK. The Board finds that the Legal Documents standard is inapplicable to this application.
- LL. The Board finds that the development would have no negative effect on historic or archaeological resources.
- MM. The Board finds that there are no environmentally sensitive areas designated on the property.
- NN. The Board finds that there are no environmentally sensitive areas designated on the

property.

## **II. ADDITIONAL FINDINGS**

- A. The applicant has obtained approval from the Town of Bar Harbor Design Review Board.

## **III. CONDITIONS OF APPROVAL**

- A. All dwelling units would be required to be leased for a period of not less than 90 days and at no time could the dwelling spaces be used as rented guest suites for the hotel. The number of dwelling units and affordable housing units must conform to the calculations in the applicant's so-called "Illustrative Aid 20" provided during the Board of Appeals hearing which indicates the floor area of the building over 35 feet in height measures 2,884 square feet. The portion of the hotel devoted to dwelling space measures 3,474 square feet<sup>1</sup> and must contain a total of six dwelling units, two of which are required to be dedicated to affordable housing.
- B. The proposed hotel must contain no more than 102 rentable guest suites. Guest suites numbered 109, 220, 223, 325, 328, and 425 must be used exclusively as two bedroom deluxe suites and must have only one keyed entry at the outer most point of access to the space. The adjoining unnumbered rooms must not be used as separately rentable guest suites as this would create the need for additional parking spaces which the development does not supply.
- C. The applicant must receive approval from the Bar Harbor Town Council for proposed traffic pattern changes on Lennox Place prior to the issuance of building permits. Note that the Department of Public Works Capacity Statement details additional comments and concerns related to the design of this project. As such, these comments and conditions are incorporated by reference as if fully set forth herein this Additional Consideration.
- D. The applicant shall be responsible for obtaining assistance from the Bar Harbor Police Department to direct traffic should queuing or other traffic related concerns arise, and the applicant shall bear the financial responsibility for such police services.
- E. The Public Works Director has endorsed the Capacity Statement required for approval of this project. The applicant must demonstrate that they have met all conditions required in this Capacity Statement prior to the issuance of a building permit including but not limited to the following:

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<sup>1</sup> Square footage equal to dwelling space on each floor of the hotel is as follows: first floor – 900 square feet, second floor – zero square feet, third floor – 1,287 square feet, and fourth floor – 1,287 square feet for a total of 3,474 square feet of dwelling space.

1. The applicant shall submit to the Town plan/profile construction drawings which detail all utility work which will be conducted in Town right-of-ways. These drawings shall show the proposed location of utilities, as well as the location of existing utilities that will remain undisturbed during the construction process. The plan/profile drawings shall also include typical cross sections of trench work. The Department of Public Works will assist the applicant in locating any existing Town owned utilities. The applicant is hereby advised that utility work within the Town right-of-way shall not commence until the Department of Public Works has reviewed and approved the plan/profile construction drawings described above.
2. Upon approval of the utility construction drawing, the applicant shall hold a pre-construction utility coordination meeting. Representatives from Bangor-Hydro, Fairpoint Communications, Time Warner Cable, Bar Harbor Water Division, Bar Harbor Wastewater Division, and the Bar Harbor Highway Division shall be present at this meeting. The applicant shall review the utility drawings and discuss their scope of work and schedule for completion. The applicant, or its designated general contractor, shall be responsible for scheduling the meeting and maintaining notes for distribution to participants. Progress meetings shall be scheduled as needed.
3. All sidewalks within the public way shall be constructed with a minimum of 3500 psi concrete, reinforced with fiber mesh or welded wire slab. Expansion joints shall be cut a minimum of every five feet. The Town walks to be reconstructed include: Rodick Street, from the southern walkway into the parking deck heading north to its intersection with West Street; West Street, from its intersection with Rodick Street to its intersection with Main Street; and Main Street, from the intersection of West Street to the southern boundary with Geddy's restaurant.
4. All sidewalks shall be ADA compliant, and conform to all ADA standards including, but not limited to, the following: 1) all sidewalk intersections with public ways and tip downs shall be constructed with ADA compliant truncated dome pavers; and 2) all crosswalks shall be painted to meet ADA standards.
5. Roadway curbing shall be comprised of granite stone set in concrete. Existing granite curbing may be reused upon Department of Public Works approval. Any existing granite curbing that is removed from the right-of-way shall be retained by the Department of Public Works in coordination with the applicant's general contractor and the Highway Department.
6. In order to minimize construction impacts, the applicant shall coordinate with

the Department of Public Works to determine if other work within the right-of-way is necessary. Note that the water line on Rodick Street, as well as the sidewalk located on the western side of Rodick Street, is scheduled for replacement. Replacement work for the water line should be completed prior to the street being paved. Replacement of the sidewalk should be coordinated with other construction activities on Rodick Street. Additionally, the wastewater and storm drain conditions south of Rodick Street intersection with York Street require evaluation and may need to be replaced. This evaluation and possible replacement should be completed before paving as well. Coordination of this work will benefit the Town and the applicant in reducing the overall construction related impacts.

7. Due to the number of utility connections and disconnections associated with the project, the following streets shall be paved at full width: Rodick Street, from the intersection of York Street, north to the intersection of West Street; and West Street from the intersection with Rodick Street to its intersection with Main Street.
- F. The applicant shall provide evidence of recorded deeds that demonstrate the underlying lots have been combined. The recorded deed shall be submitted and received by the Town Assessor prior to issuance of building permits.

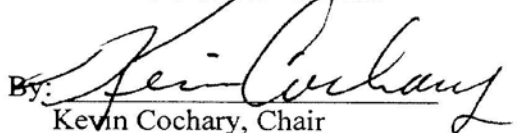
**IV. Based on the above findings and conclusions, the Board approves the application of North-South Corp. to construct a 102 room hotel on West Street.**

IN WITNESS WHEREOF, Kevin Cochary, duly authorized chair of the Bar Harbor Planning Board, has signed this decision this 19<sup>th</sup> day of May 2010.

WITNESS:

\_\_\_\_\_  
Name:

PLANNING BOARD CHAIR

By:   
Kevin Cochary, Chair  
Planning Board, Town of Bar Harbor





**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.”



## 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 1.02-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.



## **Appendix 4 – Shoreland Zoning**

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## **“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.]

# Shoreland Zoning News, DEP-Bureau of Land Quality Control-Tracking Expansions of Non-Conforming Structures

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September/October 1989

Shoreland

Zoning

News

\*\*\*\*\* Andrea M. Lapointe, Editor 289-2111

## Tracking Expansions of Non-Conforming Structures

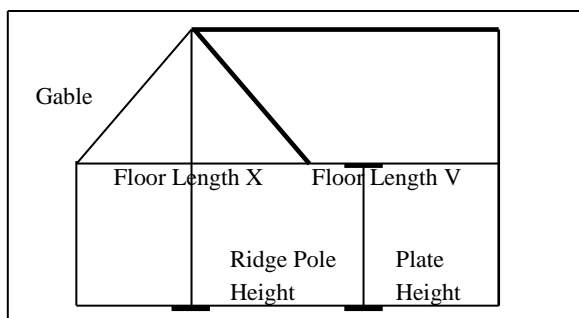
By Laurel M. Dodge, Summer Intern

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:  $\frac{1}{2}$  (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 ft <sup>3</sup>
	-New total volume	= 46,200 ft <sup>3</sup>
	Difference	= 6,200 ft <sup>3</sup>

then: 6,200 ft<sup>3</sup> is what percent of the original?

- a. 6, 200 ft<sup>3</sup> = n% x 40,000 ft<sup>3</sup>
  - b. 6,200 ft<sup>3</sup>/40,000 ft<sup>3</sup> = .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

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		



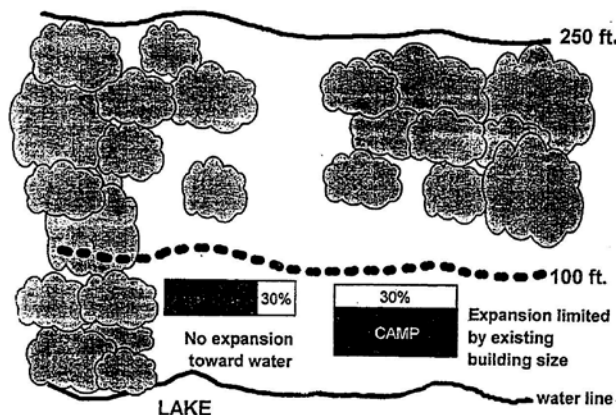
## **“News from the 118<sup>th</sup> Legislature-Current 30 Percent Expansion Rule” by Geoff Herman, Maine Municipal Association**

The second session of the 118<sup>th</sup> Legislature, which finally adjourned (from a special session) on April 9<sup>th</sup>, included among its enactments only a few changes to existing law that directly impact on the municipal planning community.

### **Shoreland Zoning**

There was one mandatory and one optional change to the shoreland zoning law.

### **CURRENT 30 PERCENT EXPANSION RULE**



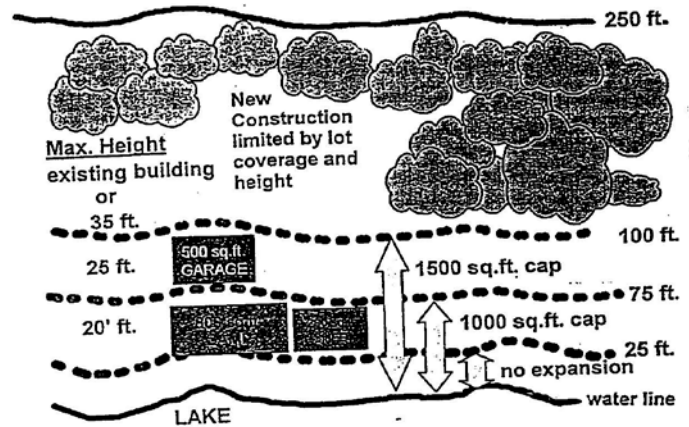
(Illustrations provided by the Shoreland Zoning Unit, Maine DEP)

**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 9<sup>th</sup> 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

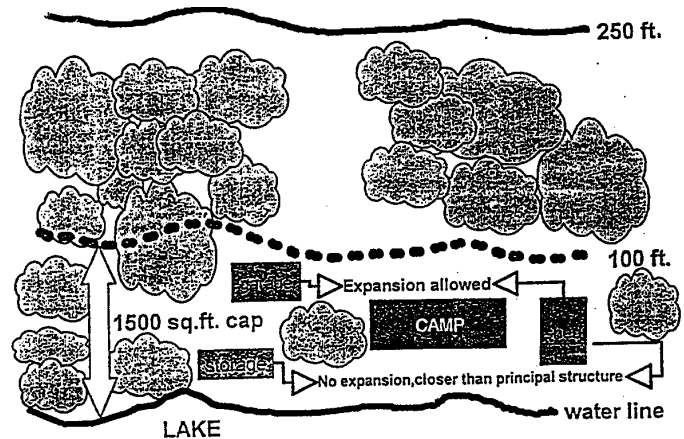
## EXPANSION OPTION



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.

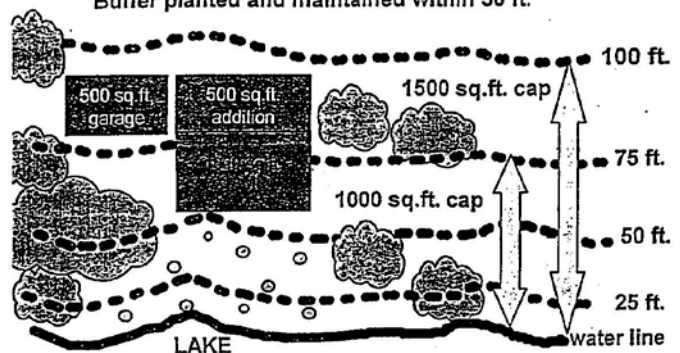
Within the 100' setback, the maximum allowance would be 1,500 square feet and the maximum height of the structure would be 25' or the structure's existing height, whichever is greater. A bonus 500 square foot expansion allowance would be granted under this alternative if the property owner creates and 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

Up to 500 sq. ft. above cap allowed provided:  
Camp greater than 50 ft. from shore, and  
Buffer planted and maintained within 50 ft.



## **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 is 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 or 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 1/2 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 receives 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, *Felder 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 became non-conforming.

## **Appendix 5 – Subdivisions**

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## 30-A M.R.S.A. Sections 4401-4408 (Municipal Subdivision Law)

### § 4401. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Densely developed area. “Densely developed area” means any commercial, industrial or compact residential area of 10 or more acres with an existing density of at least one principal structure per 2 acres.
2. Dwelling unit. “Dwelling unit” means any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, condominiums, apartments and time-share units.
- 2-A. Freshwater wetland. “Freshwater wetland” means freshwater swamps, marshes, bogs and similar areas which are:
  - A. Inundated or saturated by surface or ground water at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils; and
  - B. Not considered part of a great pond, coastal wetland, river, stream or brook.

These areas may contain small stream channels or inclusions of land that do not conform to the criteria of this subsection.
- 2-B. Farmland. “Farmland” means a parcel consisting of 5 or more acres of land that is:
  - A. Classified as prime farmland, unique farmland or farmland of statewide or local importance by the Natural Resources Conservation Service within the United States Department of Agriculture; or
  - B. Used for production of agricultural products as defined in Title 7, section 152, subsection 2.
3. Principal structure. “Principal structure” means any building or structure in which the main use of the premises takes place.

4. Subdivision. “Subdivision” means the division of a tract or parcel of land into 3 or more lots within any 5-year period that begins on or after September 23, 1971. This definition applies whether the division is accomplished by sale, lease, development, buildings or otherwise. The term “subdivision” also includes the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period, the construction or placement of 3 or more dwelling units on a single tract or parcel of land and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period.
- A. In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of the tract or parcel is considered to create the first 2 lots and the next dividing of either of these first 2 lots, by whomever accomplished, is considered to create a 3rd lot, unless:
- (1) Both dividings are accomplished by a subdivider who has retained one of the lots for the subdivider’s own use as a single-family residence that has been the subdivider’s principal residence for a period of at least 5 years immediately preceding the 2nd division; or
  - (2) The division of the tract or parcel is otherwise exempt under this subchapter.
- B. The dividing of a tract or parcel of land and the lot or lots so made, which dividing or lots when made are not subject to this subchapter, do not become subject to this subchapter by the subsequent dividing of that tract or parcel of land or any portion of that tract or parcel. The municipal reviewing authority shall consider the existence of the previously created lot or lots in reviewing a proposed subdivision created by a subsequent dividing.
- C. A lot of 40 or more acres must be counted as a lot, except:
- (2) When a municipality has, by ordinance, or the municipal reviewing authority has, by regulation, elected not to count lots of 40 or more acres as lots for the purposes of this subchapter when the parcel of land being divided is located entirely outside any shoreland area as defined in Title 38, section 435, or a municipality’s shoreland zoning ordinance.



- D-1. A division accomplished by devise does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.
- D-2. A division accomplished by condemnation does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.
- D-3. A division accomplished by order of court does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.
- D-4. A division accomplished by gift to a person related to the donor of an interest in property held by the donor for a continuous period of 5 years prior to the division by gift does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph is transferred within 5 years to another person not related to the donor of the exempt real estate as provided in this paragraph, then the previously exempt division creates a lot or lots for the purposes of this subsection. "Person related to the donor" means a spouse, parent, grandparent, brother, sister, child or grandchild related by blood, marriage or adoption. A gift under this paragraph cannot be given for consideration that is more than ½ the assessed value of the real estate.
- D-5. A division accomplished by a gift to a municipality if that municipality accepts the gift does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.
- D-6. A division accomplished by the transfer of any interest in land to the owners of land abutting that land does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph is transferred within 5 years to another person without all of the merged land, then the previously exempt division creates a lot or lots for the purposes of this subsection.
- E. The division of a tract or parcel of land into 3 or more lots and upon each of which lots permanent dwelling structures legally existed before September 23, 1971 is not a subdivision.

- F. In determining the number of dwelling units in a structure, the provisions of this subsection regarding the determination of the number of lots apply, including exemptions from the definition of a subdivision of land.
- G. Notwithstanding the provisions of this subsection, leased dwelling units are not subject to subdivision review if the municipal reviewing authority has determined that the units are otherwise subject to municipal review at least as stringent as that required under this subchapter.
- H-1. This subchapter may not be construed to prevent a municipality from enacting an ordinance under its home rule authority that:

- (1) Expands the definition of “subdivision” to include the division of a structure for commercial or industrial use; or
- (2) Otherwise regulates land use activities.

A municipality may not enact an ordinance that expands the definition of “subdivision” except as provided in this subchapter. A municipality that has a definition of “subdivision” that conflicts with the requirements of this subsection at the time this paragraph takes effect shall comply with this subsection no later than January 1, 2006. Such a municipality must file its conflicting definition at the county registry of deeds by June 30, 2003 for the definition to remain valid for the grace period ending January 1, 2006. A filing required under this paragraph must be collected and indexed in a separate book in the registry of deeds for the county in which the municipality is located.

- I. The grant of a bona fide security interest in an entire lot that has been exempted from the definition of subdivision under paragraphs D-1 to D-6, or subsequent transfer of that entire lot by the original holder of the security interest or that person’s successor in interest, does not create a lot for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.
5. New structure or structures. “New structure or structures” includes any structure for which construction begins on or after September 23, 1988. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this subchapter.

