

## CHAPTER 4 – Administrative Appeals

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

### Jurisdiction

#### General Rule

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

#### Enforcement 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 just described 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); *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598 (holding that a decision to issue or deny a certificate of occupancy was appealable); *Farrell v. City of Auburn*, 2010 ME 88, 3 A.3d 385, and *Eliot Shores, LLC v. Town of Eliot*, 2010 ME 129, \_\_\_\_\_ A.3d \_\_\_\_\_ (holding that the board's decision related to the appeal of an enforcement order was advisory and not appealable based on the language of the ordinance). 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.

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

### **Appeal of Failure to Act**

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

### **Appeal of Failure to Enforce**

The court will allow a person with legal standing to file a direct legal challenge in court where a municipality refuses to bring an enforcement action because it believes that the

ordinance is not being violated. *Richert v. City of South Portland*, 1999 ME 179, 740 A.2d 1000; *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063.

## Deadline for Filing Appeal

### Appeal to Board of Appeals

If an ordinance or statute does not provide a time limit within which an appeal to the board of appeals must be filed, the court has held that a period of 60 days constitutes a reasonable appeal period. *Keating v. Zoning Board of Appeals of City of Saco*, 326 A.2d 521 (Me. 1974); *Gagne v. Cianbro Corp.*, 431 A.2d 1313 (Me. 1981); *Boisvert v. Reed*, 1997 ME 72, 692 A.2d 921 (Me. 1997). The Maine Supreme Court has held that in the case of the issuance of a building permit, the appeals period begins to run from the date of issuance of the permit, even though there is no formal public decision comparable to the decision-making process used by a board. *Boisvert v. King*, 618 A.2d 211 (Me. 1992); *Otis v. Town of Sebago*, 645 A.2d 3 (Me. 1994); *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162; *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545 (CEO's issuance of stop work order nearly two years after permit issued by former CEO was deemed an untimely appeal of the original permit decision); *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598. An abutter's request for a cease and desist order related to permits that were issued and never appealed has been deemed an untimely appeal of those permits and denied. *Fryeburg Water Company v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618. In *Ream v. City of Lewiston*, CV-91-209 (Me. Sup. Ct., Andro. Cty., July 24, 1991), the court found that the language of the ordinance appeal provision was broad enough to allow an appeal of a code enforcement officer's decision not to revoke a permit, so the deadline for filing an appeal ran from that decision and not the original permit decision.

### Appeal to Court

An appeal to the Superior Court from a decision of the appeals board must be filed within 45 days of the date of the board's original decision on an application. 30-A M.R.S.A. § 2691; *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, 837 A.2d 148. It is possible that a court might allow these time periods to be extended under Rule 80B if the person filing the appeal can show "good cause." *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422; *Viles v. Town of Embden*, 2006 ME 107, 905 A.2d 298. But see, *Reed v. Halprin*, 393 A.2d 160 (Me. 1978). For an appeal which

must go directly to Superior Court, the appeal deadline is governed by Rule 80B and is 30 days from the date of the local vote, except in the case of a subdivision decision, where the court has ruled that the deadline runs from the date of the planning board's written order. *Hylar v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990). The 30 day deadline applies even to an appeal of an allegedly illegal condition of subdivision approval. *Sold, Inc. v. Town of Gorham*, 2005 ME 24, 868 A.2d 172. If the applicable local ordinance establishes a deadline for appealing a zoning decision made by a planning board directly to Superior Court, then that deadline will control. *Woodward v. Town of Newfield*, 634 A.2d 1315, 1317 (Me. 1993). Where the board of appeals has voted to reconsider a decision, an appeal of the reconsidered decision must be filed with the court within 15 days. 30-A M.R.S.A. § 2691.

### **Untimely Appeal; Incomplete Appeal Application**

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

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

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

If a decision is not appealed, it cannot be challenged indirectly at a later date by way of another appeal on a related matter. Nor can one town official or board challenge a decision by another official or board by refusing to issue a permit or approval on the basis that the other board's or official's decision was wrong. For example, if a board of appeals grants a setback variance which the planning board believes is illegal, the planning board cannot refuse to grant its approval for the structure that was the subject of the variance solely on the

basis that the variance should not have been granted. The planning board must live with the decision of the appeals board unless the planning board, municipal officers, or other aggrieved party successfully challenges the variance in Superior Court. *Fryeburg Water Co. v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618; *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545; *Milos v. Northport Village Corporation*, 453 A.2d 1178 (Me. 1983); *Fisher v. Dame*, 433 A.2d 366 (Me. 1981). See also *Town of North Berwick v. Jones*, 534 A.2d 667 (Me. 1987), *Fitanides v. Perry*, 537 A.2d 1139 (Me. 1988), *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989), *Wright v. Town of Kennebunkport*, *supra*, *DeSomma v. Town of Casco*, 2000 ME 113, 755 A.2d 485, *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644, and *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930 (dealing with collateral estoppel/res judicata).

### **Appeal Involving Exempt Gift Lots in a “Family” Subdivision**

For a case ruling on the timing of an appeal challenging a code enforcement officer’s decision to issue building permits based on a conclusion that the lots were exempt gift lots under 30-A M.R.S.A. § 4401(4) (Subdivision Law), see *Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258.

### **Exhaustion of Remedies**

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

separate ordinance. *Hodson v. Town of Hermon*, 2000 ME 181, 760 A.2d 221; *Thomas v. City of South Portland*, 2001 ME 50, 768 A.2d 595.

