

# Manual for Local Land Use Appeals Boards

## A Legal Perspective

October 1999 revised edition – second printing  
Replacing 1989 and limited 1992 revised editions  
[Supplement #2, January 2004 is incorporated into the manual.]

*Financial assistance for the preparation and printing of the 1989 edition of this handbook was provided by the Margaret Chase Smith Library Center in Skowhegan, Maine.*

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## Introduction

Serving on a municipal board of appeals is probably one of the most difficult jobs that a citizen can volunteer to do. The board of appeals, more than any other local board, generally performs the same function at the local level as an appeals court judge. Like a judge, the appeals board must decide difficult questions in accordance with local ordinances, State laws, and court cases. Often those decisions will seem harsh and contrary to “common sense,” both to board members and to the general public. This is particularly true when the board is asked to decide a request for a variance. However, the board is bound to follow the law until the law is changed. Explaining this to citizens seeking help from the board probably is one of the board’s most unpleasant tasks.

This manual has been prepared in an effort to lay out some of the basic legal information which every appeals board member should know in order to feel confident in performing the board’s duties. We want to stress that it is a **general discussion**, however. While it will apply in most municipalities, a particular town or city may have an ordinance or charter provision, which imposes different or additional rules or requirements for the board to follow.

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 hopefully will be a valuable general reference tool for most boards. However, it 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 this manual is Rebecca Warren Seel, Esq. James Katsiaficas, Esq. contributed extensively to the 1999-revised edition. A special note of thanks goes to the following people for their assistance in the preparation of the 1989 edition of this manual: Charles Lane, Esq.; Jeffrey Thaler, Esq.; James Collins, NMRPC; Richard Flewelling, Esq.; Ellerbe Cole, Esq.; Joseph Wathen, Esq.; William Livengood, Esq.; James Katsiaficas, Esq.; John Maloney, AVCOG; Madge Baker, Esq., SMRPC; Elery Keene, NKRPC; Sherry Hanson and Dan Soule, D.E.C.D.; Mathew Eddy and Barbara Barhydt, GPCOG; Andrea Smith, Legal Services Secretary; and Loretta Reichel, typesettist. The title to this manual was changed from “Handbook for Local Appeals Boards: A Legal Perspective” in the 1999 edition to reflect more accurately the audience for whom this manual is intended.

## Terms and Abbreviations Used in This Manual

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

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

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

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

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

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

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

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

*Note: Copies of the Maine statutes may be available at the town office or city hall. The statutes, court cases, and court rules of procedure also are available at the State Law Library, University of Maine law school library and possibly at the county courthouse. They are also available on the Internet.*

# Chapter 1

## Board of Appeals

### Creation, Appointment, Liability

## Chapter 1

[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #2, January 2004 is included.*

### Creation, Appointment, Liability

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

#### Creation of a Zoning Board of Appeals

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

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

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

If an appeals board is established after September 23, 1971, 30-A M.R.S.A. § § 2691 and 4353 (formerly 30 M.R.S.A. § 2411 and § 4963 respectively) require a municipality to adopt an ordinance or charter provision before the board may legally exercise any of the zoning appeals functions delegated to it by State law. Neither of these State laws fixes the number of members or their terms. Section 2691

states that a board may have five or seven members serving terms of at least three years and no more than five years. This language requires the ordinance to specify the number of members and the length of their terms, at a minimum. In 1972 former § 2411 was amended to allow towns of less than 1,000 residents to create appeals boards consisting of three members. Section 2411 originally authorized municipalities of 5,000 or more residents to provide for up to three associate board members. In 1975 this provision of the law was revised to allow communities of any size to have a maximum of three associate appeals board members.

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

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

**Ordinance or Article Wording.** The important point to remember is that a board of appeals has no authority to act as an official arm of municipal government unless it has been legally established by one of the methods described above. After September 23, 1971, a simple article in the warrant, such as "To see if the town will vote to establish a board of appeals," is not a sufficient procedure by itself to create a board because it leaves unanswered such questions as the number of board members and their terms of office. Nor is a provision in the town's shoreland zoning or other ordinance which simply states that a board is established "as provided in state law" sufficient to create a legal board. Also, any ordinance or charter provision establishing an appeals board after September 23, 1971 must be consistent with the provisions of 30-A M.R.S.A. § 2691, even if the ordinance or charter provision was enacted prior to February 28, 1989 (the effective date of § 2691). Sample ordinances and sample article wording appear in Appendix 1.

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

### **Creation of Other Types of Appeals Boards/Home Rule Authority**

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

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

With the advent of home rule, municipalities could legally establish more general appeals boards for other purposes such as subdivision appeals, housing code appeals, site plan review appeals, and so on, or could delegate additional duties to the board of appeals and thereby increase its jurisdiction, provided the ordinance or charter provision creating the board or delegating duties was consistent with 30

M.R.S.A. § 2411 (now 30-A M.R.S.A. § 2691). At least one statute (30-A M.R.S.A. § 4103) expressly authorizes the municipality to delegate building code appeals to boards of appeal created pursuant to 30-A M.R.S.A. § 2691. In contrast, 28-A M.R.S.A. § 1054, relating to special amusement permits for licensed liquor establishments, automatically empowers appeals boards to hear special amusement appeals without the need for action by the municipality. Another example of power to hear an appeal, which is automatically conferred on the board by statute, is a provision in Title 7, § 51 et seq. (Farmland Registration Law), which requires zoning boards of appeal to hear appeals regarding the eligibility of a particular piece of farmland for registration to entitle it to protection from "inconsistent development" on adjoining property and to entertain requests for variances to allow inconsistent development.

### **Elected Board Members**

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

In communities establishing an appeals board for the first time, the board members may be elected or appointed. The method of selection must be stated in the ordinance or charter provision creating the board. The adoption of the ordinance or charter provision creating an elected board must occur at least 90 days before the annual meeting at which the first board members will be elected. 30-A M.R.S.A. § 2525 and § 2528.

### **Qualifications for Office**

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

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

**Incompatible Positions.** A person serving on an appeals board may not hold another office which is "incompatible" with the appeals board position. Two offices are "incompatible" if the duties of each are so inconsistent or conflicting that one person holding both would not be able to perform the duties of each with undivided loyalty. *Howard v. Harrington*, 114 Me. 443, 446 (1916); McQuillin, *Municipal Corporations*

(3<sup>rd</sup> ed. rev.) § 12.67. An example of incompatible offices would be if one person served on both the planning board and zoning board of appeals under an ordinance scheme which authorized planning board decisions to be appealed to the board of appeals, since the same person would be involved in making the initial decision and then deciding whether that decision was correct on appeal. The positions of local building inspector and code enforcement officer also would be incompatible with the position of appeals board member if the appeals board has been authorized to hear appeals from decisions made by either one of those other officials. It also is incompatible for one person to serve as a selectperson or councilor and an appeals board member because 30-A M.R.S.A. § 2691 expressly prohibits it. That same law also prohibits the spouse of a selectperson or councilor from serving on the appeals board.

The courts have ruled that, in accepting and taking an oath for an office which is incompatible with one already held the person automatically vacates the first office, as though he or she had actually resigned it. *Stubbs v. Lee*, 64 Me. 195 (1914); *Howard v. Harrington*, *supra*.

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

### **Vacancy**

As a general rule, when a permanent vacancy occurs in an appointed appeals board position, the municipal officers have the authority to fill the vacancy by appointment for the remainder of the term. 30-A M.R.S.A. § 2602. The ordinance or charter provision creating the board should define what constitutes a "permanent vacancy." If a vacancy occurs on an elected board, the municipal officers may either appoint someone to fill the vacancy for the remainder of the term or leave the position unfilled, if there is no ordinance or charter provision to the contrary, but they do not have the authority to fill the position by calling an election. 30-A M.R.S.A. § 2602; *Googins v. Gilpatrick*, 123 Me. 23 (1932).

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

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

### **Removal**

If an appeals board position is one which is filled by an appointment made by the municipal officers for a definite term, then the municipal officers may remove that person before the end of the term only for just cause, after notice and hearing. 30-A M.R.S.A. § 2601 and § 2691(2)(D). "Just cause," means a legally justifiable reason, such as a blatant disregard for the law. "Just cause" 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.

### **Liability of Board Members**

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

### **Maine Tort Claims Act**

- **Individual Board Members Generally Immune.** Under 14 M.R.S.A § 8104-D, members of the appeals board generally are liable for their negligent acts or omissions occurring in the course and scope of employment. However, the exceptions to liability found in 14 M.R.S.A. § 8111 generally protect a board of appeals member from personal liability and having to pay monetary damages to an injured party. The statute provides immunity from liability for an action or failure to act which falls into one of the following categories: “quasi-legislative” (for example, adoption of bylaws or procedures); “quasi-judicial” (for example, granting or denying a variance); “discretionary” (for example, an ordinance provision which gives the board discretion whether to conduct a site visit or whether to conduct a public hearing); or intentional, as long as the board members acted in good faith and within the scope of their authority (for example, where a board member comments at a board meeting about the quality of work submitted by one of the applicant’s experts). The statute also provides immunity from claims based on the performance or failure to perform an administrative enforcement function. *(from Supplement #2, January 2004)*
- **Individual Liability for Negligence.** However, an individual board member may be personally liable for his/her negligent or intentional act or failure to act if the act is ministerial (not involving any discretion), is an intentional act not undertaken in good faith, or is outside the scope of his/her authority. A possible example of a negligent act is where the board approves a variance from a road frontage requirement where the ordinance says only lot size and setback requirements may be reduced by variance. An example of an action outside the authority of a board member is where a board member is consulted by a member of the public about whether a certain permit or variance is needed for a project, the board member provides advice which is wrong, and the person relies to his detriment on that advice. In order to recover damages as compensation for negligence, the person would have to show that he or she was injured and that the board member’s negligence was the cause of the injury and not something else, such as the applicant’s own negligence. *(from Supplement #2, January 2004)*
- **Municipal Liability and Immunity; Defense/Indemnification of Board Members.** Generally speaking, 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’s 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 also should refrain from commenting publicly about the suit.

**Maine Civil Rights Act.** The Maine Civil Rights Act (5 M.R.S.A. § 4681 - § 4683), prohibits a person from "intentionally interfer(ing) by threat, intimidation or coercion" with another person's exercise or enjoyment of rights secured by the U.S. Constitution or the laws of the United States or rights secured by the Maine Constitution or laws of the State. Unlike federal law (see discussion below), the State Civil Rights Act does not apply only to actions done "under color of law." This means that a board member could be sued under this law whether or not he or she was acting in an official capacity if a violation of this law results from that board member's action. The Maine Attorney General is authorized to seek an injunction or other corrective action on behalf of the injured person in order to protect that person in exercising his or her rights. The injured person also may pursue a civil action on his or her own behalf seeking appropriate monetary or corrective relief. The law also authorizes the successful party (other than the State) to recover its reasonable attorneys 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.** The individual board members would be immune from personal liability under federal law for damages resulting from a board decision if the board acted in "good faith". "Good faith" means that the board did not know and should not have known that its decision would deprive the injured person of a federal or constitutional right. *Owen v. City of Independence*, 445 U.S. 622 (1980). For example, if the appeals board denies an application, the applicant might try to sue the board and ask a court to order the board to approve the application and to pay damages to him as compensation for the loss of use of his property. As long as the board acted in good faith in interpreting the ordinance and denying the application, the court would not award damages against the members even if the court found that the application should have been approved. However, if, for example, the court found that the only reason that the board had for denying the application was that it wanted to prevent a family with a particular ethnic background from moving into the neighborhood, it probably would award damages against the board members personally.
- **Municipal Liability.** In any event, even if the board members are not personally liable for damages, the municipality will be liable if the court finds that the person bringing the suit actually was deprived of a federal or constitutional right by the board's decision and the decision was made pursuant to a "policy, practice, or custom" of the municipality. The municipality cannot rely on the board's good faith in defending a suit against the municipality. A person who wins a case under the Civil Rights Act of 1871, whether against the municipality or the members of the board, can recover attorney fees as well as damages. (42 U.S.C.A. § 1988). There is no statutory limit on damages under the federal law as there is under the Maine Tort Claims Act.
- **Defense and Indemnification.** Title 14 § 8112 (2-A) (Maine Tort Claims Act) states essentially that if board members are sued for violating someone's rights under a federal law, the municipality must pay their defense costs and may pay any damages awarded against them for a violation of federal law, if they consent. This is not true if they are found criminally liable or if it

is proven that they acted in bad faith.

- **Notice of Suit.** If sued under federal law, the board should notify the town or city manager (if any) or the municipal officers immediately, since an insurer may deny coverage and defense if notice is not provided in time.

### **Maine Freedom of Access Act (“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 appeals board to allow the general public to attend board meetings and workshops, to open its records for public inspection, and to give prior public notice of its meetings. A copy of the law is included in Appendix 2. A more detailed discussion of how it affects the appeals board appears in Chapter 3 of this handbook. If the board willfully violates the FOAA, the municipality could be liable to pay a \$500 fine. Also, the statute states that certain decisions made in violation of the FOAA are void.

### **Records Retention and Preservation and Public Access**

Title 5 § 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. An excerpt from the Board’s regulations is included in Appendix 2. 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 successor.