6. Tract or parcel of land. “Tract or parcel of land” means all contiguous land in the same ownership, except that lands located on opposite sides of a public or private road are considered each a separate tract or parcel of land unless the road was established by the owner of land on both sides of the road after September 22, 1971.
7. Outstanding river segments. In accordance with Title 12, section 402, “outstanding river segments” means:
  - A. The Aroostook River from the Canadian border to the Masardis and T.10, R.6, W.E.L.S. town line, excluding the segment in T.9, R.5, W.E.L.S.;
  - B. The Carrabassett River from the Kennebec River to the Carrabassett Valley and Mt. Abram Township town line;
  - C. The Crooked River from its inlet into Sebago Lake to the Waterford and Albany Township town line;
  - D. The Damariscotta River from the Route 1 bridge in Damariscotta to the dam at Damariscotta Mills;
  - E. The Dennys River from the Route 1 bridge to the outlet of Meddybemps Lake, excluding the western shore in Edmunds Township and No. 14 Plantation;
  - F. The East Machias River, including the Maine River, from 1/4 of a mile above the Route 1 bridge to the East Machias and T.18, E.D., B.P.P. town line, from the T.19, E.D., B.P.P. and Wesley town line to the outlet of Crawford Lake, and from the No. 21 Plantation and Alexander town line to the outlet of Pocomoonshine Lake, excluding Hadley Lake, Lower Mud Pond and Upper Mud Pond;
  - G. The Fish River from the bridge at Fort Kent Mills to the Fort Kent and Wallagrass Plantation town line, from the T.16, R.6, W.E.L.S. and Eagle Lake town line to the Eagle Lake and Winterville Plantation town line, and from the T.14, R.6, W.E.L.S. and Portage Lake town line to the Portage Lake and T.13, R.7, W.E.L.S. town line, excluding Portage Lake;
  - H. The Kennebagog River from its inlet into Cupsuptic Lake to the Rangeley and Lower Cupsuptic Township town line;

- I. The Kennebec River from Thorns Head Narrows in North Bath to the Edwards Dam in Augusta, excluding Perkins Township, and from the Route 148 bridge in Madison to the Caratunk and The Forks Plantation town line, excluding the western shore in Concord Township, Pleasant Ridge Plantation and Carrying Place Township and excluding Wyman Lake;
- J. The Machias River from the Route 1 bridge to the Northfield and T.19, M.D., B.P.P. town line;
- K. The Mattawamkeag River from the Penobscot River to the Mattawamkeag and Kingman Township town line, and from the Reed Plantation and Bancroft town line to the East Branch in Haynesville;
- L. The Narraguagus River from the ice dam above the railroad bridge in Cherryfield to the Beddington and Devereaux Township town lines, excluding Beddington Lake;
- M. The Penobscot River, including the Eastern Channel, from Sandy Point in Stockton Springs to the Veazie Dam and its tributary the East Branch of the Penobscot from the Penobscot River to the East Millinocket and Grindstone Township town line;
- N. The Piscataquis River from the Penobscot River to the Monson and Blanchard Plantation town line;
- O. The Pleasant River from the bridge in Addison to the Columbia and T.18, M.D., B.P.P. town line, and from the T.24, M.D., B.P.P. and Beddington town line to the outlet of Pleasant River Lake;
- P. The Rapid River from the Magalloway Plantation and Upton town line to the outlet of Pond in the River;
- Q. The Saco River from the Little Ossipee River to the New Hampshire border;
- R. The St. Croix River from the Route 1 bridge in Calais to the Calais and Baring Plantation town line, from the Baring Plantation and Baileyville town line to the Baileyville and Fowler Township town line, and from the Lambert Lake

Township and Vanceboro town line to the outlet of Spednik Lake, excluding Woodland Lake and Grand Falls Flowage;

- S. The St. George River from the Route 1 bridge in Thomaston to the outlet of Lake St. George in Liberty, excluding White Oak Pond, Seven Tree Pond, Round Pond, Sennebec Pond, Trues Pond, Stevens Pond and Little Pond;
- T. The St. John River from the Van Buren and Hamlin Plantation town line to the Fort Kent and St. John Plantation town line, and from the St. John Plantation and St. Francis town line to the Allagash and St. Francis town line;
- U. The Sandy River from the Kennebec River to the Madrid and Township E town line;
- V. The Sheepscot River from the railroad bridge in Wiscasset to the Halldale Road in Montville, excluding Long Pond and Sheepscot Pond, including its tributary the West Branch of the Sheepscot from its confluence with the Sheepscot River in Whitefield to the outlet of Branch Pond in China;
- W. The West Branch of the Pleasant River from the East Branch in Brownville to the Brownville and Williamsburg Township town line; and
- X. The West Branch of the Union River from the Route 181 bridge in Mariaville to the outlet of Great Pond in the Town of Great Pond.

#### **§ 4402. Exceptions**

This subchapter does not apply to:

1. Previously approved subdivisions. Proposed subdivisions approved by the planning board or the municipal officials before September 23, 1971 in accordance with laws then in effect;
2. Previously existing subdivisions. Subdivisions in actual existence on September 23, 1971 that did not require approval under prior law;
3. Previously recorded subdivisions. A subdivision, a plan of which had been legally recorded in the proper registry of deeds before September 23, 1971;

4. Airports with an approved airport layout plan. Any airport with an airport layout plan that has received final approval from the airport sponsor, the Department of Transportation and the Federal Aviation Administration; or
5. Subdivisions in existence for at least 20 years. A subdivision in violation of this subchapter that has been in existence for 20 years or more, except a subdivision:
  - A. That has been enjoined pursuant to section 4406;
  - B. For which approval was expressly denied by the municipal reviewing authority, and record of the denial was recorded in the appropriate registry of deeds;
  - C. For which a lot owner was denied a building permit under section 4406, and record of the denial was recorded in the appropriate registry of deeds; or
  - D. That has been the subject of an enforcement action or order, and record of the action or order was recorded in the appropriate registry of deeds.

#### **§ 4403. Municipal review and regulation**

This section governs municipal review of proposed subdivisions.

1. Municipal reviewing authority. The municipal reviewing authority shall review all requests for subdivision approval. On all matters concerning subdivision review, the municipal reviewing authority shall maintain a permanent record of all its meetings, proceedings and correspondence.
- 1-A. Joint meetings. If any portion of a subdivision crosses municipal boundaries, all meetings and hearings to review the application must be held jointly by the reviewing authorities from each municipality. All meetings and hearings to review an application under section 4407 for a revision or amendment to a subdivision that crosses municipal boundaries must be held jointly by the reviewing authorities from each municipality. In addition to other review criteria, the reviewing authorities shall consider and make a finding of fact regarding the criteria described in section 4404, subsection 19.

The reviewing authorities in each municipality, upon written agreement, may waive the requirement under this subsection for any joint meeting or hearing.

2. Regulations; review procedure. The municipal reviewing authority may, after a public hearing, adopt, amend or repeal additional reasonable regulations governing subdivisions which shall control until amended, repealed or replaced by regulations adopted by the municipal legislative body. The municipal reviewing authority shall give at least seven (7) days' notice of this hearing.
  - A. The regulations may provide for a multi-stage application or review procedure consisting of no more than three (3) stages:
    - (1) Preapplication sketch plan;
    - (2) Preliminary plan; and
    - (3) Final plan.

Each stage must meet the time requirements of subsections 4 and 5.

3. Application; notice; completed application. This subsection governs the procedure to be followed after receiving an application for a proposed subdivision.
  - A. When an application is received, the municipal reviewing authority shall give a dated receipt to the applicant and shall notify by mail all abutting property owners of the proposed subdivision, and the clerk and the reviewing authority of municipalities that abut or include any portion of the subdivision, specifying the location of the proposed subdivision and including a general description of the project. The municipal reviewing authority shall notify by mail a public drinking water supplier if the subdivision is within its source water protection area.
  - B. Within 30 days after receiving an application, the municipal reviewing authority shall notify the applicant in writing either that the application is complete or, if the application is incomplete, the specific additional material needed to complete the application.
  - C. After the municipal reviewing authority has determined that a complete application has been filed, it shall notify the applicant and begin its full evaluation of the proposed subdivision.
  - D. The municipal reviewing authority may not accept or approve final plans or final documents prepared within the meaning and intent of Title 32, chapter 141 that

are not sealed and signed by the professional land surveyor under whose responsible charge they were completed, as provided in Title 32, section 18226.

4. Public hearing; notice. If the municipal reviewing authority decides to hold a public hearing on an application for subdivision approval, it shall hold the hearing within 30 days after determining it has received a complete application. The municipal reviewing authority shall have notice of the date, time and place of the hearing:
  - A. Given to the applicant; and
  - B. Published, at least two (2) times, in a newspaper having general circulation in the municipality in which the subdivision is proposed to be located. The date of the first publication must be at least seven (7) days before the hearing.
5. Decision; time limits. The municipal reviewing authority shall, within 30 days of a public hearing or, if no hearing is held, within 60 days of determining it has received a complete application or within any other time limit that is otherwise mutually agreed to, issue an order:
  - A. Denying approval of the proposed subdivision;
  - B. Granting approval of the proposed subdivision; or
  - C. Granting approval upon any terms and conditions that it considers advisable to:
    - (1) Satisfy the criteria listed in section 4404;
    - (2) Satisfy any other regulations adopted by the reviewing authority; and
    - (3) Protect and preserve the public's health, safety and general welfare.
6. Burden of proof; findings of fact. In all instances, the burden of proof is upon the person proposing the subdivision. In issuing its decision, the reviewing authority shall make findings of fact establishing that the proposed subdivision does or does not meet the criteria described in subsection 5.



7. Conditioned on variance. If the initial approval or any subsequent amendment of a subdivision is based in part on the granting of a variance, the sub-divider must comply with section 4406, subsection 1, paragraph B.

#### **§ 4404. Review criteria**

When adopting any subdivision regulations and when reviewing any subdivision for approval, the municipal reviewing authority shall consider the following criteria and, before granting approval, must determine that:

1. Pollution. The proposed subdivision will not result in undue water or air pollution. In making this determination, it shall at least consider:
  - A. The elevation of the land above sea level and its relation to the flood plains;
  - B. The nature of soils and subsoils and their ability to adequately support waste disposal;
  - C. The slope of the land and its effect on effluents;
  - D. The availability of streams for disposal of effluents; and
  - E. The applicable state and local health and water resource rules and regulations;
2. Sufficient water. The proposed subdivision has sufficient water available for the reasonably foreseeable needs of the subdivision;
3. Municipal water supply. The proposed subdivision will not cause an unreasonable burden on an existing water supply, if one is to be used;
4. Erosion. The proposed subdivision will not cause unreasonable soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results;
5. Traffic. The proposed subdivision will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed and, if the proposed subdivision requires driveways or entrances onto a state or state aid highway located outside the urban compact area of an urban

compact municipality as defined by Title 23, section 754, the Department of Transportation has provided documentation indicating that the driveways or entrances conform to Title 23, section 704 and any rules adopted under that section;

6. Sewage disposal. The proposed subdivision will provide for adequate sewage waste disposal and will not cause an unreasonable burden on municipal services if they are utilized;
7. Municipal solid waste disposal. The proposed subdivision will not cause an unreasonable burden on the municipality's ability to dispose of solid waste, if municipal services are to be utilized;
8. Aesthetic, cultural and natural values. The proposed subdivision will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, significant wildlife habitat identified by the Department of Inland Fisheries and Wildlife or the municipality, or rare and irreplaceable natural areas or any public rights for physical or visual access to the shoreline;
9. Conformity with local ordinances and plans. The proposed subdivision conforms with a duly adopted subdivision regulation or ordinance, comprehensive plan, development plan or land use plan, if any. In making this determination, the municipal reviewing authority may interpret these ordinances and plans;
10. Financial and technical capacity. The sub-divider has adequate financial and technical capacity to meet the standards of this section;
11. Surface waters; outstanding river segments. Whenever situated entirely or partially within the watershed of any pond or lake or within 250 feet of any wetland, great pond or river as defined in Title 38, chapter 3, subchapter I, article 2-B, the proposed subdivision will not adversely affect the quality of that body of water or unreasonably affect the shoreline of that body of water.
  - A. When lots in a subdivision have frontage on an outstanding river segment, the proposed subdivision plan must require principal structures to have a combined lot shore frontage and setback from the normal high-water mark of 500 feet.
    - (1) To avoid circumventing the intent of this provision, whenever a proposed subdivision adjoins a shoreland strip narrower than 250 feet which is not

lotted, the proposed subdivision shall be reviewed as if lot lines extended to the shore.

- (2) The frontage and set-back provisions of this paragraph do not apply either within areas zoned as general development or its equivalent under shoreland zoning, Title 38, chapter 3, subchapter I, article 2-B, or within areas designated by ordinance as densely developed. The determination of which areas are densely developed must be based on a finding that existing development met the definitional requirements of section 4401, subsection 1, on September 23, 1983;

- 12. Ground water. The proposed subdivision will not, alone or in conjunction with existing activities, adversely affect the quality or quantity of ground water;
- 13. Flood areas. Based on the Federal Emergency Management Agency's Flood Boundary and Floodway Maps and Flood Insurance Rate Maps, and information presented by the applicant whether the subdivision is in a flood-prone area. If the subdivision, or any part of it, is in such an area, the sub-divider shall determine the 100-year flood elevation and flood hazard boundaries within the subdivision. The proposed subdivision plan must include a condition of plan approval requiring that principal structures in the subdivision will be constructed with their lowest floor, including the basement, at least one foot above the 100-year flood elevation;
- 14. Freshwater wetlands. All freshwater wetlands within the proposed subdivision have been identified on any maps submitted as part of the application, regardless of the size of these wetlands. Any mapping of freshwater wetlands may be done with the help of the local soil and water conservation district;
- 14-A. Farmland. All farmland within the proposed subdivision has been identified on maps submitted as part of the application. Any mapping of farmland may be done with the help of the local soil and water conservation district;
- 15. River, stream or brook. Any river, stream or brook within or abutting the proposed subdivision has been identified on any maps submitted as part of the application. For purposes of this section, "river, stream or brook" has the same meaning as in Title 38, section 480-B, subsection 9;

16. Storm water. The proposed subdivision will provide for adequate storm water management;
17. Spaghetti-lots prohibited. If any lots in the proposed subdivision have shore frontage on a river, stream, brook, great pond or coastal wetland as these features are defined in Title 38, section 480-B, none of the lots created within the subdivision have a lot depth to shore frontage ratio greater than 5 to 1;
18. Lake phosphorus concentration. The long-term cumulative effects of the proposed subdivision will not unreasonably increase a great pond's phosphorus concentration during the construction phase and life of the proposed subdivision; and
19. Impact on adjoining municipality. For any proposed subdivision that crosses municipal boundaries, the proposed subdivision will not cause unreasonable traffic congestion or unsafe conditions with respect to the use of existing public ways in an adjoining municipality in which part of the subdivision is located.
20. Lands subject to liquidation harvesting. Timber on the parcel being subdivided has not been harvested in violation of rules adopted pursuant to Title 12, section 8869, subsection 14. If a violation of rules adopted by the Maine Forest Service to substantially eliminate liquidation harvesting has occurred, the municipal reviewing authority must determine prior to granting approval for the subdivision that 5 years have elapsed from the date the landowner under whose ownership the harvest occurred acquired the parcel. A municipal reviewing authority may request technical assistance from the Department of Agriculture, Conservation and Forestry, Bureau of Forestry to determine whether a rule violation has occurred, or the municipal reviewing authority may accept a determination certified by a forester licensed pursuant to Title 32, chapter 76. If a municipal reviewing authority requests technical assistance from the bureau, the bureau shall respond within 5 working days regarding its ability to provide assistance. If the bureau agrees to provide assistance, it shall make a finding and determination as to whether a rule violation has occurred. The bureau shall provide a written copy of its finding and determination to the municipal reviewing authority within 30 days of receipt of the municipal reviewing authority's request. If the bureau notifies a municipal reviewing authority that the bureau will not provide assistance, the municipal reviewing authority may require a subdivision applicant to provide a determination certified by a licensed forester.

For the purposes of this subsection, “liquidation harvesting” has the same meaning as in Title 12, section 8868, subsection 6 and “parcel” means a contiguous area within one municipality, township or plantation owned by one person or group of persons in common or joint ownership. This subsection takes effect on the effective date of rules adopted pursuant to Title 12, section 8869, subsection 14.

#### **§ 4405. Access to direct sunlight**

The municipal reviewing authority may, to protect and ensure access to direct sunlight for solar energy systems, prohibit, restrict or control development through subdivision regulations. The regulations may call for subdivision development plans containing restrictive covenants, height restrictions, side yard and set-back requirements or other permissible forms of land use controls.

#### **§ 4406. Enforcement; prohibited activities**

The Attorney General, the municipality or the planning board of any municipality may institute proceedings to enjoin a violation of this subchapter.

1. Sales or other conveyances. No person may sell, lease, develop, build upon or convey for consideration, or offer or agree to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision that has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and approved under Title 38, chapter 3, subchapter I, article 6, where applicable, and subsequently recorded in the proper registry of deeds.
  - A. No register of deeds may record any subdivision plat or plan that has not been approved under this subchapter. Approval for the purpose of recording must appear in writing on the plat or plan. All subdivision plats and plans required by this subchapter must contain the name and address of the person under whose responsibility the subdivision plat or plan was prepared.
  - B. Whenever the initial approval or any subsequent amendment of a subdivision is based in part on the granting of a variance from any applicable subdivision approval standard, that fact must be expressly noted on the face of the subdivision plan to be recorded in the registry of deeds.

- (1) In the case of an amendment, if no amended plan is to be recorded, a certificate must be prepared in recordable form and recorded in the registry of deeds. This certificate must:
  - (a) Indicate the name of the current property owner;
  - (b) Identify the property by reference to the last recorded deed in its chain of title; and
  - (c) Indicate the fact that a variance, including any conditions on the variance, has been granted and the date of the granting.
- (2) The variance is not valid until recorded as provided in this paragraph. Recording must occur within 90 days of the final subdivision approval or approval under Title 38, chapter 3, subchapter I, article 6, where applicable, whichever date is later, or the variance is void.

B-1. Whenever the subdivision is exempt from Title 38, chapter 3, subchapter I, article 6, because of the operation of Title 38, section 488, subsection 5, that fact must be expressly noted on the face of the subdivision plan to be recorded in the registry of deeds. The developable land, as defined in Title 38, section 488, subsection 5, must be indicated on the plan. The person submitting the plan for recording shall prepare a sworn certificate in recordable form and record it in the registry of deeds. This certificate must:

- (1) Indicate the name of the current property owner;
- (2) Identify the property by reference to the last recorded deed in its chain of title and by reference to the subdivision plan;
- (3) Indicate that an exemption from Title 38, chapter 3, subchapter I, article 6, has been exercised;
- (4) Indicate that the requirements of Title 38, section 488, subsection 5, have been and will be satisfied; and
- (5) Indicate the date of notification of the Department of Environmental Protection under Title 38, section 488, subsection 5.

The exemption is not valid until recorded as provided in this paragraph. Recording must occur within 90 days of the final subdivision approval under this subchapter or the exemption is void.

