Maine Municipal Association

Manual for Local Planning Boards: A Legal Perspective

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CHAPTER 2 – The Decision-Making Process

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

Forms

An important first step in establishing good decision-making procedures is the development of good application forms. The forms should let the applicant know what information the board wants and should require the applicant to sign the form once completed. Sample forms are included in Appendix 2. Others may be available from the regional planning commission or council of governments serving the area or from neighboring communities who have developed good systems of their own. Before using sample or borrowed forms, however, the board must review them carefully to be sure that they will fit the board's needs and be consistent with the town or city ordinance which governs the application. Application forms must be consistent with the requirements of the ordinance which governs the project. Application forms do not normally require the approval of the legislative body. The board generally has implicit authority to develop and use forms.

Bylaws/Rules of Procedure

In the absence of a local ordinance or charter provision to the contrary, any administrative board, like a planning board, can (and should) adopt written bylaws to govern non-substantive "housekeeping" matters. Such bylaws generally do not need to be approved by the legislative body. *In Re Maine Clean Fuels, Inc.,* 310 A.2d 736 (Me. 1973); *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). This is because bylaws of this type are not the same as an ordinance. Examples of the kinds of things covered in bylaws are the election of officers, the time and place of meetings, how meetings are called and advertised, agenda items, and the rules of procedure that the board will use to run its regular meetings and public hearings, where not otherwise addressed in a State law, local ordinance or charter. Issues such as the number of members needed to constitute a quorum, the number of votes needed to approve a motion, the number of absences allowed before a position can be declared vacant, and the deadline for filing an appeal generally must be part of an ordinance or charter adopted by the legislative body rather than merely in bylaws approved by the board, unless the board's bylaws are simply stating a rule that already exists by virtue of a local or State law. 1 M.R.S.A. § 71. Sample bylaws and hearing procedures are included in Appendix 2. In adopting bylaws, the board should be careful to avoid conflicts with a local ordinance, charter, or State statute, such as the Maine Freedom of Access Act (1 M.R.S.A.

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

A board created prior to 1971 should avoid conflicts between its bylaws and the old planning board statute (30 M.R.S.A. § 4952) (see Appendix 1 for a copy). Even though bylaws do not need the approval of the legislative body in most cases, the board may want to submit them for approval to avoid arguments that any portion of the bylaws exceeds the board's authority. In the absence of written bylaws, or where written bylaws do not address an issue, the board is free to fashion its own procedures, and the courts will defer to the board, as long as the procedure is fair and does not conflict with State, federal or local law. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987).

Jurisdiction of the Board/Other Assignments

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

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

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

Standing to Apply

If the ordinance or statute under which an application for a permit or other approval is being submitted does not state who has a sufficient legal interest in the property in question (i.e., "standing") to apply for approval to conduct the project, the Maine Supreme Court has ruled that the applicant must be a person who has some "right, title, or interest" in the property. *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974); *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983). This could include a property deed, a lease, a written option or contract to purchase the property. However, whether these documents/interests are sufficient for the purposes of conferring standing to apply for a permit to conduct a particular use will depend on the language of the document/deeded interest. The document/deed must give the applicant a "legally cognizable expectation" of having the power to use the property in the ways that would be authorized by the permit if approved. *Murray v. Town of Lincolnville, supra.* For example, where a person who had an easement for ingress and egress to a lake did not have a right to build and use a dock by virtue of the language of that easement, that person lacked standing to apply for a permit. *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). See also, *Badger v. Hill*, 404 A.2d 222 (Me. 1979), and *Picker v. State of Maine Department of Environmental Protection*, AP-01-75 (Me. Super. Ct., Kenn. Cty., April 6, 2002) (restrictive covenant didn't deprive landowner of standing to apply for permit and prove that he could conduct the proposed use within the restricted areas without violating the deed covenant). A title dispute will not automatically deprive a person of standing to apply for a permit. *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). Where property is jointly owned, all owners need not be parties to the application in order for the "standing" test to be met. *Losick v. Binda*, 130 A.537 (NJ 1925). If an applicant relies on a written option to purchase as the basis for standing to apply and then allows the option to lapse, such a lapse would allow the board to find that the applicant no longer has standing. *Madore v. Maine Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157. The board should reject an application if it determines that the applicant does not have standing to apply. The burden is on the applicant to present written evidence sufficient to satisfy the board. If the person filing the application is acting as the authorized agent of the owner, that person should give the board a written letter of authorization signed by the owner.

This standing test governs people who are seeking approval of an application for a permit, conditional use, variance or other land use approval from a board or official who has the initial authority to grant such a request. The courts have established a different "standing" test for people who want to appeal such a decision. That test is discussed in Chapter 3 of this manual.

Freedom of Access Act (Right to Know Law)

General

Under the Freedom of Access Act (FOAA) (also known as the "Right to Know Law") (1 M.R.S.A. § 401 et seq.), the public has a right to be present any time the board or a subcommittee of the board (comprised of three or more members) meets, even if the meeting is just a "workshop" or a "strategy meeting." Any meeting of a majority of the full board at which the members will discuss official business or vote must be preceded by public notice. The same is true for subcommittees of the board comprised of three or more members; some attorneys are of the opinion that a subcommittee of any size is governed by the public notice requirements if the body which has designated the subcommittee is itself comprised of three or more members. *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). This law also gives the public the right to tape, film, take notes, or otherwise make a record of the meeting without first seeking permission, as long as it is done in a non-disruptive manner. It does not guarantee the public a right to speak. The right to speak generally is guaranteed only where a meeting has been advertised as a public hearing, absent a local ordinance or bylaw to the contrary.

Notice of Meetings

The Freedom of Access Act itself does not require that a meeting agenda be posted and does not specify the form or amount of the notice which must be used to publicize the meeting. The law does require notice of non-emergency meetings to be given in a manner reasonably calculated to inform the public far enough in advance of the meeting to allow the public to make plans to attend. In some communities, this may mean newspaper notice of some sort and in others posting notice around town may be enough. Giving notice of regular meetings and special meetings about a week before the meeting is advisable. If the meeting is an emergency meeting, the Freedom of Access Act requires the board to notify a media representative using the same or faster means as are used to notify board members, rather than giving notice to the public as described above. If no media representative attends, that doesn't make the meeting illegal. Be sure to document how, when and who from the media was notified. If the meeting in question is a regular board meeting and notice of the board's regular meeting schedule was given in the annual town report, such notice might be enough for the purposes of the Freedom of Access Act in some towns. However, it probably would be safer to post a notice of regular meetings in a readily-accessible public place, such as the town office public bulletin board or the Post Office or a local store, and leave it up indefinitely. Local ordinance or charter provisions may impose more specific and more stringent notice requirements.