Records in the custody and control of the board of appeals are public records under Maine’s Freedom of Access Act, with rare exceptions. Any member of the general public has a right to inspect public records at a time that is mutually convenient for the custodian and the person wanting to inspect them. Inspection should be done with supervision of the custodian or someone designated by the custodian; a member of the public should never be allowed to remove public records and take them somewhere else to review and copy. If the person wants a copy of a public record, the municipality may charge a reasonable fee. When a person wants to inspect or obtain a copy of a record, which might be confidential, the custodian has 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. Written, taped and computerized materials all generally fall within the definition of “public record” for the purposes of the Freedom of Access Act if they are received or made by the board in connection with the transaction of public business. Application materials, board minutes, email communications, 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. *(from Supplement #2, January 2004)*

## **Chapter 2**

### **Board of Appeals**

#### **Jurisdiction of the Appeals Board**

## Chapter 2

[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #2, January 2004 is included.*

### Jurisdiction of the Appeals Board

In the absence of a State statute, local ordinance, or charter provision expressly stating that a decision may be appealed to a local board of appeals, the board of appeals has no "jurisdiction" (legal authority) to hear such an appeal. *Fisher v. Dame*, 433 A.2d 366 (Me. 1981); *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91, 95 (Me. 1984). Where no local appeal is authorized, a person's only appeal (if any) is to the Superior Court under Civil Rule of Procedure 80B. 30-A M.R.S.A. § 2691; *Lyons v. Board of Directors of SAD No. 43*, 503 A.2d 233 (Me.1986); *Levesque v. Inhabitants of Town of Eliot*, 448 A.2d 876 (Me. 1982). (A copy of § 2691 appears in Appendix 1 and a copy of Rule 80B is included in Appendix 3.)

#### Statutory Appeals Jurisdiction

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

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

**Special Amusement Permits.** Title 30-A § 2691(4) grants automatic jurisdiction to appeals boards over appeals filed under the State law relating to special amusement permits (28-A M.R.S.A. § 1054). A special amusement permit is required from the municipal officers before any licensed liquor establishment can offer "entertainment" as defined in that law. Municipalities are required to have ordinances or regulations spelling out the conditions which an applicant must meet in order to obtain such a permit.

**Farmland Registration Law.** Title 7, section 51 et seq. automatically authorizes zoning boards of appeal to hear (1) appeals regarding whether a particular piece of farmland is eligible to be registered for protection from inconsistent development and (2) requests for variances to allow inconsistent development to occur on land adjacent to a registered farmland parcel. Although the law has not allowed new registrations since 1991, a board of appeals may be asked to review a challenge to the continued eligibility of a parcel of registered farmland or a variance application from the owner of land adjoining registered farmland. (*from Supplement #2, January 2004*)

#### Jurisdiction by Ordinance or Charter

Unless an appeal falls within one of these statutory categories, the appeals board must look for a local ordinance or charter provision providing the legal basis for any other type of appeal filed with the board before the board may legally act. Title 30-A § 2691(4) specifically states that once a municipality has established an appeals board, it 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 nonaction may be appealed to the board.** (*Emphasis added.*)

A number of State laws indicate subject areas in which the appeals board may be authorized to act, such as building codes (30-A M.R.S.A. § 4103) and tax assessment appeals (30-A M.R.S.A. § 2526). These laws do not automatically give the board jurisdiction. They require an ordinance or charter provision to implement them. Likewise, if a municipality wants to provide a local appeal under any type of "home rule" ordinance other than zoning (e.g., site plan review, subdivision, building code), it must be sure to include an express appeal provision giving authority to the appeals board which complies with 30-A M.R.S.A. § 2691(4). Sample ordinance provisions are contained in Appendix 1 of this handbook. Regarding subdivision appeals, even if the municipality is reviewing subdivisions under the Municipal Subdivision Law (30-A M.R.S.A. § 4401 et seq. rather than a local ordinance, the board of appeals has no authority to hear subdivision appeals unless expressly authorized by municipal ordinance.

### **Other Assignments**

In some municipalities, a board of appeals may be asked by the municipal officers or town or city manager to assist with a project such as drafting a new ordinance or revisions to an existing ordinance. While such a task may not be one which the board is legally required to perform, if the members have the time and willingness to help, then they may do so." (*from Supplement #2, January 2004*)

# **Chapter 3**

## **Board of Appeals**

### **The Decision-Making Process**

### Chapter 3

[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #2, January 2004 is included.*

## The Decision-Making Process

The discussion which follows should be used by the appeals board as a general guide in dealing with applications in which it is the original decision-maker (e.g. variance applications) or appeal applications in which the ordinance requires the board to conduct a "de novo" review. There may be provisions in a local ordinance which conflict with these general rules and which may control the board's decision. If the board is faced with such a conflict, it should consult with the board's attorney to resolve it. For additional discussion regarding variances, the board also should refer to the discussions in Chapters 4 and 5 of this manual. (*from Supplement #2, January 2004*)

### Forms

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

### Appeals Board Bylaws

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

This is because bylaws of this type are not the same as an ordinance. Examples of the kinds of things covered in bylaws are the election of officers, the time and place of meetings, how meetings are called and advertised, agenda items, and the rules of procedure which the board will use to run its regular meetings and public hearings, where not otherwise addressed in a local ordinance or charter. Issues such as the number of board members needed to constitute a quorum, the number of votes needed to approve a motion, the number of absences allowed before a position can be declared vacant, and the deadline for filing an appeal generally should be contained in an ordinance or charter adopted by the legislative body rather than merely in bylaws approved by the board. 1 M.R.S.A. § 71; 30-A M.R.S.A. § 2691. A sample set of bylaws and hearing procedures is included in Appendix 2. In adopting bylaws, the board should be careful to stick to procedural kinds of provisions and avoid conflicts with a local ordinance or charter or a State or federal law, such as the Maine Freedom of Access Act (Right to Know Law) (1 M.R.S.A. § 401 et seq.) (see Appendix 1). A board created prior to 1971 also should avoid conflicts in its bylaws with 30 M.R.S.A. § 4954. Even though bylaws do not need the approval of the legislative body in most cases, the board may want to submit them for approval to avoid arguments that any portion of the bylaws exceeds the board's authority. In the absence of written bylaws, or where written bylaws do not address an issue, the board is free to fashion its own procedure and the courts will defer to the board's

procedure so long as that procedure is fair and does not conflict with State, federal or local law. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). (from Supplement #2, January 2004)

### **Standing to Apply for a Permit**

If the ordinance or statute under which an application for a permit or other approval is being submitted does not state who has a sufficient legal interest in the property in question (i.e., "standing") to apply for approval to conduct a project, the Maine Supreme Court has ruled that the applicant must be a person who has some "right, title or interest" in the property. *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974); *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983). This could include a written option or contract to purchase the property or a leasehold or easement interest. However, whether these documents/interests are sufficient for the purposes of conferring standing to apply for a permit to conduct a particular use will depend on the language of the document/deeded interest. The document/deed must give the applicant a "legally cognizable expectation" of having the power to use the property in the ways that would be authorized by the permit if approved. See *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 area without violating the deed covenant). A title dispute will not automatically deprive a person of standing to apply for a permit. *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995.) Where property is jointly owned, all owners need not be parties to the application in order for the 'standing' test to be met. *Losick v. Binda*, 130 A. 537 (NJ 1925). The board should reject an application if it determines that the applicant does not have standing to apply. The burden is on the applicant to present evidence sufficient to satisfy the board, such as a copy of the property deed, written lease, or written option agreement. If the person filing the application is acting as the authorized agent of the owner, that person should give the board a written letter of authorization signed by the owner. This "standing" test governs people who are seeking approval of an application for a permit, conditional use, or variance from the board or official who has the initial authority to grant such a request. The courts have established a different "standing" test for people who want to *appeal* such a decision. That test is discussed in Chapter 4 of this manual.

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

**General.** Under the Freedom of Access Act ("Right to Know Law") (1 M.R.S.A. § 410 et seq.), the public has a right to be present any time the board or a subcommittee of the board meets, even if the meeting is just a "workshop" or a "strategy meeting." Any meeting of a majority of the full board at which the members will discuss official business or vote must be preceded by public notice. The same is true for subcommittees of the board comprised of three or more members. *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). This law also gives the public the right to tape, film and take notes of the meeting, as long as it is done in a non-disruptive manner. It does not guarantee the public a right to speak. The right to speak is guaranteed only where a meeting has been advertised as a public hearing, absent a local ordinance or bylaw to the contrary. (A copy of the Freedom of Access Act is included in Appendix 2.)

**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 reach most of the people in the community far enough in advance of the meeting to allow the public to

make plans to attend. In some communities, this may mean newspaper notice of some sort and in others posting notice around town may be enough. Giving notice about a week before the meeting is advisable for both regular and special meetings. If the meeting is an emergency meeting, the 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. *(from Supplement #2, January 2004)*

**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 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 has adjourned. Any such communications should be limited to nonsubstantive issues; for example, calling or emailing board members to set a meeting date or agenda items. Delivery of substantive information between meetings by email may be permissible as long as no discussion of the information occurs outside the meeting by email or otherwise, and as long as it is noted in the record of the next board meeting and all parties are given access to the information and provided a reasonable opportunity to review it and offer comments. *(from Supplement #2, January 2004)*

**Executive Sessions.** One exception to the rule that meetings are open to the public is where the board wants to consult with its lawyer "concerning the legal rights and duties of the (board), pending or contemplated litigation, settlement offers, and matters where (the attorney/client privilege between the board and its lawyer would be jeopardized) or where premature public knowledge would clearly place the municipality at a substantial disadvantage." To fall within this exception, the board's attorney should be at the meeting either in person or by conference telephone call. The Freedom of Access Act only allows the board to conduct a **discussion** with its attorney in an "executive session" if the board (1) takes the vote to go into executive session in a public meeting, (2) follows the procedures in § 405, and (3) does not make any final decisions in executive session. In *Underwood v. City of Presque Isle*, 715 A.2d 148 (Me. 1998), the court found that the planning board had conducted impermissible discussions about the merits of the land use proposal which it was reviewing while in executive session with its attorney to receive advice regarding the board's legal rights and duties. The court noted that "it may be difficult at times for a board convening in executive session (with its attorney) to determine when its permissible consultation with counsel has ended and impermissible deliberations on the merits of a matter have begun. We cannot offer any bright line to eliminate that difficulty. We can, however, remind public boards and agencies of the Legislature's declaration in the (Freedom of Access Law) that 'their deliberations be conducted openly,' and that the (law) 'be liberally construed...to promote its underlying purposes.' Consistent with these declarations, any statutory exceptions to the requirement of public deliberations must be narrowly construed. The mere presence of an attorney cannot be used to circumvent the (Freedom of Access Law's) open meeting requirement - *(from Supplement #2, January 2004)*. Section 405 authorizes other subject matter to be discussed in an executive session, but those other subjects generally are not relevant to boards of appeal.

**Common Violations.** Practices which violate the Freedom of Access Act include the following:

- a. polling board members by telephone to vote on an application or to discuss it;
- b. taking an application house to house to have it approved or leaving it at the town office for board members to review and sign individually rather than by a public vote of the board;
- c. chance meetings between board members and/or with private citizens at the grocery store or a private party at which they discuss an application, especially where a majority of the board is involved in the discussion;
- d. making decisions in a "closed door" meeting or excluding the public when not authorized by law;
- e. conducting discussions or making decisions by e-mail.

**Site Visits.** If a majority of the board is going to visit the site of a proposed project or appeal, the board should be aware that such on-site meetings are meetings which must be preceded by public notice and at which the public has a right to be present under the Freedom of Access Act ("Right to Know Law"). Site visits conducted by individual board members or by a subcommittee comprised of less than a majority of the full board arguably would not be subject to the public notice requirements of the law. However, site visits by individual members or by subcommittees of less than a majority of the full board can raise due process problems, which the board may wish to avoid, especially where the site visit occurs after the board has closed its record to additional public comment and has begun to make its decision. *Compare, City of Biddeford v. Adams*, 1999 ME 49, 727 A.2d 346 (Me. 1999), and *Fitanides v. Lambert*, CV-92-662 (Me. Super. Ct., York Cty., July 30, 1992), with *Armstrong v. Town of Cape Elizabeth*, AP-00-023 (Me. Super. Ct., Cum. Cty., Dec. 21, 2000). (*from Supplement #2, January 2004*)

During a site visit which is not conducted 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 either with each other or with the applicant. Nor should the applicant or anyone else be conducting demonstrations to prove a point, which might be in controversy about the application. Such discussions or demonstrations would constitute illegal "ex parte" communications and would cause due process problems for the parties not present. The individual board members also need to be sure to note for the written record at the next board meeting the fact that a site visit was conducted and what information the visit generated that might affect the visiting board member's vote on the application. It is crucial that a site visit conducted by less than a majority of the full board occur before the board closes the record to any further public comment. *Adams, supra*. It is also crucial that the ultimate findings and conclusions prepared by the board in making its decision address the evidence from the site visit and that the findings in general are sufficiently detailed to allow a court to determine how the board evaluated all the evidence. *In Re Villeneuve*, 709 A.2d 1067 (Vt. 1998).

Even if the board members do all of this, an applicant or someone opposing the project still could try to challenge the individual site visits as a violation of their due process rights if they were not at the site also 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.

Sometimes a board decides to conduct a site visit and will set a date for the site visit to occur at a later date 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. (*from*

*Supplement #2, January 2004)*

## **Board Records**

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

All board records are public records, unless a particular record is made confidential by a specific statute or is governed by a court order protecting it from public inspection. 1 M.R.S.A. § 401 et seq. (Freedom of Access Act); 30-A M.R.S.A. § 2961(3)(B). This is true regardless of the form in which they are maintained (paper records, audio or video tapes, computer disks or files, email). 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.

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. 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. *(from Supplement #2, January 2004)*

## **Conflict of Interest**

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

- **Statutory Test.** There are several tests of what constitutes a conflict of interest. One is established by statute in Title 30-A § 2605. The statutory test applies 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 and 2) is "directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity." If a board member falls into one of the relationships listed in category 1 but does not have the 10% interest covered by category 2, then that board member does not have a legal conflict of interest.
- **Case Law Test.** For a board member whose conflict of interest is not governed by Title 30-A (because that board member does not fall within category 1 as discussed in the preceding paragraph), then 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 pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act . . ." *Lesieur v. Inhabitants of Rumford*, 113 Me. 317 (1915), as cited in *Tuscan v. Smith*, 130 Me. 36 (1931).