- C. A building official may not issue any permit for a building or use within a land subdivision unless the subdivision has been approved under this subchapter and under Title 38, chapter 3, subchapter I, article 6, where applicable.
  - D. Any person who sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision that has not been approved under this subchapter and under Title 38, chapter 3, subchapter I, article 6, where applicable, shall be penalized in accordance with section 4452.
  - E. Any person who, after receiving approval from the municipal reviewing authority or approval under Title 38, chapter 3, subchapter I, article 6 and recording the plan at the registry of deeds, constructs or develops the subdivision or transfers any lot in a manner other than depicted on the approved plans or amendments or in violation of any condition imposed by the municipal reviewing authority or the Department of Environmental Protection, when applicable, must be penalized in accordance with section 4452.
  - F. Any person who sells, leases or conveys for consideration any land or dwelling unit in a subdivision approved under this subchapter and exempt from Title 38, chapter 3, subchapter I, article 6, because of the operation of Title 38, section 488, subsection 5, shall include in the instrument of sale, lease or conveyance a covenant to the transferee that all of the requirements of Title 38, section 488, subsection 5, have been and will be satisfied.
2. Permanent marker required. No person may sell or convey any land in an approved subdivision unless at least one permanent marker is set at one lot corner of the lot sold or conveyed. The term “permanent marker” includes, but is not limited to, the following:
- A. A granite monument;
  - B. A concrete monument;

- C. An iron pin; or
  - D. A drill hole in ledge.
3. Utility installation. A public utility, water district, sanitary district or any utility company of any kind may not install services to any lot or dwelling unit in a subdivision, unless written authorization attesting to the validity and currency of all local permits required under this chapter has been issued by the appropriate municipal officials or other written arrangements have been made between the municipal officers and the utility, except that if a public utility, water district, sanitary district or utility company of any kind has installed services to a lot or dwelling unit in a subdivision in accordance with this subsection, a subsequent public utility, water district, sanitary district or utility company of any kind may install services to the lot or dwelling unit in a subdivision without first receiving written authorization pursuant to this section.
4. Permit display. A person issued a permit pursuant to this subchapter in a great pond watershed shall have a copy of the permit on site while work authorized by the permit is being conducted.

#### **§ 4407. Revisions to existing plat or plan**

Any application for subdivision approval which constitutes a revision or amendment to a subdivision plan which has been previously approved shall indicate that fact on the application and shall identify the original subdivision plan being revised or amended. In reviewing such an application, the municipal reviewing authority shall make findings of fact establishing that the proposed revisions do or do not meet the criteria of section 4404.

1. Recording. If a subdivision plat or plan is presented for recording to a register of deeds and that plat or plan is a revision or amendment to an existing plat or plan, the register shall:
- A. Indicate on the index for the original plat or plan that it has been superseded by another plat or plan;
  - B. Reference the book and page or cabinet and sheet on which the new plat or plan is recorded; and



- C. Ensure that the book and page or cabinet and sheet on which the original plat or plan is recorded is referenced on the new plat or plan.

#### **§ 4408. Recording upon approval**

Upon approval of a subdivision plan, plat or document under section 4403, subsection 5, a municipality may not require less than 90 days for the subdivision plan, plat or document to be recorded in the registry of deeds.



# **The Statutory Definition of “Subdivision” for Purposes of Municipal Review and Related Issues by Rebecca Warren Seel (2014)**

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**Introduction:** The following discussion of the Municipal Subdivision Law is intended as general information and not as legal advice. It is important to read and re-read the statutory language, pertinent municipal ordinance provisions, and relevant court decisions in attempting to determine whether a particular fact pattern constitutes a subdivision requiring municipal review and approval. Municipal review of subdivisions is governed by 30-A M.R.S.A. § § 4401-4408 (2011 & Supp. 2013). The definition of “subdivision” that controls review by the Department of Environmental Protection under the Site Location of Development Act is found in 38 M.R.S.A. § 482(5)(Supp. 2013). The definition governing review by the Land Use Planning Commission of subdivisions in the unorganized territories of Maine is found in 12 M.R.S.A. § § 682 (Supp. 2013), 682-A and 682-B (2005).

**The Statute:** A copy of the Municipal Subdivision Law [30-A M.R.S.A. § § 4401-4408 (2011 & Supp. 2013); formerly 30 M.R.S.A. § 4956 and 30-A M.R.S.A. § 4551] appears in its entirety in Appendix A-1 of these materials. A complete legislative history for this law is included in Appendix A-2.

**The Statutory Definition of “Subdivision”:** The statutory definition of “subdivision” for the purposes of municipal review currently is found in 30-A M.R.S.A. § 4401(4)(Supp. 2013). It includes two distinct categories: land subdivisions and dwelling unit subdivisions.

## **Land Subdivisions—Basic Elements and Issues**

### **The elements:**

- the “division”
- of a “tract or parcel” of land
- into 3 or more “lots”
- within any 5 year period beginning on or after September 23, 1971
- whether accomplished by “sale, lease, development, buildings or otherwise”
- by whomever accomplished
- unless otherwise exempt as a “homestead” lot, “open space” lot, 40 acre lot, devise, condemnation, court order, gift to relative, gift to a municipality,

transfer to an abutter, lot not part of a subdivision when created, lot with a pre-September 23, 1971 dwelling structure, or “grandfathered” subdivision (see discussions below)

### **The issues:**

1. **The “division” into lots by sale, lease, development, buildings or otherwise** means the “splitting off of a legal interest of sufficient dignity” in the land.

- *Town of York v. Cragin*, 541 A.2d 932 (Me. 1988) (held that structures such as hotel, motel, apartment building, multi-unit condo structure didn’t qualify as “divisions” of land); see discussion later in these materials of current statutory language regarding multi-unit dwellings and construction or placement of “dwelling units.”
- *Town of Arundel v. Swain*, 374 A. 2d 317 (Me. 1977) (use of campsites for a rental fee in a traditional type of campground didn’t qualify as “divisions”).
- *Planning Board of Town of Naples v. Michaud*, 444 A. 2d 40 (Me. 1982) [Fee simple sale of site in a campground constituted a “division.” Although the sites had no fixed boundaries, the court found that there was a “functional division” on the basis that the layout of the sites would lend itself to a feeling of control by the occupant (“territorial imperative”) and would provide a legal basis on which a court could establish legal boundaries.]
- *Town of Harpswell v. Powers*, Mem. of Decis., February 17, 1998 (lease of two portions of Powers’ parcel of land divided the parcel into 3 lots requiring subdivision approval).
- *Horton v. Town of Casco*, 2013 ME 111, 82 A. 3d 1217 (lease agreement giving AT&T the right to use and occupy a certain space for a finite period of time and for the specific and limited purpose of building a wireless communication tower was akin to a license and was not a sufficient interest in the land to constitute a division that created a lot)
- A mobile home park generally qualifies as a type of division by lease.
- Mortgage interests—If encompassing the entire lot, the mortgage doesn’t constitute a division in its own right; if on a portion of the lot, it does constitute a division [30-A M.R.S.A. §4401(4)(I)(Supp. 2013)(bona fide security interest granted on an entire exempt lot does not create a lot, absent intent to avoid subdivision review); *Town of Orrington v. Pease*, 660 A. 2d 919 (Me. 1995)].
- Mortgagee not prevented from lawfully foreclosing upon property in an unapproved subdivision. *Gorham Savings Bank v. Baizley*, 1998 ME 9, 704 A.2d 398.

- A land installment contract isn't a "sale" until a deed is issued because the buyer has no enforceable interest in the land; may be an example of a division by "otherwise."
- A purchase and sale agreement describing a lot to be sold must contain language conditioning the sale on obtaining subdivision approval if entered before a plan is approved, if the lot is part of an unapproved subdivision. 30-A M.R.S.A. § 4406 (2011); *Murray v. Town of Lincolnville*, 462 A.2d 40 (Me. 1983).
- The creation of a condominium interest in land may constitute a division.
- Placement of 3 or more buildings on a single parcel, where the land and buildings are in single ownership and used by the owner (e.g., college campus; complex of commercial buildings including main office, storage building, warehouse)—does it constitute a subdivision? Arguably it is a division by "buildings," but the statute is unclear when the buildings aren't dwelling units.
- Where a strip of land is sold in fee for a road, it constitutes a "division" for the purposes of the subdivision law, even though it is not a buildable lot in its own right.
- Beware of unintended subdivisions which result from poor descriptions/conveyancing language in deeds, as for example, where the intent is to convey 2 lots, but because a small portion of land is left out of the description, a third, unintended lot, is created.

## 2. A "tract or parcel"

- § 4401(6) (Supp. 2013) defines "tract or parcel" as "all contiguous land in the same ownership, except that lands located on opposite sides of a public or private road are considered each a separate tract or parcel of land unless the road was established by the owner of land on both sides of the road after September 22, 1971." (This definition was amended by P.L. 2007, ch. 49, § 1, effective September 20, 2007, adding the reference to September 22, 1971.)
- A lot is analyzed as part of the bigger tract or parcel from which it was split (a.k.a., "parent parcel"), at least until 5 years have elapsed since its creation, and maybe longer under 30-A M.R.S.A. § 4406(1)(E) (2011) or some local ordinances; it doesn't become a tract or parcel in its own right at least until the expiration of 5 years from its creation, even if it is a lot which is exempt when first created. (See discussion of exempt lots later in these materials.)
- "All contiguous land"—"Contiguous" is defined in *The American Heritage Dictionary of the English Language* (4<sup>th</sup> edition) as "sharing an edge or boundary; touching." This would include land on each side of a road or stream or river, if the ownership of the bed is the same as on both sides. (But see the discussion below regarding a parcel divided by a road.)

- In the “same ownership”—Title of all contiguous parcels must be held in the same names and in the same estate to be treated as a single tract or parcel; see *Town of Orrington v. Pease*, 660 A.2d 919 (Me. 1995), and *Town of Bridgton v. Rolfe*, District Court, District Nine, Division of No. Cumberland, Dkt. BRI-90-LU-1, August 15, 1990.
- If the road separating the land on each side was “established” by the owner of land on both sides of the road after September 22, 1971, then the land on each side constitutes a combined single parcel, not two separate parcels. Research when and how the road in question was established by reviewing records at the registry of deeds and State, county and municipal records documenting creation of the road and the maintenance and use of the road. Questions: Does “established” mean “officially” created? What is “creation”? Is September 22, 1971 now the point of reference for all road-related “tract or parcel” analyses or only for divisions occurring after September 20, 2007 (the effective date of the amendment to the definition of “tract or parcel”)? Is it enough that the landowner at the time physically removed trees and made a path with heavy equipment? Is prescriptive use without a court declaration regarding status enough? Use less than 20 years? Are deeded easement rights a “road”?
- See § 4404(13), (14), (14-A), and (15) (Supp. 2013) regarding flood areas, freshwater wetlands, farmland, and rivers, streams and brooks—These must be identified if “within the subdivision,” not just for the lots that will be offered for sale, but for all the land that is part of the “subdivision” as defined, including retained acreage. Whether these must be identified on the plan itself or only on accompanying maps is unclear. (“Farmland” definition was added as § 4401(2-B) by P.L. 2009, ch. 356, Pt. C, § 1, effective September 12, 2009; “farmland” review criterion was added as § 4404(14-A) by P.L. 2009, ch. 356, Pt. C, § 2, effective September 12, 2009.)

### 3. **Creation of 3 or more lots**

- Two “divisions” of the parcel create 3 lots, whoever makes the divisions.
- Where the owner conveys a lot from the middle of a parcel to another person and retains the portions on either side of the middle piece, a subdivision is not created. Only one “division” has occurred and only 2 lots are created; the pieces on either side of the middle are considered to be a combined single lot retained by the owner, even though they do not touch at any point. *Bakala v. Town of Stonington*, 647 A. 2d 85 (Me. 1994). If one of the “end” pieces is then conveyed to a third party within the same 5 year period and the conveyance is not eligible for an exemption, the conveyance constitutes a second division and creates a third countable lot requiring subdivision approval. Question: What if

the owner conveys a lot out of the middle to one person and also conveys the land on either side of the middle piece to a second person, with each end piece having its own legal description in the deed of conveyance? Some argue that this is controlled by *Bakala* and that no subdivision is created. Others take the position that this is distinguishable from *Bakala* because there is more than one “division” as a result of the conveyance of the end pieces to another person. The answer probably depends on whether multiple deeds were used to convey the end pieces and whether those deeds were delivered simultaneously.

**4. Within any 5 year period beginning on or after September 23, 1971**

- To determine how many lots have been split from a “parent” parcel within a single 5 year period, the starting point for calculating the 5 year period is the creation of a particular lot (e.g., when sold, leased, made the subject of a written purchase and sale agreement or option to purchase); the presumption is that the division occurred on the date of the deed or other document, absent other evidence of record to the contrary.
- A rolling window; for each lot created, use its date of creation as the point of reference to determine whether that lot is part of a subdivision by looking forward 5 years and back 5 years; the date of creation of the first lot split from a particular parent parcel isn’t the only point of reference for the other lots. Planning board approval doesn’t create a lot; it only gives permission to create it legally by splitting off an interest in that lot. *Planning Board of Town of Naples v. Michaud*, 444 A. 2d 40 (Me. 1982); *Town of York v. Cragin*, 541 A. 2d 932 (Me. 1988). See *Pleasant View Mobile Home Park v. Town of Mechanic Falls*, 538 A. 2d 273 (Me. 1988) (if a subdivision plan was approved before September 23, 1971 and the 5 year period begins before that date, the development may continue as an exempt subdivision after that date, without new subdivision approval).
- 30-A M.R.S.A. § 4406 (1)(E)(2011)—If a person obtains planning board approval of a subdivision plan and records the plan, that person can’t make changes to the plan or create additional lots without planning board approval of a plan revision, regardless of whether the changes occur more than 5 years later; not true for people who buy the lots shown on the recorded plan—after 5 years from the creation of their lots, the lots become separate tracts/parcels in their own right, absent a local ordinance provision to the contrary addressing further division of approved lots. However, § 4406(1)(E) (2011) refers to the “transfer of any lot in a manner other than depicted on the approved plans.” What if the person who received the original subdivision approval wants to create and convey a new lot that is eligible for a gift exemption or an exemption as a transfer to an abutter? Both §4401(4)(D-4) and (D-6) (Supp.2013) characterize

those exempt transactions as not creating a lot. Arguably those conveyances would not trigger review under § 4406(1)(E) (2011).

- A patient landowner may divide his/her parcel once in each new 5 year period without needing subdivision approval.

5. **A lot is exempt from the calculation of “3 or more within any 5 year period” if it qualifies under one of the following exemptions:**

**A. Homestead” exemption [§ 4401(4)(A)(1)(Supp. 2013)]**

- Both the first and second divisions must be accomplished by a sub-divider who has used one of the lots for his/her own principal single family residence for a period of at least 5 years immediately preceding the second division.
- A seasonal residence no longer qualifies for this exemption.
- Mere ownership of the land is not enough; the person must have lived in a residence there.
- The lot with the “homestead” dwelling structure can’t be the first conveyance, but probably can be sold as the second division made; probably doesn’t have to be retained longer.
- This exemption was clarified in 2001 (P.L. 2001, ch. 359, effective September 21, 2001) by adding references to “principal residence” and “immediately preceding.” Initial effective date was September 21, 2001, retroactive to June 1, 2001, per P.L. 2001, ch. 359, § 8; P.L. 2001, ch. 523 clarified the effective date as September 21, 2001—ch. 523 was enacted as emergency legislation effective March 12, 2002.
- What if the land and house were jointly owned by a husband and wife, but only the husband lived on the property continuously during the 5 year period? The wife lived there occasionally, but mostly out of state while trying to sell another home. Could it be said that the Maine property was the wife’s “principal residence”? The statute doesn’t say “legal residence.” Is there a difference?

**B. “Open Space” exemption [§4401(4)(A)(1)(Supp. 2013)]**

- Repealed in 2001 by P.L. 2001, ch. 359. Initial effective date was September 21, 2001, retroactive to June 1, 2001, per P.L. 2001, ch. 359, § 8; P.L. 2001, ch. 523 clarified the effective date as September 21, 2001—ch. 523 was enacted as emergency legislation effective March 12, 2002.



- This section authorized an exemption for a lot retained by the sub-divider as “open space” as defined in 36 M.R.S.A. §1102(Supp. 2013) for a period of 5 years prior to the second division.
- The law was unclear whether there had to be a filing with the municipal tax assessor for open space classification and approval by the assessor.

**C. Lots not part of a subdivision when created [§4401(4)(B)(Supp. 2013)]**

- The first lot created isn’t really an exempt lot, because it is counted in determining whether 3 or more exist. It can be used/developed by the owner, even though a subdivision plan has already been filed with the planning board for review, but not yet approved. *Paladac v. City of Rockland*, 558 A. 2d 372 (Me. 1989).
- Lots eligible for one of the statutory exemptions are “not part of a subdivision when created.”
- “Do not become subject to this subchapter by the subsequent dividing of that tract or parcel or any portion”—Those lots that are not part of a subdivision when created won’t be the subject of substantive review by the planning board or conditions of approval, but must be shown on the plan so that the planning board may take them into account in reviewing and fashioning conditions applicable to other lots. This doesn’t mean that subsequent divisions of those lots are automatically exempt and not subject to review. Requiring that those lots be numbered on a plan doesn’t make them subject to review and conditions of approval; the numbering may help everyone better understand what has happened and what is proposed. Language can be included on the plan to clarify the status of such lots. See generally, *Martin v. City of Lewiston*, 2008 ME 15, 939 A. 2d 110.

**D. Lots of 40 or more acres [§ 4401 (4)(C) (Supp. 2013)]**

- As of July 25, 2002, these lots are **NO LONGER EXEMPT BY STATUTE** (P.L. 2001, ch. 651); they were previously exempt unless (1) all or part of the “parent parcel” was within the shoreland zone or (2) a municipal ordinance eliminated the exemption.
- To be exempt under current law, the municipality must adopt an ordinance (or planning board regulation, where there is no subdivision ordinance adopted by the legislative body) which restores the exemption; the ordinance/regulation must be adopted after July 25, 2002 to be effective in reinstituting the exemption.

