

Maine
Municipal
Association

Manual for Local Land Use Appeals Board

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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.