Board Member Discussions/Email

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

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

Executive Sessions

One exception to the rule that meetings are open to the public is where the board wants to consult with its lawyer in executive session "concerning the legal rights and duties of the (board), pending or contemplated litigation, settlement offers, and matters where (the attorney/client privilege between the board and its lawyer would be jeopardized) or where premature public knowledge would clearly place the municipality at a substantial disadvantage." To fall within this exception, the board's attorney should be at the meeting, either in person or by telephone conference call. Section 405 of the Freedom of Access Act only allows the board to conduct a discussion with its attorney in an executive session and only if the board (1) takes a vote to go into executive session during a public meeting which was preceded by public notice, (2) follows the procedures in Section 405 for making the motion and taking that vote, and (3) does not make any final decisions in executive session. In *Underwood v. City of Presque Isle*, 1998 ME 166, 715 A.2d 148, the court found that the

planning board had conducted impermissible discussions about the merits of the land use proposal which it was reviewing while in executive session with its attorney to receive advice regarding the board's legal rights and duties. The court noted that "it may be difficult at times for a board convening in executive session (with its attorney) to determine when its permissible consultation with counsel has ended and impermissible deliberations on the merits of a matter have begun. We cannot offer any bright line to eliminate that difficulty. We can, however, remind public boards and agencies of the Legislature's declaration in the (Freedom of Access Act) that 'their deliberations be conducted openly,' and that the (law) 'be liberally construed...to promote its underlying purposes.' Consistent with these declarations, any statutory exceptions to the requirement of public deliberations must be narrowly construed. The mere presence of an attorney cannot be used to circumvent the (Freedom of Access Act's) open meeting requirement." Section 405 authorizes other subject matter to be discussed in an executive session, but those other subjects generally are not relevant to planning boards.

Common Violations

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

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

Site Visits

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

AP-00-023 (Me. Super. Ct., Cum. Cty., Dec. 21, 2000). Many private municipal attorneys advise the municipal boards that they represent that site visits conducted by less than a majority of the board should never occur and insist that the board only conduct site visits as a public meeting of a majority of the board. See generally, *Fitanides v. City of Saco*, 684 A.2d 421 (Me. 1996).

During a site visit which is conducted by less than a majority of the board and not as part of a public meeting recorded in board minutes, the individual board members have an obligation not to discuss substantive issues about the site or the application with each other, the applicant, or anyone else. Nor should the applicant or anyone else be conducting demonstrations to prove a point which might be in controversy about the application. Such discussions or demonstrations would constitute illegal ex parte communications and would cause due process problems for the parties not present. The individual board members also need to be sure to note for the written record at the next board meeting the fact that a site visit was conducted and what information the visit generated that might affect the visiting board member's vote on the application. If a site visit is conducted by less than a majority of the full board after the board has closed the record to further public comment, the information gathered during the visit cannot be used by the board unless it reopens the record and allows public comment. *Adams, supra.* See generally, *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148. It is crucial that the ultimate findings and conclusions prepared by the board in making its decision address the evidence from the site visit and that the findings in general are sufficiently detailed to allow a court to determine how the board evaluated all the evidence. *In Re: Villeneuve*, 709 A.2d 1067 (Vt. 1998).

Even if the board members do all of this, an applicant or someone opposing the project still could try to challenge a site visit not conducted as a board as a violation of his/her due process rights if he/she was not at the site to observe whether there were any improper *ex parte* communications. To avoid these due process challenges, the board may want to require that all site visits be done as a board with public notice under the Freedom of Access Act. If a board member is unable to attend a site visit, the board doesn't need to reschedule it. The board can publicly advise an absent member of what was observed during the site visit at the next board meeting and provide an opportunity for rebuttal by the applicant or some other interested person who disagrees with the board's description of the site.

Sometimes a board decides to conduct a site visit and sets a date for the site visit while it is at a public meeting on the application which will be the subject of the site visit. It arguably is enough for the purpose of giving notice under the FOAA for the board to announce the date, time and place of the site visit without also providing additional public notice by some other means, if the announcement is made at a meeting which itself complied with FOAA notice requirements. However, to be safe, the board also should provide notice to the public

in the manner usually followed, for the benefit of the people who were not at the meeting where the site visit is announced.

Site visits conducted as a board meeting by a majority of the board essentially are using that private property as a public meeting space. As such, the protections afforded by the Maine Tort Claims Act (14 M.R.S.A. § 8101 et seq.) should protect the municipality as well as the landowner, provided the owner has not deliberately created a hazardous situation. If a site visit will occur on certain types of commercial or industrial property that present greater hazards to visitors, it may be wise for the owner and/or board to assign staff to serve as safety monitors and steer board members and members of the public away from dangerous situations.

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

Additional Information

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

Board Records

All board records are public records under the FOAA, unless a particular record is made confidential by a specific statute or is governed by a court order protecting it from public inspection. 1 M.R.S.A. § 402. This is true regardless of the form in which they are maintained (paper records, audio or video tapes, CDs, electronic files, email) and regardless of whether they are still in "draft" form. Any member of the general public has a right to inspect and copy public records of the board at a time which is mutually convenient. If a person requests a copy of a public record, the municipality may charge a reasonable fee. The law also establishes guidelines under which a municipality may charge for the time involved in researching and retrieving records. 1 M.R.S.A. § 408-A. For more information regarding new requirements governing how to respond to requests for public information, see 1 M.R.S.A. § § 408-A and 413 and MMA's "Right to Know Law" information packet (available online at www.memun.org).

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

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

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

Conflict of Interest; Bias; Family Relationships

Financial Conflict of Interest

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

- ***Statutory Test.*** There are several tests of what constitutes a conflict of interest. One is established by statute in 30-A M.R.S.A. § 2605. The statutory test applies only to a board member who (1) is an "officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity" which is making the application to the board or which will be affected by the board's decision and (2) is "directly or

indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity." If a board member falls into one of the relationships listed in category 1 but does not have the 10% interest covered by category 2, then that board member does not have a financial conflict of interest as defined in § 2605.

- ***Case Law Test.*** For a board member whose conflict of interest is not governed by Title 30-A (because that board member does not fall within both categories discussed in the preceding paragraph), there is a common law (case law) standard defining activity which may constitute a conflict of interest. That standard is "whether the town official, by reason of his interest, is placed in a situation of temptation to serve his own personal interest to the prejudice of the interests of those for whom the law authorized and required him to act..." *Lesieur v. Inhabitants of Rumford*, 113 Me. 317 (1915), as cited in *Tuscan v. Smith*, 130 Me. 36 (1931).
- ***Examples.*** Under the statutory test, if a board member were an employee of a company which had a subdivision application before the board, there would be no legal conflict of interest requiring that board member to abstain unless he or she also had a 10% stock or ownership interest in that company. An example of an indirect conflict of interest controlled by the statute is where a board member owns a company which owns 10% of the stock of a private corporation which is making an application to the board. Under the case law test, a board member who is also the applicant would have a conflict of interest. A court probably would find that a board member also had a conflict of interest under that test where the board member is a real estate agent trying to sell the property which is the subject of the application and his or her commission on the sale hinges on whether the board grants approval of the proposed use. Likewise, if a board member is a secured creditor of the applicant whose security interest will be affected by the board's decision on the application or an abutting property owner whose property value will be affected by the board's action, a court might find that the board member has a common law conflict of interest. (Regarding a board member who is an abutter and whether he/she must abstain, see two articles from the May 2007 and June 2007 *Maine Townsman* magazine ("Ethics for Quasi-Judicial Boards" by Douglas Rooks and "Letter to the Editor" by Fred Snow), available on MMA's website at www.memun.org. If someone from a board member's family who lives with that board member and contributes to household expenses is employed by the person applying to the board for a permit, a court might find that a common law conflict of interest exists if approval or denial of the application will directly affect that family member's job. See *Hughes v. Black*, 156 Me. 69, 160 A.2d 113 (1960).
- ***Failure to Abstain.*** If a board member who has a legal conflict of interest fails to abstain from the discussion and from the vote and fails to note the nature of his or her interest in the record of the meeting, a court could declare the board's vote void if someone challenged it. (This abstention and reason must be permanently recorded with the town or city clerk.) But see *Nestle Waters North America, Inc. v. Town of Fryeburg*, 2009 ME 30,

967 A.2d 702 (court refused to invalidate a 4-1 vote in 2005 in which the board chair had participated, even though the board later forced the recusal of the chair in connection with a 2007 vote).