- A municipality can't establish a 40 acre exemption for lots which are conveyed from a bigger parcel which is partially or totally within the "shoreland zone" as defined in 38 M.R.S.A. §435 (Supp. 2013) or by local ordinance.
- The reference to parcels within the shoreland zone not being eligible for the 40 acre lot exemption was first added in 1988, effective April 19, 1988; the reference to a municipal definition of "shoreland zone" was added in 1989.
- There was a brief period (1987-1989) during which a plan of 3 or more 40 acre lots sometimes had to be filed with the Registry and the municipality, although no review was required.

**E. Divisions by Devise [§4401(4)(D-1) (Supp. 2013)]**

- "Devise" refers to a lot left to a person in a will.
- "Intent to avoid the objectives" of the subdivision law is applicable to this exemption (see P.L. 2001, ch. 359 and ch. 523).
- A lot created by devise is not exempt from local minimum lot standards even though not counted for subdivision purposes. Cf., Estate of Eldon C. Hunt, 2010 ME 23, 990 A.2d 544.

**F. Divisions by Condemnation [§4401(4)(D-2)(Supp. 2013)]**

- "Condemnation" refers to lots resulting from the use of eminent domain by a governmental entity.
- The "intent to avoid" standard is applicable to lots created by condemnation, according to the statute, though it is difficult to imagine an actual scenario (see P.L. 2001, ch. 359 and ch. 523).
- Lots created by condemnation are not exempt from local minimum lot standards even though not counted for subdivision purposes.

**G. Divisions by Order of Court [§4401(4)(D-3)(Supp. 2013)]**

- The "intent to avoid" standard is applicable (see P.L. 2001, ch. 359 and ch. 523).
- Intent to avoid the law might be a relevant analysis in a divorce settlement adopted by the court.
- Court-ordered divisions are not exempt from local minimum lot standards even though not counted for subdivision purposes.

**H. Divisions accomplished by Gift to a Person Related to the Donor**

**[§ 4401(4)(D-4)(Supp. 2013)] if:**

- The “parent parcel” was held by the donor for a continuous period of 5 years “prior” to the gift conveyance (effective September 21, 2001, per P.L. 2001, ch. 523, which took effect as an emergency law on March 12, 2002; initially effective September 21, 2001, retroactive to June 1, 2001, per P.L. 2001, ch. 359). Does this mean “immediately prior”?
- Qualifying relatives are spouse, parent, grandparent, brother, sister, child, or grandchild related by blood, marriage or adoption. (See discussion of P.L. 2001, ch. 359 and ch. 523 above regarding effective dates.) There is no reference to “domestic partners,” so probably they are not eligible for the purposes of this exemption, since exemptions are narrowly construed by the courts.
- The conveyance may be for consideration and still be a gift as long as the consideration is not more than  $\frac{1}{2}$  the “assessed value of the real estate.” Questions: Who determines the “assessed value”? Probably the municipal assessor. What “real estate”? Arguably the gift lot, but the statute is unclear. Possible interpretations: (1) Take the assessed value of the entire parcel which is being divided as recorded by the local assessor in the valuation book and divide it by the number of divisions being proposed as gifts; or (2) use the assessed value of the proposed gift lot as determined by the assessor based on the characteristics of the lot; or (3) compare the consideration paid for the gift with the assessed value of the whole parcel as stated in the valuation book by the assessor and determine whether it is an amount which is  $\frac{1}{2}$  or less of that value. Option #2 raises unfunded State mandate issues, but seems to be the favored approach. (See discussion of P.L. 2001, ch. 359 and ch. 523 above regarding effective dates.)
- The person receiving the gift lot can’t “transfer” the “real estate exempt under this paragraph” for 5 years except to another qualifying relative of the original donor; if transferred sooner to a person and/or for an amount that would not qualify as a gift, the exemption for the original gift lot is lifted retroactively to the date of the gift (the “reach back” provision). (The effective date of this provision was July 14, 1990.) Issue #1: There is a strong argument that the exemption is lost retroactively even if only a portion of the gift lot is transferred, since the gift exemption statute doesn’t expressly state that the exemption is lost if only the entire gift lot is transferred. Where the Legislature wants to make a distinction between all or part of a lot, it knows how to do that. E.g., §4401(4)(D-6) and

§ 4401(4)(I) (Supp. 2013). Issue #2: Since the statute says “transfer” and not “give,” some might argue that the donee could either give or sell to a qualified relative. However, since the original exemption relates to a gift, it is reasonable to construe “transfer” to mean that the donee may not sell the gift lot to a qualifying relative without jeopardizing the gift exemption, unless the transfer by the donee meets the same test for consideration as the original gift. The “reach back” language was first added to the statute when a gift couldn’t involve any consideration, but it now should be read in light of the current test for a “gift.” Issue #3: What if all or part of the gift lot is leased within the 5 year period? A lease arguably does not constitute a “transfer” for the purposes of the “reach back” provision; “transfer” probably envisions the conveyance of title.

- Avoid problems for third parties that could result from transfers by the original donees that lift the gift exemption retroactively; include broad, clear language in the deeds from the original donor to those donees citing the statute and reminding them and prospective buyers about the consequences of an ineligible transfer by the donee within 5 years of the original gift conveyance. Attorneys representing third parties who purchase lots within the same 5 year period as gift conveyances from the same parent parcel should remind their clients about the possibility of the retroactive elimination of gift exemptions and resulting need for subdivision approval. They should caution their clients against dividing their own lots without first determining what may have been done with the gift lots.
- Intent of the donor in making the gift is relevant; the 5 year retention period didn’t replace the broader intent analysis. Maine court decisions involving the gift to relatives exemption and intent to avoid the objectives of the law include: *Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258 (case dealing with the role of the local code enforcement officer in determining whether a “family subdivision” has been created and the point at which that decision is appealable); *Tinsman v. Town of Falmouth*, 2004 ME 2, 840 A.2d 100 (court agreed with town’s contention that conveyances of “gift” lots were intended to avoid the objectives of the subdivision law based on a number of things, including: landowner’s background in real estate development; his admission that some of the transfers were intended to avoid subdivision requirements; town planner’s testimony that approval would be difficult to obtain due to poorly drained soils; numerous transfers between him and his corporation without consideration over a short period of time; and the sequence of conveyances); *Paumgarten v. Inhabitants of Town of Mt. Desert*, District Court, District Five, Division of Southern Hancock, Dkt No. BAR92-CV-

031, December 27, 1993 (conveyances by partnership to the partners and their wives constituted gifts to family members; evidence of their intent to make the conveyances in order to take advantage of needed federal tax exemptions supported a finding that there was no intent to avoid the objectives of the subdivision law); *Hylar v. Town of Blue Hill*, 570 A. 2d 316 (Me. 1990)(in reviewing new subdivision applications, the planning board may reconsider the validity of earlier family transfers in light of the donors' subsequent conduct); *Scorcia v. Inhabitants of Town of Boothbay*, CV-91-116 (Me. Super. Ct., Linc. Cty., June 10, 1992) (conveyance from husband and wife to husband was not intended to avoid subdivision review but rather to comply with the town's building permit regulations); *Fisher v. Dame*, 433 A.2d 366 (Me. 1981) (appeal of board's finding regarding family gift conveyances was deemed to be an untimely Rule 80B appeal rather than a declaratory judgment action); *Bauer v. Town of Gray*, AP-99-90 (Me. Super. Ct., Cum. Cty., September 6, 2000) (a planning board decision regarding intent must be supported by substantial evidence in the record which it created; the parties must introduce pertinent evidence into the planning board record; they can't bolster the record through a trial of the facts in Superior Court.); *Bauer v. Town of Gray*, AP-99-090 (Me. Super. Ct., Cum. Cty., May 17, 2001) (a planning board may base findings regarding intent to avoid the objectives of the statute on circumstantial evidence); *Inhabitants of Town of Lyman v. Dion*, CV-83-663 (Me. Super. Ct., York Cty., July 1, 1987) ("desire to avoid the effect of a change in the minimum lot size requirement is not tantamount...to an intent to avoid the objectives of the state subdivision statutes and local ordinances implementing those statutes. . . . (T)he town equates the criteria for subdivision approval, such as consideration of the impact of a development on existing water supplies or soil erosion, with the 'objectives' of the subdivision statute. That equation is also inappropriate. Although the statutes do not specify the objectives of the subdivision law, the statutory scheme indicates two overriding legislative objectives: to prevent the adverse environmental consequences of uncontrolled development, and to protect members of the public who purchase subdivided lots.... (N)othing in the record to support a finding that there is any intent to avoid the second objective. All of the conveyances were to family members. These were not sham transactions which were designed to lead ultimately to conveyances to members of the public unrelated to (the donors). (E)ven the right of first refusal retained by (the donors) was intended to provide for some continuing family control over the disposition of these lots, rather than to provide for the possibility of a reconveyance to (the donors) for the purpose of then

conveying these parcels to unrelated members of the public.... The record would support a finding that (the donor's) own experience with the subdivision process in Lyman...gave him a secondary intent to allow his children to develop their parcels and the family compound without subdivision controls. However, the existence of this subsidiary intent does not deprive the gifts of their bona fide quality and does not run afoul of the statutory language.”)

- What if the parcel from which the gift lot is conveyed was jointly owned for part of the 5 year period and one joint owner acquired the other's interest during the third year? If the one who owned it either jointly or solely for the entire 5 year period conveys a gift lot, does he/she satisfy the “continuous ownership” requirement? Probably.
- A landowner seeking exemption from subdivision approval has the burden of proving that he/she did not intend to avoid the objectives of the law. *Tinsman, supra*; a local code enforcement officer must make factual findings related to intent in determining the legality of a “family subdivision.” *Mills, supra*.

#### **I. Gift to a Municipality (§ 4401(4)(D-5)(Supp. 2013)]**

- To be eligible, the gift lot must be accepted by a vote of the legislative body (i.e., town meeting or town/city council).
- The “intent to avoid” standard is applicable to municipal gifts (per P.L. 2001, ch. 359 and ch. 523).

#### **J. Transfer to Abutter [§ 4401(4)(D-6)(Supp. 2013)**

- Amended most recently by P.L. 2013, ch. 126, § 1, effective October 9, 2013, deleting the phrase “that does not create a separate lot,” which had been a source of much confusion.
- Prior to the 2013 amendment, the first sentence read: “A division accomplished by the transfer of any interest in land to the owners of land abutting that land that does not create a separate lot does not create a lot or lots for the purposes of this definition, unless the intent of the transfer is to avoid the objectives of this subchapter.” This version took effect September 21, 2001. (Initially effective September 21, 2001, retroactive to June 1, 2001, per P.L. 2001, ch. 359; P.L. 2001, ch. 523 clarified that the effective date was September 21, 2001—ch. 523 took effect as emergency legislation on March 12, 2002).

- The pre-2013 version of this exemption involved the transfer of an interest in land to the owner of abutting land that did not create a “separate lot.” Some argued that such a transfer is always exempt because it is just a shift in the lot line and never creates a “separate lot.” They took the position that the issue of whether the conveyed piece is “buildable” was irrelevant because the language of the statute said “separate lot,” not “buildable lot,” so the Task Force report (see below) that was the springboard for the amendment was not controlling. Others focused on the language of the Task Force report as pertinent legislative history that must be considered to resolve an ambiguity regarding the meaning of “separate lot” in the statutory language. They argued that if the conveyed acreage had insufficient area to satisfy applicable minimum lot size requirements for development, making it a lot that was not separately “buildable,” the conveyance was exempt and didn’t result in a countable lot, unless intended to avoid the objectives of the subdivision law; if there is enough acreage to create a “buildable” lot, then it is not an exempt transfer. It is impossible to say with certainty what the Legislature intended. (See “Task Force to Study Growth Management, Proposals by Subdivision Law/Impact Fee Working Group” in Appendix A-4 of these materials.) Now that the “separate lot” language has been repealed, the question is whether to judge abutter transfers made prior to October 9, 2013 by the amended version of §4401(4)(D-6) or the current version. Can we view the deletion of the “separate lot” language as simply a clarification of the intent of the pre-2013 language? The “Summary” in the legislative document that proposed the 2013 amendment (L.D. 966, First Regular Session, 126<sup>th</sup> Legislature) reads: “This bill clarifies an exemption to the definition of ‘subdivision’ for purposes of planning and land use regulation. This bill specifies that a parcel of land created by a division that is transferred to an owner abutting that parcel is not subject to municipal review and regulation.” Based on the bill’s “Summary,” it seems reasonable to construe abutter transfers made prior to October 9, 2013 in light of the current statute.
- If the exempt conveyance is transferred by the abutter within 5 years to another person without all of the “merged land,” then the exemption for the original conveyance is lifted retroactively to the date of the original transfer to the abutter (“reach back” provision). Does “merged land” refer to all of the land owned by the abutter at the time of the original exempt conveyance and the land that was transferred? Probably. If so, then a person who owns 100 acres and receives a conveyance of a small strip from an abutter to even off a boundary must either hold the entire 100+ acres for 5 years or convey the entire 100+ acres if sooner than 5 years.

- The lot conveyed to the abutter must directly abuts his/her existing parcel (“transfer of any interest in land to the owners of land abutting that land”); it isn’t enough that some other part of the “parent parcel” borders the abutter’s land.
- The piece being conveyed must be to the same person/people who owns/own the abutting parcel—identical record title. *Town of Orrington v. Pease*, 660 A. 2d 919 (Me. 1995); *Town of Bridgton v. Rolfe*, District Court, District Nine, Division of No. Cumberland, Dkt. BRI-90-LU-1, August 15, 1990.

**K. Existing Developed Parcel [§ 4401(4) (E)(Supp. 2013)]**

- The division of a parcel into 3 or more lots doesn’t constitute a subdivision if a permanent dwelling structure legally existing before September 23, 1971 is located on each of the lots being created.
- Old fishing camps and cottage colonies—Do the cabins/cottages constitute “dwelling structures” or “commercial” structures? There is no helpful legislative history and no court decisions directly on point. In a municipality with a land use ordinance, a court may try to resolve this issue based on definitions in that ordinance. E.g., *Wachusett Properties Inc. d/b/a The Cabins at China Lake v. Town of China*, CV-07-329 (Me. Super. Ct., Kenn. Cty, September 9, 2008). Some argue that such cabins constitute commercial structures under *Oman v. Town of Lincolnville*, 567 A.2d 1347 (Me. 1990). Others focus on the residential nature of the activity conducted by the occupants of the cabins.
- Where a project involves a set of pre-September 23, 1971 cottages or cabins and other common buildings used as a dining hall, kitchen, recreation hall, or similar common uses, if the proposed project will create separate lots on each of which one of those structures will be located, it will not be exempt from subdivision review. The common buildings would not qualify as “permanent dwelling structures,” even if the cabins/cottages do.
- In the example above, what if the land remains in single ownership, but the buildings are sold to separate owners? A dwelling unit subdivision? No, because the buildings are not new residential construction since September 23, 1988 and not newly placed on the parcel. (See further discussion regarding dwelling unit subdivisions later in these materials.)

**L. Documenting Eligibility For Exemption in the Registry--If there is no official ruling by the planning board on the eligibility of a lot for an exemption,**



record factual documentation (in affidavit form?) in the Registry; if the planning board has taken official action at an advertised public meeting of the board regarding eligibility for an exemption, record a certified copy of the documentation of that board vote in the Registry. Where a code enforcement officer has issued building permits after determining that the lots involved were exempt gift lots under § 4406(1)( C)(2011), record a certified copy of the CEO's findings. See *Mills, supra*.

## **Dwelling Unit Subdivisions—The Elements and Issues**

### **The elements:**

- The “division” of a “new structure or structures” on a “tract or parcel” of land into 3 or more “dwelling units” within a 5-year period.
- The construction or placement of 3 or more dwelling units on a single “tract or parcel” of land; although this part of the definition is not expressly modified by a reference to a 5 year period, it is commonly believed that the Legislature intended that a 5 year period should also apply to this part of the definition. This interpretation is supported by the lack of a comma separating this category of dwelling unit subdivision from the one involving conversions.
- The division of an existing structure or structures previously used for commercial or industrial use into 3 or more “dwelling units” within a 5 year period.

### **The issues:**

- “Dwelling unit” means “any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, condominiums, apartments and time-share units.” [§ 4401(2) (Supp. 2013)]
- “New structure” includes “any structure for which construction begins on or after September 23, 1988. The area included in the expansion of an existing structure is deemed to be a new structure.” [§ 4401(5) (Supp. 2013)] Example: An existing single family dwelling was built in 1985; an addition built in October 1988 is occupied by two dwelling units. This is not a subdivision.
- “Tract or parcel” is defined in § 4401(6)(Supp. 2013) as “all contiguous land in the same ownership, except that lands located on opposite sides of a public or private road are considered each a separate tract or parcel of

land unless the road was established by the owner of land on both sides of the road after September 22, 1971.” (Amended by P.L. 2007, ch. 49, § 1, effective September 20, 2007).

- Hotel and motel units generally don’t qualify as “dwelling units.” *Town of York v. Cragin*, 541 A.2d 932 (Me. 1988).
- The Maine Legislature first added dwelling unit provisions to the statutory definition in response to *York v. Cragin*, effective September 23, 1988.
- Leased dwelling units (e.g., multi-unit apartment building) do not require subdivision review if the planning board determines that the units are otherwise subject to review under another local ordinance which is at least as stringent as that required by the Municipal Subdivision Law [§ 4401(4)(G)(Supp. 2013)]; typically, the other review is conducted under a separate site plan review ordinance or a site plan review or conditional use review which is part of a town- wide zoning ordinance.
- Does the following constitute the construction or placement of 3 or more dwelling units on a single tract or parcel? A landowner divides a parcel into 2 countable lots, selling each to different people. The owner of one lot builds a duplex. The owner of the other lot places a mobile home on the lot. All of this is done within a single 5 year period. There is no clear answer regarding whether this is a subdivision. Some attorneys say yes, using the “parent parcel” as the point of reference, and find 3 dwelling units placed or constructed on the original tract or parcel within a 5 year period based on the definition of “tract or parcel.” Others say no, viewing each lot, now in separate ownership, as a single “parcel” for the purposes of this part of the definition of “dwelling unit”—no individual lot has 3 dwelling units on it. But see *Inhabitants of Town of Harpswell v. Powers*, CV- 95-1093 (Me. Super. Ct., Cum. Cty., June 9, 1997), where the court found that the statutory definition of “subdivision” includes the combination of dividing a parcel and placing structures upon one or more of the lots within a single 5 year period; on appeal, the Law Court decided the case on other grounds in a Memorandum of Decision dated February 17, 1998.
- In § 4401(4) (Supp. 2013), the fact that the conversion of an industrial or commercial building to a multi-unit residence is a statutory subdivision and the conversion of a one unit residential structure to a multi-unit residence is not reflects the Legislature’s preoccupation with trying to address what was happening on the Portland waterfront with condominium conversion of warehouses; it makes no sense from the standpoint of the purpose of subdivision review.
- Conversion of an old sea captain’s home into 3 or more apartments is not a statutory subdivision.