**Examples.** Under the statutory test, if a board member were an employee of a company which had an appeal application before the board, there would be no legal conflict of interest requiring that board member to abstain unless he or she also had a 10% stock or ownership interest in that company. An example of an indirect conflict of interest controlled by the statute is where a board member owned a company which owned 10% of the stock of a private corporation which was 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 was a real estate agent trying to sell the property which was covered by the

application and his or her commission on the sale hinged on whether the board granted approval of the appeal. Likewise, if the 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. 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.)

**Appearance of Impropriety.** Even if no legal conflict of interest exists, a board member would be well advised to avoid even the appearance of a conflict by abstaining in order to avoid the appearance of impropriety and maintain the public's confidence in the board's work. *Aldom v. Roseland*, 42 NJ Super. 495, 127 A.2d 190 (1956); 30-A M.R.S.A § 2605.

**Defined by Ordinance or Charter; Authority of Board to Determine.** A municipality may define what constitutes a conflict of interest by including such a provision in a local charter or ordinance. Even without such a provision, a board of appeals has authority under 30-A M.R.S.A. § 2691 to decide whether one of its members has a legal conflict of interest based on the facts presented. Such a decision can be made either at the request of the affected board member or on the initiative of the rest of the board.

**Former Board Member Representing Clients Before the Board.** Another conflict issue addressed by § 2605 arises in the situation where a board member who leaves the board attempts to represent a private client before the board. If the board member is trying to represent the client on a matter in which he or she had prior involvement as a board member, the statute establishes certain waiting periods before this representation would be legal. If the matter was completed at least one year before the board member left office, then there is a one-year waiting period from the time the board member left. If the matter was still pending at the time the board member left and within one year of leaving, then the board member is absolutely prohibited from representing a client on that matter.

**Current Board Member Representing Clients Before the Board.** Title 30-A M.R.S.A. § 2605 requires that a member of a board refrain from 'otherwise attempting to influence a decision in which that official has an interest.' While it would not be reasonable to interpret this law as prohibiting a board member from abstaining and stepping down as a board member to present his/her own application to the board, it probably does prohibit a board member (including alternate members) from representing another applicant who is seeking the board's approval or some other party to the proceeding. (*from Supplement #2, January 2004*)

## **Bias**

**Bias Based on Blood/Marital Relation to Appellant or Other Party.** Title 1, § 71(6) of the Maine statutes states that a board member must disqualify himself or herself if a situation requires that board member to be disinterested or indifferent and the board member must make a decision which involves a person to whom the board member is related by blood or marriage within the 6<sup>th</sup> degree (parents, grandparents, great-grandparents, great-great grandparents, brothers, sisters, children, grandchildren,

great-grandchildren, aunts, uncles, great aunts/uncles, great-grand aunts/uncles, first cousins, first cousins once removed, first cousins twice removed, second cousins, nephews, nieces, grand-nephews/nieces, great grand nephews/nieces). (See chart in Appendix 2) If a board of appeals member is hearing an appeal from a decision by the planning board under a zoning ordinance and the appeals board member is related to a planning board member within the 6<sup>th</sup> degree, he or she should abstain. This is because under 30-A M.R.S.A. § 4353, the planning board is a "party" to zoning appeals. See also *Inhabitants of the Town of West Bath v. Zoning Board of the Town of West Bath*, CV-91-19 (Me. Super. Ct., Sag. Cty., May 7, 1991). The same would not necessarily be true if the board member were related to the code enforcement officer (CEO) and the decision being appealed was the CEO's, because the CEO is not a statutory party to board of appeals proceedings. However, it would be advisable for a board of appeals member related to the CEO within the 6<sup>th</sup> degree to abstain when a zoning appeal involves the CEO's decision in order to avoid the appearance of bias and a challenge on due process grounds.

**Bias 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). (See discussion in *Grant's Farm Associates, Inc. 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 an ample record to support the board's decision to deny approval. See also *Widewaters Stillwater Co. LLC v. City of Bangor*, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001), where the court refused to find that a letter written in support of a zone change constituted evidence of a board member's bias regarding the application which was being reviewed by the board.) (from Supplement #2, January 2004)

**Burden of Proof; Examples.** The burden of proving bias is on the applicant. *In Re Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973). If a board member reaches a conclusion based on the application and expresses that opinion to the press before the board has voted, a court probably would not find that the board member was biased against the project. This also would be true where a board member had expressed an opinion regarding the proper interpretation of the applicable ordinance or statute. *Cf.*, *New England Telephone and Telegraph Co. v. P.U.C.*, 448 A.2d 272, 280 (Me. 1982) and *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410 (Me. 1984). However, if, for example, the applicant could show (1) that the board member had a personal grudge against him because they were involved in a lawsuit relating to another matter or (2) that the board member in question had repeatedly stated in public that he personally found all projects of that type to be offensive and had stated furthermore that there was no way that he (the board member) would ever vote to approve any project of that type, or (3) that prior to becoming a board member, the member in question had testified against the application in earlier board proceedings, a court probably would view the board member as biased. *Pelkey, supra*.

**Investigations Conducted by Board Members.** Sometimes board members want to collect information to help the board make its decision rather than relying 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. 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 or other members of the public to respond. 18 A.L.R.2d 562.

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. (from Supplement #2, January 2004)

**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 arguably has the authority to decide.

### **How the Affected Board Member Should Handle a Conflict or Bias**

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

If a board member does not believe that he/she has a conflict or bias but the majority of the board believes that a conflict or bias does exist, the majority of the board may vote on that issue. 30-A M.R.S.A. § 2691; *State Taxpayers Opposed to Pollution v. Bucksport Zoning Board of Appeals* (and *AES-Harriman Cove, Inc. v. Town of Bucksport*), CV-91-217 and 92-41 (Me. Super. Ct., Han. Cty., January 21, 1993). If the board finds that a conflict or bias does exist based on the facts, then the board may order the conflicted or biased board member not to participate. If a board member thinks that he/she may have a conflict or bias which would legally disqualify him/her but is not sure, that board member may ask the rest of the board to consider the facts and vote on the matter.

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

### **Conducting the Meeting**

**Scheduling a Meeting; Notice Requirements.** 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 application, then the chairperson should arrange a special meeting within a reasonable time. Notice of the meeting time and place should be given to the applicant and to any other people (such as abutters) whom the board may be required to notify by the relevant statute, ordinance or bylaws of the board. The board also should give reasonable notice to the public and press, as required by the Freedom of Access Act, or other relevant ordinance or State law. For zoning appeals and variance applications, 30-A M.R.S.A. § 4353 requires the board to give notice of the appeal to the municipal officers, the planning board, and the person filing the appeal. There is no statutory requirement of notice to abutters for zoning appeals. Nor is there a statute requiring that notice be given to the municipal CEO. 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 Human Services (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 3 of this manual. Although the statutes do not expressly mention appeals involving those projects, it would be wise for the board of appeals to give notice of the appeal to be safe, especially where the board will be conducting a “de novo” review of the appeal (see discussion of “de novo” review in Chapter 4). *(from Supplement #2, January 2004)*

Even if the chairperson believes that the board has no jurisdiction to hear the requested appeal or that the appeal was not filed within the required deadline, the chairperson still must schedule an initial board meeting on the appeal in order for the board to make that decision by majority vote. The chair cannot simply refuse to call the meeting or require the applicant to withdraw the appeal. *(from Supplement #2, January 2004)*

**Attendance by Applicant/Appellant.** As long as the applicant/appellant has received reasonable notice of the meeting at which his or her application will be discussed, it is not legally required that the applicant/appellant or his/her authorized representative be present. A board which does not believe that it can make a decision without asking questions of the applicant or his/her agent should table further action until a future meeting and request that the applicant or a representative either attend the meeting or provide written answers to specific questions. If the applicant fails to do this or does not provide satisfactory answers, the board then can deny the application for lack of sufficient information relating to specific provisions of the relevant ordinance. The board has no legal authority to force an applicant/appellant to attend its meeting or to be represented by someone else. *(from Supplement #2, January 2004)*

**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 board constitutes a quorum, unless a local ordinance establishes a different quorum requirement. 1 M.R.S.A. § 71(3). A member who must abstain due to a legal conflict of interest in a particular case may not be counted in determining whether a quorum is present for that issue, absent ordinance language to the contrary. *Fitandides v. City of Saco*, 684 A.2d 421 (Me. 1996). *Corpus Juris Secundum, "Parliamentary Law"*, § 6. However, if so many members are disqualified due to a conflict of interest, bias, or other legal reason that the board will not be able to meet its quorum requirement, and there is no other body legally authorized to act, those members may be able to participate under a legal theory called "the rule of necessity." *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410-411 (Me. 1984). The board should consult with its attorney before applying the “rule of necessity” in order to determine whether some other alternative is possible, such as the creation of a special board to hear that particular case. See *Cyr v. Town of Wallagrass*, AP-00-14 (Me. Super. Ct., Aroost. Cty., March 1, 2001 and April 26, 2001), and *Dunnells v. Town of Parsonfield*, CV-95-515 (Me. Super. Ct., York Cty., February 7, 1997). *(from Supplement #2, January 2004)*
- **Use of Alternate Members.** If alternate board member positions were created by the legislative body when it established the board of appeals, 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, it will ensure that only voting board members are involved in making the findings and conclusions that are legally required for a decision on an application and will also make it easier for a judge to determine which board members’ comments and votes were legally relevant for the purposes of the final decision if it is appealed. *(from Supplement #2, January 2004)*

- **Timeliness of Appeal; Required Notices Given.** If a quorum exists and the application involves an appeal, the chairperson then should indicate whether the appellant has filed a complete appeal application within the required deadline. The chairperson also should indicate whether required notices of the meeting have been given. (See Chapter 4)
- **Summarize Appeal.** If so, 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 appear to give the board jurisdiction over the permit application or appeal.
- **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. (See earlier discussion in this chapter.)
- **Standing.** If the board decides that it does have authority to review the application, it also must decide whether the applicant has "standing" to apply or to appeal (depending on the type of application). (See related discussion in this chapter and in Chapter 4.)
- **Complete Application Submitted; Fees.** The board must also determine as a preliminary matter whether the basic application form has been completed properly or whether there is information missing; this is not a substantive review of the information provided to determine whether the applicant has satisfied all the ordinance requirements. As part of this process, the board should determine whether required application fees have been paid.

If the board decides that the applicant has met these kinds of 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 (*Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., Apr. 8, 1998), or that the applicant lacks standing, the board should deny the application, expressly stating the reasons. *(from Supplement #2, January 2004)*

**Procedure.** At this point the chairperson should explain the rules of procedure which the board must follow during its meeting and the extent to which public comments and questions will be allowed. The

chairperson, using the procedures adopted by the board, regulates the conduct of the meeting—recognizing members of the board and audience who want to speak, entertaining motions, ruling on the relevance of questions asked, and otherwise keeping the meeting in order if tempers start to flare, even to the extent of having an unruly person removed by a law enforcement officer. Unless the board's rules say otherwise, the chairperson's right to vote is not limited to breaking ties. The Maine Supreme Court has recognized that boards generally have the inherent authority to adopt their own rules of procedure e.g., *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). Board procedures do not need to provide an applicant with a full adjudicatory hearing complete with cross-examination and rebuttal in order to satisfy due process requirements. *Fichter v. Board of Environmental Protection*, 604 A.2d 433 (Me. 1992). Sample procedures and introductory remarks by the chairperson are included in Appendix 2, as well as a copy of 30-A M.R.S.A. § 2691(3). (See Appendix 1.) One issue, which the board should be sure to address in its rules of procedure, is the effect of a tie vote. The rules also should address participation by the chairperson in votes taken by the board; unless the rules provide otherwise, the chairperson may participate in all votes of the board, not just when necessary to break a tie.

### **Public Participation**

- **General.** If the meeting has not been advertised as a "public hearing," members of the general public may attend and listen but have no statutory right to ask questions or to comment verbally under the Freedom of Access Act. (The law 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.) However, the board may have bylaws which require that the public be given at least a limited opportunity to speak at any board meeting. If the bylaws contain no express provision requiring public comment, it still may be to the board's benefit to allow a reasonable amount of relevant comment and questions from the public, despite the fact that a particular meeting has not been advertised as a "public hearing." Besides being a good public relations strategy, it will help ensure that the board has the information it needs to make a sound decision, provided the applicant is given adequate opportunity to address this information. Applications involving an appeal or variance must be the subject of a public hearing before a decision is made on the substance of an appeal, either because of an express requirement in a local ordinance or by inference from the language of 30-A M.R.S.A. § 2691. Where an application involves a request for a conditional use or special exception, many ordinances leave it to the board to decide whether to call a public hearing. Where a zoning appeal or variance is involved, 30-A M.R.S.A. § 4353 requires the board to give direct notice of the hearing date to the appellant, municipal officers, and planning board. Local ordinances often require special notice to abutters and sometimes indicate how notice to the general public must be given. Several State laws may require notice to public drinking water suppliers. (See the earlier discussion in this chapter.)
- **Sequence of Presentations.** If the board's bylaws do not indicate the sequence in which the chairperson should recognize speakers, the chairperson could use the following as a "rule of thumb":
  - a. presentation by applicant and his/her attorney and witnesses, without interruption;
  - b. questions through the chairperson to the applicant by board members and people who will be directly affected by the project (e.g., abutters) and requests for more detailed information on the evidence presented by the applicant;
  - c. presentations by abutters or others who will be directly affected by the project and their attorneys and witnesses;
  - d. questions by the applicant and board members through the chairperson to the people directly affected and the witnesses who made presentations;
  - e. rebuttal statements by any people who testified previously;

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

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

**Taking Adequate Time to Make a Decision; Seeking Technical and Legal Advice.** Although the board should avoid unreasonable delays in making a decision and should not "string the applicant along," the board should not feel pressured into making a decision at the first meeting, if not required to do so by a deadline in the applicable ordinance or statute or its bylaws, unless the matter involved is routine. This is especially true where the meeting has been very emotional because of a controversial proposal. The board should temporarily table further action on the application to allow the board to visit the site of the proposed project and double check the information presented for the record verbally or in writing. (See discussion of site visits earlier in this chapter.) The board members should consider seeking technical advice from its regional planning commission or from a State agency or from other experts which the board is authorized to consult and legal advice from the municipality's lawyer, particularly if the applicant is represented by a lawyer. (If the municipality is unwilling to budget money for the board to use to hire its own consultants, it may be willing to adopt ordinance provisions which require an applicant to set aside an amount of money in escrow which can be used by the board to hire consultants of its own to help the board review the application. (A sample ordinance provision appears in Appendix 3). If the board anticipates that the 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 advisers present at future meetings at which the application is discussed. The board must be careful to introduce into the record any information provided by its advisers, whether the information is provided orally or in writing, especially if the information is provided outside the public board meeting.