- ***Appearance of Impropriety.*** Even if no legal conflict of interest exists, a board member would be well advised to avoid even the appearance of a conflict by abstaining from the board's discussion and vote. This practice will help maintain the public's confidence in the board's work. *Aldom v. Roseland*, 42 NJ Super. 495, 127 A.2d 190 (1956); 30-A M.R.S.A. § 2605. However, if abstaining where not legally required would deprive the board of a quorum, then abstaining is not recommended.
- ***Defined by Ordinance or Charter; Authority of Board to Determine.*** A municipality may define what constitutes a conflict of interest by local charter or ordinance. Even without such an ordinance provision, the courts have recognized that a board has general authority to determine whether one of its members has a legal conflict. Such a decision can be made either at the request of the affected board member or on the initiative of the rest of the board.
- ***Former Board Member Representing Clients Before the Board.*** Another conflict issue addressed by § 2605 arises in the situation where a board member who leaves the board attempts to represent a private client before the board. If the board member is trying to represent the client on a matter in which he or she had prior involvement as a board member, the statute establishes certain waiting periods before this representation would be legal. If the matter was completed at least one year before the board member left office, then there is a one year waiting period from the time the board member left. If the matter was still pending at the time the board member left and within one year of leaving, then the board member is absolutely prohibited from representing a client on that matter.
- ***Current Board Member Representing Clients Before the Board.*** Title 30-A M.R.S.A. § 2605 requires that a member of a board refrain from otherwise attempting to influence a decision in which that official has an interest. While it would not be reasonable to interpret this law as prohibiting a board member from abstaining and stepping down as a board member to present his/her own application to the board, it probably does prohibit a board member (including alternate members) from representing another applicant who is seeking the board's approval or some other party to the proceeding.

Bias

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

- ***Bias Based on Blood/Marital Relation to Applicant or Other Party.*** Title 1 M.R.S.A. § 71 (6) states that a board member must disqualify himself or herself if a situation requires that board member to be disinterested or indifferent and the board member must make a quasi-judicial decision which involves a person to whom the board member is

related by blood or marriage within the 6th degree (parents, grandparents, great-grandparents, great-great grandparents, brothers, sisters, children, grandchildren, great-grandchildren, aunts, uncles, great aunts/uncles, great-grand aunts/uncles, first cousins, first cousins once removed, first cousins twice removed, second cousins, nephews, nieces, grandnephews/nieces, great grandnephews/nieces). (See chart in Appendix 2)

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

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

  The Maine Supreme Court has held that it is legally permissible and not evidence of bias for a board member to review materials submitted by the parties in advance of the board's meeting and prepare a memo or an outline of issues and potential findings in order to assist the board in consideration of matters that might arise at the board's meeting. *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.

- ***Local Ordinance Definition of Bias; Authority of Board to Decide.*** As with conflict of interest, a municipality may attempt to define what constitutes bias through a provision in a local ordinance. In the absence of an ordinance, the board may decide.

How the Affected Board Member Should Handle a Conflict or Bias

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

If a board member does not believe that he or she has a conflict or bias but other members of the board disagree, the board may vote on that issue; the member with the alleged conflict or bias must abstain. *State Taxpayers Opposed to Pollution v. Bucksport Zoning Board of Appeals (and AES-Harriman Cove, Inc. v. Town of Bucksport)*, CV-91-217 and 92-41 (Me. Super. Ct., Han. Cty., January 21, 1993). If the board finds that a conflict or bias does exist

based on the facts, then the board may order the conflicted or biased board member not to participate as a member. If a board member thinks that he or she may have a conflict or bias which would legally disqualify him or her but isn't sure, that board member may ask the rest of the board to consider the facts and vote on the matter. *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577.

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

Conducting the Meeting

Scheduling a Meeting; Notice Requirements; Agenda

When the board receives an application, the board chairperson should set up a public meeting at which the applicant can present his or her application and discuss it with the board. If the board does not meet on a regular basis or if the board's next regular meeting will not fall within a specific decision-making deadline established in the board's bylaws or in the ordinance or statute which requires the board to review the project, then the chairperson should arrange a special meeting within a reasonable time. Notice of the meeting time and place should be given to the applicant and to any other people (such as abutters) whom the board may be required to notify by the relevant statute, ordinance or bylaws of the board. For example, the Municipal Subdivision Law requires that abutters receive notice when a subdivision application is filed with the municipality. 30-A M.R.S.A. § 4403. The board also should give reasonable notice to the public and press, as required by the Freedom of Access Act or relevant local ordinance, charter provisions, or other State law.

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

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

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

There is no statute requiring that notice be given to the municipal code enforcement officer. Public drinking water suppliers must receive notice that an application has been filed in the following situations: (1) a junkyard, automobile graveyard, or auto recycling business which is located within a source water protection area of a particular public drinking water supplier as shown on maps prepared by the Department of Health and Human Services (DHHS) (30-A M.R.S.A. § 3754); (2) an expansion of a structure using subsurface wastewater disposal where the lot is within a mapped drinking water source protection area (30-A M.R.S.A. § 4211(3)(B)); (3) a proposed land use project which is within a mapped source water protection area, is reviewed by the planning board, and notice to abutters is required as part of that review (30-A M.R.S.A. § 4358-A); and (4) a subdivision which is within a mapped source water protection area (30-A M.R.S.A. § 4403(3)(A)). A sample notice form is included in Appendix 2 of this manual. Contact the Public Drinking Water Program at DHHS for more information about their mapping program and what constitutes a "public drinking water supply" (287-2070) or go to www.medwp.com.

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

No State law requires that an agenda be part of any posted or published notice. Whether the agenda must be included in the notice will depend on any applicable local requirements. In any case, it is recommended that a board use a printed agenda to govern its meetings and that a category called "other business" be included. Where a local ordinance required published notice to include an agenda, one judge has held that the agenda and notice cannot be misleading and therefore the board could not legally entertain an application that was not listed with others on the agenda. *Reardon v. Inhabitants of Town of Machias*, AP-99-014 (Me. Super. Ct., Wash. Cty., July 25, 2000).