## Standing

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

### “Particularized Injury” Test

When a person can demonstrate that he or she has suffered or will suffer a “particularized injury” as a result of a decision by the planning board or CEO, he/she has met one part of the general test for “standing” to file an appeal with the board of appeals, if the board has jurisdiction to hear the appeal by ordinance or statute. To meet the “particularized injury” test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. *Brooks v. Cumberland Farms, Inc.*, 1997 ME 203, 703 A.2d 844; *Christy’s Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d 535 (Me. 1991); *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987); *New England Herald Development Group v. Town of Falmouth*, 521 A.2d 693 (Me. 1987); *Leadbetter v. Ferris*, 485 A.2d 225 (Me. 1984); *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91 (Me. 1984); *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983). The court has held that “particularized injury for abutting landowners can be satisfied by a showing of ‘the proximate location of the abutter’s property, together with a relatively minor adverse consequence if the requested variance were granted’.” *Fryeburg Water Co. v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618; *Norris Family Associates, LLC v. Town of Phippsburg*, 2005 ME 102, 879 A.2d 1007; *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673. See also, *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266 (defining “abutter” to include “close proximity”); and *Drinkwater v. Town of Milford*, AP-02-08 (Me. Super. Ct., Pen. Cty., April 18, 2003) (son of landowners whose property abutted the applicants’ and who worked on his parents’ land failed to document that he had a future interest in his parents’ land sufficient to give him standing to appeal as an abutter). A person who can show that he/she owns property in the same neighborhood as the applicant’s property, even if not an abutter, generally will be deemed to have a particularized injury. *Singal v. City of Bangor*, 440 A.2d 1048 (Me. 1982). Where a person claims that a project will cause him potential harm because he drives by the site daily and will be exposed to greater safety risks due to traffic

generated by the project, the court has held that such harm is not distinct from that which will be experienced by many other members of the driving public and therefore was not sufficient for the purposes of the “particularized injury” test. *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735.

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

### **Actual Participation in Proceedings Required**

Anyone wishing to appeal from a planning board decision to the board of appeals or a board of appeals decision to Superior Court under Rule 80B must also be able to show actual participation for the record in the hearing conducted by the planning board and board of appeals 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); *Department of Environmental Protection v. Town of Otis*, 1998 ME 214, 716 A.2d 1023.

### **Appeal by Permit Holder**

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

### **Appeal by Municipality**

See *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517 for an example of a case where the municipality challenged a board of appeals decision in Superior Court.

### **Nature of Review—De Novo vs. Appellate**

The Maine Supreme Court has held that 30-A M.R.S.A. § 2691 requires a board of appeals to conduct a “de novo” review of an appeal, “unless the municipal ordinance explicitly directs otherwise.” *Stewart v. Town of Sedgwick*, 2000 ME 157, 757 A.2d 773; *Yates v. Town of Southwest Harbor*, 2001 ME 2, 763 A.2d 1168; *Gensheimer v. Town of Phippsburg*, 2005 ME 22, 868 A.2d 161. This means that the board of appeals steps into the shoes of the original decision-maker and starts the review process from scratch, holding its own hearings, creating its own record, and making its own independent judgment of whether a project should be approved based on the evidence in the record which the board of appeals created. The record created by the planning board or code enforcement officer is relevant only to the extent that it is offered as evidence for the record of the board of appeals hearing. The board of appeals will weigh that evidence along with any other that it receives. The board of appeals does not use its record to judge the validity of the decision made by the planning board or code enforcement officer. The board of appeals, in effect, must pretend that the planning board or code enforcement officer decision was never made. In a “de novo” proceeding, the board of appeals is not deciding whether the planning board or code enforcement officer decision was in conformance with the ordinance, whether it was supported by the evidence in the record, or whether it had procedural problems. The board of appeals is deciding only whether the new record which the board of appeals has created supports a finding by the board of appeals that the permit application should be approved or denied. It does this by following the procedures and using the performance standards/review criteria that governed the CEO or planning board in making the original decision. The

original applicant has the burden of proof in a de novo appeal, even if someone else filed the appeal.

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

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

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

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

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

### **Authority of Appeals Board Regarding Decision Appealed**

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

### **Consolidation of Pending Appeals**

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

## Court Review of Appeals Board Decision

If the board of appeals conducted a “de novo” review of an appeal and the board of appeals’ decision is appealed to Superior Court, the Superior Court will review the board of appeals decision and board of appeals record in determining whether to uphold or reverse the decision. If the board of appeals acted in an “appellate review” capacity, then the Superior Court will review the original decision made by the planning board or code enforcement officer and the related record, not that of the board of appeals. *Stewart, supra*. The court must decide whether the decision-maker “abused its discretion, committed 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, 832 A.2d 765. It will uphold the decision being appealed unless it was “unlawful, arbitrary, capricious, or unreasonable.” *Senders v. Town of Columbia Falls*, 647 A.2d 93 (Me. 1994); *Kelly & Picerne v. Wal-Mart Stores*, 658 A.2d 1077 (Me. 1995); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 1998 ME 153, 712 A.2d 1061. The court will uphold the board’s decision even if conflicting evidence in the record would support a contrary decision, as long as the record does not compel a contrary conclusion. *Herrick v. Town of Mechanic Falls*, 673 A.2d 1348 (Me. 1996); *Two Lights Lobster Shack, supra*; *Grant’s Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). If the official or board whose decision is reviewed by the court failed to make required findings and conclusions, the court generally will “remand” (send back) the case to that decision-maker with instructions to make written findings sufficient to allow the parties and the court to know whether or not the applicant satisfied each relevant ordinance standard and why. *E.g., Chapel Road Associates v. Town of Wells*, 2001 ME 178, 787 A.2d 137; *Widewaters Stillwater v. BAACORD*, 2002 ME 27, 790 A.2d 597; and *Ram’s Head Partners LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916. Compare those cases with *Bragdon v. Town of Vassalboro*, 2001 ME 137, 780 A.2d 299, and *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371.