- Conversion of a residential accessory garage built in 2001 into 2 dwelling units on the same lot with a principal single family residence built in 2001 is arguably not a subdivision, since the garage is arguably a residential structure for the purposes of the conversion rule; conversion of a barn on a family commercial dairy farm into 3 apartments is arguably the conversion of a commercial structure and therefore a statutory subdivision.
- The same counting and exemption rules that apply to divisions of land govern the determination of the number of dwelling units in a structure. [§ 4401(4)(F)(Supp. 2013)]. Since the language of § 4401(4)(F)(Supp. 2013) addresses only dwelling units within a single structure, it is arguable that exemptions do not apply to dwelling units that are placed or constructed on the lot or that are located in a converted commercial or industrial structure. This probably was not what the Legislature intended.
- Question: If a person gives a lot to each of his 3 children and, in the same 5 year period, each child builds or places a dwelling structure on his/her lot, is there a 3 dwelling unit subdivision requiring planning board approval?

Arguably there is, since the grantor didn't give both the lot and dwelling to each child and the courts generally construe exemptions narrowly. Some would argue that there is no subdivision because each lot is a separate "tract or parcel" and also because requiring review of the dwelling units would defeat the purpose of the exemptions for the lots.

### **Exempt Subdivisions [30-A M.R.S.A. § 4402 (2011)]**

Certain subdivisions are "exempt" from subdivision review under the current law. However, sometimes an "exempt" subdivision cannot be developed as it exists, as it was approved, or as shown on the plan in question. This is because a current municipal ordinance, such as a zoning or minimum lot size ordinance, may have a nonconforming lot provision that requires legally nonconforming lots that are undeveloped, contiguous and in single ownership to be merged. In order to convey separate lots, the original exempt subdivision lots may have to be reconfigured to comply with current dimensional requirements. If that is the case, and the "exempt" subdivision cannot legally be developed "as is," any changes made necessary by the new dimensional requirements may cause the subdivision to be changed in such a way that it is no longer "grandfathered" and must receive planning board approval under the current subdivision law before lots may be offered or conveyed. The following subdivisions are listed as "exempt" in § 4402:

1. Subdivisions approved by the planning board or municipal officers before September 23, 1971 in accordance with the laws in effect at that time.
2. Subdivisions in “actual existence” on September 23, 1971 that didn’t require approval under prior law [land divided and lots surveyed prior to September 23, 1971 constituted “actual existence”—*State ex rel Brennan v. R.D. Realty Corporation*, 349 A. 2d 201 (Me. 1975)].
3. Subdivisions shown on plans legally recorded in the proper registry of deeds before September 23, 1971.
4. Airports with an airport layout plan that has received final approval from the airport sponsor, Maine Department of Transportation and the Federal Aviation Administration.
5. A subdivision in violation of the Municipal Subdivision Law [30-A M.R.S.A. § § 4401-4408 (2011 & Supp. 2013)] that has been in existence 20 years or more, except a subdivision that falls within one or the following categories:
  - That has been enjoined pursuant to § 4406 (2011);
  - For which approval was expressly denied by the planning board and a record of the denial was recorded in the appropriate registry of deeds;
  - For which a lot owner was denied a building permit under § 4406 (2011) and a record of the denial was recorded in the appropriate registry of deeds;
  - That has been the subject of an enforcement action or order and a record of the action was recorded in the appropriate registry of deed.

Section 4402(5) (2011) took effect on September 19, 1997. To prevent the 20 year period from expiring, the municipality must make the required recordings any time before the end of the 20 year period. The 20 year period arguably begins with the creation of the lot which resulted in the creation of an unapproved subdivision. The Maine Law Court in *Town of Eddington v. University of Maine Foundation*, 2007 ME 74, 926 A. 2d 183, held that Section 4402(5)(2011) establishes the statute of limitations that controls the enforcement of subdivision violations under § 4406 (2011).

### **Municipal Ordinance Definitions [30-A M.R.S.A. § 4401(4)(H-1) (Supp. 2013)]**

**Statutory Limitations on Home Rule Authority:** Home rule authority regarding the definition of “subdivision” is now expressly limited to definitions which include the division of a structure for commercial or industrial uses (e.g., a commercial unit “mini-mall”) or ordinances which “otherwise regulate land use activities.” It is no longer legal for a municipality to adopt a definition which changes the exemptions (other than as permitted by the statute regarding 40 acre lots) or which establishes a different timeframe or different number of lots for the creation of a subdivision. A municipal ordinance definition of “subdivision” which was in conflict with the statute and which was in effect on July 25,

2002 remained in effect until January 1, 2006 if the municipality recorded the ordinance definition in the registry of deeds by June 30, 2003. By January 1, 2006, ordinance definitions had to be consistent with the statutory definition, except as otherwise provided by the statute. P.L. 2001, ch. 651, effective July 25, 2002. (Since municipalities were prohibited from adopting conflicting definitions of “subdivision” as of June 1, 2001, it is basically ordinance definitions in effect on that date which would be recorded in the registry and preserved until 2006. See P.L. 2001, ch. 523, § 1, effective as an emergency on March 12, 2002, which established June 1, 2001 as the retroactive effective date for P.L. 2001, ch. 359, § 4.)

In *Mills v. Town of Eliot*, 2008 ME 134, 955 A. 2d 258, the Law Court noted that “in 2001, the State statute...permitted local governments to enforce a more expansive, i.e., inclusive, definition of a subdivision in the regulation of land use activities, meaning local ordinances need not exempt ‘family subdivisions’ from the requirements for forming subdivisions.” This recognition by the court of a municipality’s home rule authority to adopt a different definition of “subdivision” is a reminder of the importance of researching municipal records and registry records to determine whether a particular municipality had adopted and was enforcing a modified definition of “subdivision” prior to June 1, 2001, before the Legislature imposed express limitations on home rule ordinance authority regarding the definition.

**Recording the Ordinance:** Section 4401(4)(H-1) (Supp. 2013) required each registry to collect and index in a separate book any subdivision ordinances that were filed. However, the registries may not have been aware of this requirement, so may have recorded subdivision ordinances in their regular books, not in a special one. Anyone researching whether a subdivision was created during the above time period must check with the appropriate registry to see whether a particular municipality’s subdivision ordinance was on file, whether it was filed by the required deadline, and to what extent the ordinance varied from the statutory definition.

It is likely that only a few municipalities recorded their subdivision ordinances. Many may not have known about the requirement of recording in order to preserve a home rule definition, or knew about it and missed the recording deadline. Some may have decided that it was not worth the effort to record, knowing that it would only preserve the definition until 2006. Others may not have recorded because they were not experiencing the kind of development activity that they saw in the 1970’s and 1980’s when they adopted their home rule definitions. For a report prepared by Kirsten Hebert of the State and Federal Relations Department at Maine Municipal Association in September 2001 entitled “Maine’s Subdivision Law and Its Home Rule Implications,” see Appendix 5 in these materials. The original report includes a spread sheet indicating which municipalities adopted definitions which vary from the statutory definition and in what respects. That spread sheet is not included in the appendix to these materials, but can be found on pages 99-104 of the text for

the March 2004 MSBA Seminar entitled “Subdivisions in Maine—2004.” See also a discussion of municipal ordinance definitions prepared by Rebecca Warren Seel, Esq. in the seminar text for a November 1990 Maine State Bar Association seminar entitled “The Definition of Subdivision in Maine Law.”

**“Resubdivision” Provisions:** Some municipal ordinances include provisions addressing the “resubdivision” of a lot shown on an approved plan. Those provisions typically require review and approval by the planning board whenever an approved lot is further divided, regardless of who does the dividing or when. This approach is more far-reaching than the language of 30-A M.R.S.A. § 4406(1)(E) (2011), but probably does not constitute an alteration of the definition of “subdivision” for the purposes of the limits on home rule authority and the recording deadline discussed above.

**Related Issues: Waivers; Expiration Clauses/Extension of Deadlines/Recording Deadline; Plan Revisions; Pending Applications/Retroactivity Clauses; Abandonment of Approved Plans; Subdivisions Crossing Municipal Boundaries; Violations of the Subdivision Law**

## **Waivers**

Planning boards are often given the authority in subdivision ordinances and regulations to approve “waivers” of certain requirements. See the language of a particular ordinance or regulation to know exactly what kind of requirements may be waived and what findings the board must make to support a waiver. *Jarrett v. Town of Limington*, 571 A. 2d 814 (Me. 1990); *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172; *Bodack v. Town of Ogunquit*, 2006 ME 127, 909 A. 2d 620; *JPP, LLC v. Town of Gouldsboro*, 2008 ME 194, 961 A. 2d 1103. In granting waivers, planning boards must ensure that they are waiving only a requirement that is established by the subdivision ordinance or regulation and not a requirement that actually is based on a provision of a zoning ordinance; only boards of appeal have the authority to grant variances from zoning requirements. *York v. Town of Ogunquit*, *supra*; *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A. 2d 58. See also, 30-A M.R.S.A. § 4353(4-C) (Supp. 2013), last paragraph. If a planning board grants initial subdivision approval or approval of a plan amendment based on the granting of a waiver of a subdivision requirement, 30-A M.R.S.A. §4406 (1)(B)(2011) requires that this be noted on the face of the plan and that the plan be recorded within 90 days of final approval in order to prevent the waiver from becoming void. The recording is done by the applicant, not the municipality. Where no amended plan is filed as part of the request that an amendment be approved, § 4406(1)(B)(2011) outlines the contents of a certificate which must be recorded in the registry if the amendment was approved on the basis of a waiver.

## **Extension of Deadlines/ Expiration Clauses/Recording Deadline**

Some municipal ordinances or subdivision regulations authorize conditions of approval which are subject to certain compliance deadlines. Even without such an ordinance provision, the planning board has general authority under 30-A M.R.S.A. § 4403(5)(C) (Supp. 2013) to grant approval on any terms or conditions that it deems advisable and reasonably related to applicable review criteria. At least one court has held that a board has no obligation to grant an extension of such a deadline and that just because the board granted one extension, it is not obligated to continue to do so. *People's Heritage Savings Bank, v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., April 27, 1992).

Many municipal ordinances include clauses which provide that a permit, approval or variance will expire unless the authorized work has begun or been substantially completed within a stated deadline. Such ordinance provisions have been upheld by the Law Court. In order to know what kind of work must be completed and within what timeframe, it is necessary to review the ordinance under which the permit, variance or approval was granted. Failure to satisfy the deadline will generally result in the permit, variance or approval becoming void. *E.g., 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.

Some communities also may have an ordinance requirement that an approved plan must be recorded at the registry within a certain number of days after final approval or the approval becomes void. The ordinance also may provide for the granting of an extension of the filing deadline. If the deadline for recording the plan expires before an extension is sought and approved, the plan becomes void and the board has no authority to approve an extension. *Burr v. Town of Rangeley*, 549 A. 2d 733 (Me. 1988), citing *George D. Ballard, Builders v. Westbrook, supra*. Title 30-A, section 4408 of the Maine statutes (Supp. 2013) provides that a municipality may not establish a recording deadline of less than 90 days. (P.L. 2011, ch. 245, § 1)

## **Plan Revisions or Amendments after Approval and Recording**

To amend a previously approved subdivision plan, 30-A M.R.S.A. § 4407 (2011) requires that an application for subdivision approval be submitted to the planning board and that it bear certain information. The statute provides little guidance as to the contents of the application or accompanying plan or the procedure to be followed by the planning board in its review and approval; some municipal ordinances or subdivision regulations include more

detail. It is safest for the board to follow the same procedures as for an initial subdivision application. But see, *Buckingham v. Town of Scarborough*, AP-99-79 (Me. Super. Ct., Cum. Cty., August 13, 2000), where the court noted that there are no express notice requirements regarding an amendment to a plan, no requirement that a public hearing be held, and no time limits imposed on when an amendment may be sought, absent language to the contrary in a local ordinance or regulation.

The board's review of a plan revision is limited to the proposed revision. It does not conduct a review of the entire original plan and cannot apply any new ordinances to the entire plan in conducting its review, absent language to the contrary in a local ordinance. *Schmidt v. Inhabitants of Readfield*, CV-89-169 (Me. Super. Ct., Kenn. Cty., August 16, 1989). See also, *Chasteen v. Town of China*, AP-02-45 (Me. Super. Ct., Kenn. Cty., April 30, 2003) and *DeMille v. Town of Cape Elizabeth*, AP-99-45 (Me. Super. Ct., Cum. Cty., 12/21/99) (discussion regarding the extent to which lots that were part of the original plan were "grandfathered" and not subject to the new ordinance requirements). When a subdivision plan is amended to add another lot, that lot becomes subject to any conditions of approval imposed as part of the approval of the original plan, absent language to the contrary in the decision or the applicable ordinance or regulation. *LaBelle v. Blake*, CV-94-85 (Me. Super. Ct., Kenn. Cty., April 11, 1997). Where a change to an approved plan is not something for which monumentation would be necessary or relevant, it is not necessary to require certification of monumentation as part of the approval of the revised plan. *Chasteen v. Town of China*, *supra* (revision of phosphorous control plan). For a case involving a plan revision coupled with the granting of a waiver, see *Leonard v. Town of Winthrop*, AP-03-52 (Me. Super. Ct., Kenn. Cty., September 24, 2004).

Where the original subdivision plan as approved did not specify the type of subsurface wastewater disposal system that had to be used on the lots as a condition of approval, the fact that the developer later sought a plumbing permit for a cluster system rather than for individual systems on each lot did not constitute a revision of the plan requiring planning board approval. *Hamilton v. Town of Cumberland*, 590 A. 2d 532 (Me. 1991). The court noted that the board could have designated the type of system it wanted to require as a condition of approval, but did not do so.

As noted earlier in these materials, if the person who received the original subdivision approval is the one proposing to make changes to the approved plan by creating additional lots, that person is required to obtain approval of a revised plan from the planning board, regardless of how much time has passed since the plan approval. 30-A M.R.S.A. § 4406(1)(E)(2011). Changes made by others may also require approval of a revised plan, depending on the wording of the applicable ordinance or conditions of approval. It should be noted that some attorneys believe that, under State law, once a lot is shown on an approved plan, it remains within the planning board's jurisdiction indefinitely and that any changes to



it require planning board approval, regardless of who makes the changes or when. Question: What if a “change” involves the conveyance of a new exempt lot? No clear answer. Obtaining approval to create an exempt lot in cases where non-exempt lots would require approval is the safest course. (See earlier discussion of this issue in these materials under “Land Subdivisions—The Issues: 4. Within any 5-year period beginning on or after September 23, 1971” (third bulleted paragraph).

Where a sub-divider applies to the planning board for approval of a plan revision after lots have been sold as depicted on an approved plan, in some cases the sub-divider will also need to obtain release deeds from those lot owners in order to go forward with the revision, even if the planning board has granted approval. The other lot owners generally have a right to have the original plan developed as depicted on the approved and recorded plan which was in effect when they bought their lots; this right cannot be taken away by the granting of approval of a revision by the planning board. The planning board’s approval of a revision is simply evidence that the board found that the revision satisfies applicable statutory and ordinance requirements. *See, Green v. Lawrence*, 2005 ME 90, 877 A. 2d 1079, and *Kargar v. Town of Falmouth*, AP-07-14 (Me. Super. Ct., Cum. Cty, March 5, 2008).

### **Pending Applications/Retroactivity Clauses in New Ordinances**

Sometimes a municipality amends an applicable ordinance provision either while an application is being reviewed by the planning 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 (1989) 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 Law Court. *City of Portland v. Fisherman’s Wharf Associates II*, 541 A.2d 160 (Me. 1988). The courts have found that an application is “pending” if the board has conducted at least one substantive review of the application, absent a contrary provision regarding what is “pending” in the ordinance. *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). 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,” absent a local ordinance provision to the contrary. *P.W. Associates v. Town of Kennebunkport*, CV-88-716 and CV-89-29 (Me. Super. Ct., Yor. 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. *Larrivee v. Timmons*, 549 A.2d 744 (Me. 1988); *Perrin v. Town of Kittery*, 591 A. 2d 861 (Me. 1991). Changes enacted in other relevant ordinances would apply, which in some cases will mean that subdivision lots will need to be revised in order to conform to the new ordinances. This in turn will probably trigger the need to submit a revised subdivision plan for review and approval.

### **Abandonment of an Approved Subdivision Plan**

There are times when it is advantageous for a landowner to abandon all or a portion of a subdivision plan approval due to property tax considerations or for other business reasons. There is no process described in the Municipal Subdivision Law in Title 30-A for the approval of a plan abandonment. One approach is for the landowner to submit a plan which includes the language required by §4407 (2011) and which depicts the land in question in its pre-subdivision approval form, eliminating proposed lot lines, roads, and other improvements, and which bears a statement explaining that the revised plan is intended to abandon the approval granted by the planning board on a specified date, recorded in a specified book at a specific registry of deeds, and return the parcel to its pre-subdivision approval condition. Once approved by the board, this revised plan would be recorded in the registry of deeds. Some attorneys view this method of abandonment as being more consistent with the statute. The following language appeared on a plan submitted to the Town of Sumner’s planning board by a developer who used this method for abandoning his approved subdivision plan: “This plan is submitted as an amendment to a revised final subdivision plan of Labrador Pond Estates previously approved by the Town of Sumner planning board on November 15, 1988 and recorded in the Oxford County Registry of Deeds in Plan File # 2388. The purpose of this amendment to that revised subdivision plan is to revert the entire subdivided parcel shown hereon to its status prior to approval of the original final subdivision plan of Labrador Estates on December 29, 1987, recorded in said Registry of Deeds Plan File #2283.” The following language also appeared on the plan below the signature lines: “This is to certify that after reviewing the amendment to a subdivision shown by this plan, and considering Title 30-A, M.R.S.A., sections 4401 through 4407, as amended, and the Town of Sumner Subdivision Ordinance, the above signed have established that this amendment will revert the subdivision of this parcel to the unsubdivided status that existed prior to the original subdivision approval of Labrador Pond Estates on Dec. 29, 1987. The board finds that the parcel status as amended does not require review under either Title 30-A, M.R.S.A. sections 4401 through 4407, as amended, or the Town of Sumner Subdivision Ordinance.”