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

Attendance by Applicant; Applicant's Special Needs

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

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

Preliminary Business

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

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

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

- ***Use of Alternate Members.*** If alternate board member positions have been created by the legislative body, and if those positions have been filled, then the chairperson may designate an alternate to take the place of a regular voting member at a particular meeting when a regular member is absent or disqualified due to a conflict of interest or otherwise. (See related discussion later in this chapter entitled "Participation by Board Members Who Miss Meetings.") An alternate who has not been designated to take the place of a regular member at a particular meeting is not legally a board member for the purposes of that meeting; the alternate is really no different than a member of the public, since he/she has no right to make motions, second them, or vote. It is safest from a due process standpoint to allow alternate members to make comments or ask questions only to the extent that members of the public are allowed to do this. Neither alternates nor members of the public should be allowed to make comments once the board has closed its record and begun its deliberations and decision-making process, unless the board is prepared to reopen its record and allow both comments and rebuttal. By treating alternates as members of the public for the purposes of their ability to participate in the board's discussion, the board ensures that only voting board members are involved in making the findings and conclusions that are legally required for a decision on an application and will also make it easier for a judge to determine which board members' comments and votes were legally relevant for the purposes of the final decision if it is appealed.
- ***Required Notices Given.*** The chairperson should indicate whether required notices of the meeting have been given to the press, abutters, or anyone else.
- ***Summarize Application.*** If a quorum exists, then the chairperson should summarize for those present the nature of the application and any documents submitted in support of or in opposition to the application.
- ***Jurisdiction.*** He or she also should indicate to the board which provisions of the applicable ordinance or statute give the board jurisdiction over the application.
- ***Conflict of Interest or Bias.*** The chairperson should advise the board members that if any of them has a direct or indirect pecuniary interest in the subject matter of the application, that member must make his or her interest known in the minutes of the meeting and must abstain from participating in any discussion and the vote taken in relation to that application. Otherwise, if someone challenged the board's decision in court, the court could void the decision. 30-A M.R.S.A. § 2605. The same is true regarding bias. (See earlier discussion in this chapter.) If alternate or associate board

member positions have been established by the legislative body and have been filled, the chair should designate an alternate or associate to sit in place of a disqualified member.

- ***Standing.*** If the board decides that it does have authority to review the application, it also must decide whether the applicant has "standing" to apply. (See related discussion in this chapter and in Chapter 3.)
- ***Complete Application Submitted; Fees.*** The board must also determine as a preliminary matter whether the basic application form has been completed properly or whether there is information missing; this is not a substantive review of the information provided to determine whether the applicant has satisfied all the ordinance requirements. As part of this process, the board should determine whether required application fees have been paid. *Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., Apr. 8, 1998). A board cannot impose additional fees to cover its costs after an application is filed, absent clear ordinance authority to the contrary. *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202.

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

Procedure

At this point the chairperson should explain the rules of procedure which the board must follow during its meeting and the extent to which public comments and questions will be allowed. The chairperson, using the procedures adopted by the board or by the town, regulates the conduct of the meeting—recognizing members of the board and audience who want to speak, entertaining motions, ruling on the relevance of questions asked, and otherwise keeping the meeting in order if tempers start to flare, even to the extent of having an unruly person removed by a law enforcement officer. Sample procedures are included in Appendix 2. The Maine Supreme Court has recognized that boards generally have inherent authority to adopt their own rules of procedure. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). Board procedures do not need to provide an applicant with a full adjudicatory hearing complete with direct cross examination and rebuttals in order to satisfy due process requirements. *Fichter v. Board of Environmental Protection*, 604 A.2d 433 (Me. 1992). The rules should address the effect of a tie vote. *Stevenson v. Town of Kennebunk*, 2007 ME 55, 930 A.2d 1046. Unless an ordinance or the board's rules say otherwise, the chairperson's right to vote is not limited to breaking ties.

The Maine Supreme Court has upheld decisions made by planning boards following a vote to reconsider an earlier decision even though the board had not adopted rules of procedure

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

Public Participation

- ***General.*** Unless a meeting has been advertised as a "public hearing," members of the general public may attend and listen but have no statutory right to ask questions or offer comments under the Freedom of Access Act. If the board advertises a meeting as a public hearing, the general public must be given a right to speak. This means residents and non-residents, taxpayers and non-taxpayers. The board may adopt rules that give preference to residents and non-resident property owners, both in the order of presentations and the amount of time allotted. The Freedom of Access Act also allows the public to take notes, tape record, film or make similar records of the meeting as long as it is not disruptive of the proceedings. No permission is needed from the board or other audience members for a person to do those things. The board may have bylaws or there may be a local ordinance requiring that the public be given at least a limited opportunity to speak at any planning board meeting. If there is no express provision requiring public comment, it still may be to the board's benefit to allow a reasonable amount of relevant comment and questions from the public, despite the fact that a particular meeting has not been advertised as a "public hearing." Besides being a good public relations strategy, it will help ensure that the board has the information it needs to make a sound decision, provided the applicant is given adequate opportunity to address this information. Local ordinances often require special notice to abutters and sometimes indicate how notice to the general public must be given. Several State laws may require notice to public drinking water suppliers for certain types of projects. (See the earlier discussion in this chapter.)
- ***Sequence of Presentations.*** If the board's bylaws do not indicate the sequence in which the chairperson should recognize speakers, the chairperson could use the following as a guide:

  a. presentation by applicant and his or her attorney and witnesses, without interruption
  b. questions through the chairperson to the applicant by board members and people who will be directly affected by the project (e.g., abutters) and requests for more detailed information on the evidence presented by the applicant

c. presentations by abutters or others who will be directly affected by the project and their attorneys and witnesses
d. questions by the applicant and board members through the chairperson to the people directly affected and the witnesses who made presentations
e. rebuttal statements by any of the people who testified previously
f. comments or questions by other interested people in the audience

Once everyone has had an opportunity to be heard to the extent allowed by the board's procedures, the chairperson should close the hearing. If more time is needed, the board may vote to extend the hearing to a later date. See sample procedures in Appendix 2.

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

Although the board should avoid unreasonable delays in making a decision and should not "string the applicant along," the board should not feel pressured into making a decision at the first meeting. This is especially true where the meeting has been very emotional because of a controversial proposal. The board should take time to visit the site of the proposed project where that would be helpful. (See discussion of site visits in this chapter.) The board should consider seeking technical advice from its regional planning commission, from a State agency (such as the Department of Environmental Protection), or other experts that the board is authorized to consult, and legal advice from the municipality's lawyer or the legal department at Maine Municipal Association, particularly if the applicant or another party is represented by a lawyer. If the municipality is unwilling to budget money for the board to use to hire its own consultants or lawyer, it may be willing to adopt an ordinance provision that requires an applicant to set aside an amount of money in escrow which can be used by the board to hire consultants to help the board review the application. A sample ordinance provision appears in Appendix 5 and Appendix 6. See *Nestle Waters North America, Inc. v. Town of Fryeburg*, 2009 ME 30, 967 A.2d 702, for a case in which the court acknowledged reliance by the planning board on a vehicle traffic peer review study paid for by the town. See *Duffy v. Town of Berwick*, 2013 ME 105, 82 A. 3d 148 for a case involving peer review related to air emissions paid for by the applicant and issues related to the selection of the company performing the review. If the board anticipates that an application will be controversial and that the board's decision ultimately will be challenged in court, it should consider having its professional technical and legal advisors present at some or all of the meetings at which the application is discussed. The board must be careful to introduce into the record any information provided by its advisors, whether the information is provided orally or in writing, especially if the information is provided outside the public board meeting. See *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202, and *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200, for a discussion of the utilization by a board of legal advice provided by its attorney.