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 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 the matter which is the subject of the appeal, that attorney may be unable to advise the board of appeals on that matter because of provisions in the ethical codes governing lawyers, as well as to avoid due process issues. The attorney will make that judgment call; some attorneys believe that it is legally and 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. If the attorney decides that he/she cannot also advise the board of appeals, the municipality will need to retain a different attorney for the board of appeals if the board needs legal advice. (*from Supplement #2, January 2004*)

**Minutes and Record of the Meeting.** It is very important that the board's secretary take reasonably complete and accurate minutes of when and where the meeting occurred, who was present, the subject of the application, what was said by whom, what votes were taken, and any agreements made regarding procedures or other issues at a board meeting. 30-A M.R.S.A. § 2691. The minutes, any documents submitted by the applicant or others (such as the application, a report from a professional engineer, a letter from an abutter, plans, maps, photographs, or diagrams), and the board's findings of fact and

conclusions regarding whether the applicant has complied with the statute or ordinance in question will comprise the "record" for that case. *Any* information in whatever form which is presented to the board as a basis for the board's decision must be entered into the official record. Judges also 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. 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 controversial it is. (from Supplement #2, January 2004)

### **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 that evidence substantial? Is it credible? Is it outweighed by conflicting evidence?
- f. To what extent does the ordinance/statute authorize the board to impose conditions on its approval?

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

- **General Rule.** Once the board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute. The board should not base its decision on the amount of public opposition or support displayed for the project. Nor should its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met his or her burden of proof and complied with the provisions of the statute/ordinance. *Brak v. Town of Georgetown*, 436 A.2d 894 (Me. 1981). *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768. If the board does not believe that the applicant's project meets each of the requirements of the ordinance/statute based on the evidence in the record, the board must deny the application. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). Where a proposed project complies with all of the relevant ordinance requirements, the board must approve the application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994). At least one court has expressly warned board members that they must not "abdicate (their) responsibility, ignore the ordinance and approve an application regardless of whether it meets the conditions of the ordinance or not" and that board members who are philosophically hostile to zoning should address their concerns to the local and

State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance. *Fraser v. Town of Stockton Springs*, CV-88-97 (Me. Super. Ct., Waldo Cty., Aug. 10, 1989). (from Supplement #2, January 2004)

- **"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. 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." (from Supplement #2, January 2004)
- **"Substantial Evidence" Test.** "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The fact that two inconsistent conclusions can be drawn from the recorded evidence related to a specific performance standard does not mean that the board's conclusion regarding that standard is not supported by "substantial evidence." *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1296 (Me. 1985). Where the board denies an application on the basis that the record shows that the "proposed project would have specific adverse consequences in violation of the criteria . . . for approval," a court will uphold the decision unless the applicant can demonstrate both that the board's findings are unsupported by record evidence and that the record compels contrary findings. *Grant's Farm, supra*. (See additional discussion of the standard of review on appeal in Chapter 4 of this manual.)
- **Relevance of Deed Restrictions, Title Disputes, Constitutional Issues, Other Code Violations and Related Lawsuits.** The board cannot deny an application because the proposed use would violate a 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). *Cf.*, *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). 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 clear that the board's granting of approval in no way resolves the title 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 the option of either tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order) or denying approval on the basis that the board is unable to find that

the applicant has met a 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). The fact that the property involved is already the subject of other code violations also would not constitute a basis for denial, absent language in the ordinance to that effect. *Bauer v. Town of Gorham*, CV-89-278 (Me. Super. Ct., Cum. Cty., Nov. 21, 1989). Nor may the board refuse to act upon or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*, 663 A.2d 41 (Me. 1995). (See Chapter 4 of this manual for additional discussion of constitutional issues.) Even if the board cannot legally resolve some of these 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 a court appeal. (from Supplement #2, January 2004)

- **Expert vs. Non-Expert Testimony; Personal Knowledge of Board Members; Investigations by 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). 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 1202, 1208 (Me. 1982). In the absence of expert testimony, the board may rely on the testimony of any one personally familiar with the site and conditions surrounding the application. *American Legion v. Town of Windham*, 502 A.2d 484 (Me. 1985); *Grant's Farm Associates v. Town of Kittery*, 554 A.2d 799 (Me. 1989); *Goldman v. Town of Lovell*, 592 A.2d 165 (Me. 1991). Board members may rely on their own expertise and experience and that of their professional staff as well, provided that information is formally entered into the record. *Pine Tree Telephone and Telegraph Co. v. Town of Gray*, 631 A.2d 55 (Me. 1993). *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577. If members of the board do conduct independent investigations in order to generate the information needed to help the board analyze an application and reach a decision, those members must be careful to be objective in their quest; otherwise, the applicant may have grounds to cite one or more members for bias or due process violations. See generally, 18 A.L.R. 2d § 4.
- **Staff Interpretations.** 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).
- **Participation by Board Members Who Miss Meetings.** If a board member has not been able to attend every meeting at which the board conducted a public hearing or received and discussed substantive evidence regarding a particular application, it is arguable that such a board member cannot participate in making the decision on the application because it would violate due process. *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990); *Fitanides v. City of Saco*, 684 A.2d 421 (Me. 1996). However, in a case where so many of the board members have an attendance problem that the board will never have a quorum if a strict reading of *Pelkey* were applied, and there is no other body authorized to act on the matter, the board may be forced to allow the affected members to participate in making the decision under the common law "rule of necessity." *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410-411 (Me. 1984). (But see *Cyr v. Town of Wallagrass*, AP-00-14 (Me. Super. Ct., Aroost. Cty., March 1, 2001 and April 26, 2001), where a new board of appeals was appointed to hear a particular case.) In *Pelkey*, the court placed great importance on the need for individual board members to hear the evidence and assess the credibility of witnesses in order to afford due process to the parties to the board's proceedings; board members who didn't do that were disqualified from participation in the board's decision-making process on that application. (from Supplement #2, January 2004)

A recent Maine Supreme Court decision, *Green v. Commissioner of Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 2001 ME 86, 776 A.2d 612, is being interpreted by many municipal attorneys as a modification of the “perfect attendance” requirement for board members established in *Pelkey*. The court in *Green* found that “as long as a decision-making officer both familiarizes himself with the evidence sufficient to assure himself that all statutory criteria have been satisfied and retains the ultimate authority to render the decision, he can properly utilize subordinate officers to gather evidence and make preliminary reports.” On the basis of *Green*, *Lemont v. Town of Eliot*, CV-91-577 (Me. Super. Ct., York Cty, November 11, 1992, and *In Re Villeneuve*, 709 A.2d 1067 (Vt., 1998), many municipal attorneys are advising board members who miss a public hearing or other board meeting at which substantive discussions of an application occur that they may continue to participate in the decision-making process without violating due process if they take the following steps: (1) read hearing and meeting minutes, review any documents or other evidence submitted at those meetings, and listen to/watch any audio or video recordings of those meetings, (2) prepare a written statement describing what the board member did to educate himself/herself about what occurred at the missed meeting, (3) sign the statement (preferably in notarized form), and (4) enter it into the record at the next meeting. (See Appendix 2 for sample affidavit form.) If the applicant and other parties to the proceeding agree that this is adequate, then this should be noted in the record too. Some municipal attorneys advise board members who have missed a substantive meeting that they may not participate without the consent of all parties in order to avoid a due process challenge. (from Supplement #2, January 2004)

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. (from Supplement #2, January 2004)

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. (from Supplement #2, January 2004)

## **Approval and Form of Decision**

**Majority Vote Rule.** It is the opinion of the attorneys on the MMA Legal Services staff that, in determining whether a motion has been approved by a majority of the board, State law requires that calculation be based on the total number of regular voting members on the board, 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. (from Supplement #2, January 2004)

**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). If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). See generally, *Marchi v.*

*Town of Scarborough*, 411 A.2d 1071 (Me. 1986); *see, Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985). As previously noted, the effect of a tie vote should be spelled out in the board's rules of procedure to avoid confusion.

**Findings and Conclusions.** When taking a final vote, the board should 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 drawn about whether the facts show that the project is in compliance with the ordinance/statute.

- "*Findings of fact*" are statements by the board summarizing all the basic facts involved in a particular application. Such a summary of facts would include the name of the applicant and his/her relationship to the property, location of the property, basic description of the project, key elements of the proposal (lot size, setback, frontage, and other items which relate directly to the dimensional requirements or performance standards in the ordinance), evidence submitted by the applicant beyond what is shown on the plan, evidence submitted by people other than the applicant either for or against the project, and evidence which the board enters into the record based on the personal knowledge of its members or experts which the board has retained on its own behalf.
- "*Conclusions of law*" are statements linking the specific facts covered in the findings of fact to the specific list of criteria in an ordinance or statute, which the applicant must meet in order to receive the board's approval. For example, a conclusion of law pertaining to the "undue hardship" test for a variance would be: "We conclude that the applicant will not be able to realize a reasonable return on his investment without a variance from the required side and front setbacks. Testimony from his appraiser and from a local realtor indicates that a house of only 10 feet x 20 feet could be built on the lot without a variance. Based on their experience, such a house would not sell in that neighborhood. The lot had been for sale for 10 years before the applicant purchased it. Only single-family residences are allowed in this district under § 105 of the Zoning Ordinance." Simply stating that "the applicant will not be able to obtain a reasonable return without a variance" is not enough, since this fails to explain why the board decided that the applicant met that standard.  
(from Supplement #2, January 2004)

**Reasons for Preparing Written and Detailed Findings and Conclusions.** The Maine Freedom of Access Act requires findings to be prepared in cases where an application is being denied or approved on condition (1 M.R.S.A. § 407). Title 30-A, § 2691(3)(E) requires board of appeals decisions to 'include a statement of findings and conclusions, upon all the material issues of fact, law, or discretion presented and the appropriate order, relief or denial of relief.' Rule 80B(E) of the Maine Rules of Civil Procedure, which governs appeals from a local board's decision which are filed in Superior Court, indicates that as part of the record which the court will be reviewing, the court wants to see the board summarize its findings of fact and conclusions of law. The practical purpose behind preparing findings and conclusions is that it helps the board ensure that it has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another purpose is to provide a written statement of the reason for the board's decision which is detailed enough to enable the applicant or anyone else who is interested (1) to judge whether they agree or disagree with the board and (2) to decide whether there are sufficient grounds on which to appeal the decision. Probably the most important purpose is to provide a clear statement for the Superior Court of the facts which were submitted for the board's consideration and the facts on which the board relied in concluding that the review standards were/were not met by the applicant. This is particularly important where the board must choose between conflicting evidence which has been introduced to prove that a particular standard has/has not been met. If the board fails to make written findings of fact and conclusions, it appears now that the court will remand the case to the board for the preparation of findings and conclusions before reaching a decision, rather than reading through the board's minutes and other records to determine the

basis for the decision. (E.g., *Carroll v. Town of Rockport*, 2003 ME 135; *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131; *McGhie v. Town of Cutler*, 2002 ME 62, 793 A.2d 504; *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834; *Widewaters Stillwater Co., LLC v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597; *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me.1983); *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660; compare, *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991). (See Appendix 3 for excerpts from some of these cases.) In a case where the board of appeals heard an appeal application "de novo," the "standard of review" which governs the Superior Court in deciding whether to uphold the board's decision is the "substantial evidence in the record" test, i.e., is there sufficient credible evidence in the record of the case created by the board of appeals to support the board's decision? The court also will determine whether the board applied the proper law and whether the board applied that law correctly or acted arbitrarily or capriciously. *Curtis v. Main*, 482 A.2d 1253 (Me. 1984); *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013. (from Supplement #2, January 2004)

**Address Each Review Standard.** It is important for the board to address **each** standard of review in reaching its decision in case the decision is appealed and the court disagrees with some of the board's conclusions. See generally, *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989), *Tompkins v. City of Presque Isle*, 571 A.2d 235 (Me. 1990), and *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988).