## Preserving Objections for a Court Appeal

If a party to the proceedings has any objections to procedures or proposed findings by the board, he or she must raise them at the meeting so that the board has a chance to consider them and address them in its decision. Failure to raise these objections before the board will prevent that person or any other party from making those objections in an appeal to the Superior Court. *Pearson v. Town of Kennebunk*, 590 A.2d 535, 537 (Me. 1991); *Wells v.*

*Portland Yacht Club*, 2001 ME 20, 771 A.2d 371; *Oliver v. City of Rockland*, 1998 ME 88, 710 A.2d 905; *Rioux v. Blagojevic*, AP-02-24 (Me. Super. Ct., Pen. Cty., June 24, 2003).

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

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

## **Decision-Making Process**

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

## **Deadlines; Notice Requirements**

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

be given and what deadlines govern their decision-making process. If the original applicant is not the person who filed the appeal, the board should also provide direct notice of the hearing date and of the board's decision to the original applicant to ensure due process.

## **Attending Planning Board Meetings**

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

## **Consideration of Constitutional Issues**

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

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

Sometimes boards are asked to approve land use appeals on the basis that the municipal ordinance is in violation of the Federal Fair Housing Act Amendments (FFHA) relating to group homes for individuals with disabilities or that the ordinance violates the Americans

with Disabilities Act (ADA). Often these claims are valid, but they put the appeals board in a position of having to approve something which is contrary to the express language of a local ordinance adopted by the town meeting or council. Since the municipality could be faced with civil rights liability under federal law if its ordinances do deprive citizens of federally-protected rights, the board of appeals should consult with the municipality's private attorney when one of these issues is raised as part of an appeal.

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

### **Authority of Municipal Officers**

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

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

Unless an ordinance provides otherwise, the Maine Supreme Court has held that an applicant whose appeal or request for a variance was denied has no legal right to request another hearing on the same appeal or variance unless he or she can show a substantial change in the circumstances which provided the basis for the first appeal or variance. *Driscoll v. Gheewalla*, 441 A.2d 1023 (Me. 1982); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985). See also, *Twomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563.

## Reconsideration by the Board of Appeals

Title 30-A M.R.S.A. § 2691 authorizes a board of appeals to reconsider a decision within 45 days of its original decision. Whether the board agrees to reconsider and rehear an earlier decision is entirely discretionary, absent language to the contrary in a local ordinance. *Tarason v. Town of South Berwick*, 2005 ME 30, 868 A.2d 230. A request to the board to reconsider a decision must be filed within 10 days of the decision that is to be reconsidered and the action taken on that reconsideration must occur and be completed within 45 days of the date of the vote on the original decision. The board may conduct additional hearings and receive additional evidence and testimony. An appeal of a reconsidered decision must be made within 15 days after the decision on reconsideration.

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

## Authority of the Board to Modify/Revise an Appeal Application

If a person submits an application to the planning board or code enforcement officer for a permit and is denied, there may be several bases on which that person can or should appeal to the board of appeals (where a local appeal is authorized). The person may file an administrative appeal seeking to challenge the way the ordinance was administered, the way an ordinance provision was interpreted, or the way the evidence was analyzed in deciding

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

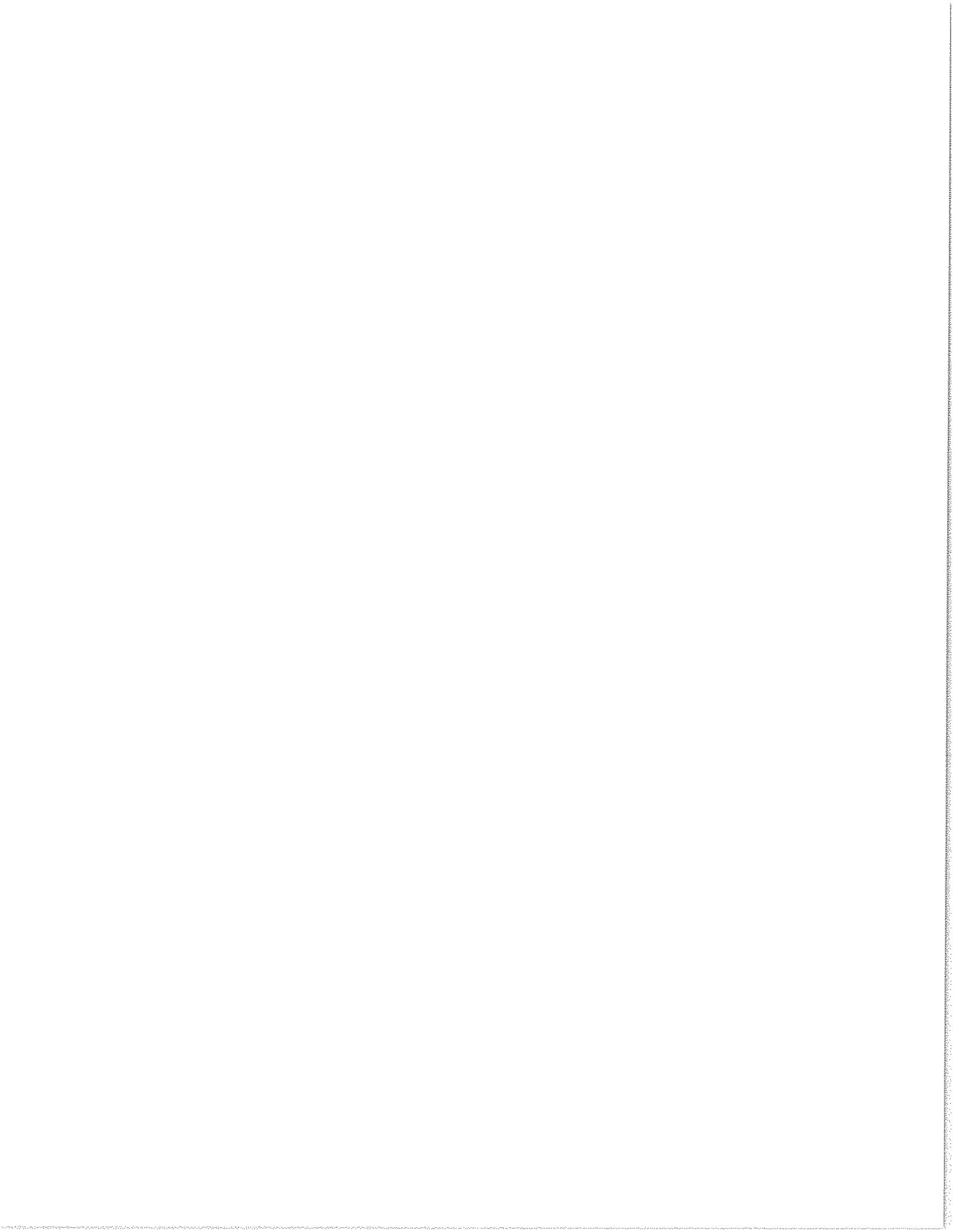
## **Role of Code Enforcement Officer or Planning Board at Appeals Board Meeting**