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

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

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

Minutes and Record of the Meeting

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

It is very important that the board's secretary take reasonably complete and accurate minutes of meetings at which the board is reviewing and discussing an application, including what was said and by whom and any agreements made regarding procedures or other issues at the board meeting. The minutes, any documents submitted by the applicant or others (such as the application, a report from a professional engineer, a letter from an abutter, plans, maps, photographs or diagrams), and the board's findings of fact and conclusions regarding whether the applicant has complied with the statute or ordinance in question will comprise the "record" for that case. Any information, in whatever form it is presented to the board as a basis for the board's decision, must be entered into the official record. Judges find it easier

to determine the nature and order of documents entered into the board's record when the board has marked those documents (for example, Applicant's Exhibit #1). Tape recording the meeting is not legally required. In taping a meeting (either audio tape or video tape), it is important to use high quality equipment and to make sure that anyone speaking is close enough to a microphone to pick up his/her statements on the tape. A tape which is full of inaudible statements is of no use to the board or a reviewing court. *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916. There is no law requiring that board minutes contain a verbatim account of the entire meeting. The amount of detail included in the minutes by the board's secretary will be dictated in part by the desires of a majority of the board and in part by the complexity of the application being reviewed and how likely it is that the board's decision will be appealed. It may be advisable to seek guidance from the attorney who will defend the board's decision in court if an appeal seems probable. See Appendix 3 for sample minutes.

Making the Decision

Checklist for Reviewing Evidence

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

a. Does the board still believe that it has authority to make a decision on the application under the ordinance or statute?
b. What does the ordinance/statute require the applicant to prove?
c. Does the ordinance/statute prohibit or limit the type of use being proposed?
d. What factors must the board consider under the ordinance/statute in deciding whether to approve the application?
e. Has the applicant met his or her burden of proof, i.e., has the applicant presented all the evidence which the board needs to determine whether the project will comply with every applicable requirement of the ordinance/statute? Is it outweighed by conflicting evidence? Is it credible? Is that evidence substantial? Is it relevant to the ordinance requirements?
f. To what extent does the ordinance/statute authorize the board to impose conditions on its approval?

Basis for the Board's Decision

- ***General Rule.*** Once the board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute. The board should not base its decision on the amount of public opposition or support displayed for the project. Nor

should its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met his or her burden of proof and complied with the provisions of the statute/ordinance. *Bruk v. Town of Georgetown*, 436 A.2d 894 (Me. 1981); *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768; *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. If the board does not believe that the applicant's project meets each of the requirements of the ordinance/statute based on the evidence in the record, the board should deny the application. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). Where a proposed project complies with all of the relevant ordinance requirements, the board must approve the application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994). At least one court has expressly warned board members that they must not "abdicate (their) responsibility, ignore the ordinance and approve an application regardless of whether it meets the conditions of the ordinance or not" and that board members who are "philosophically hostile to zoning should address their concerns to the local and State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance." *Fraser v. Town of Stockton Springs*, CV-88-97 (Me. Super. Ct., Waldo Cty., August 10, 1989).

- ***Ex Parte Communications.*** The board's decision, whether it approves, denies, or conditionally approves an application, must be supported by substantial evidence in the record. Individual board members should not allow themselves to be influenced by information provided to them outside an official board meeting (i.e., an *ex parte* communication) unless they enter that information into the board's record and all parties to the proceeding receive notice of the additional information and are given an opportunity to respond to it. The Maine Supreme Court has observed that if the parties are given a full opportunity to respond to such information, the *ex parte* communication may not be egregious enough to cause a court to overturn the board's decision on due process grounds. *Duffy v. Town of Berwick*, 2013 ME 105, 82 A. 3d 148. See also, *Passadumkeag Mountain Friends v. Board of Environmental Protection*, 2014 ME 116, 102 A. 3d 1181. A board member who is approached by an individual wanting to provide him or her with information outside a public meeting setting should actively discourage the person from doing so and encourage the person to submit the information to the board in writing or through oral testimony at a board meeting. The board member should explain that, by providing information outside the public meeting, the person may be causing constitutional due process problems with the board's process and that the board may not legally be able to consider the information the person is trying to present. Under no circumstances should board members meet with someone representing just one side of an issue outside a public meeting setting. *Mutton Hill Estates, Inc. v. Inhabitants of Town of Oakland*, 468 A.2d 989 (Me. 1983). Board members should not even discuss an application with the code enforcement officer outside a public board meeting in order to avoid due process problems. *White v. Town of*

Hollis, 589 A.2d 46 (Me. 1991). (But see *Maddocks v. Unemployment Insurance Commission*, 2001 ME 60, 768 A.2d 1023, where the court held that a party who was aware of the *ex parte* communication and failed to object during the Commission hearing waived the due process issue on appeal to court.) For additional discussion of this issue, see "Site Visits" and "Board Member Discussions/Email" earlier in this chapter under "Freedom of Access Act."

- ***Substantial Evidence.*** "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The fact that two inconsistent conclusions can be drawn from the recorded evidence related to a specific performance standard does not mean that the board's conclusion regarding that standard is not supported by "substantial evidence." *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1296 (Me. 1985). Where the board denies an application on the basis that the record shows that the "proposed project would have specific adverse consequences in violation of the criteria...for approval," a court will uphold the decision unless the applicant can demonstrate both that the board's findings are unsupported by record evidence and that the record compels contrary findings. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989).
- ***Relevance of Deed Restrictions, Title Disputes, Constitutional Issues, Other Code Violations, and Related Lawsuits.*** The board cannot deny an application because the proposed use would violate a private deed restriction if the use otherwise would be in compliance with the applicable ordinance/statute. *Whiting v. Seavey*, 188 A.2d 276 (Me. 1963); *Our Way Enterprises, Inc. v. Town of Wells*, 535 A.2d 442 (Me. 1988). *Cf., Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). (But see the discussion of "**Standing to Apply**" earlier in this chapter.) The board has no legal authority to resolve boundary or title disputes as part of its decision on an application. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises*, 531 A.2d 1272 (Me. 1987). (See sample language in Appendix 3 which the board can insert into its decision in a case where a title or boundary issue has been raised to make it clear that the board's granting of approval in no way resolves the title or boundary problem.) If the board is presented with credible written expert evidence by both the applicant and an opponent which is in direct conflict and which involves a title/boundary issue, the board probably has three options: (1) tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order); (2) approving the application on the basis that the applicant has provided substantial, relevant and credible evidence and letting the parties pursue the matter further in court; or (3) denying approval on the basis that the board is unable to find that the applicant has met the required burden of proof. The board also cannot resolve constitutional problems with an ordinance in deciding an application. *Cf., Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). But see, *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. The fact that the property involved is already the subject of other code violations would not constitute

a basis for denial, absent language in the ordinance to that effect. *Bauer v. Town of Gorham*, CV-89-278 (Me. Super. Ct., Cum. Cty., Nov. 21, 1989). Nor may the board refuse to act on an application or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*, 663 A.2d 41 (Me. 1995). Even if the board cannot legally resolve some of these issues, if a party to the board's proceedings raises such a challenge, the board should note the challenge and its response in the record of the case so that it is preserved in the event of an appeal.