**Recommended Procedure for Preparing Findings and Conclusions.** There are a number of ways to handle the process of making findings and voting on an application. Probably the method used by most boards and recommended by most municipal attorneys 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 vote on each review criterion found that each was satisfied, then 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 were subject to conditions of approval, the board should reiterate these conditions in the final vote so that there will be no confusion regarding what conditions are applicable; only those conditions which were adopted by a majority vote on an individual review criterion or which are adopted by the majority

of the board in the final vote would apply. The final vote and any conditions need to be recorded in detail by the secretary in the board's minutes. The chairperson should explain during the course of discussing and approving findings and conclusions that, if any board member thinks the applicant has not met his or her burden of proof and that some information is missing or not convincing, that board member should state those concerns during the findings and conclusion phase. The final vote on whether to approve/reject the application is really a formality; the important, binding decisions are those regarding the individual findings and conclusions. If the board members do not cite problems with the evidence at that stage, the board will have no legal basis for denying the application. *(from Supplement #2, January 2004)*

If the board feels overwhelmed on 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 facts and conclusions the board should vote to approve. Board members must not discuss these issues outside the board meeting, however, in order to avoid problems under the Freedom of Access Act. Once the board has reconvened and has formulated rough findings and conclusions, 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 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 writing draft findings and conclusions to be reviewed and approved by the board at another meeting, held within any decision-making deadline established by the ordinance or by statute. In the case of a board decision on an application for an appeal or variance, the board must keep in mind that 30-A M.R.S.A. § 2691(3) requires the board to issue a written decision to the applicant and others within seven days of taking a final vote to approve or deny the application; if the board takes what it considers a "preliminary 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. Several sample written decisions appear in Appendix 3. *(from Supplement #2, January 2004)*

Several problems can result if the board delegates the responsibility of developing a tentative draft of findings and conclusions before it has gone through the list of criteria and developed its own. The board runs the risk of "rubber-stamping" a decision that could have been formulated by less than a majority of the board or by a non-board member. *Brown v. Inhabitants of the Town of Bar Harbor*, CV-83-56 (Me. Super. Ct., Han. Cty., Jan. 19, 1984). The other risk is that if a subcommittee of the board 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). Where a board of appeals lacks secretarial staff, it may invite interested parties to submit proposed written findings of fact and conclusions of law to assist the board in its preparation of a decision. *(from Supplement #2, January 2004)*

**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 (and anyone else required by statute or ordinance) promptly after the decision is made. The board should check the applicable statute or ordinance to see if it states a deadline. For example, 30-A M.R.S.A. § 2691 requires the board to send or hand deliver a copy of its written decision to the applicant, the applicant's

representative, the municipal officers, and the planning board within seven days of making the decision in the case of an appeal. The date on which this is done should be included in the record. A copy of the record should be maintained in the official files of the board. The record is a public record under the Right to Know Law and can be inspected and copied by any member of the general public, whether or not a resident of the municipality.

In the case of a variance decision, the board is required to provide a recordable certificate to the applicant. This is discussed more fully in Chapter 5 and Appendix 4 of this manual. (See Chapter 4 of this manual for a discussion of reconsideration of appeals decisions.)

**Conditions of Approval.** A board has inherent authority to attach conditions to its approval of an application. See generally, *In Re: Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). 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); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). If it is the municipality's intention to render a permit void if the permit holder fails to comply with conditions of approval within a certain timeframe, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., July 1, 1994). If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter, the board should be certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the 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 protect the public, 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). (from Supplement #2, January 2004)

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). (from Supplement #2, January 2004)

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. (*from Supplement #2, January 2004*)

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

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

**Conditional Approval.** 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 and what kinds the ordinance 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 at least, the board should be very 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 protect the public, 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).

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

Even if the board finds that it can deny an application because it does not comply with one of the standards of review, the board should still complete its review to determine whether there are any other bases for denial. That way, if the denial is appealed, it is possible that a court could uphold it even if the court disagrees with some of the board's conclusions - (*from Supplement #2, January 2004*). *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988); *Tompkins v. City of Presque Isle*, 571 A.2d 235 (Me. 1990); *Grant's Farm Associates Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989).

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

**Transfer of Ownership after Approval.** It is commonly assumed that a subsequent purchaser of land

for which a special exception approval was granted previously does not need to return to the board for a new review and approval simply because of the change in ownership. However, at least one Maine Superior Court case has held otherwise. *Inland Golf Properties, Inc. v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000), citing a discussion in K. Young, *Anderson's American Law of Zoning*, § 20.02, pgs 416-417. Until the Maine Supreme Court rules on this issue, where an original approval was based on the financial or technical capacity of the original applicant, the board probably should require the new owner to offer similar proof to the board before proceeding to complete the project under the original approval. It is advisable to include language in the applicable ordinance which expressly addresses this issue to avoid any confusion. (Regarding variance approval and a new owner, see Chapter 5.) (from Supplement #2, January 2004)

**Vague Ordinance Standards/Delegation of Legislative Authority.** It is very important for an ordinance, especially a zoning ordinance, to contain fairly specific standards of review if it requires the issuance of a permit or the approval of a plan. The standards must be something more than "as the Board deems to be in the best interest of the public" or "as the Board deems necessary to protect the public health, safety and welfare." *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It also is very important to have language in the ordinance instructing the board as to the action, which the board must take. It is not enough merely to say that the board must "consider" or "evaluate" certain information. *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). (from Supplement #2, January 2004)

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 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 gives that authority to some other official or board. (from Supplement #2, January 2004)

It is not legally permissible to include a review standard in the ordinance which requires a board to find that a project will be "compatible with the neighborhood" or "harmonious with the surrounding environment." Compare, *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987) with *American Legion, Field Allen Post #148 v. Town of Windham*, 502 A.2d 484 (Me. 1985), *In Re: Spring Valley Development*, 300 A.2d 736, 751-752 (Me. 1973), and *Secure Environments, Inc. v. Town of Norridgewock*, 544 A.2d 319 (Me. 1988). A standard that requires a board or official to determine whether a development "will conserve natural beauty" has also been declared unconstitutional. *Kosalka v. Town of Georgetown*, 2000 ME 106, 752 A.2d 183. Compare, *Conservation Law Foundation, Inc. v. Town of Lincolnville*, 2001 ME 175, 786 A.2d 616. The court has upheld an ordinance review standard that requires a determination that "the proposed use will not adversely affect the value of adjacent properties." *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1992). A shoreland zoning ordinance provision requiring a board to find that a proposed pier, dock or wharf would be "no larger than necessary to carry on the activity" has also been upheld, *Stewart v. Town of Sedgwick*, 2002 ME 81, 797 A.2d 27, as has ordinance language requiring a finding that a pier, dock or wharf would not "interfere with developed areas. *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996). (from Supplement #2, January 2004)

If a court finds that an ordinance does not satisfy the tests outlined in the cases cited above, it generally will hold that a denial of an application by the board based on the deficient portions of the ordinance is invalid. The result is that the applicant will be able to do what he or she applied to do in the first place,

absent some other law or ordinance which controls the application and provides a separate basis for review and possible denial. *Bragdon v. Town of Vassalboro*, 2001 ME 137, 780 A.2d 299. 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. (*from Supplement #2, January 2004*)

**Prior Mistakes by the Board.** The fact that a board of appeals or its predecessor made mistakes in the issuance of a permit or variance 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 the Use of the Permit.** Generally, once the board has issued a permit, the holder of the permit has an unlimited amount of time within which to complete the work covered by the permit. However, the board should check the applicable ordinance or statute to be sure. (See discussion in Chapter 6 regarding "Applicability of New Laws.") 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 . . ."). See also *DeSomma v. Town of Casco*, 2000 ME 113, 755 A.2d 485, regarding the interpretation of an ordinance expiration clause and whether it applied to a particular variance or permit. (*from Supplement #2, January 2004*)

# **Chapter 4**

## **Board of Appeals**

### **Administrative Appeals**

## Chapter 4

[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #1, March 2001 is included. Supplement #2, January 2004 is included.*

### Administrative Appeals

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

#### Jurisdiction

**General Rule.** The issue of jurisdiction to hear an appeal was discussed previously in Chapter 2. If an ordinance or statute does not expressly authorize an appeal to the board of appeals, then the person wishing to challenge a planning board or code enforcement officer decision must appeal directly to the Superior Court under Civil Rule of Procedure 80B. 30-A M.R.S.A. § 2691; *Lyons v. Board of Directors of SAD No. 43*, 503 A.2d 233 (Me. 1986); *Levesque v. Inhabitants of Town of Eliot*, 448 A.2d 876 (Me. 1982). (See copy of Rule 80B in Appendix 3.) When an appeal is from a permit decision made under a zoning or shoreland zoning ordinance, the board of appeals has exclusive authority to hear and decide the appeal, even if the ordinance doesn't expressly grant jurisdiction to the board. 30-A M.R.S.A. § 4353. When a non-zoning ordinance grants jurisdiction to the board of appeals, it must specify the precise subject matter that may be appealed to the board and the official(s) whose action or non-action may be appealed to the board." 30-A M.R.S.A. § 2691. (*from Supplement #2, January 2004*)

**Enforcement Decision.** When an appeal involves an enforcement decision by a code enforcement officer rather than a decision regarding 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) (where ordinance language authorized an appeal from **any** decision by the CEO); *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); and *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). A municipality which does not want to allow an appeal to the board of appeals from a CEO's notice of violation, stop work order, cease and desist order, or similar type of enforcement notice must be fairly explicit in its ordinance. (*from Supplement #2, January 2004*)

**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). (from Supplement #2, January 2004)

**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. (from Supplement #2, January 2004)

### 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*, 326 A.2d 521 (Me. 1974); *Gagne v. Cianbro Corp.*, 431 A.2d 1313 (Me. 1981); *Boisvert v. Reed*, 692 A.2d 921 (Me. 1997). The Maine Supreme Court has held that in the case of the issuance of a building permit, the appeals period begins to run from the date of issuance of the permit, even though there is no formal public decision. *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. However, the court may allow an appeal for “good cause” even if an appeal deadline provided in a local ordinance has expired. *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422. (from Supplement #2, January 2004)

**Appeal to Court.** An appeal to the Superior Court from a decision of the appeals board must be filed within 45 days of the date of the board’s original decision on an application (not the date of a decision to reconsider an earlier decision, where there has been a request to reconsider). 30-A M.R.S.A. § 2691. *Forbes v. Town of Southwest Harbor*, 2001 ME 9, 763 A.2d 1183. 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. *Vachon v. Town of Kennebunk*, 499 A.2d 140 (Me. 1985). *Overlock v. Inhabitants v. Town of Thomaston*, AP-02-004 (Me. Super. Ct., Knox Cty., February 11, 2003); *Carroll v. Town of Rockport*, 2003 ME 135. It is possible that a court might allow these time periods to be extended under Rule 80B if the person filing the appeal can show good cause, but probably unlikely where a time period has been established by statute. *Reed v. Halprin*, 393 A.2d 160 (Me. 1978). For an appeal which must go directly to Superior Court, the appeal deadline is governed by Rule 80B and is 30 days from the date of the vote, except in the case of a subdivision decision, where the court has ruled that the deadline runs from the date of the planning board’s written order. *Hylar v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990). If the applicable local ordinance establishes a deadline for appealing a zoning decision by a planning board directly to Superior Court, then that deadline will control. *Woodward v. Town of Newfield*, 634 A.2d 1315, 1317 (Me. 1993). (from Supplement #2, January 2004)

**Untimely Appeal; Incomplete Appeal Application.** 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*. As a general rule, the court will dismiss an appeal which was not filed within the applicable time limits.

An appeal to the board of appeals is not timely if it is not filed in accordance with the municipality's required procedures, including the completion of whatever appeal application form is required by the municipality and payment of any required fee. *Washburn v. Town of York*, CV-92-11 (Me. Super. Ct., York Cty., November 10, 1992); *Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., April 8, 1998). The fact that a permit was void when issued does not have any bearing on the deadline for appealing the issuance of the permit or the board's jurisdiction. *Wright, supra*. But see, *Brackett v. Rangeley, supra*. (from Supplement #2, January 2004)

**Indirect Attempts to Challenge an Appeals Board Decision without Appealing; Refusal of Other Town Official(s) to Comply with Appeals Board Order.** If a decision is not appealed, it cannot be challenged indirectly at a later date by way of another appeal on a related matter. Nor can one town official or board challenge a decision by another official or board by refusing to issue a permit or approval on the basis that the other board's or official's decision was wrong. (For example, if a board of appeals grants a setback variance which the planning board believes is illegal, the planning board cannot refuse to grant its approval for the structure which 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.) *Milos v. Northport Village Corporation*, 453 A.2d 1178 (Me. 1983); *Fisher v. Dame*, 433 A.2d 366 (Me. 1981); *Ocean Park Associates v. Town of Old Orchard Beach*, CV-87-396 (Me. Super. Ct., Yor. Cty., Dec. 23, 1988). (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; and *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644 and *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930 (dealing with collateral estoppel/res judicata). (from Supplement #2, January 2004)

### **Exhaustion of Remedies**

If a statute or ordinance requires appeals to be heard first by the board of appeals, a court generally will refuse to decide an appeal which has been filed directly with the court and will "remand" the case (send it back) to the board of appeals to hold a hearing, create a record, prepare findings and conclusions, and make a decision. If a board has been legally established by the municipality but no members have been appointed or if the board does not have enough members serving to take legal action, the court will order the municipality to make the necessary appointments. The same is true where a municipality is legally required to have a local appeals board by State law to hear certain kinds of appeals (e.g., zoning appeals), but has failed to establish one; the court will order the municipality to take the necessary legislative action to create the board and then appoint the necessary people to fill the positions on the board. The legal concept involved here is called "exhaustion of administrative remedies." *Fletcher v. Feeney*, 400 A.2d 1084 (Me. 1979); *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988); *Freeman v. Town of Southport*, 568 A.2d 826 (Me. 1990); *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991). A planning board decision made under a local zoning ordinance must be appealed first to the local board of appeals, unless the ordinance expressly authorizes a direct appeal to court. This is also true for a site plan review decision where the site plan review is part of a zoning ordinance and not a separate ordinance. *Hodson v. Town of Hermon*, 2000 ME 181, 760 A.2d 221; *Thomas v. City of South Portland*, 2001 ME 50, 768 A.2d 595. (from Supplement #2, January 2004)