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

Although the code enforcement officer (CEO) can be a very valuable resource for the board, the code enforcement officer has no special legal standing to actively participate at board meetings under general law. In the absence of a local ordinance or policy that requires the board to solicit input from the code officer on appeal or other applications that the board is

reviewing, the board has the discretion whether or not to seek input from the CEO. The CEO may request to be recognized by the board if he/she wishes to offer advice or comment about what the board is considering, but the board has no legal obligation to allow the CEO to speak at that point. The exception to this general rule is where the application is an appeal from a decision that the CEO made. In that context, the CEO should be given the same right to present his/her case that the applicant has.

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



## **CHAPTER 5 – Variances and Waivers**

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

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

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

### **Zoning Variances in General; Statutory “Undue Hardship” Test**

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

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

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

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

### **Other Limitations by Ordinance**

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

### **Strictly Construed**

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

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

## **Personal Hardship**

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

## **The “Reasonable Return” Standard**

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

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

### **The “Unique Circumstances” Standard**

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

### **The “Essential Character of the Locality” Standard**

The third “undue hardship” criterion focuses on the “essential character of the locality” and generally appears to be almost the flip side of the coin from criterion number two (discussed above). For example, if a landowner requests a setback variance to build an addition bringing his home closer than the required road setback, but no closer than all of the neighboring homes, the requested variance would not alter the “character of the locality.” *Driscoll v. Gheewalla, supra*. However, it probably would not meet the “uniqueness” criterion or the “reasonable return” criterion. The “essential character” standard may have

been intended to relate to use variances when originally drafted, but it applies to both use and dimensional variances.

## **The “Self-Created Hardship” Standard**

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

## **Request for Variance “After the Fact”**

A person who commits a violation of an ordinance requirement, such as a zoning setback, sometimes will seek a variance after-the-fact as a way to correct the violation. Normally an ordinance violation must be resolved through regular code enforcement channels rather than through a variance granted by the board of appeals. If a landowner does apply for a variance after-the-fact, the board should review the request without taking into account that the structure has been built. The board should determine whether the applicant would have been entitled to a variance if he/she had come to the board before the fact and only grant a variance if the applicant satisfies all prongs of the undue hardship test and only to the extent needed. Usually an after-the-fact application is the result of a builder's error where the building could have conformed to the ordinance requirements but someone mismeasured. In that case the hardship is self-created and the variance should be denied. It then becomes an enforcement issue to get the building moved or altered so that it conforms. *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673.

## Authority to Grant Variances

### Zoning Variances

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

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

### Non-Zoning Variances

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

## **Effect of Variance Decision**

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

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

After a variance is granted and a building is constructed or activity conducted based on that variance, the building or activity thereafter should be treated as a legally conforming structure or use for the purposes of deciding which ordinance provisions govern it in the future. *Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. This is probably true even if the variance was granted illegally, if it is not appealed. *Wescott Medical Center v. City of South Portland*, CV-94-198 (Me. Super. Ct., Cum. Cty., July 15, 1994). (See also the discussion about the need to record variances appearing later in this chapter.)

## **Procedure for Obtaining a Variance**

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

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

If the municipal officers or the planning board believe that the board of appeals has wrongfully granted a zoning variance where the applicant has not met all of the criteria for “undue hardship” set out in § 4353, as a board they have “standing” to challenge the board

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

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

### **Recording Requirement**

State law (30-A M.R.S.A. § 4353 and § 4406) requires the board of appeals and the planning board to prepare a certificate which can be recorded in the Registry of Deeds and provide it to the applicant for recording whenever they grant a zoning variance or a subdivision variance or waiver. A sample zoning variance certificate and a copy of the law are included in Appendix 4. To be valid, zoning variance certificates must be recorded within 90 days of the decision. Subdivision variances or waivers must be recorded within 90 days of final approval of the plan. If the certificate is not recorded within the stated deadline, the variance/waiver becomes void. The only way to "reactivate" the variance or waiver in that case is for the person wishing to rely on the variance or waiver to submit a new application on which the board may act. The board's review would be governed by the ordinance in effect at the time of the new application. The board is not obligated to grant the variance/waiver automatically the second time around; if it determines that it made a mistake the first time, it should deny the new request. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. If the board is only authorized to hear a variance request as an appeal from a decision by another board or official, then the person who wants the variance would need to reapply for the permit/approval and be denied again in order for the board of appeals to hear the new variance request, absent language in the ordinance to the contrary.