- ***Overlap with State and Federal Law.*** The planning board may be required by a local ordinance or State law to determine whether any State or federal laws apply to an applicant's project before the board may grant its approval. The board can draw on the expertise of the applicable State or federal agency to help it make this determination. Approval of a State or federal permit does not eliminate the need for the landowner to obtain local approval for his or her project, if required. Where a question exists about whether a project complies with State or federal law, one option for the board is to adopt a condition of approval requiring the applicant to obtain either approval from the State or federal agency or a letter from the agency stating that it has no jurisdiction before commencing work under the local permit/approval. The board's condition should require that proof of the State/federal approval or letter be filed with the municipality.
- ***Expert vs. Non-Expert Testimony; Personal Knowledge of Board Members.*** The board may base its decision on non-expert testimony in the record if it finds that testimony more credible than expert testimony presented on the same issue. *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717 (Me. 1983) (flooding issue); *DeMille v. Town of Cape Elizabeth*, AP-99-45 (Me. Super. Ct., Cum. Cty., December 21, 1999) (traffic safety issue); *Gott and Sons, Inc. v. Town of Lamoine*, CV-11-04 (Me. Super. Ct., Han. Cty., December 5, 2012), citing *Hutz v. Alden*, 2011 ME 27, 12 A. 3d 1174, and *Gorham v. Town of Cape Elizabeth,* 625 A. 2d 898 (Me. 1992) (impact on property values). If two conflicting expert opinions are offered for the record, the board has the option of making its own independent finding of fact. *Cf., Gulick v. Board of Environmental Protection*, 452 A.2d 1202, 1208 (Me. 1982). In the absence of expert testimony, the board may rely on the testimony of anyone personally familiar with the site and conditions surrounding the application and on its own investigations. *American Legion v. Town of Windham*, 502 A.2d 484 (Me. 1985); *Grant's Farm Associates v. Town of Kittery*, 554 A.2d 799 (Me. 1989); *Goldman v. Town of Lovell*, 592 A.2d 165 (Me. 1991). Board members may rely on their own expertise and experience and that of their professional staff, provided that information is formally entered into the record. *Pine Tree Telephone and Telegraph Co. v. Town of Gray*, 631 A.2d 55 (Me. 1993); *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577. See the discussion appearing earlier in this chapter regarding investigations by individual board members.
- ***Staff Interpretations; Role of the Code Enforcement Officer.*** Where a municipal official or staff person whose principal job is to interpret an ordinance offers statements

about the proper interpretation of the ordinance and whether the applicant's evidence was sufficient to comply with the ordinance, the court has said that the opinion of that staff person or official is entitled to some deference. *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990). See also *Philric Associates v. City of South Portland, supra.*

Absent a local charter provision, ordinance or job description to the contrary, the code enforcement officer is not a member of the planning board and has no official role regarding the planning board's proceedings or the custody and care of planning board records. While the code enforcement officer often has valuable information and insights to share with the board, he/she should offer it for the planning board's official record either in written form or through public testimony offered during a public board meeting at the invitation of the board. This will help ensure that no illegal *ex parte* communications occur. *E.g., White v. Town of Hollis*, 589 A.2d 46 (Me. 1991). For more about the duties of the code enforcement officer, see MMA's *Code Enforcement Officer Manual.*

- ***Testimony by Witnesses Who Are Not Physically Present at the Meeting.*** It probably is legal to allow a person to give testimony by speaker phone. However, the board probably could adopt a rule that does not permit such testimony except where all parties to the proceeding have consented. Depending on the nature of the issue on which the hearing is being conducted, it could be important to observe the demeanor of a witness in order to gauge whether he/she is being truthful; obviously that would not be possible with testimony offered by speaker phone. There also could be times where the board might not be certain as to the identity of the person presenting the information. Testimony offered by speaker phone could be challenged on those grounds in a particular case, even if it is allowed and goes unchallenged in most cases. Probably the best approach is for the board to adopt a rule of procedure which prohibits testimony unless it is offered in person at the meeting or in writing and signed by the witness, but allow an exception to this rule where all parties have agreed for the record to permit testimony by some other method (e.g., speaker phone, webcam, etc.).
- ***Participation by Board Members Who Miss Meetings.*** If a board member has not been able to attend every meeting at which the board discussed substantive evidence regarding a particular application, it is arguable that such a board member cannot participate in making the decision on an application because it would violate due process. *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990); *Fitanides v. City of Saco*, 684 A.2d 421 (Me. 1996). One Maine Supreme Court decision, *Green v. Commissioner of Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 2001 ME 86, 776 A.2d 612, is being interpreted by many municipal attorneys as a modification of the "perfect attendance" requirement for board members established in *Pelkey*. The court in *Green* found that "as long as a decision-making officer both familiarizes himself with the evidence sufficient to assure himself that all

statutory criteria have been satisfied and retains the ultimate authority to render the decision, he can properly utilize subordinate officers to gather evidence and make preliminary reports." On the basis of *Green, supra*, *Lemont v. Town of Eliot*, CV-91-577 (Me. Super. Ct., York Cty, November 11, 1992, and *In Re: Villeneuve*, 709 A.2d 1067 (Vt. 1998), many municipal attorneys are advising board members who miss a public hearing or other board meeting at which substantive discussions of an application occur that they may continue to participate in the decision-making process without violating due process if they take the following steps: (1) read hearing and meeting minutes, review any documents or other evidence submitted at those meetings, and listen to/watch any audio or video recordings of those meetings, (2) prepare a written statement describing what the board member did to educate himself/herself about what occurred at the missed meeting, (3) sign the statement (preferably in notarized form), and (4) enter it into the record at the next meeting. (See Appendix 2 for sample affidavit form.) If the applicant and other parties to the proceeding agree that this is adequate, then this should be noted in the record too. Some municipal attorneys advise board members who have missed a substantive meeting that they may not participate without the consent of all parties in order to avoid a due process challenge. If an alternate member sits in place of a regular member at a particular board meeting, it may be advisable to let that alternate continue to sit in connection with that particular application and avoid a challenge to the regular member's participation.

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

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

Reopening the Hearing Process

In at least once case, the court has upheld a board's right to reopen its hearing process to allow an applicant to submit new evidence to clarify a technical issue and modify its plan without allowing additional public comment. The court found that there had been prior extensive hearings that were more than adequate to afford due process. *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202.