An approach favored by other attorneys is for the landowner to submit a “Notice of Intent to Abandon” for acceptance by the planning board and a “Certificate of Abandonment” for the

board or other appropriate municipal official to complete which can then be recorded at the registry of deeds. See Appendix A-3 of these materials for sample forms to implement this latter process prepared by William H. Dale, Esq., of Jensen, Baird, Gardner and Henry, for a 1994 Maine State Bar Association seminar entitled “Maine’s Land Use Laws.” The forms are reprinted in this seminar text with the permission of their author.

It is important to note that 23 M.R.S.A. § 3027 (1992) imposes additional requirements and limitations in the context of a subdivision in which a highway property interest has been dedicated to a municipality. Also, as was mentioned earlier in the discussion of plan revisions, if any lots have been sold in relation to a recorded plan which the owner is seeking to abandon, the abandonment process will involve obtaining not only the approval of the planning board, but also a release of rights in the plan by those who already purchased lots. Obviously, if enough of the lots shown on the plan have been sold to create a subdivision, the entire approved plan could not be abandoned.

### **Subdivisions Divided by Municipal Boundaries**

Title 30-A, section 4403(1-A) (Supp. 2013) provides that “if any portion of a subdivision crosses municipal boundaries, all meetings and hearings to review the application must be held jointly by the reviewing authorities from each municipality,” unless waived by written agreement of the reviewing authorities (i.e., the planning boards, or where none, the municipal officers) of each municipality. The same is true where a revision of an approved plan is being proposed. This language clearly requires that all of the municipalities in which a portion of the subdivision is located must meet jointly for all meetings and hearings related to the proposed subdivision. A prior version of the law required only that the boards “meet jointly to discuss the application.” One case decided under the prior law found that it was enough if the board of the town in which the majority of the subdivision was located notified the other town and had its code enforcement officer attend a meeting with the board of the other town to discuss the proposed subdivision. *Tolman v. Inhabitants of the Town of Ogunquit*, CV-92-559 (Me. Super. Ct., York Cty., August 17, 1993). Such a process would not be consistent with the current version of §4403, which has been in effect since 1997. Joint meetings are required unless the boards sign a written agreement waiving the requirement. *Johansen v. City of Bath*, AP-10-002, Me. Super. Ct., Sagh. Cty, December 14, 2010. In *Town of North Yarmouth v. Moulton*, 1998 ME 96, 710 A.2d 252, the Law Court held that North Yarmouth was required by the statute to review and approve the proposed subdivision, even though the only portion which was located in North Yarmouth was land marked on the plan as “reserved for a road.” The court disagreed with the Moultons’ argument that a municipality must review a proposed subdivision only where 3 or more lots in the subdivision will be created within that town’s boundaries. The current statute, which requires all meetings and hearings involving the subdivision to be held jointly when any portion of the subdivision crosses municipal boundaries, doesn’t provide any guidance

regarding procedures to be followed by the boards in conducting joint sessions. There have been at least 6 or 7 subdivisions in York County within the past decade which crossed municipal lines and required joint review, according to staff at Southern Maine Regional Planning Commission.

### **Subdivision Violations and Enforcement Actions**

Title 30-A, section 4406 of the Maine statutes (2011) authorizes the Attorney General, a municipality, or the municipal planning board to institute proceedings to enjoin a violation of the Municipal Subdivision Law. Municipal code enforcement officers are generally authorized by local ordinance or order of the municipal officers to enforce the Municipal Subdivision Law on behalf of the municipality.

Title 30-A, section 4452 of the Maine statutes (Supp. 2013) establishes the penalties which a court may order for land use violations, including violations of the subdivision law. A municipality arguably may establish more stringent penalties by home rule ordinance.

Land use enforcement actions in court seeking penalties and corrective action are generally brought under Maine Rule of Civil Procedure 80K. Not all violations are prosecuted in court. Many municipalities attempt to negotiate a “consent agreement” with the violator as a way to recover a penalty and obtain corrective action without going to court. Sometimes a municipality will file a Rule 80K complaint and then ask the court to adopt a negotiated consent agreement as its decision, at which point the consent agreement becomes a “consent decree.” For some types of violations, municipalities issue a “no action letter,” which is merely a statement by the current council or board of selectpersons that they agree not to prosecute the violation because of its inconsequential nature, such as a very old sideline setback violation of a few feet. Since these letters are not binding on a subsequent board or council or on the municipalities’ legislative body, many attorneys and financial institutions are unwilling to accept them.

If a person seeks subdivision approval after the violation has occurred, there is no guarantee that a planning board will approve the subdivision at all or approve it as it exists on the face of the earth. The planning board must review the plan as though none of it had been built or conveyed. If approval is denied, and if any illegal structures are not removed voluntarily by the landowner, the municipality could ask a court to order the owner to remove/demolish the structures. Title problems for any illegally conveyed lots would need to be resolved by the parties in some other way if the planning board will not approve the subdivision after the fact.

As previously discussed, an illegal subdivision may become “grandfathered” if it has been in existence for 20 years and the municipality has not taken the actions or recorded any of the documents outlined in 30-A M.R.S.A. § 4402(5)(2011) before the end of the 20 year period. The 20 year period probably begins with the creation of the lot which triggered the need for subdivision approval; this isn’t addressed in the statute. For a discussion of the relationship between 30-A M.R.S.A. § § 4402(5) and 4406 (2011), see *Town of Eddington v. University of Maine Foundation, supra*.

A violation may be unintentional and may be corrected by obtaining planning board approval after the fact or by the reconveyance of the lots to the original owner. However, a municipality has the legal right to take enforcement action to recover a monetary penalty pursuant to 30-A M.R.S.A. § 4452 (Supp. 2013) in recognition that a violation did exist at one point.

Local building officials are prohibited from issuing building permits for lots in an illegal subdivision. 30-A M.R.S.A. § 4406(1)(C ) (2011). (Amended by P.L. 2007, ch. 699, § 24, effective July 18, 2008, to replace “building inspector” with “building official”) Question: What if a permit application is submitted after the creation of an illegal subdivision for a building which will be situated on the first lot created? It is arguable that the permit can be issued because the lot in question wasn’t part of a subdivision when it was created. It also could be argued that, since the permit wasn’t sought until after the lot became part of an illegal subdivision by virtue of subsequent conveyances, the permit cannot be granted until the subdivision violation is corrected.

For a statute validating certain subdivision plans recorded prior to January 1, 1970 which were approved by the wrong municipal board or which did not bear a notation regarding approval, see 33 M.R.S.A. § 353-B(1999).

## **Appendices**

A-1. Municipal Subdivision Law (30-A M.R.S.A. § § 4401 to 4408)

A-2. Complete Legislative History of the Municipal Subdivision Law (history through 1999 prepared by Christopher Neagle, Esq. and reprinted here with is permission; updated by Rebecca Warren Seel, Esq. through 2014)

A-3. Forms for Use in Abandoning an Approved Subdivision Plan (prepared by William Dale, Esq. and reprinted here with his permission)

A-4. Report of Legislative “Task Force to Study Growth Management: Proposals by Subdivision Law/Impact Fee Working Group” (November 13, 2000)

A-5. Report entitled “Maine’s Subdivision Law and Its Home Rule Implications: A Response to LD 1278, P.L. 2001, ch. 359” by Kirsten Hebert, Maine Municipal Assoc., September 2001 (attachments 1-6 omitted)

A-6. Diagrams depicting various subdivision scenarios and related Commentary

Excerpt from material prepared by William H. Dale, Esq., Jensen, Baird, Gardner, and Henry, for 1994 Maine Bar Association seminar entitled "Maine's Land Use Laws." Reprinted with permission of the author and the Maine Bar Association. Copyright 1994. All rights reserved.

**Exhibit A – Notice of Abandonment**

Development Company  
100 Main Street  
Anytown, Maine 04000

Date

Town Manager  
Town Office  
Center Street  
Anytown, Maine 04000

RE: Subdivision

Dear Town Manager:

Development Company, a subsidiary of Big Company, intends to abandon its approved subdivision on the Shore Road in Anytown, known as \_\_\_\_\_, approved by the Anytown Planning Board on \_\_\_\_\_, 20\_\_\_\_\_ and recorded in the \_\_\_\_\_ County Registry of Deeds in Plan Book \_\_\_\_\_, Page \_\_\_\_\_. We have decided not to develop the \_\_\_\_\_ that was the basis for the subdivision.

Development Company understands that once this Notice is accepted by the Anytown Planning Board, all local approvals relating to said project will be considered null and void and any future development will be governed by the current Anytown Land Use and Subdivision Ordinances. We further understand that after the Planning Board's action the Town will release the \_\_\_\_\_ Bank Letter of Credit (or other form of Performance Guarantee) securing construction in the amount of \$\_\_\_\_\_ and the \$\_\_\_\_\_ deposit held in escrow toward Shore Road improvements.

Thank you for your cooperation in this regard.

Very truly yours,

\_\_\_\_\_  
President, Development Company





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**Exhibit B**

**CERTIFICATE OF ABANDONMENT**

I, \_\_\_\_\_, Town Manager of the Town of \_\_\_\_\_,  
Maine, do hereby certify that on \_\_\_\_\_ 20\_\_\_\_\_, the Town of \_\_\_\_\_  
received a written Notice of Abandonment from \_\_\_\_\_,  
developer of \_\_\_\_\_  
(name of subdivision), a \_\_\_\_\_  
(description of development), that the said developer no longer intends to pursue its plans to  
subdivide certain property located on the \_\_\_\_\_  
(street or road) in said Town, which said subdivision was to be known as "\_\_\_\_\_."

Said Notice of Abandonment is attached hereto as Exhibit A-Notice of Abandonment.

The \_\_\_\_\_  
(town) Planning Board at its meeting on \_\_\_\_\_,  
20\_\_\_\_\_, accepted said Notice of Abandonment and authorized the release of a certain  
\_\_\_\_\_

(letter of credit or other form of Performance Guarantee) and escrowed funds held by the  
Town. This Certificate is intended to give public notice of the abandonment of said  
subdivision as recorded in the \_\_\_\_\_

County Registry of Deeds in Plan Book \_\_\_\_\_, Page \_\_\_\_\_.

Accordingly, the Town certifies that certain improvements set forth in Exhibit A to \_\_\_\_\_  
Bank irrevocable letter of credit No. \_\_\_\_\_, dated \_\_\_\_\_ (the  
"Letter of Credit") (or other form of Performance Guarantee) have not been commenced and

need not be completed, and said Letter of Credit (or other form of Performance Guarantee) have not been commenced and need not be completed, and said Letter of Credit (or other form of Performance Guarantee) has been returned to \_\_\_\_\_ Bank to be terminated. Further, the improvements to \_\_\_\_\_ (street or road), for which funds were escrowed, need no longer be completed and the escrowed funds have been released to \_\_\_\_\_(developer).

Dated: \_\_\_\_\_  
\_\_\_\_\_  
Town Manager

State of Maine  
\_\_\_\_\_, ss. \_\_\_\_\_ 20\_\_\_\_

Personally appeared the above-named \_\_\_\_\_,  
Town Manager, and acknowledged the foregoing instrument to be his free act and deed in his/her capacity.

Before me,  
\_\_\_\_\_  
Notary Public/Attorney at Law  
\_\_\_\_\_  
(Print Name)

## Task Force to Study Growth Management: Proposals by Subdivision Law/Impact Fee Working Group (2000)

### I. SUBDIVISION LAW

#### 1. *HOME RULE ORDINANCE AUTHORITY:*

- Clarify in statute that municipalities are authorized to adopt ordinances that define subdivision more narrowly than state law. For example, by ordinance, a municipality could define subdivision as division into less than 3 lots.

Draft statutory change:

30-A M.R.S.A. § 4401, sub-§ 4, ¶H is amended to read:

H. *Nothing in this subchapter may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expands the definition of subdivision ~~to include the division of a structure for commercial or industrial use or~~ which otherwise regulates land use.*

#### 2. *EXEMPTIONS TO DEFINITION OF SUBDIVISION:*

##### § 4401(4)(A)(1):

- Homestead Exemption § 4401(4)(A)(1) – Retain exemption, but add requirement that the single-family residence has been the subdivider's principal residence for the immediate past 5 years prior to the division.
- Open Space Exemption § 4401(4)(A)(1) – Delete the exemption for a division where the subdivider had retained one of the lots for open space land for a period of 5 years prior to the second division.

Draft statutory change:

A. *In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of the tract or parcel is considered to create the first 2 lots and the next dividing of either of these first 2 lots, by whomever accomplished, is considered to create a 3rd lot, unless:*

*(1) Both dividings are accomplished by a subdivider who has retained one of the lots for the subdivider's own use as a single-family residence that has been the subdivider's principal residence ~~or for~~*

~~open space land as defined in Title 36, section 1102, for a period of at least 5 years immediately preceding before the 2<sup>nd</sup> division dividing occurs; or~~

(2) The division of the tract or parcel is otherwise exempt under this subchapter.

**§ 4401(4)(C):**

- 40-Acre Lot Exemption § 4401(4)(C) – Retain exemption for 40-acre lots, but delete 4401(4)(C)(2).

Draft statutory change:

C. A lot of 40 or more acres shall not be counted as a lot, except:

(1) When the lot or parcel from which it was divided is located entirely or partially within any shoreland area as defined in Title 38, section 435, or a municipality's shoreland zoning ordinance; ~~or~~

~~(2) When a municipality has, by ordinance, or the municipal reviewing authority has, by regulation, elected to count lots of 40 or more acres as lots for the purpose of this subchapter when the parcel of land being divided is located entirely outside any shoreland area as defined in Title 38, section 435, or a municipality's shoreland zoning ordinance.~~

**§ 4401(4)(D):**

Currently, 6 exemptions are identified in paragraph D. Under the working group proposal, each exemption would be identified in a separate paragraph.

Current statutory language:

D. A division, accomplished by **devise, condemnation, order of court, gift to a person related** to the donor by blood, marriage or adoption or a **gift to a municipality** or by the transfer of any interest in land to the owner of land **abutting** that land does not create a lot or lots for the purposes of this definition, unless the intent of the transferor in any transfer or gift within this paragraph is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph by a gift to a person related to the donor by blood, marriage or adoption is

*transferred within 5 years to another person not related to the donor of the exempt real estate by blood marriage or adoption, then the previously exempt division creates a lot or lots for the purposes of this subsection.*

- Devise Exemption § 4401(4)(D) – No consensus by working group:
  - A. One group would keep the exemption.
  - B. Other group would delete the exemption. Rationale – one ought not to be able to do in death what you can't do in life.

Draft statutory change if keep the exemption:

*D-1. A division accomplished by **devise** does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.*

Condemnation Exemption § 4401(4)(D) – Retain exemption.

Draft statutory change:

*D-2. A division accomplished by **condemnation** does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.*

Order of the Court Exemption § 4401(4)(D) -

Draft statutory change:

*D-3. A division accomplished by **order of court** does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.*

Gifts to Relatives Exemption § 4401(4)(D) – To get exemption:

1. The lot being divided must be held for 5 years prior to the transfer.
2. The recipient of the gift must hold the lot for 5 years after the transfer.
3. The recipient of the gift must be related to the donor by blood, marriage or adoption and to the 1<sup>st</sup> or 2<sup>nd</sup> degree (parent, grandparent, brother/sister, child, grandchild).

4. There must be no consideration component given for the gift.
5. There should be a limit on the number of receipts of gifts allowed to one relative before subdivision review is required, but the working group did not reach consensus. Alternative choices are:
  - One lot per relative per parcel
  - One lot per relative per county
  - One lot per relative per lifetime statewide

Draft statutory change:

*D-4 A division accomplished by **gift to a person related to the donor** of an interest in property held by the donor for a continuous period of 5 years prior to the division by gift does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph is transferred within 5 years to another person not related to the donor of the exempt real estate as provided in this paragraph, then the previously exempt division creates a lot or lots for the purposes of this subsection. “Person related to the donor” means a parent, grandparent, brother, sister, child or grandchild related by blood, marriage or adoption. A gift under this paragraph cannot be given for consideration that can be assessed a monetary value. [?? 1 lot per relative per parcel/1 lot per relative per county/1 lot per relative per lifetime statewide ??]*

Gifts to Municipalities Exemption § 4401(4)(D) – Retain exemption, but add requirement that the municipality must accept the gift. Also task force should consider expanding this exemption to gifts to the “state or any political subdivision of the state”. Also consider expanding the exemption to conservation commissions, municipal land trusts, etc.

Draft statutory change:

*D-5 A division accomplished by a **gift to a municipality** if that municipality accepts the gift does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.*

- Abutters Exemption § 4401(4)(D) – Retain the exemption for transfers that do

not create a new buildable lot. Also, add provision that the abutter cannot sell the acquired lot (he could sell the merged lot) and get the exemption unless he held the lot for 5 years.

Draft statutory change:

*D-6. A division accomplished by the transfer of any interest in land to the owner of land **abutting** that land that does not create a buildable lot does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph is transferred **without the abutting land** within 5 years to another person, then the previously exempt division creates a lot or lots for the purposes of this subsection.*

### 3. **CHANGES TO STATUTE TO PREVENT SPRAWL**

- Not discussed by Working Group. See documents prepared by Dan Fleishman.

## II. **IMPACT FEES**

- Proposal: Require impact fees to be linked to a comprehensive plan. Also, require that an impact fee must be linked to that aspect of a capital improvement plan that relates to the improvement that is being assessed the impact fee. Example: if a municipality charges an impact fee for highway construction, then the municipality needs to have at least a 5-year capital improvement plan for highways.