### **Abandonment**

If a person has received approval of a variance, but later decides that he/she wants to abandon the variance and give up his/her legal rights in relation to it, it probably can be done, but there is no process spelled out in State law. Absent a procedure provided by ordinance, the person should make a written request to the board of appeals. The board should take a formal vote acknowledging that the owner wants to abandon the variance and issue a "certificate of abandonment" which can be recorded at the Registry. A sample certificate appears in Appendix 4 of this manual. It must be in notarized form and should

include: the landowner's name; property address; a Registry of Deeds Book and Page description of the property; a reference to the Book and Page where a variance approval certificate was recorded, if any; the date on which the variance was approved; the date on which the request for abandonment was granted; the reason for the abandonment request; and a statement that the board's approval of the abandonment makes the original variance void and of no effect and that the variance cannot be relied upon for any future construction activity. Before approving and issuing a certificate, the board of appeals should require proof that neither the applicant, the landowner (if a different person), nor any third party has taken action in reliance on the original granting of the variance which might be jeopardized by its abandonment.

## **Second Request for Same Variance**

This issue was previously discussed in Chapter 4.

## **Shoreland Zoning Variances**

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

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

The Maine Supreme Court has interpreted 30-A M.R.S.A. § 4353 and 38 M.R.S.A. § 439-A(4) as allowing a municipal board of appeals to grant a dimensional variance to permit an expansion within the shoreland zone as long as the applicant proves undue hardship and the

dimensional variance and expansion are not otherwise prohibited by the ordinance. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

## Disability Variances

Most zoning variances may not be granted unless the applicant has satisfied all elements of the “undue hardship” test in Title 30-A § 4353(4) of the Maine statutes. State law [30-A M.R.S.A. § 4353(4-A)] provides a separate variance test for applicants who want to construct or alter a structure needed for access to or egress from a dwelling by a person with a disability who resides there or who regularly uses the dwelling. (See Appendix 4 for a copy of this law.) This includes variances needed for access to interior areas as well as to enter and exit the building. As was noted earlier in this chapter, this variance test applies to all municipalities with zoning ordinances, whether or not this test has been adopted as part of the ordinance by the municipality. Typical requests include a variance for the construction of a wheelchair ramp which would otherwise violate a setback requirement or a variance for an expansion of a portion of the dwelling which would otherwise violate a setback requirement where the expansion is necessary to allow adequate turning area inside the dwelling for a wheelchair. An application for a disability variance from a setback requirement to allow a deck to be constructed for use by a disabled individual generally would not fit this test. An applicant for a disability variance does not need to satisfy the “undue hardship” test applicable to other zoning variances in order to be entitled to approval. If the applicant can prove that he or she or someone regularly using the dwelling has a disability as defined in the statute, that the variance is really necessary to enable the disabled individual to enter or leave the dwelling or some interior portion of the dwelling, and that the variance requested is the minimum necessary to meet this need, the board should grant the variance. The board may condition its approval on the removal of the structural component which was the subject of the variance either when the disability ceases or when the person with the disability no longer resides there or regularly uses the dwelling; the board is not required to do so, however. Even though disability variances are not usually sought in order to comply with the Americans with Disabilities Act, the board may use ADA guidelines to help it decide how much of a reduction to grant. For several court decisions dealing with disability variances, see *Corson v. Town of Lovell*, Civil No. 92-394-P-H, U.S. Dist. Ct., Dist. of Maine, August 3, 1993; *McGinnis v. Inhabitants of Town of Peru*, CV-94-62 (Me. Super. Ct., Oxf. Cty, Oct. 5, 1994).

This law does not expressly state that medical information submitted to document the disability is confidential. Consequently, some attorneys feel strongly that this medical information is public and cannot be discussed in executive session. Others are equally adamant that the board should treat it as confidential and discuss it in executive session

based on the various state and federal statutes that make medical information confidential in other contexts. An applicant who does not want the information discussed publicly or otherwise disclosed may seek a court order attempting to prevent disclosure. A motion to go into executive session for discussion of the medical information probably should cite 1 M.R.S.A. § 405(6)(F) as the authority for the executive session. Until a court rules on this issue or the statute is amended, it is recommended that the municipality decide which position it will take after consulting its local attorney and put language on its disability variance application form stating how the municipality intends to treat personal medical information. Because of the potential for claims based on federal confidentiality laws and privacy rights, it may be safer to treat the information as confidential. (See Appendix 4 for a copy of this law).