Preserving Objections for Appeal

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

Approval and Form of Decision

- ***Majority Vote Rule.*** It is the opinion of the attorneys on the MMA Legal Services staff that, in determining whether a motion has been approved by a majority vote of the board, State law requires that calculation to be based on the total number of regular voting members on the board (not including the number of alternate or associate members), whether or not there are vacancies on the board. However, an ordinance provision authorizing "a majority of those present and voting" to approve a motion would be legal and would supersede the statutory rule. 1 M.R.S.A. § 71 (3). *Warren v. Waterville Urban Renewal Authority*, 161 Me. 160 (1965). While many private municipal attorneys agree with this opinion, there are some who do not. To avoid controversy over what rule legally applies, it is advisable to spell it out in the local ordinance which governs a particular decision.
- ***Abstention.*** In the absence of a State law, local ordinance, or local rules of procedure to the contrary, an abstention is not counted as either a vote in favor of a motion or against it. *Gerrity v. Ballich*, CV-84-646 (Me. Super. Ct., Yor. Cty., June 27, 1985).
- ***Tie Votes.*** If a motion results in a tie vote, the board has failed to act and another vote should be taken to try to get a definitive decision. *Quinney v. Lambert*, CV-84-435 (Me. Super. Ct., Yor. Cty., July 8, 1985); see also concurring opinion in *Stevenson v. Town of Kennebunk*, 2007 ME 55, 930 A.2d 1046. If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). See generally, *Marchi v. Town of Scarborough*, 411 A.2d 1071 (Me. 1986). See, *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1292 (Me. 1985). As previously noted, the effect of a tie vote should be spelled out in the board's rules of procedure or applicable local ordinance to avoid confusion.

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

  "Findings of fact" are statements by the board summarizing the basic facts involved in a particular application. Such a summary of facts would include the name of the applicant and his or her relationship to the property, location of the property, basic description of the project, key elements of the proposal (number of lots, size of lots, frontage, setback, type of structures, type of streets, sewage and solid waste systems, water supply, and other items which relate directly to the dimensional requirements or performance standards in the ordinance), evidence submitted by the applicant beyond what is shown on the plan, evidence submitted by people other than the applicant either for or against the project, and evidence which the board enters into the record based on the personal knowledge of its members or experts which the board has retained on its own behalf.

  "Conclusions of law" are statements linking the specific facts covered in the findings of fact to the performance standards/review criteria in the ordinance or statute which the applicant must meet in order to receive the board's approval. For example, a conclusion of law pertaining to sewage disposal would be: "We conclude that the applicant will provide adequate sewage disposal for the lots in the subdivision as required by 30-A M.R.S.A. § 4404(6). Soils reports have been submitted for each site prepared by a site evaluator showing that at least one spot on each lot could support a subsurface wastewater disposal system which complies with the State Plumbing Code."

  The Maine Freedom of Access Act requires findings to be prepared in cases where an application is being denied or approved on condition. 1 M.R.S.A. § 407. The State law pertaining to subdivisions [30-A M.R.S.A. § 4403(6)] requires that the board make "findings" establishing that the project does or does not meet the requirements of the statute or ordinance. The State's model shoreland zoning guidelines also require that the board make "findings" when preparing a decision. Rule 80B(e) of the Maine Rules of Civil Procedure, which governs appeals from a local board's decision filed directly in Superior Court, indicates that as part of the record which the court will be reviewing, the court wants to see the board summarize its findings of fact and conclusions of law.

  The practical purpose behind preparing findings and conclusions is that it helps the board ensure that it has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another purpose is to provide a written statement of the reason for the board's decision which is detailed enough to enable the

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

- ***Address Each Review Standard.*** It is important for the board to address each standard of review in reaching its decision in case the decision is appealed and the board of appeals or court disagrees with some of the board's conclusions. See generally, *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989), *Tompkins v. City of Presque Isle*, 571 A.2d 235 (Me. 1990), and *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988).
- ***Recommended Procedure for Preparing Findings and Conclusions.*** There are a number of ways to handle the process of making findings and voting on an application. Probably the method used by most boards and recommended by most municipal attorneys is as follows: The board should use the ordinance or statute which governs the review of the

proposal and the application form as a checklist. The board's chairperson should focus the board's attention on each performance standard/review criteria in the ordinance, ask the board to vote whether it is applicable, and if they find that it is, ask whether it has been satisfied by the evidence in the record. The board must cite evidence which supports a finding either in favor of the applicant or against the applicant.

If there is conflicting evidence, the board should indicate why it favors one piece of evidence over another, or why it can't make a finding either way. If a review standard has multiple parts, the board's findings must address each part. *Chapel Road Associates v. Town of Wells*, 2001 ME 178, 787 A.2d 137. As the board addresses the ordinance requirements, it should make a motion and vote on one before moving to the next, and that vote and the facts supporting the vote should be recorded in detail by the secretary in the minutes. The statement of facts in support of the motion must be part of the motion on which the board votes, so that it is clear what facts the board found in support of its conclusion. It is not enough simply to let each board member say what he or she thinks are the pertinent facts, record those individual statements in the minutes and then ask each board member to say "yes" or "no" as to whether the applicant has met a particular criterion. *Carroll v. Rockport, supra.*

If the board finds that a condition of approval is necessary in order to find in favor of the applicant, the condition should be addressed at that time and supported by findings also. After taking these separate board votes on the individual review criteria, the board should then take a "bottom line" vote to approve or deny the application or approve it with conditions. This vote must be consistent with the votes taken on the individual review criteria. Unless the votes on each review criterion found that each was satisfied, a motion to approve the application would have to be defeated.

It appears from the case law that the same members don't have to vote in favor or against on each standard and on the overall motion to approve or deny the application; as long as there is a majority of members voting one way or the other on each motion, it doesn't have to be the same board members comprising the majority on each vote. *Widewaters, supra*. In a case where one or more of the votes on individual review criteria was subject to conditions of approval, the board should reiterate those conditions in the final vote so that there will be no confusion regarding what conditions are applicable; only those conditions which are adopted by a majority vote on an individual review criterion or which are adopted by the majority of the board in the final vote apply. The final vote and any conditions need to be recorded in detail by the secretary in the board's minutes.

The chairperson should explain during the course of discussing and approving findings and conclusions that, if any board member thinks the applicant has not met his or her burden of proof and that some information is missing or not convincing, that board

member should state those concerns during the findings and conclusion phase. The final vote on whether to approve/reject the application is really a formality; the important, binding decisions aré those regarding the individual findings and conclusions. If the board members do not cite problems with the evidence at that stage, the board will have no legal basis for denying the application, unless it revisits and modifies its earlier votes on the individual standards.

If the board wants time to think about the evidence submitted in connection with a particular application and wants to wait until another meeting to go through the formal process for voting on each criterion as outlined above, it may do so as long as the members bear in mind any deadline for making a final decision which must be met under the relevant ordinance. This may necessitate calling a special meeting to take a final vote in time to meet the deadline. In the meantime, the individual board members can be thinking about what findings of fact and conclusions of law the board should vote to approve. Board members must not discuss these issues outside the board meeting, however, in order to avoid problems under the Freedom of Access Act. Once the board has reconvened and has discussed each review standard, it can then either take time at that meeting to prepare formal written findings and conclusions and approve a final decision at that meeting or it can conduct a general discussion of each ordinance criterion and the evidence presented and then delegate to one person (i.e., one member of the board, a paid secretary, the board's attorney or similar person) the task of sorting through the individual statements and preparing a set of draft findings and conclusions for the board to discuss in detail and approve at a subsequent meeting held within any required deadline. It is crucial that the board carefully discuss the draft decision in detail in order to make that decision its own before voting whether to approve it. Another approach used by some boards is to invite the parties to submit proposed findings and conclusions for review, discussion and possible adoption by the board. (See *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489, where the court found that it was legal for a board member to bring a list of issues and draft findings to the meeting for the board's consideration.). If the board takes what it considers a "preliminary vote" to be finalized at a subsequent meeting following the preparation and review of a final draft of its findings, then the board should make this clear for the record. See generally, *Beckford v. Town of Clifton*, 2014 ME 156, 107 A. 3d 1124. Several sample written decisions and a number of excerpts from Maine Supreme Court cases indicating the kind of detail that a court expects in a board decision appear in Appendix 3.