### **Standing**

**“Particularized Injury” Test.** When a citizen can demonstrate that he or she has suffered, or will suffer, a “direct and personal injury” as a result of a decision by the planning board or CEO, that citizen has “standing” to file an appeal with the board of appeals if the board has jurisdiction. To meet the “direct and personal injury” test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. *Brooks v. Cumberland Farms, Inc.*, 1997 ME 203, 703 A.2d 844; *Christy’s Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d 535 (Me. 1991); *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987); *New England Herald Development Group v. Town of Falmouth*, 521 A.2d 693 (Me. 1987); *Leadbetter v. Ferris*, 485 A.2d 225 (Me. 1984); *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91 (Me. 1984); *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983). The court has held that “particularized injury for abutting landowners can be satisfied by a showing of ‘the proximate location of the abutter’s property, together with a relatively minor adverse consequence if the requested variance were granted’.” *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673. See also, *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266 (defining “abutter” to include “close proximity”); and *Drinkwater v. Town of Milford*, AP-02-08 (Me. Super. Ct., Pen. Cty., April 18, 2003) (son of landowners whose property abutted the applicants’ and who worked on his parents’ land failed to document that he had a future interest in his parents’ land sufficient to give him standing to appeal as an abutter).” (from Supplement #2, January 2004)

**Actual Participation in Proceedings Required.** Anyone wishing to appeal from a planning board decision to the board of appeals or a board of appeals decision to Superior Court under Rule 80B must also be able to show actual participation for the record in the local hearing on the application or appeal. It is not enough for a person to express his/her concerns to board members or other officials outside the setting of the public hearing or to speak at a preliminary meeting of the board regarding the appeal. Participation must be at the official hearing in person or through someone there acting as the person’s official agent or by submitting written comments for the official hearing record. *Jaeger v. Sheehy*, 551 A.2d 841 (Me. 1989); *Lucarelli v. City of South Portland*, 1998 ME 239, 719 A.2d 534; *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371. Under 30-A M.R.S.A. § 4353, the municipal officers and the planning board are automatically made “parties” to the appeals board proceedings, so they would not have to meet the test outlined above in order to file an appeal in Superior Court from an appeals board decision. *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989). The same is not true for other officials, like the code enforcement officer, who want to appeal the board of appeals’ decision; since those other officials are not statutory parties, they would have to satisfy the two-part test for standing. *Tremblay v. Inhabitants of Town of York*, CV-84-859 (Me. Super. Ct., York Cty., Oct. 3, 1985). However, any official wishing to appeal a decision of the planning board to the board of appeals must show actual participation for the record in the planning board’s public hearing to satisfy the test for standing, just like any other citizen. See, *Department of Environmental Protection v. Town of Otis*, 1998 ME 214, 716 A.2d 1023. 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). (from Supplement #2, January 2004)

**Appeal by Permit Holder.** If the person wishing to appeal is the person who applied for a permit 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 the applicant had allowed their purchase and sale agreement to lapse before filing an appeal, the court held that they had no standing to pursue a denial of their permit application. *Madore v. Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157. (from Supplement #2, January 2004)

**Appeal by Municipality.** See *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517 for an example of a case where the municipality challenged a board of appeals decision in Superior Court. (from Supplement #2, January 2004)

### Standard of Review

**Standard of Review.** Unless a local ordinance expressly provides otherwise, when a planning board or code enforcement officer's decision is appealed to the board of appeals, the board is not limited to reviewing the record prepared by the planning board or code enforcement officer in making its decision. 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 the 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. (See also the Maine Superior Court decision in *Buell v. Town of Southwest Harbor*, AP-03-11 (Me. Super. Ct., Han. Cty., August 29, 2003). This means that the board of appeals 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 almost 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. (from Supplement #2, January 2004)

When a local ordinance does expressly provide 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 conducted a de novo review or was the original decision-maker, according to the court in *Yates, supra*. The board may hear presentations by each of the parties, but only for the purpose of summarizing the case or trying to clarify certain points; new evidence or arguments may not be introduced. (from Supplement #2, January 2004)

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.

For sample language directing the board to conduct a de novo or an appellate review of an appeal, see Appendix 1. (*from Supplement #2, January 2004*)

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 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). (*from Supplement #2, January 2004*)

**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. (*from Supplement #2, January 2004*)

**Consolidation of Pending Appeals.** It is possible that a decision made by the CEO or planning board will be appealed to the board of appeals by different parties at different times within the appeal period citing the same or different grounds for appeal. Absent language in an applicable statute or ordinance to the contrary, the board of appeals probably could either hear the appeals separately or consolidate them. If the board wants to consolidate them in order to minimize the time and expense and confusion of dealing with each one separately, it would be advisable to get the written consent of the parties before doing so. If written consent is refused, then the board should handle each appeal independently to avoid any risk of jeopardizing an appellant's appeal deadlines or other rights. (*from Supplement #2, January 2004*)

**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, and 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 (Me. 1999); *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013; *Hannum v. Board of Environmental Protection*, 2003 ME 123. 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*, 712 A.2d 1061 (Me. 1998). 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). If the official or board whose decision is reviewed by the court failed to make required findings and conclusions, the court generally will "remand" 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. 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. (from Supplement #2, January 2004)

**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 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). (from Supplement #2, January 2004)

**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. (from Supplement #2, January 2004)

**Decision-Making Process.** The discussion of the decision-making process applicable to permit applications and variance applications in Chapter 3 is relevant in many respects to the process and rules that the board should follow in hearing and deciding an appeal application, especially where the board hears the appeal "de novo." The board's decision must be based only on evidence entered into the official written record of the proceedings. The board should discourage attempts to provide information or influence members outside public meetings. The requirements of the Maine Freedom of Access Act governing meeting notices must be followed, as well as any other statutory or local notice requirements. (from Supplement #2, January 2004)

**Deadlines; Notice Requirements.** Generally, deadlines for holding a public hearing on an appeal, who must be notified of the hearing, deadlines for making the decision on the appeal, and deadlines for providing a written decision and to whom are covered in the applicable local ordinance. State law governing appeals boards generally requires that the board provide written notice of its decision within 7 days of making the decision to the municipal officers, the planning board, and the person who filed the appeal. 30-A M.R.S.A. § 2691. For zoning appeals, 30-A M.R.S.A. § 4353 requires the board to give notice of the hearing date to the person appealing, the municipal officers and the planning board. Otherwise, the board must look to the applicable local ordinance to determine when, where, and to whom notice must be given and what deadlines govern their decision-making process.

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

obligation to note that information for the record. (See earlier discussion in Chapter 3 of "ex parte" communications and related issues.)

### **Consideration of Constitutional Issues**

A board of appeals is without authority to decide whether an ordinance has constitutional problems. *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). Such issues must be resolved as part of an appeal to Superior Court. However, the applicant is legally obligated to raise such constitutional concerns during the board of appeals proceedings in order to preserve that issue for his or her Superior Court appeal. *New England Whitewater Center, Inc. v. Department of Inland Fisheries and Wildlife*, 550 A.2d 56 (Me. 1988). There may be other constitutional issues involving lack of notice, bias or conflict of interest, or lack of due process, which the board of appeals can legally, address. Again, even if a board is unable to resolve these constitutional procedural issues, the applicant must raise them before the board in order to raise them again in an appeal to Superior Court.

### **Conflict Between Ordinance and Federal Fair Housing Act**

#### **Amendments or the Americans with Disabilities Act**

With increasing frequency boards are being asked to approve land use appeals on the basis that the municipal ordinance is in violation of the Federal Fair Housing Act Amendments (FFHA) relating to group homes for individuals with disabilities or that the ordinance violates the Americans With Disabilities Act (ADA). (See Appendix 3 for a related Legal Note from the *Maine Townsman* magazine.) Often these claims are valid, but they put the appeals board in a position of having to approve something which is contrary to the express language of a local ordinance which was adopted by the town meeting or council. Since the municipality could be faced with civil rights liability under federal law if its ordinances do deprive citizens of federally protected rights, the board of appeals should consult with the municipality's private attorney when one of these issues is raised as part of an appeal.

This same dilemma will also arise under 30-A M.R.S.A. § 4357-A with regard to group homes. A copy of this law and a related Legal Note from the *Maine Townsman* magazine appear in Appendix 3. The law makes it clear that group homes which are operated essentially as single family homes must be treated the same as single family homes for non-disabled people. Again, if the local ordinance is in conflict with this statute, consult with the municipality's private attorney before making a decision.

#### **Authority of Municipal Officers**

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

#### **Second Appeal of Same Decision**

Unless an ordinance provides otherwise, the Maine Supreme Court has held that an applicant whose appeal or request for a variance was denied has no legal right to request another hearing on the same

appeal or variance unless he or she can show a substantial change in the circumstances which provided the basis for the first appeal or variance. *Driscoll v. Gheewalla*, 441 A.2d 1023 (Me. 1982); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985).

### **Reconsideration by the Board of Appeals**

Title 30-A M.R.S.A. § 2691 authorizes a board of appeals to reconsider a decision 'within 30 days of its prior decision.' This statute further provides that '(a) vote to reconsider and the action taken on that reconsideration must occur and be completed within 30 days of the date of the vote on the original decision.' The entire process of voting whether to reconsider and taking action on the reconsideration itself must be completed within that time frame. In *Carmel v. City of Old Town*, AP-00-9 (Me. Super. Ct., Pen. Cty., Feb. 19, 2001), a Superior Court justice interpreted this language as 'adding 30 days to any time limit that may be imposed locally on the issuance of the 'prior decision' (i.e., the local time limit for issuing a written decision); the Carmel decision was affirmed by the Maine Supreme Court in *Carmel v. City of Old Town*, Decis. No. Mem. 01-82 (Oct. 3, 2001), a non-precedential Memorandum of Decision. When reconsidering a decision, the board is authorized to hold additional hearings and receive additional evidence. 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 any one 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). (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).) 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 a reconsideration is received, the board must vote at a meeting preceded by public notice as to whether it will entertain the request or deny it. Even if the chair knows that the board always rejects requests filed too close to the end of the 30-day deadline, the chair must schedule it for action at a board meeting if the person will not withdraw the request. In the Maine Supreme Court case of *Forbes v. Town of Southwest Harbor*, 2001 ME 9, 763 A.2d 1183, the board voted to reconsider its decision but postponed making a final reconsideration decision on the substantive issues to a meeting date which was more than 30 days from the date of its original decision. In the meantime, the property owner had filed a Rule 80B appeal in Superior Court in order not to jeopardize his appeal rights. The Superior Court remanded the case to the board of appeals, ordering it to make a reconsideration decision. The Maine Supreme Court found that the board had a statutory duty to complete the process within 30 days of the original decision and that the landowner should not be penalized by this failure of the board because it was not within his control to prevent it. The normal 45-day deadline for filing a Rule 80B appeal in Superior Court arguably is extended in the case of a reconsideration proceeding. The *Carmel* case cited above, citing *Cardinali v. Town of Berwick*, 550 A.2d 921, 922 (Me. 1988), held that "the period of limitations is tolled while a motion for reconsideration is pending," despite the express language of § 2691 (3)(F) and the legislative history of that section. However, until another court adopts the holding in *Carmel*, a municipality may want to cite the *Forbes* case in support of the argument that the deadline is 45 days from the date of the original decision. (from Supplement #2, January 2004)

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

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

Some ordinances actually require the code enforcement officer or planning board members to attend board of appeals hearings. Whether or not it is a local requirement, it is a recommended practice and should not be viewed by the appeals board as a threat to its authority. In most cases the appeals board members will find it helpful to have the CEO or a planning board member present to answer questions relating to a particular decision being appealed or about the town's ordinances generally. 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. It is important to remember that an applicant and other parties to the proceeding must have adequate time to address any information provided to the board, especially if the information is not provided during the public hearing and is a fact or legal conclusion which might be disputed.

In some communities the code enforcement officer acts as staff to the board of appeals and actively conducts research for them, 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 should be avoided in those cases.

# **Chapter 5**

## **Board of Appeals Variances and Waivers**

**Chapter 5**  
[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #2, January 2004 is included.*

**Variances and Waivers**

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

There often is confusion between variances/waivers and special exceptions/conditional uses. When the board of appeals grants a zoning variance, or other authorized waiver, it is 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 language 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 town. The purpose of the special exception or conditional use review procedure is to allow the board to determine whether conditions should be imposed on the way the use is conducted or constructed, in order to ensure that the use is consistent with and has no adverse impact upon the surrounding neighborhood. (See the discussion of procedure and required ordinance language in Chapter 3 of this manual.)

**Zoning Variances in General; Statutory "Undue Hardship" Test**

There are four different tests for granting a zoning variance outlined in 30-A M.R.S.A. § 4353. Two of these tests apply to all municipal zoning ordinances whether or not the municipality has adopted the statutory provisions: the "undue hardship" test in § 4353(4), governing dimensional and use variances generally, and the disability variance test in section 4353(4-A), governing variances to permit construction or alterations needed to accommodate a person with a disability who lives in the subject dwelling or who is a regular user. The other two tests are outlined in § 4353(4-B) and § 4353(4-C) and apply to certain dimensional variances, but only in municipalities which have adopted them by ordinance. (See Appendix 4 for a detailed discussion.)