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

## **Practical Difficulty and Single Family Dwelling Setback Variances**

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

## **Sample Forms and Decisions**

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

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

### Revocation of Permit or Approval

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

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

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

## **Equitable Estoppel**

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

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

### **“Pending” Applications**

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

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

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

### **Approved Projects; Expiration Clause**

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

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

Even in the absence of such an expiration clause, it may be possible to apply new ordinances to previously approved projects in certain cases, depending on the facts. For example, where

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

### **Retroactivity Clause**

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

## **Vested Rights**

### **Vested Rights in Valid Permit**

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

### **Vested Rights to Proceed with Approved Construction Under Existing Ordinance**

The Maine Supreme Court in *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266, stated that "in order for a right to proceed with construction under the existing ordinance to vest, three requirements must be met: (1) there must be the actual physical commencement of some significant and visible construction; (2) the commencement must be undertaken in good faith...with the intention to continue with the construction and to carry it through to completion; and (3) the commencement of construction must be pursuant to a validly issued permit" (citing a number of cases from Maine and other states). The court went on to note that "rights may not vest solely because a property owner: (1) filed an application for a building permit; (2) was issued a building permit; (3) relied on the language of the existing

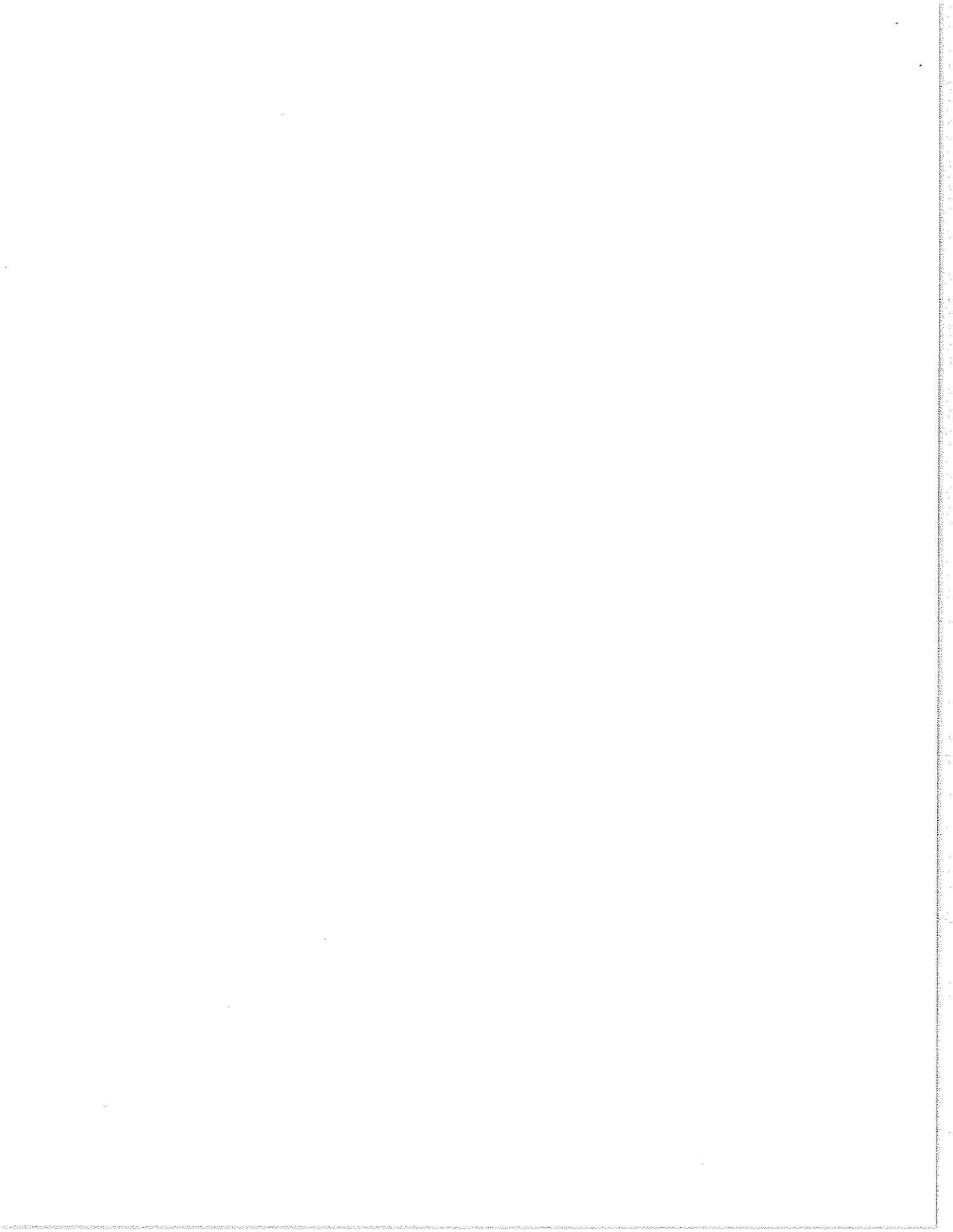
ordinance; or (4) incurred preliminary expenses in preparing and submitting the application for a permit” (citing a number of Maine cases). In *Sahl* the court found that the landowner had acquired vested rights based on the facts and also found that an expiration clause applicable on its face to permits approved before a certain date did not apply to the project in question.

### **Vested Rights in Erroneously Approved Permit**

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

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

If a person receives approval for a project, but the board later determines that it has granted the approval in error (such as for a use which is prohibited by the pertinent ordinance or which requires the approval of another board or official), before attempting to treat the approval as invalid or revoke it, the board should seek legal advice regarding whether the person has acquired vested rights in the approval under the facts of that particular situation.



## CHAPTER 7 – Ordinance Interpretation

### General Ordinance Interpretation Rules

#### General

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

#### Consistency

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

#### Object; Context; Common Meaning

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

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

### **Ambiguity Construed in Favor of Landowner**

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

### **Natural Meaning of Undefined Terms**

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

### **Similar Uses**

The board of appeals has the ultimate authority at the local level to interpret the provisions of a zoning ordinance under 30-A M.R.S.A. § 4353. Even in the absence of a provision in a zoning ordinance authorizing "uses similar to permitted uses" or words to that effect, the court has held that a zoning appeals board has the inherent authority under 30-A M.R.S.A. § 4353 to interpret whether a proposed use which is not expressly authorized is "similar to"

a use which is expressly addressed in the ordinance. In doing so, the board must act reasonably and base its decision on the facts in the record and the provisions of the ordinance. *Your Home, Inc. v. City of Portland*, 432 A.2d 1250 (Me. 1981).