Several problems can result if the board delegates the responsibility for developing a tentative draft of findings and conclusions before it has gone through the list of criteria and developed its own. The board runs the risk of "rubber-stamping" a decision that could have been formulated by less than a majority of the board or by a non-board member. *Brown v. Inhabitants of the Town of Bar Harbor*, CV-83-56 (Me. Super. Ct.,

Han. Cty., Jan. 19, 1984). Another risk is that if a subcommittee of the board comprised of three or more members is asked to develop tentative findings and conclusions, the subcommittee members may not realize that they must comply with the notice requirements of the Maine Freedom of Access Act (1 M.R.S.A. § 406). *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). They also run the risk that someone may try to introduce new information which was not presented at the full board meeting and to which the applicant and other parties may not have had an opportunity to respond, thereby depriving the applicant and those parties of their right to due process under the Constitution. *Mutton Hill Estates, Inc. v. Inhabitants of the Town of Oakland*, 468 A.2d 989 (Me. 1983). Whatever procedure is used by the board to prepare and approve findings and conclusions, it is crucial to their validity that the board carefully review them to make sure that each review standard and subpart of each standard is addressed and that the board clearly adopts all of the findings and conclusions as part of its own decision. *Chapel Road Associates, supra.*

- ***Conditions of Approval.*** A planning board has inherent authority to attach conditions to its approval of an application. See generally, *In Re: Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). There must be a "nexus" and "rough proportionality" between a condition of approval and the impact of the proposed development. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). A conditional approval "which has the practical effect of a denial...must be treated as a denial." *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty, Jan. 12, 1990). Any conditions which the board wants to impose on the applicant's project must be clearly stated in its decision and on the face of any plan to be recorded to ensure their enforceability. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). (See Appendix 3 for sample language.) If it is the municipality's intention to render a permit void if the permit holder fails to comply with conditions of approval within a certain time frame, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., July 1, 1994).

If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter, the board should be certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the board may find

itself later on with a situation where the applicant has not met the conditions, forcing the municipality to go to court to convince a judge to enforce the conditions of approval. Unless the board and applicant can reach an agreement on reasonable conditions to impose which are both technically and financially feasible for the applicant and adequate to satisfy the ordinance requirements, the board should not approve the application. *Cf., Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990).

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

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

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

Reviewing Conditional Use/Special Exception Permit Applications

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

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

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

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

After Making the Decision; Notice of Decision

Once the board has made its decision, the secretary should incorporate the findings and legal conclusions and the number of votes for and against the application into the minutes. A copy of the decision should be sent to the applicant promptly after the decision is made. The board should check the applicable statute or ordinance to see if it states a deadline. The date on which this notice is sent should be included in the record. A copy of the record should be maintained in the official files of the board. The record is a public record under the Maine Freedom of Access Act and can be inspected and copied by any member of the public, whether or not a resident of the municipality.

Reconsideration

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

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

Effect of Decision; Transfer of Ownership After Approval

It is commonly assumed that a subsequent purchaser of land for which a conditional use or special exception or site plan review approval was granted previously does not need to return to the board for a new review and approval simply because of the change in ownership. However, at least one Maine Superior Court case has held otherwise. *Inland Golf Properties, Inc. v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000), citing a discussion in Young, *Anderson's American Law of Zoning* (4th ed.), § 20.02. Until the Maine Supreme Court rules on this issue, where an original approval was based on the financial or technical capacity of the original applicant, the board probably should require the new owner to offer similar proof to the board before proceeding to complete the project under the original approval. It is advisable to include language in the applicable ordinance which expressly addresses this issue to avoid any confusion.

Second Request for Approval of Same Project

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

Vague Ordinance Standards; Improper Delegation of Legislative Authority

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

If an ordinance gives the board unlimited discretion in approving or denying an application, it creates two constitutional problems. It violates the applicant's constitutional rights of equal protection and due process because (1) it does not give the applicant sufficient notice

of what requirements he or she will have to meet and (2) it does not guarantee that every applicant will be subject to the same requirements. It amounts to substituting the board's determination of what are desirable land use regulations for that of the legislative body (town meeting or town or city council), where it legally belongs. The courts call this an "improper delegation of legislative authority." Legally, only the legislative body can adopt ordinances, unless a statute or charter gives that authority to some other local official or board.

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

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

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

The board should look carefully at the administrative procedures and appeals procedures found in the ordinance and statute (if any) governing its review. Often, the steps which an applicant must follow to obtain the necessary planning board approval, building permit from

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

The same is true with regard to projects which need a variance from one or more of the dimensional requirements of the ordinance. Many ordinances require a variance to be sought from the board of appeals as part of an appeal from a denial of an application by the CEO or planning board rather than as a direct request to the appeals board. Those same ordinances often authorize only the CEO to judge an applicant's compliance with specific dimensional requirements; the planning board's review of an application is often limited to a more general list of criteria (e.g., "will not unreasonably pollute water," "will not adversely affect traffic congestion," etc.). Many boards incorrectly assume that they are supposed to review an application for conformance with all the requirements of the ordinance and also incorrectly assume that an applicant may seek and obtain a variance before requesting either the CEO's or planning board's approval. To avoid confusion, ill will and an illegal decision, the planning board and other officials involved should take the time to review and understand the procedures outlined in the ordinance before taking action or advising the applicant.

Prior Mistakes by the Board

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

Time Limit on Use of Permit

Generally, once the board has issued a permit or approval, the holder of the permit or approval has an unlimited amount of time within which to complete the work covered by the approval or permit. However, the board should check the applicable ordinance or statute to be sure. Some ordinances provide that a permit expires if work is not begun within a certain period of time. This sort of time limit has been upheld by the Maine Supreme Court. *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*,

585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993) (interpretation of "significant progress of construction" within six months of obtaining a permit); *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998) (interpreting meaning of "the work authorized...is suspended or abandoned at any time after the work is commenced...").

Selected Statutes Which Might Affect a Project Being Reviewed

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

Subdivision Law

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

Seasonal Conversion Law

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

Entrance Permit

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

Road Setback

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

Overboard Discharges

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

Construction or Expansion of Structure Requiring Subsurface Disposal

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

Farmland

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

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

Small Gravel Pits

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

Maine Endangered Species Act

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

Regulation of State, Federal, County, and Municipal Projects

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

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

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

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

Erosion and Sedimentation Control; Stormwater Management

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

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

Minimum Lot Size

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

Essential Services/Public Utilities

Title 30-A M.R.S.A. § 4352(4) and a related Public Utility Commission (PUC) rule found in 65-407 CMR Ch. 885 provide a process that a public utility may follow to be exempt from compliance with a local zoning ordinance. The utility must first apply for local permit approval and go through the local review process before seeking an exemption certificate from the PUC.

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

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

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

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