The most common variance test is the "undue hardship" test and is outlined in 30-A M.R.S.A. § 4353(4). It authorizes the board of appeals to grant zoning variances (including shoreland zoning variances) 'only when strict application of the ordinance to (the person seeking the variance and his or her) property would cause undue hardship.' The "undue hardship" test applies to use variances and dimensional variances to the extent each type is allowed in a particular zoning ordinance. The statutory four part "undue hardship" test appears below. **Each** of these statutory standards must be met as well as any additional requirements imposed locally. The board of appeals may not grant a zoning variance which is governed by the "undue hardship" test unless it finds that:

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

**Other Limitations by Ordinance**

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

### **Strictly Construed**

The Maine Supreme Court has stated in numerous cases that a board of appeals must grant zoning variances sparingly—they are the exception rather than the rule. The test for "undue hardship" outlined above is a very strict one and very difficult to meet. No matter how harmless the variance request may seem and regardless of whether there is no opposition from neighbors, the board must remember that its decision is governed by the legal requirements for 'undue hardship' in § 4353 for zoning variances and any other requirements imposed by the applicable local ordinance and **only** those requirements. If the board is presented with repeated requests for the same type of variance, particularly in the same neighborhood, this may indicate that the ordinance requirements are too restrictive or unrealistic for that area of town and that the legislative body needs to consider amending the ordinance. The appeals board should refer this problem to the planning board or comprehensive planning committee for further study and a recommendation to the municipal officers. Generally, the landowner also will have the option of petitioning for an ordinance amendment, especially in towns which still have town meeting and operate under the general laws of the State. **For a summary of Maine court cases analyzing the undue hardship test for zoning variances, see Appendix 4.**

### **Personal Hardship**

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

### **The "Reasonable Return" Standard**

Most court cases in Maine pertaining to zoning variances have focused on whether the applicant can realize a "reasonable economic return" on his or her investment in the property without the variance. The court has made it clear that "reasonable return" does not equal "maximum return." *Barnard v. Town of Yarmouth*, 313 A.2d 741 (Me. 1974); *Grand Beach Assoc., Inc. v. Town of Old Orchard Beach*, 516 A.2d 551 (Me. 1986). It is extremely difficult for an applicant to prove that he or she cannot realize a reasonable return and that no other permitted use could be conducted to realize such a return (e.g., *Leadbetter v. Ferris*, 485 A.2d 225 (Me. 1984); *Curtis v. Main*, 482 A.2d 1253 (Me. 1984); *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987); *Marchi v. Town of Scarborough*, 511 A.2d 1071 (Me. 1986); *Goldstein v. City of South Portland*, 728 A.2d 164 (Me. 1999); *Rowe v. City of South Portland*, 730 A.2d 673 (Me. 1999); *Brooks v. Cumberland Farms, Inc.*, 703 A.2d 844 (Me. 1997). A landowner

cannot be forced to sell his land to an abutter as a way to realize a "reasonable return." *Marchi, supra*. However, where an applicant for a variance owns adjoining land which he or she could use to avoid the need for a variance, the court has held that a variance should not be granted." *Sibley, supra*. But see, *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. The typical request for a setback variance to allow a deck, porch, garage, storage building or addition to an existing structure will have to be denied on the basis of the "reasonable return" standard, absent proof that the person has tried to sell that property 'as is' and no one will buy it unless the proposed construction can occur or that the property cannot be used for any other legal purpose under the zoning ordinance without a variance. *Brooks v. Cumberland Farms, supra*. (See Appendix 4 for a summary of Maine Supreme Court cases involving variances, most of which discuss the "reasonable return" standard.)

### **The "Unique Circumstances" Standard**

The court has also addressed "undue hardship" as it relates to the unique circumstances of the property and general conditions in the neighborhood. A landowner seeking a variance from a required lot size in a case where other lots in the neighborhood are all of a similar substandard size generally cannot meet the 'uniqueness' test. The same is true where all the lots in the neighborhood are subject to deed restrictions limiting the size of the structure which can be built on the lot. Compare *Sibley v. Town of Wells*, 462 A.2d 27 (Me. 1983) with *Driscoll v. Gheewalla*, 441 A.2d 1023 (Me. 1982). Likewise, if all of the lots in the area are swampy or steeply sloped, or if they all have rock outcropping, or if they all have utility easements running through them, an application for a variance related to any of these problems probably would have to be denied. Such common neighborhood problems must be addressed through the town's comprehensive plan and appropriate ordinance provisions, not case by case through the granting of a variance.

### **The "Essential Character of the Locality" Standard**

The third "undue hardship" criterion focuses on the "essential character of the locality" and generally appears to be almost the flip side of the coin from criterion number two (discussed above). For example, if a landowner requests a setback variance to build an addition bringing his home closer than the required road setback, but no closer than all of the neighboring homes, the requested variance would not alter the "character of the locality." *Driscoll v. Gheewalla, supra*. However, it probably would not meet the "uniqueness" test in the second criterion. This criterion may have been intended to relate to use variances when originally drafted, but it applies to both use and dimensional variances.

### **The "Self-Created Hardship" Standard**

The question of whether the applicant for a variance or a prior owner of the land created the hardship which justifies a variance is not as simple to answer as it may appear. If a person seeking a variance was the owner of the lot when the ordinance requirement in question took effect, that person generally would not have a "self-created" hardship and could satisfy criterion number four. Until recently, Maine court cases held that a board must deny a variance application from someone who bought the lot after the ordinance took effect, since he or she would be presumed to have had knowledge of the restrictions on the use of the lot which the ordinance imposed, and therefore had a self-created hardship. *Bishop v. Town of Eliot*, 529 A.2d 798 (Me. 1987). However, the Maine Supreme Court in *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995) and in *Rocheleau v. Town of Greene*, 708 A.2d 660 (Me. 1998) held that knowledge of zoning restrictions by a purchaser of a nonconforming lot, without more, will hardly ever constitute a self-created hardship.

### **Request for Variance "After the Fact"**

If a person commits a violation of an ordinance requirement, such as a zoning setback, and seeks a variance after-the-fact, such a person has a self-created hardship. An ordinance violation should be resolved through normal code enforcement channels, not by the board of appeals. There may be circumstances, however, where the resolution of a code violation is to enter a consent agreement in which the landowner agrees to file an application and diligently seek a variance and to remove an illegal structure if the variance is not granted. The board should review such a request for a variance without taking into account that the structure was already built; the board should determine whether the applicant would have been entitled to a variance if he had come to the board before the fact. *Rowe v. City of South Portland*, 730 A.2d 673 (Me. 1999). (See Legal Note in Appendix 4.)  
(from Supplement #2, January 2004)

### **Authority to Grant Variances**

**Zoning Variances.** A zoning ordinance provision which attempts to give the planning board, code enforcement officer, or municipal officers the authority to grant variances violates 30-A M.R.S.A. § 4353, since the statute gives the board of appeals the sole authority to grant a zoning variance. *Perkins v. Town of Ogunquit*, 709 A.2d 106 (Me. 1998). 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. Nor may a planning board vote to waive a zoning ordinance requirement when exercising its waiver authority under a subdivision ordinance or regulation." *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172. (from Supplement #2, January 2004)

**Non-Zoning Variances.** Often 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 the statutory definition. Although the municipality may give the authority to grant these waivers to the board of appeals, there is no conflict with § 4353 if the ordinance empowers the planning board to grant waivers. In any case, a non-zoning ordinance which authorizes the planning board or municipal officers to waive certain requirements should set out standards for the board to use in determining whether an applicant will suffer a hardship without a waiver. However, if the waiver authority granted to the planning board or municipal officers under a non-zoning ordinance attempts to authorize the board to waive dimensional requirements established under a zoning ordinance, such a waiver provision, is beyond the municipality's home rule authority and is illegal. *Perkins v. Town of Ogunquit*, 709 A.2d 106 (Me. 1998).

### **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. The granting of the variance removes an obstacle to the issuance of the sought-after permit by the planning board or the code enforcement officer.

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

After a variance is granted and a building is constructed or activity conducted based on that variance, the building or activity thereafter should be treated as a legally conforming structure or use for the purposes of deciding which ordinance provisions govern it in the future. *Sawyer Environmental Recovery Facilities Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. This is probably true even if the variance is 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). (See also the discussion about the need to record variances appearing later in this chapter.) (from Supplement #2, January 2004)

### **Procedure for Obtaining a Variance**

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

### **Appeal of Board of Appeals Decision by Other Municipal Officials**

If the municipal officers or the planning board believe that the board of appeals has wrongfully granted a zoning variance where the applicant has not met all of the criteria for “undue hardship” set out in § 4353 (a copy of which is included in Appendix 4), as a board they have ‘standing’ to challenge the board of appeals’ decision in Superior Court pursuant to 30-A M.R.S.A. § 4353(4). *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989). However, in the case of an appeal by the planning board, the municipal officers may not necessarily vote to pay for such an appeal, so the planning board should consult with the municipal officers before retaining a lawyer to avoid having to pay from their own pockets. (See additional discussion of “standing” in Chapter 4.) (from Supplement #2, January 2004)

### **Recording Variances; Abandonment of an Approved Variance**

**Recording Requirement.** State law (30-A M.R.S.A. § 4353 and 4406) requires the board of appeals and the planning board to prepare a certificate which can be recorded in the Registry of Deeds and provide it to the applicant for recording whenever they grant a zoning variance or a subdivision variance or waiver. Sample forms and copies of the laws are included in Appendix 4. To be valid, zoning variance certificates must be recorded within 90 days of the decision. Subdivision variances or waivers must be recorded within 90 days of final approval of the plan. If these certificates 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 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 automatically the second time around; if it determines that it made a mistake the first time, it should deny this new request. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. If the board’s jurisdiction to hear a variance request is triggered by the denial of a permit application (or similar application) and an appeal from that decision, then the person whose variance has become void would need to reapply for the permit/approval and be denied again in order for the board of appeals to have jurisdiction over the new variance request, absent language in the ordinance to the contrary.

**Abandonment.** If a person has recorded a variance certificate but later decides that he wants to abandon the variance and give up his legal rights in relation to it, he probably may do so, but there is no process spelled out in State law. Absent a procedure provided by ordinance, the person should make a written request to the board of appeals. The board should take a formal vote acknowledging that the owner wants to abandon the variance and issue a “certificate of abandonment” which can be recorded at the

Registry. Such a written request and certificate could be patterned after similar documents developed by Portland attorney William Dale for abandonment of subdivision approval, which appear in Appendix 3 of Maine Municipal Association's *Manual for Local Planning Boards*. Before approving and issuing a certificate, the board of appeals should require proof that neither the applicant, the landowner (if a different person), nor any third party had taken action in reliance on the original granting of the variance which might be jeopardized by its abandonment. (from Supplement #2, January 2004)

### **Second Request for Same Variance**

This issue was previously discussed in Chapter 4.

### **Shoreland Zoning Variances**

Previously, 38 M.R.S.A. § 438-A(6) required 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 prior to action on the application by the board. This is no longer a requirement. However, shoreland-zoning ordinances do require that variance decisions be filed with the DEP within a certain number of days from the date of the decision. If DEP staff believe 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*, 716 A.2d 1023 (Me. 1998). The State does have 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, however.

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*, 715 A.2d 930 (Me. 1998).

### **Disability Variances**

Most zoning variances may not be granted unless the applicant has satisfied all elements of the "undue hardship" test in Title 30-A § 4353(4) of the Maine statutes. State law (30-A M.R.S.A. § 4353(4-A)) provides a separate variance for applicants who want to construct or alter a structure needed for access to or egress from a dwelling by a person with a disability who resides there or who regularly uses the dwelling. As was noted earlier in this chapter, this variance test applies to all municipalities with zoning ordinances, whether or not this test has been adopted as part of the ordinance by the municipality. Typical requests include a variance for the construction of a wheelchair ramp which would otherwise violate a setback requirement or a variance for an expansion of a portion of the dwelling which would otherwise violate a setback requirement where the expansion is necessary to allow adequate turning area inside the dwelling for a wheelchair. An applicant for a disability variance does not need to satisfy the "undue hardship" test applicable to other zoning variances in order to be entitled to approval. If the applicant can prove that he or she or someone regularly using the dwelling has a disability as defined in the statute, that the variance is really necessary to enable the disabled individual to enter or leave the dwelling or some interior portion of the dwelling, and that the variance requested is the minimum necessary to meet this need, the board should grant the variance. The board may condition its approval

on the removal of the structural component which was the subject of the variance either when the disability ceases or when the person with the disability no longer resides there or regularly uses the dwelling. Although the law does not expressly state that medical information submitted to document the disability is confidential, it would be wise for the board to err on the side of protecting the applicant's privacy rights and treat this information as confidential; it should be discussed in a properly called executive session and should be treated as a confidential record until a court finds otherwise. (See Appendix 4 for a copy of this law and Appendix 3 for a Legal Note discussing the relationship between the Americans With Disabilities Act and local ordinances). Even though disability variances are not usually sought in order to comply with the Americans with Disabilities Act, the board may use ADA guidelines to help it decide how much of a reduction to grant. *(from Supplement #2, January 2004)*

### **Sample Forms and Decisions**

For sample forms which the board may give to an applicant seeking a variance and which the board may use in preparing a written decision, see Appendix 3. *(from Supplement #2, January 2004)*

# Chapter 6

## Board of Appeals

Vested Rights, Equitable Estoppel,  
Pending Applications, and Permit  
Revocation

## Chapter 6

[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #2, January 2004 is included.*

# 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/board who issued the approval believes that it should be revoked. Generally, the issuing official or board should not attempt to revoke the permit or approval on the ground that the property owner is violating certain conditions of the approval, unless authorized by a court order. However, the issuing authority may have authority to revoke its approval after providing notice and an opportunity for a hearing, without being authorized to do so by a court order or by ordinance, upon discovering that it granted the approval without authority or that the applicant made false statements on the application which were material to the decision. 83 Am. Jur.2d Zoning and Planning § 645; 13 Am. Jur.2d Buildings § § 16, 18; McQuillin, *Municipal Corporations* (3rd ed. rev.), § § 26.212a, 26.213, 26.214. The Maine Supreme Court in *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545, held that a new code enforcement officer's attempt to revoke a permit which was improperly granted by the prior code enforcement officer constituted an untimely appeal of the former code enforcement officer's decision and allowed the permit to stand; the court didn't comment about whether the code enforcement officer who had issued the illegal permit could have revoked it himself at that point if he were still in office. 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 by the wrong local official is totally invalid and cannot serve as a basis for a claim of vested rights. Before attempting to revoke any permit or approval, the board or official should consult with its municipal attorney.