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

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

The court in Maine has established the following rules relating to nonconforming uses, structures, and lots. These court-made rules must be read in light of the specific language of the nonconforming use, structure, and lot provisions of a given ordinance in order to

determine whether the court decisions cited below have any bearing on a nonconforming use, structure or lot in a specific municipality.

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

### **Gradual Elimination**

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

### **Phased Out Within Legislative Standards**

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

### **Expansion of Nonconforming Use**

“Where the original nature and purpose of an existing nonconforming use remain the same, and the nonconforming use is not changed in character, mere increase in the amount or intensity of the nonconforming use within the same area does not constitute an improper expansion or enlargement of a nonconforming use,” where the language of the ordinance prohibits the extension or enlargement of a nonconforming use or the change of that use to a dissimilar use. *Frost v. Lucey*, 231 A.2d 441 (Me. 1967); *Boivin v. Town of Sanford*, 588 A.2d 1197 (Me. 1991); *Total Quality Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *W.L.H. Management Corp. v. Town of Kittery*, 639 A.2d 108 (Me. 1994); *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489. An increase in the amount of time that a nonconforming use is conducted does not constitute the expansion or extension of the nonconforming use, in the absence of language in the

ordinance to the contrary. *Frost v. Lucey, supra*; *Trudo v. Town of Kennebunkport*, 2008 ME 30, 942 A.2d 689.

### **Expansion of Nonconforming Structure**

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

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 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 nor 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.

## **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*, (4<sup>th</sup> ed.), § 6.65. Although "discontinuance" or cessation of the use for the period stated in the ordinance does not automatically constitute abandonment, it may be evidence of an intent to abandon if accompanied by other circumstances relating to the use or non-use of the property, such as the removal of advertising signs or allowing the building formerly occupied by the use to become dilapidated.

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

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

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

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

### **Constitutionality**

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

### **Merger of Lots**

Where two or more unimproved, recorded legally nonconforming lots are adjacent and owned by the same person, the State Minimum Lot Size Law (12 M.R.S.A. § 4807-D) and many zoning and other local ordinances require that those lots be merged and considered as one for the purposes of development to the extent necessary to eliminate the nonconformity. In order to require the merger of a developed and undeveloped nonconforming lot of record or two developed nonconforming lots of record which are contiguous and in the same ownership, the Maine courts have said that the ordinance must expressly require such a merger. *Moody v. Town of Wells*, 490 A.2d 1196 (Me. 1985); *Powers v. Town of Shapleigh*, 606 A.2d 1048 (Me. 1992) (where the court interpreted the phrase "not contiguous to any other lot in the same ownership" to mean either built or vacant in the context of the rest of the nonconforming lot section, since that section used the words "vacant" and "built" where it wanted to make that distinction). For other nonconforming lot cases, see *Farley v. Town of Lyman*, 557 A.2d 197 (Me. 1989) and *Robertson v. Town of York*, 553 A.2d 1259 (Me. 1989). If a zoning ordinance establishes a local minimum lot size which is different from and more restrictive than the State's, the question of merger will be controlled by the ordinance. Where an ordinance requires the merger of lots in the same ownership which

have “contiguous frontage” with each other, the court in Maine has held that such a provision does not apply to corner lots. *Lapointe v. City of Saco*, 419 A.2d 1013 (Me. 1980). The court also has held that a merger clause which refers to lots with “continuous frontage” does not require the merger of a back lot which is landlocked with an adjoining lot or the merger of adjoining lots which “front” on different streets. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. See also, *John B. DiSanto and Sons, Inc. v. City of Portland*, 2004 ME 60, 848 A.2d 618, where the court upheld the board of appeals’ interpretation of the phrase “separate and distinct ownership” as meaning continuously held under separate and distinct ownership from the adjacent lots. For a case interpreting conflicting lot merger clauses in a town wide and shoreland zoning ordinances, see *Logan v. City of Biddeford*, 2006 ME 102, 905 A.2d 293.

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

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

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

The authority to divide an existing legally nonconforming lot is more likely to be addressed in the applicable ordinance. As a general rule, ordinances prohibit an action that makes an existing legally nonconforming situation more nonconforming. A person who has an existing “grandfathered” lot might cause that lot to lose its grandfathered status and become an illegal lot if he/she attempts to convey any portion of it, particularly if it is a developed lot. *Viles v. Town of Embden*, 2006 ME 107, 905 A.2d 298. Often a minimum lot size requirement is triggered by a proposal to build on a lot rather than by the creation of a lot. A lot which is vacant might be legal at any size under the terms of the applicable town ordinance. If the owner divides and conveys part of the lot and then seeks a permit to build on the portion of the lot that he retained, that portion would not qualify as a grandfathered, legally nonconforming lot because it was not a lot of record when the town’s ordinance took

effect. Therefore if the lot doesn't meet the minimum lot size requirement for the building that he plans to construct, he probably will be unable to get approval. Since the lot is undersized because of his action, he probably will not qualify for a variance either. A person proposing such a division should consider not only whether the division itself is legal but whether the division will limit the legal right to develop the lots at a later date.

### **Functional Division**

Where a single parcel of land had been developed with a number of buildings prior to the effective date of the 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.