## Certificate of Variance or Waiver Approval

I, \_\_\_\_\_, the duly appointed and qualified Secretary

of the Planning Board for \_\_\_\_\_,

County, State of Maine, hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_,

the following-described variance or waiver was granted pursuant to the provisions of 30-A

M.R.S.A. § 4401 et seq. and Section \_\_\_\_\_ of the Subdivision Ordinance.

1. Property Owner: \_\_\_\_\_.

2. Property Description: \_\_\_\_\_ County Registry of Deeds, Book \_\_\_\_\_ Page \_\_\_\_\_.

3. Variance/Waiver and Conditions attached: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

IN WITNESS WHEREOF, I have hereto set my hand and seal this \_\_\_\_\_

day of \_\_\_\_\_,

/s/ \_\_\_\_\_

, Secretary

\_\_\_\_\_  
(Printed or Typed Name)

STATE OF MAINE

\_\_\_\_\_, SS.

Then personally appeared before me the above-subscribed official of the municipality of \_\_\_\_\_

\_\_\_\_\_

and acknowledged the above certificate to be his/her free act and deed in his/her official capacity as Secretary of the Planning Board.

Date: \_\_\_\_\_, 20      /s/ \_\_\_\_\_  
(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 final subdivision approval or approval under Title 38, chapter 3, subchapter I, article 6, where applicable, whichever date is later, or the variance/waiver is void (30-A M.R.S.A. § 4406(B)).

## **Hows and Whys and Dos and Don'ts of LOCs and Bonds By Peter Morelli**

How secure does that performance bond in the safe down the hall make you feel?

“A performance bond has merely given you a right to sue an insurance company,” says Portland attorney F. Paul Frinkso.

An irrevocable letter of credit, on the other hand, is “almost as good as cash,” according to Frinkso’s colleague Christopher Vaniotis, who adds one important caveat, “if drafted properly.”

The two members of the law firm Bernstein, Shur, Sawyer and Nelson discussed the intricacies of managing performance guarantees at a recent meeting of the Cumberland County Planners Association. About a dozen town planners and engineers attended the workshop and rated it one of the most useful they’d been to in a long time.

The performance guarantee issue has become a major concern not only because of numerous project failures and developer bankruptcies, but also because of the many banks in trouble, said Scarborough Planner Joe Ziepniewski, who organized the workshop. He and colleague Ken Dinsmore noted that many of the letters of credit in Scarborough are drawn on Maine Savings Bank, one of the state’s most troubled. Several planners at the meeting reported the recent need to draft letters of credit.

Frinkso called good management of performance guarantees “a matter of self-preservation” in a political environment. Residents and councilors angry about the implications of a failed project may decide they need someone to blame, he said.

Cash is the best performance guarantee, but seldom a realistic option on large projects, the lawyers and planners agreed. A cash guarantee requires that a developer have twice as much capital to do a project, one planner noted. If cash is used, it should be deposited in an escrow account in the city’s name and supported by an appropriate agreement between the town and the developer.

Second best is the irrevocable letter of credit which is really a contract between the bank and town, without the developer in an intermediary role. If properly drafted the letter of credit can be collected upon within three business days with two simple steps, the presentation of a notice of default and the presentation of a draft.

The attorneys provided sample language for l.o.c.s. A key phrase states that the draft will be paid if the town finds that the “developer has failed to complete in a timely fashion improvements required” by a referenced set of plans and conditions. Another key issue, Vaniotis said, is a specific schedule for performance.

Frinkso and Vaniotis stressed the importance of drafting the letter of credit so that it secures the entire project without reference to the specific breakdown of the items covered by the letter. Releases should not be tied to specific improvements that have been completed, they said. No releases should be made until “no matter what, you will never ever need more than the reduced amount,” Frinkso said. Don’t accept letters of credit that are phrased to say that the bank “is holding the money of the (developer),” Frinkso said.

We need to be concerned about bank failures, the attorneys said, because in the case of receivership, letters of credit are a low priority creditor.

One defense against bank failure Frinkso said, is to accept letters of credit only from banks with a local presence. This provides three advantages: \*Information is available from local regulators. \*Problems are resolved in Maine courts. \*You can talk to a local loan officer.

The Bernstein Shur office is working on language that will allow the town to require a replacement letter of credit from a different institution if the bank can no longer meet certain nationally recognized quality standards.

The deadlines in the letter of credit are important and should be aligned with a “tickler” system in the planning office, Frinkso said. Falmouth Planner George Thebarger said his office notifies the bank 60 days before the deadline that the project is not completed. Thirty days before the deadline Falmouth warns that if the project is not completed it will collect. And 14 days before the deadline, it sends the default notice and draft.

The attorneys also recommend the use of performance guarantees on site plans on private property if they are not prohibited by ordinance.

If the l.o.c. is properly worded, “it’s none of the bank’s business to discuss whether the work is done properly,” Frinkso said.

In contrast a performance bond by a surety company is far less secure. The insurer has a role in determining the extent of correcting it. Proving default is “a helluva burden,” Frinkso said.



## Sample Letter of Credit

Date: \_\_\_\_\_

Jane Planner, Chairman  
Your Town Planning Board  
Town Hall  
Your Town, ME 04000

Re: Letter of Credit: Developer, Inc., Sunshine Estates, Your Town

Dear Ms. Planner:

This letter will confirm to Your Town that the Big Town Savings Bank has issued a loan commitment to Developer, Inc. for the Purpose of constructing all required improvements in the "Sunshine Estates" subdivision.

Big Town Savings Bank will set aside \$230,000 in a Construction Escrow Account, for completion of the required improvements. This account can be drawn upon by Your Town in the event that Developer, Inc. fails to complete steps A through H listed below for Windy Road by (two years from date of Final Plan approval).

Approximate length of road 2, 350 feet:

A. Grub roadways full width of 50 feet - \$4/ft.	\$ 9,400
B. Shape sub-base and grade it - \$4/ft.	9,400
C. Install under drain culverts - \$16/ft.	37,600
D. Install sewer \$22/ft. x 2,050 plus pump \$16,500	61,600
E. Install water mains 14/ft. x 2,400	33,600
F. Apply and shape 18" gravel base \$8.30	19,500
G. Apply and shape 3' of crushed gravel; apply 1 ¾ of base course bituminous concrete to width of 24', apply bituminous curb and 2" of bituminous concrete to a width of 5', 10/ft. x 2,350'	23,500
H. Apply ¾" of surface bituminous concrete to width of 24' - \$5/ft.	11,800

Big Town Savings Bank understands that Developer, Inc., or the contractor, will notify the Town Engineer or Code Enforcement Officer before any of the above work has begun and obtain his approval in writing as he completes each phase of the road construction.

This Account shall expire when Your Town acknowledges in writing to Developer, Inc. that the work outlined in Steps A through H has been completed in accordance with Your Town's subdivision regulations and street acceptance ordinance, and the approved plans of Sunshine Estates. Any funds remaining in the account on (Date specified above) for work outlined in Steps A through H which has not been completed and approved by the Town on that date shall be released to the Town to complete such work. As the Town Engineer or Code Enforcement Officer has issued his written approvals to Developer, Inc. the funds in this Account will be released based upon the schedule above.

Drafts drawn upon this account must be for this particular subdivision and to complete any work which is outlined above. Furthermore, drafts must be accompanied by itemized statements showing costs of work to be completed and must be submitted prior to (six to nine months following date specified above). Your Town will not be responsible for repayment or interest cost for any funds released to the Town for work not completed on or before (date specified above).

Very truly yours,

Barbara Banker  
Loan Officer

SEEN AND AGREED TO: \_\_\_\_\_  
Developer, Inc.

Your town hereby accepts this original letter as evidence of Developer, Inc.'s obligation to be performed.

\_\_\_\_\_  
Town Manager  
or  
Chair of the Select Board

## **SMRPC Model Subdivision Regulations—Application Fee Provisions**

### **Preliminary Plan:**

#### **6.1 Procedure.**

- B. All applications for preliminary plan shall be accompanied by a nonrefundable application fee of \$300, plus \$50 per lot or dwelling unit, payable by check to the municipality. In addition, the applicant shall pay an escrow fee of \$250 per lot or dwelling unit, to be deposited in a special escrow account designated for that subdivision application, to be used by the Board for hiring independent consulting services to review engineering and other technical submissions associated with the application, and to ensure compliance with the Zoning Ordinance and Subdivision Regulations. If the balance in this special account is drawn down by 75%, the Board shall notify the applicant, and require that the balance be brought back up to the original deposit amount. The Board shall continue to notify the applicant and require a deposit as necessary whenever the balance of the escrow account is drawn down by 75% of the original deposit. Any balance in the escrow account remaining after a decision on the final plan application by the Board shall be returned to the applicant.

### **Final Plan**

- B. All applications for final plan approval for a major subdivision shall be accompanied by a nonrefundable application fee of \$300, payable by check to the municipality. The Planning Board may continue to require the replenishment of the escrow account for hiring independent consulting services to review the application for final plan approval, along with any supporting materials, pursuant to the procedures of section \_\_\_\_\_.





## List of *Maine Townsman* Legal Notes Discussing Issues Related to Subdivision Review

The following *Maine Townsman* Legal Notes may be found in the Legal Notes Archives on MMA's website at [www.memun.org](http://www.memun.org):

1. "Planning Board Review: 'Final Subdivision Plans Requirement of Seal'" (July 1992)
2. "Important Information to Include on an Approved Subdivision Plan" (July 1994)
3. "Subdivision Takings Claim Denied" (May 1998)
4. "Liquidation Harvesting and Local Subdivision Review" (January 2005)
5. "Subdivisions and Farmland" (August/September 2009)
6. "Paper Streets I" (October 1996)
7. "Paper Streets II (November 1996)
8. "Update on Paper Streets" (August/September 1997)



## **Appendix 6 – Ordinance Drafting, Adoption and Amendment**

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<b>“Ten Common Mistakes in Drafting Land Use Ordinances”.....</b>	<b>439</b>
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## **“Ordinance Enactment” Information Packet and Online Ordinance/Charter Collection**

MMA’s Legal Services Department publishes an “Ordinance Enactment” Information Packet that is available by contacting the Legal Services Department (1-800-452-8786 or 623-8428 or [legal@memun.org](mailto:legal@memun.org)) or by going to MMA’s website at [www.memun.org](http://www.memun.org) in the “Members Center.” You will need to apply for a password (free for officials from member municipalities) to enter that section of the website.

The packet includes:

- Cover memo discussing a number of issues
- Title 30-A M.R.S.A. § § 2528, 3001, 3009, 4324, 4352 and 4403
- Title 38-A M.R.S.A. § 438-A
- Title 12 M.R.S.A. § 685-A
- Title 1 M.R.S.A. § § 401-414
- MMA’s “Right to Know Law” Information Packet
- Sample ordinance amendment format and warrant articles: Kennebunk and Denmark
- “Ordinance Enactment,” “Legal Note,” *Maine Townsman*, April 1989
- “Preemption Doctrine,” “Legal Note,” *Maine Townsman*, June 1991
- *Sample* “Certification of an Ordinance by the Municipal Officers”
- *Sample* “Ordinance adopting by reference the Maine Model Uniform Building Code (MUBEC) prepared by MMA and sample Supplemental Building Ordinance for Town of York.
- 
- Sample ordinance adopting by reference the National Fire Prevention Code and Life Safety Code (City of South Portland)
- MMA “Moratorium Ordinance” Information Packet
- Public hearing notice for adoption of parking ordinance

In addition to this information packet, a number of others related to other types of ordinances can also be found on MMA’s website in the “Members Center” (See the list in Appendix 7 of this manual).

Links to various online ordinance collections on the websites of various Maine municipalities are also available through MMA’s website.



# Ten Common Mistakes in Drafting Land Use Ordinances

*By Richard P. Flewelling, Esq., Maine Municipal Association*

## 1. Inconsistent Terminology

An ordinance is not an essay, and using different terms to refer to the same thing (e.g., “home,” “residence,” “abode”) is confusing and implies distinctions where none may be intended. Choose a single generic term (e.g., “dwelling”), define it if necessary, and use it consistently throughout the ordinance.

## 2. Omitted Definitions

Some terms are commonly understood and may not require a specific definition (e.g., “use,” “structure”), but many have no generally accepted meaning and are subject to broad interpretation (e.g., “frontage,” “setback”). Failure to define uncertain terms in an ordinance is a clear invitation to misunderstanding and dispute.

## 3. Superfluous Definitions

Every definition should have a purpose in the ordinance. Defining terms whose meaning is obvious (e.g., “Town,” “Planning Board”) or that appear nowhere else in the ordinance is a waste of space and diverts attention from what really matters.

## 4. Faulty Incorporation of Materials

Maps, specifications and other standards or requirements are not made enforceable just by attachment to or passing mention in an ordinance. They should be fully identified (i.e., by title, date and source) and expressly incorporated by reference (e.g., “...which is incorporated herein by reference and made a part hereof”). There are also special notice, adoption and filing requirements for national building, electrical and similar codes (see 30-A M.R.S.A. § 3003).

## 5. Mis-cited Statutes

It is nonsense for an ordinance to refer to a law that no longer exists or that now exists in a different place or form. If in doubt about the correct citation to a statute, always check with appropriate sources.

## 6. Inconsistencies with Other Laws

A “conflicts” clause deferring to the more restrictive of inconsistent regulations is no substitute for an ordinance that is in harmony with specific statutory requirements. For

instance, State law restricts municipal authority to regulate manufactured housing and mobile home parks (see 30-A M.R.S.A. § 4358). An ordinance that ignores limitations such as these is unenforceable and an embarrassment.

7. Absent or Imprecise Standards

Most ordinances vest at least some discretion in boards to grant (or deny) permits under certain qualified circumstances (e.g., conditional uses or special exceptions). Without specific standards or with only vague criteria to guide officials in reviewing plans and administering approvals, however, a board's decisions are subject to reversal and the entire exercise will have been in vain.

8. Cannibalism of Other Ordinances

An ordinance that consists of nothing more than an amalgamation of borrowed parts from other models is no more pleasing or predictable than Frankenstein's monster. Use other ordinance as prototypes only and make sure that custom components (e.g., cluster housing provisions, mobile home park regulations) mesh with standard features in form, sequence and process.

9. Missing Directions and Disorganization

Every ordinance should answer these questions (among others) and in roughly this order: What is regulated, prohibited, or requires a permit? Who must obtain it, from whom, when and how? Under what circumstances may it be issued, and in what form? If granted, with what conditions, who monitors compliance, and how? If denied, who may appeal, to whom, when and how? What relief is available, under what circumstances? If there is a violation, who enforces it, when, and how? What are the penalties?

10. Failure to Anticipate Probabilities

No draftsman is clairvoyant, and few ordinances contemplate all possibilities, but every ordinance benefits from "reality-testing." Short of hindsight, the best way to identifying an ordinance's deficiencies is to test it with hypotheticals and "what if" scenarios and correct oversights before enactment.



## **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, 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.



## **“Application Fees,” “Legal Notes,” *Maine Townsman*, August/September 1995**

*Questions:* Our town only charges \$2.00 for a permit fee under our zoning ordinance and \$10 per lot for a subdivision application under our subdivision ordinance. The planning board often feels the need for clerical assistance and an opportunity to consult with experts, such as an engineer, hydrogeologist, or land use planner, in reviewing applications under these ordinances because of the paperwork involved and the technical decisions that they must make. However, the town does not appropriate money for the planning board to pay for such assistance. Our application fees obviously don't generate enough money to pay for these services. Can these costs be passed along to the applicant?

*Answer:* Yes, within reason. The Maine Supreme Court has held that “generally, the amount of a fee imposed by a municipality in the exercise of its police powers for the purpose of regulation must be reasonably related to the necessary or probable expenses of issuing a (permit) and of conducting such inspection, regulation, and supervision as may be lawful and necessary.” (*emphasis added*). *State v. Brown*, 135 Me. 36, 188 A. 713 (1937). (Now, see also 30-A M.R.S.A. § 4355). Where the purpose of the fee is to regulate and control an activity rather than to raise revenue, the amount exacted constitutes a fee rather than a tax if it bears the required “reasonable relationship,” even though the fee is in excess of the town's actual administrative costs. However, if the fee is greatly in excess of the amount of administrative costs associated with the permit, the amount collect is deemed to be a tax. *Corpus Juris Secundum*, “Licenses,” § 3. Since a municipality may collect taxes only where specifically authorized by the Legislature, such a tax would be improper. *Cf. Opinion of the Justices*, 141 ME. 442, 42 A.2d 47 (1945).

Consequently, if the town needs to hire a secretary for the board or experts to assist the planning board with its review of a zoning or subdivision application, the town may fund those costs through a permit fee system established by local ordinance or regulation. Generally the fee is adopted by the legislative body of the town (i.e., the town meeting, in the absence of a charter provision to the contrary). However, fees in connection with subdivision review may be established through a regulation adopted by the planning board pursuant to 30-A M.R.S.A. § 4403, provided the legislative body has not already adopted a subdivision ordinance.

A number of communities are requiring applicants to pay both a basic application fee to cover basic administrative and clerical costs and an additional amount to hire expert assistance, such as engineering studies, hydrogeology work or legal advice. Examples of these ordinance provisions are available from MMA's Legal Services Department.

(By R.W.S)

The opinions printed on the previous page are written with the intent to provide general guidance as to the treatment of issues or problems similar to those stated in the opinion. The reader is cautioned not to rely on the information contained therein as the sole basis for handling individual affairs but he/she should obtain further counsel and information in solving his/her own specific problems.

## **Appendix 7 – Miscellaneous Land Use Materials**

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<b>“LID Approach Manages Growth, Carefully,” <i>Maine Townsman</i>, August/September 2011 by Lee Burnett .....</b>	<b>451</b>
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## List of Maine Municipal Association Information Packets and Guides

The following is a list of the information packets and guides that may be accessed on MMA’s website at [www.memun.org](http://www.memun.org). They are located in the “Members Center,” which must be entered using a password obtained by applying online. Passwords are free to officials from member municipalities.