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

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). The test for analyzing whether a permit holder has acquired "vested rights" is outlined in *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266, discussed later in this chapter. The issue of whether someone has established vested rights is generally one for the courts to decide, not the board of appeals. Parties may raise these issues as part of an appeal to the board of appeals in order to preserve them for argument before a court later on, however. (from Supplement #2, January 2004)

## Equitable Estoppel

Based on the facts of a particular situation, a municipality may be equitably estopped (prevented) 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. *City of Auburn v. Desgrossilliers*, 578 A.2d 712 (Me. 1990); *F. S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992); *H. E. Sargent v. Town of Wells*, 676 A.2d 920 (Me. 1996); *Turbat Creek Preservation LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489. A finding of estoppel against a municipality is rare,

however. The courts have not found a municipality estopped by oral representations of a code enforcement officer where the ordinance clearly required any official decision or ruling made by the CEO to be in writing. *Shackford and Gooch v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984); *Courbron v. Town of Greene*, AP-01-019 (Me. Super. Ct., Andro. Cty., November 19, 2002). In deciding whether a municipality should be estopped, a court will consider the “totality of the circumstances, including the nature of the particular governmental function being discharged, and any considerations of public policy arising from the application of estoppel to the governmental function.” *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). See also, *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598. (from Supplement #2, January 2004)

### **Applicability of New Laws to “Pending” Applications or Approved Projects; Expiration and Retroactivity Clauses**

**“Pending” Applications.** Sometimes a municipality amends an applicable ordinance provision either while an application is being reviewed by the board or after the board has granted its approval but before the landowner has begun any of the work authorized by the board. If an application is “pending” when the ordinance is amended, 1 M.R.S.A. § 302 requires the board to complete its review under the original ordinance, unless the new ordinance contains a retroactivity clause. (Such clauses have been upheld by the Maine Supreme Court. *City of Portland v. Fisherman’s Wharf Associates II*, 541 A.2d 160 (Me. 1988).) 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 to the contrary. *P.W. Associates v. Town of Kennebunkport*, CV-88-716 and CV-89-29 (Me. Super. Ct., York Cty., November 20, 1989).

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

**Approved Projects; Expiration Clause.** Generally, once the board has granted project approval, a property owner has an unlimited amount of time within which to complete the work covered by the approval. However, the board should check the applicable ordinance to be sure. Some ordinances provide that a decision granting project approval expires if work is not begun or completed to a certain degree within a certain period of time. This type of provision has been upheld by the court in Maine. *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993); *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

Even in the absence of such an expiration clause, it may be possible to apply new ordinances to previously approved projects in certain cases, depending on the facts. For example, where a subdivision plan has been recorded for a number of years and the landowner has not sold the lots or made any substantial expenditures to develop the plan, it may be possible to require the owner to merge some of

the lots shown on the plan to bring them into compliance with new lot size and frontage requirements which were adopted after the approval of the plan. This is an issue which has not been directly addressed by the Maine courts, so it is advisable for the board to consult with an attorney before deciding what to do in such situations. See, *Thomas, supra*; *Fisherman's Wharf, supra*; *Larrivee, supra*; and *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992). Compare those cases with *Littlefield v. Town of Lyman, supra*; *Cardinali v. Planning Board of Town of Lebanon*, 373 A.2d 251 (Me. 1978); and *Henry and Murphy Inc. v. Town of Allentown*, 424 A.2d 1132 (NH 1980).

**Retroactivity Clause.** It is also arguable that a new ordinance can be made applicable to an approved but uncompleted project by incorporating appropriate language in a retroactivity clause. *Fisherman's Wharf, supra*. However, it is questionable whether 1 M.R.S.A. § 302 permits a municipality to make an ordinance retroactive to a date before the date on which the public first had notice of the proposed ordinance. (*from Supplement #2, January 2004*)

## Vested Rights

**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. If the error is not detected by the board or official who granted the original permit or approval, and if the time for appealing the original decision has expired, the permit or

approval probably cannot be revoked. *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545; *Wright v. Town of Kennebunk*, 1998 ME 184, 715 A.2d 162. Compare with *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422. (from Supplement #2, January 2004)

# **Chapter 7**

## **Board of Appeals**

### **Ordinance Interpretation**

## Chapter 7

[excerpt from the *Board of Appeals Manual* online version]  
*Supplement #2, January 2004 is included.*

### Ordinance Interpretation

#### General Ordinance Interpretation Rules

**General.** If the board is confronted with an ambiguous provision in a zoning ordinance as part of an administrative appeal or special exception/conditional use application and is unsure about how to apply the provision to a particular project, it should keep the following court-made rules of ordinance interpretation in mind. The board also will 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. In the absence of an ordinance provision authorizing an applicant or official to bring a request for an ordinance interpretation directly to the board of appeals, the board's authority to interpret an ordinance 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*, 688 A.2d 914 (Me. 1997).

**Object/Context.** 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*, 715 A.2d 930 (Me. 1998); *Oliver v. City of Rockland*, 710 A.2d 905 (Me. 1998); *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. (from Supplement #2, January 2004)

**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).

**Natural Meaning of Undefined Terms.** Zoning laws must be given a strict interpretation and the provision of those laws may not be extended by implication. However, they should be read according to the common and generally accepted meaning of the language used when there is no express legislative intent to the contrary, where the context doesn't clearly indicate otherwise, and where the ordinance does not define the words in question. *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*, 715 A.2d 148 (Me. 1998); *Britton v. Town of*

*York*, 673 A.2d 1322 (Me. 1996); *Town of Freeport v. Brickyard Cove Assoc.*, 594 A.2d 556 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). Compare with, *C.N. Brown and Buker, supra*. Ordinances must be interpreted reasonably to avoid an absurd result. *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842; *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768. (from Supplement #2, January 2004)

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

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

Provisions dealing with nonconforming lots, structures, and uses legally must be included in a zoning ordinance in order to avoid constitutional problems with the ordinance. Such provisions commonly are called "grandfather clauses." They typically define a "nonconforming use or structure" as a use or structure which was legally in existence when the ordinance took effect but which does not conform to one or more requirements of the new ordinance. The mere issuance of a permit under a prior ordinance generally does not confer "grandfathered" status by itself. *Cf., Thomas v. Board of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978). The use or structure must be in actual existence (or at least substantially completed) when the new ordinance takes effect in order to be "grandfathered." *Town of 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, then 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 or replacement. "Nonconforming lots" generally are defined in an ordinance to mean lots which were legal when the ordinance took effect and for which a deed or plan was on record in the Registry of Deeds. Such lots generally don't meet the lot size or frontage requirements or both of the new ordinance. However, the new ordinance generally allows them to be used for certain purposes as long as other requirements can be met.

The court in Maine has established the following rules relating to nonconforming uses, structures, and lots. These court-made rules must be read in light of the specific language of the nonconforming use provision of a given ordinance in order to determine whether the court decisions cited below have any bearing on a nonconforming use in your 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*, 712 A.2d 1061 (Me. 1998).

**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*, 710 A.2d 905 (Me. 1998).

**Expansion.** "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. "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 the *Maine Townsman* Legal Note discussing *Lewis v. Rockport* in Appendix 3.)

There is a special rule related to the expansion of existing nonconforming structures in the shoreland zone which are too close to the normal high watermark, known as the "30% rule." The rule permits expansions which are 30% or less of the existing floor area and of the volume over the lifetime of the structure without having to comply with current ordinance requirements. A common question is whether the landowner is entitled to expand both 30% of floor area and 30% of volume or whether it is a combined total. The position of the Maine Department of Environmental Protection's Shoreland Zoning Unit is that the owner is allowed to expand both floor area and volume by 30% or less. For example, the owner could build an attached deck (not closer to the water, though, without a variance) that expanded the floor area of the existing nonconforming structure by 30% and later expand the volume by 30% by enclosing the deck or raising the pitch of the roof. See *Armstrong v. Town of Cape Elizabeth*, AP-00-023, (Me. Super. Ct., Cum. Cty., December 21, 2000) and *Fielder v. Town of Raymond*, AP-01-16 (Me. Super. Ct., Cum. Cty., October 4, 2001). Based on the *Fielder* case, the DEP also takes the position that the construction of fixed walls to enclose a deck would count toward the 30% volume limitation but would not constitute additional floor area.

The Department's opinion regarding the placement of a roof and screen walls over a legally existing deck is that this creates neither volume or floor area; the floor is already present and there are no fixed walls to create volume, as screens don't constitute fixed walls. 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 this 30% expansion rule, see *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368.

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. (from Supplement #2, January 2004)

**Replacement.** 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).

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

If the ordinance regulates the reactivation of a "discontinued" nonconforming use rather than an "abandonment" of such a use, an analysis of the owner's intent is not necessary. Cessation of the use for the period of time stated in the ordinance is enough. *Mayberry v. Town of Old Orchard Beach*, 599 A.2d 1153 (Me. 1991). *Cf., Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.

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

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

Where a house burned and no livable structure thereafter existed on the property and the property had not been used since the fire (for 6 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). (*from Supplement #2, January 2004*)

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

**Merger of Lots.** Where two or more unimproved, recorded legally nonconforming lots are adjacent and owned by the same person, the State Minimum Lot Size Law (12 M.R.S.A. § 4807-1) and many zoning 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 lot of record or two developed 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, where 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, then the question of merger will be controlled by the ordinance. Where an ordinance requires the merger of lots in the same ownership which have “contiguous frontage” with each other, the court in Maine has held that such a provision does not apply to corner lots. *Lapointe v. City of Saco*, 419 A.2d 1013 (Me. 1980). The court also has held that a merger clause which refers to lots with “continuous frontage” does not require the merger of a back lot which is landlocked with an adjoining lot or the merger of adjoining lots which “front” on different streets. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. See also, *John B. DiSanto and Sons, Inc. v. City of Portland*, AP-03-13 (Me. Super. Ct., Cum. Cty., September 25, 2003), 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.

As a general rule, in order for a nonconforming lot to be conveyed and retain its “grandfathered” status, it must be conveyed with the same boundaries as it had when the ordinance took effect; otherwise, it must be treated as a newly created illegal lot. If additional acreage is added to a nonconforming lot which increases its size, but not enough to make it conforming, such an increase won’t necessarily cause the lot to lose its grandfathered status, although the legal status of an adjoining lot from which the acreage was transferred may be affected by doing this. For a discussion of the meaning of “lot of record,” see *Camplin v. Town of York*, 471 A.2d 1035 (Me. 1984).

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 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 *Keith* case might be decided differently today, since shoreland zoning ordinances now contain much more detail and expressly address a variety of scenarios with regard to the merger, division, and separate conveyance of developed or vacant contiguous or isolated nonconforming lots of record. Whether the functional division theory applied in *Keith* will control a nonconforming lot situation in a particular town will depend on exactly what the town’s ordinance does and doesn’t address and what intent can be inferred from the ordinance’s regulatory scheme. It may be advisable for the board to seek legal advice regarding the interpretation of the specific ordinance language adopted by the town before deciding to apply *Keith* to the division of a developed nonconforming lot.

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. (from Supplement #2, January 2004)

**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 the failure of a landowner to obtain a State daycare license did not deprive an existing daycare of nonconforming use status, but the fact that the owner had not obtained the necessary local site plan approval and certificate of occupancy did prevent his use from becoming a legal nonconforming use.

### **Split Lots**

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. (from Supplement #2, January 2004)

### **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 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), and *Hopkinson v. Town of China*, 615 A.2d 1166 (Me. 1992). 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.

### **Camper Trailers**

In the case of *State v. Town of Damariscotta*, CV-98-84 (Me. Super. Ct., Kenn. Cty., June 12, 2001), the court found that a wood frame structure placed on skids to allow it to be moved to various sites within a campground did not qualify as a "camper trailer" and was not within the scope of the grandfathered campground use. (from Supplement #2, January 2004)

### **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 such 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). (from Supplement #2, January 2004)

### **Conflict Between Zoning Map and Ordinance**

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. *Veerman v. Town of China*, CV-93-353 (Kenn. Cty. Super. Ct, April 13, 1994); *Coastal Property Associates, Inc. v. Town of St. George*, 601 A.2d 89 (Me. 1992). See generally *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842. See also *Nardi v. Town of Kennebunkport*, AP-00-001 (Me. Super. Ct., York Cty., Feb. 12, 2001). (from Supplement #2, January 2004)

### **Conflict Between Ordinances**

Where a townwide-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. *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me. 1998). 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, 707A.2d 389. (from Supplement #2, January 2004)

### **Road Frontage**

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). (from Supplement #2, January 2004)

### **Water Setback Measurement**

"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). (from Supplement #2, January 2004)

### **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.' (from Supplement #2, January 2004)

### **Essential Services; Communications Towers; Satellite Dishes**

Neither a communications tower nor a radio station qualifies as an "essential service" as typically defined in a local zoning ordinance, absent language to the contrary in the applicable 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 cellular 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). (from Supplement #2, January 2004)

### **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.

### **Home Occupations**

A number of Maine court decisions have interpreted local ordinance definitions of "home occupation." In *Town of Kittery v. Hoyt*, 291 A.2d 512, 514 (Me. 1972), the Maine Supreme Court concluded that a commercial lobster storage and sales business was not a home occupation under a local ordinance which defined the term as a "business customarily conducted from the home." Similarly, the court held that an auto body shop and used car rental and sales business wasn't a home occupation under an ordinance requiring such businesses to be "operated from the home." *Baker v. Town of Woolwich*, 517 A.2d 64, 68 (Me. 1987). In *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063, the court found that a commercial dog kennel with 11 indoor-outdoor runs and boarding capacity for 15 dogs qualified as a home occupation under an ordinance permitting home occupations if "customarily conducted on or in residential property." The court found this definition broader and more lenient than the ones in *Hoyt* and *Baker*. A Maine Superior Court judge found that a mail order pharmacy business did not qualify as a home occupation, based on language in the town's ordinance which referred to "stock-in-trade." *Simonds v. Town of Sanford*, CV-91-710 (Me. Super. Ct., York Cty., July 14, 1992). (from Supplement #2, January 2004)

### **Measurements for Slope of Land, Calculation of Building Expansion, Percentage of Lot Coverage, and Building Height**

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.' (from Supplement #2, January 2004)

### **Commercial, Retail Use**

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) and *Bushey v. Town of China*, 645 A.2d 615 (Me. 1994) (dog kennel as commercial use). 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. (from Supplement #2, January 2004)