### **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.

## **Lots Divided by Zone Boundary**

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

## **Definition of Dwelling Unit**

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

home”); and *Adams v. Town of Brunswick*, 2010 ME 7, 987 A.2d 502 (analysis of terms “household,” “dwelling unit,” and “boarding house”).

## **Camper Trailers**

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

## **Definition of Lot**

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

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

## **Conflict Between Ordinances**

Where a town wide zoning ordinance prohibited a particular expansion of a nonconforming use but a separate shoreland zoning ordinance permitted it, the court applied the section of the ordinance which governed conflicts between ordinances and ruled that the expansion

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

### **Road Frontage; Back Lots**

Where a town ordinance defined “frontage” as the horizontal distance between the side lot lines as measured along the front lot line, the court held that an interior road which passes through the center of the lot cannot be used to satisfy “road frontage” requirements. *Morton v. Schneider*, 612 A.2d 1285 (Me. 1992). See also *Morse v. City of Biddeford*, AP-01-061 (Me. Super. Ct., York Cty., May 10, 2002) (case involving disputed right to use the road in question) and *Fitanides v. City of Saco*, 2004 ME 32, 843 A.2d 8. For a case interpreting the requirements of a back lot development ordinance, see *Merrill v. Town of Durham*, 2007 ME 50, 918 A.2d 1203.

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

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

For a case involving measurement of the slope of the land within the shoreland zone, see *Griffin v. Town of Dedham*, 2002 ME 105, 799 A.2d 1239. *Rockland Plaza Realty v. City of Rockland*, 2001 ME 81, 772 A.2d 256, is a case in which the Maine Supreme Court analyzed ordinance provisions related to building height and percentage of lot covered by structures. *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644, provides some guidance regarding taking measurements in connection with the expansion of a nonconforming structure. Regarding expansions toward the water and the point at which the measurement of “toward the water” begins, see *Fielder v. Town of Raymond*, AP-01-16 (Me. Super. Ct., Cum. Cty., October 4, 2001), where the court found that it starts from “the linear setback boundary, not from the structure itself.”

## **Decks**

A deck which is attached to a home becomes “an extension and integral part of the principal structure” and therefore must comply with any setback requirements applicable to principal structures. *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). The court also has held that a detached deck constitutes a structure which is subject to applicable setback requirements. *Inhabitants of Town of Boothbay Harbor v. Russell*, 410 A.2d 554 (Me. 1980). In the case of *Town of Poland v. Brown*, CV-97-227 (Me. Super. Ct., Andro. Cty., Feb. 11, 1999), a landowner attempted to claim that an illegal deck was not a structure by putting wheels under it and registering it as a trailer while it was still in place on the ground with lattice skirting and outdoor furniture. The court found that “a deck by any other name is still a deck.”

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

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

## Accessory Use or Structure

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

## Home Occupations

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

## Commercial and Industrial Uses

For several Maine Supreme Court cases analyzing whether a use or structure was “commercial,” see *Beckley v. Town of Windham*, 683 A.2d 774 (Me. 1996) (holding that an office/maintenance building which was proposed as part of a boat rental facility was a commercial structure), *Bushey v. Town of China*, 645 A.2d 615 (Me. 1994) (dog kennel as commercial use), and *Silsby v. Belch*, 2008 ME 104, 452 A.2d 218 (holding that an apartment building was a residential use rather than a commercial use). See also, *Your Home, Inc. v. City of Portland*, 432 A.2d 1250 (Me. 1981). See, *C.N. Brown Co., Inc. v. Town of Kennebunk*, 644 A.2d 1050 (Me. 1994), for a case interpreting whether a gasoline filling station constituted a “retail store” as defined in the ordinance. See *Isis Development, LLC v. Town of Wells*, 2003 ME 149, 836 A.2d 1285, for an analysis of whether a self storage business constituted “warehousing” or a “service” business. See *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, for a discussion of what constitutes “light industrial” and “manufacturing.”

## Docks; Related Easements

When a project involves a dock or easement where a number of people hold shared rights to use the area and are not in agreement, the board may find some of the following court decisions helpful. The cases involve the right to apply for construction of a dock, the right to use a dock, the standards of review applicable to dock applications, and the excessive use (“overburdening”) of easement rights: *Stewart v. Town of Sedgwick*, 2002 ME 81, 797 A.2d 27; *Britton v. Department of Conservation*, 2009 ME 60, 974 A.2d 303; *Lentine v. Town of St. George*, 599 A.2d 76 (Me. 1991); *Uliano v. Board of Environmental Protection*, 2009 ME 89, 977 A.2d 400; *Twomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563; *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91 (Me. 1995); *Lamson v. Cote*, 2001 ME 109, 775 A.2d 1134; *Uliano v. Board of Environmental Protection*, 2005 ME 88, 876 A.2d 16; *Lakeside at Pleasant Mountain Condominium Association v. Town of Bridgton*, 2009 ME 64, 974 A.2d 893; *Murch v. Nash*, 2004 ME 139, 861 A.2d 645; *Chase v. Eastman*, 563 A.2d 1099 (Me. 1989); *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996); *Kroeger v. Department of Environmental Protection*, 2005 ME 50, 870 A.2d 566; *Farrington’s Owners’ Association v. Conway Lake Resorts, Inc.*, 2005 ME 93, 878 A.2d 504; *Hannum v. Board of Environmental Protection*, 2006 ME 51, 898 A.2d 392; *Badger v. Hill*, 404 A.2d 222 (Me. 1979); *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993).

## **Pond**

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

## **Quarrying; Rock Crushing; Mineral Extraction; Gravel Pits**

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

## **Meaning of “Permitted Use” or “Allowed Use” in the Context of Nonconforming Uses**

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

## **Appendices**

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