### List of Information Packets and Guides

<a href="#">Aircraft Excise Tax [Legal]</a>	<a href="#">IRS Issues for Municipalities [Resource Center]</a>
<a href="#">Americans with Disabilities Act (Comprehensive) [Legal]</a>	<a href="#">Junkyards/Automobile Graveyards [Legal]</a>
<a href="#">Americans with Disabilities Act (Title I) [HR Toolkit]</a>	<a href="#">Layoffs, Municipal Employee [HR Toolkit]</a>
<a href="#">Animal Control Officers/Dog Licensing and Regulation [Legal]</a>	<a href="#">Local Liquor Option [Legal]</a>
<a href="#">Appropriate Use Policies (for Employee E-Mail and Internet Use) [Legal]</a>	<a href="#">Malfunctioning Wastewater Disposal Units [Legal]</a>
<a href="#">Background Checks, Employee [HR Toolkit]</a>	<a href="#">Minors, Employment of [HR Toolkit]</a>
<a href="#">Bloodborne Pathogens &amp; the Municipal Workplace [HR Toolkit]</a>	<a href="#">Moratorium Ordinances [Legal]</a>
<a href="#">Board Bylaws [Legal]</a>	<a href="#">Municipal Services, Required [Legal]</a>
<a href="#">Broadband Resources</a>	<a href="#">Ordinance Enactment [Legal]</a>
<a href="#">Budget Committee [Legal]</a>	<a href="#">Personnel Files [HR Toolkit]</a>
<a href="#">Cable Television [Resource Center]</a>	<a href="#">Personnel Policies [HR Toolkit]</a>
<a href="#">Cemeteries [Legal]</a>	<a href="#">Poverty Abatements [Legal]</a>
<a href="#">Charters, Municipal [Legal]</a>	<a href="#">Reapportionment (Redistricting) [Legal]</a>
<a href="#">Citizen Education &amp; Public Relations Materials [Resource Center]</a>	<a href="#">Red Flags Rule [Legal]</a>
<a href="#">Communication and Social Media Policy and Guidelines</a>	<a href="#">RFP &amp; Purchasing Samples [Resource Center]</a>
<a href="#">Concealed Weapons [Legal]</a>	<a href="#">Right to Know [Legal]</a>
<a href="#">Contracts and Competitive Bidding [Legal]</a>	<a href="#">Road Weight Limits/Seasonal Road Closings [Legal]</a>
<a href="#">Credit Cards, Municipal Acceptance of [Legal]</a>	<a href="#">Roads [Resource Center]</a>
<a href="#">Dangerous Buildings [Legal]</a>	<a href="#">Sexual Harassment in the Workplace [HR Toolkit]</a>
<a href="#">Discipline, Municipal Employee [HR Toolkit]</a>	<a href="#">Sign Regulation, Municipal</a>
<a href="#">Drug &amp; Alcohol Testing for Certain Municipal Employees, Mandatory [HR Toolkit]</a>	<a href="#">Smoking Laws [Legal]</a>
<a href="#">Eminent Domain [Legal]</a>	<a href="#">Smoking Laws &amp; the Municipal Workplace [HR Toolkit]</a>
<a href="#">Employee Evaluations [HR Toolkit]</a>	<a href="#">State and Federal Mandates [Legal]</a>
<a href="#">Employer/Employee Issues [Personnel]</a>	<a href="#">Tax Increment Financing [Legal]</a>
<a href="#">Ethics and Conflicts of Interest [Legal]</a>	<a href="#">Tax-Acquired Property [Legal]</a>
<a href="#">Fair Labor Standards Act (FLSA) &amp; Municipal Employers [HR Toolkit]</a>	<a href="#">Telecommunications Facilities [Legal]</a>
<a href="#">Family &amp; Medical Leave Act (FMLA) [HR Toolkit]</a>	<a href="#">The Manager Plan in Maine [Second Edition, by James J. Haag]</a>
<a href="#">Family Military Leave [Maine] [HR Toolkit]</a>	<a href="#">Town Manager Plan [Legal]</a>
<a href="#">Fees, User Fees, Impact Fees, Service Charges and PILOTS [Legal]</a>	<a href="#">USERRA (Military Leave) [HR Toolkit]</a>
<a href="#">Financial Policies</a>	<a href="#">Wind Energy [Resource Center]</a>
<a href="#">Fire Protection [Legal]</a>	<a href="#">Zoning Variances [Legal]</a>
<a href="#">Fiscal Year, Changing the Municipal [Legal]</a>	
<a href="#">GA/Confidentiality [Legal]</a>	
<a href="#">General Assistance - Selected Resources [Resource Center]</a>	
<a href="#">Health Officers, Local [Legal]</a>	
<a href="#">Hiring Process, The [HR Toolkit]</a>	
<a href="#">Homestead Exemption [Legal]</a>	
<a href="#">Independent Contractor vs. Employee Status [HR Toolkit]</a>	





## List of Other Land Use Publications

### Maine Land Use Planning Commission Publications

(<http://www.maine.gov/dacf/municipalplanning/publications.shtml>)

- “How to Prepare a Land Use Ordinance: A Manual for Local Officials”
- “Scenic Assessment Inventory”
- “Creating Traditional, Walkable Neighborhoods: A Handbook for Maine Communities”
- “Comprehensive Planning: A Manual for Maine Communities”
- “Protecting Local Scenic Resources: Community-Based Performance Standards”
- “Gateway 1: Performance Standards for Large Scale Developments”
- “Low Impact Development Manual”
- “The Great American Neighborhood—A Guide to Livable Design”
- “Community Visioning Handbook: How to Imagine—and Create—A Better Future”
- “Financing Infrastructure Improvements through Impact Fees: A Manual for Maine Municipalities on the Design and Calculation of Development Impact Fees”
- “Land Stewardship Resource Guide”
- “Updating Your Comprehensive Plan: A Guide to Making Plan Updates Bolder and Smarter”
- “Draft Guidebook for the Maine Model Wind Energy Facility Ordinance”
- “Site Plan Review Handbook: A Guide to Developing a Site Plan Review System” (model ordinance included)
- “Model Subdivision Regulations for Use by Maine Planning Boards,” with expanded commentary and model forms (prepared by SMRPC, 12th edition)
- “Wireless Telecommunications Facilities Siting Ordinance”
- “Adult Entertainment Establishments”
- “Lighting Manual (TA Bulletin, July 2008)
- “Easements” (TA Bulletin, January 2002)
- “Good Neighbor Policies” (TA Bulletin, January 2002)
- “Noise” (TA Bulletin, May 2000)
- “Archeological Resources” (TA Bulletin, May 2000)
- “Buffers” (TA Bulletin, May 2000)
- “Groundwater” (TA Bulletin, May 2000)
- “Creating User Friendly Land Use Ordinances and Procedures” (TA Bulletin)

### Other Publications:

1. “Maine Planning and Land Use Laws 2014 (published every 2 years—contact Fred Michaud; <http://www.michaud.us.com>)
2. Maine Farmland Trust (<http://www.maineFarmlandtrust.org>)—“Cultivating Maine’s Agricultural Future: A Guide for Towns, Land Trusts, and Farm Supporters” (2011)
3. Maine Department of Environmental Protection, Bureau of Land and Water Quality (<http://www.maine.gov/dep/land/publications/index.html>). There are numerous publications on a variety of topics, including shoreland zoning, small community grants for subsurface waste disposal, maintenance of camp roads, erosion and sediment control, wind energy, and many others. Some have their own link and some need to be located by using the search feature.
4. Publications by Randall Arendt

- “Crossroads, Hamlet, Village, Town: Design Characteristics of Traditional Neighborhoods, Old and New,” American Planning Association, Planning Advisory Service Report Number 487/488 (September 1999)
- “Growing Greener: Putting Conservation into Local Plans and Ordinances,” Natural Lands Trust, American Planning Association, and American Society of Landscape Architects (1999)
- “Designing Open Space Subdivisions: A Practical Step-by-Step Approach,” Natural Lands Trust (September 1994)

## **“LID Approach Manages Growth, Carefully,” *Maine Townsman*, August-September 2011 by Lee Burnett**

Low-impact development, or LID, has become something of a planning mantra in states and cities around the country – and it’s beginning to be felt in Maine, too.

The basic concept is pretty simple: To reduce the impact of human-built structures, including roads, parking lots, houses and office buildings, on the environment. The rationale is twofold: To preserve, so far as possible, the natural characteristics of the site; and, to save money, sometimes lots of money, for both developers and the towns and cities where projects are built.

It turns out, though, that the specific applications of LID are varied and diverse. Some are mandatory and regulatory; others are exercises in “visioning” and writing guidelines, and sometimes incentives, for developers concerned about their environmental footprint, or to suit a client’s objective.

Reducing the impact of stormwater runoff is one of most prominent and established applications of LID. According to Fred Snow, Community Planning Director for the Kennebec Valley Council of Governments, between 20 and 30 percent of the toxic contaminants that show up in groundwater in the shoreland zone are produced by water running off impervious surfaces such as roofs and pavements from single-family dwellings.

So far, the primary focus for stormwater management has been in larger municipalities with heavily developed core areas. The latest version of the federal Clean Water Act makes the retention of stormwater on site a high priority, and suitable regulations are mandatory in larger cities and towns, such as those in the Greater Portland metro area.

### **TOPSHAM’S STANDARD**

One town where the stormwater standards are not yet mandatory is Topsham, which is nonetheless incorporating them into its comprehensive plan. New buildings at the Topsham Fair Mall, including Best Buy, have used stormwater-retention systems in their parking lots. That is something that Rod Melanson, a town planner, hopes will become standard.

“We have two impaired streams as defined by the Clean Water Act, and the regulations will probably be extended to smaller communities in the future,” he said. In addition to the mall construction, Topsham’s new municipal complex uses stormwater-retention systems.

Such systems attempt to minimize infiltration of groundwater off site, and do so with various porous pavement designs along with berms and ditching for periods of rapid runoff. They aren’t cheap, Melanson noted, but they are necessary to prevent further deterioration of water quality, particular in urban areas.

Topsham has been revising its comprehensive plan, “and it’s clear we’re not up to date on stormwater management,” he said. The new ordinance will be light on prescription and more focused on results. “On-site investigation is necessary to make these systems work. Every site is different.”

Savings from stormwater retention can be considerable. Building massive storm drains and collection systems can easily run into the millions of dollars – and sewage-treatment costs add up quickly, as well.

Snow said KVCOG is trying to focus smaller towns in the Kennebec Valley on the need to be pro-active, rather than reactive, in reducing development impacts.

In cooperation with the Kennebec County Soil Conservation Service, KVCOG produced a model ordinance for low-impact development in the state-required shoreland zone – often the only form of zoning in rural towns. The model ordinance, completed last year, has not yet been adopted by any owns, but that’s not a surprise, Snow said. Town officials have to become familiar with the problems caused by runoff before they’re willing to create standards to deal with it, he said.

## **DAY’S STORE IN BELGRADE**

Some structures have been built or renovated to LID standards, however. One example is in the village of Belgrade Lakes, where a reconstruction of Day’s Store shows a number of features suited to its location, just a stone’s throw from a lake prized for its salmon and trout fishing.

Snow said that some of the techniques are simple. Porous “pavers,” similar to concrete blocks, are applied directly to the soil, and replace the more typical asphalt paving. Another step is to provide “rain gardens,” with flowering or perennial plants, which are planted slightly below grade to capture runoff and slow its progression toward adjacent lakes and streams.

The idea is to provide a succession of steps where water is absorbed slowly.

“The natural ground cover and tree cover is ideal, and should be retained wherever possible,” Snow said. Where that is not feasible, building and landscape design can help.

The stakes, KVCOG says, are high. Its explanation of the model ordinance says that runoff “can be enough to turn a clear water lake into a lake plagued by algae blooms.”

Another approach to LID is employed by the Beginning with Habitat program housed within the Maine Department of Inland Fisheries and Wildlife. According to Director Steve Walker, Beginning with Habitat is an educational and voluntary program for towns and cities – and one that is starting to show results.

“In Maine, municipalities do most of the planning and have most of the regulations,” Walker said. “That’s why we put our emphasis on working with them.”

Walker and his colleagues have made presentations to more than 100 towns and cities, and the response has often been enthusiastic.

## **PROTECTING WATERFRONT**

That was the case in Bremen, a small community (pop. 794) in coastal Lincoln County, which organized its first town conservation commission in 2007. Dennis Prior, who chairs the commission, said its inception reflected concerns about growth and its effect on the rural landscape prized by residents.

“We place a high priority on preserving our working waterfront, which in turn depends on protecting the land,” he said.

The conservation commission – like those in most towns in Maine – plays an advisory, but influential, role.

“We’re allowed to provide input to all other town boards,” Prior said. “Whenever an ordinance is considered that involves our mission, we try to be involved.”

The commission’s work was made easier by Bremen’s previous adoption of one of the strictest growth control ordinances in the state. It allows just seven new residential units a year.

“Some years, we’re right up to the cap,” Prior said. “Other years, such as recently, there are a few left over.”

Wildlife is a big attraction for people who live in Bremen, and Prior said the presentations showed the scope of the challenge.

“For some species, it takes a huge amount of uninterrupted land—500,000 acres or more,” he said. “What does it take to keep wildlife here?”

The town has begun mapping its wildlife corridors – blocks of open space necessary to facilitate migration and other annual cycles.

Bremen may also be unique in passing an ordinance that doubles the setbacks contained in state shoreland zoning rules. Prior said townspeople see it as a form of insurance.

## **‘QUITE SIMPLE’**

At IF&W Steve Walker said there are a variety of techniques that benefit not only wildlife but the entire ecosystems needed to maintain healthy populations.

“Some of them are quite simple,” he said. “Knowing what you have is definitely the place to start.”

In all, there are 213 species “of concern,” which is different from state and federal threatened and endangered species status. Rather than wait until a species is endangered, the state tries to track populations that are significantly declining and devise protection strategies.

Beginning with Habitat has focused on fast-growing York and Cumberland counties, and to some degree on municipalities in Greater Bangor, because that’s where the most development pressure has been.

One community with significant growth pressure that’s tried to stay ahead of the curve is Freeport. This fast-growing town has experienced significant commercial and residential development pressure. One response has been to incorporate wildlife habitat mapping into the comprehensive plan.

According to Town Planner Donna Larson, the maps are advisory, and don’t require any specific actions on the part of developers. “They’re a resource, and something we think people need to know about,” she said.

They can be a tool for neighbors of proposed projects as well as those building them, she said. In some cases, rules have had an effect not necessarily on where projects are sited, but how they are built.

A few years ago, a state-mapped bald eagle nest was found within the boundaries of a proposed subdivision in Freeport. “They had to limit construction during the periods the eagles were being fledged,” Larson said. “That was one accommodation that was required.”

## **CHANGES IN SCARBOROUGH**

Earlier planning techniques can also have a bearing on LID strategies, with Scarborough providing a good example. Nearly 10 years ago, the town considered, and finally approved, a “Great American Neighborhood” development called Dunstan Crossing. It planned to feature smaller lots, more open space, and – eventually – a small retail and office center.

This “Smart Growth” plan has proven fairly popular with homebuyers, despite the prolonged recession, said Town Planner Dan Bacon. The developer sold out one townhouse complex and is

beginning another. A similar development, Eastern Village, has been started in the Oak Hill area, close to the center of town.

Scarborough can expect more such development, now that its low-density residential zones, which originally called for two-acre lots, require at least one acre of open space per dwelling.

“It definitely reduces the impact, and the costs,” Bacon said. “Developers like it because they can build shorter roads. Homeowners like it because they have woods in the back yard, rather than another house.”

Scarborough voters have also been concerned enough about the impact of development that they passed three bond issues to acquire open space. The bonds, passed in 2000, 2003 and 2009, total \$4.5 million. The money has gone to a variety of purposes, including the purchase of 513 acres on eight separate sites. The largest, a 434-property known as Broadturn Farm, is a community-supported agriculture project that also includes restoration of barns and other buildings.

Scarborough also purchased an agricultural conservation easement on 13-acre Frith Farm. Town Manager Tom Hall said he expects easement purchases to become more frequent as a way of stretching revenue from the bond issues.

### **SIDEBARS: Municipalities Using Low Impact Development & Resources**

Open Space or Natural Resources plan: Bremen, Brunswick, Eliot, Falmouth, Freeport, Hallowell, Harpswell, Holden, Poland, Raymond, Readfield, Topsham, Woodstock (in progress), Yarmouth.

- Ordinances, including conservation zoning, that reduce development impacts: Freeport, Falmouth, Brunswick
- Open space acquisition programs: Falmouth, Wells, Scarborough
- Wetland ordinances exceeding state standards: Bremen

Source: Maine Association of Conservation Commissions

### **RESOURCES**

There are a number of sources of information for towns seeking to pursue low-impact development.

For wildlife habitat and open space preservation, see: [www.beginningwithhabitat.org](http://www.beginningwithhabitat.org)

For stormwater runoff and non-point pollution, see the Nonpoint Education for Municipal Officials site at: [www.mainenemo.org](http://www.mainenemo.org).



**“Minimum Lot Size for Multi-Family,” “Legal Notes,” *Maine Townsman*,  
February 1990**

*Question:* Our town does not have a minimum lot size requirement, so we use the State law (12 M.R.S.A. § 4807-A) which is 20,000 square feet for a single-family dwelling. How do we figure out the minimum lot size for multiple family dwellings?

*Answer:* 12 M.R.S.A. § 4802(2) lays out a formula for determining minimum lot sizes for multiple unit housing. That formula uses as a guideline a certain number of gallons of subsurface waste disposal. A single family dwelling equals 300 gallons per day, and a multiple unit housing equals 120 gallons per bedroom. This formula is confusing, however, and can best be explained as follows:

A single-family dwelling requires 20,000 square feet of land for 300 gallons per day, which divides out to 66.7 square feet of land per gallon. For multi-unit buildings, multiply the total number of bedrooms by 120; then multiply the resulting figure by 66.7, and you will have the minimum square footage necessary.

For example, if a multi-family building has 8 bedrooms total, it would be:  $8 \times 120 = 960$ ;  $960 \times 66.7 = 64,032$  square feet. Rounded off, this project needs a minimum of 64,000 square feet.

Another example, assume that the project has 50 bedrooms.  $50 \times 120 = 6,000$ ;  $6,000 \times 66.7 = 400,200$  square feet. Rounded off, this project needs 400,000 square feet, or 10 acres.

Note that a municipality is not required to use either the State minimum lot size or this formula to determine the minimum lot size for multi-unit development on single lots. It may enact its own lot size ordinance, as long as it does not allow lots smaller than the State minimum.

(This explanation is from Jay Hardcastle of the Department of Health and Human Services, Health Engineering Division.

