



## KITTERY TOWN PLANNING BOARD MEETING

Council Chambers – Kittery Town Hall 200 Rogers Road, Kittery, Maine 03904

Phone: 207-475-1323 - Fax: 207-439-6806 - [www.kittery.org](http://www.kittery.org)

**AGENDA for Thursday, January 23, 2014**

**6:00 P.M. to 10:00 P.M.**

### **CALL TO ORDER – ROLL CALL – PLEDGE OF ALLEGIANCE – APPROVAL OF MINUTES – 1/9/2014**

**PUBLIC COMMENTS** - Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the Planning Board will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate. Those providing comment must state clearly their name and address and record it in writing at the podium.

### **OLD BUSINESS**

**ITEM 1 – (20 minutes) Town Code Amendment - Chapter 7, Article 3 Nonconformance, Title 16 Land Use Development Code.** Action: review amendment and schedule a public hearing Amendment includes changes to 16.7.3.5.10. *Contiguous Non-Conforming Lots* that would allow for more consistent adjustment to lot-lines. Applicants Mary Thron and Ray Arris, Kittery residents.

**ITEM 2 – (30 min) – Town Code Amendment – Title 16.7 Sewer System and Septic Disposal and 16.9.1.4 Soil Suitability.** Action: review amendment and schedule a public hearing. Amendments to the Town Code to address soil suitability as it pertains to septic disposal systems and other development.

**ITEM 3 – (30 min) – Town Code Amendment – Title 16.7.8 Land Not Suitable for Development.**  
Action: review amendment and schedule a public hearing. An amendment to the Town Code to address the applicability of the *Soil Suitability Guide for Land Use Planning in the State of Maine* referenced in Title 16.7.8.1 Locations of Sewage, item 5, which pertains to soils related to septic sewage. The proposed amendment also includes changes to the net residential area calculations.

### **ITEM 4 – (15 minutes) - Board Member Items / Discussion**

A. Review By-Law changes; B. Discuss legal issues associated with Waivers; C. Punch List Item ‘Non-Conforming Structure Replacement outside the Shoreland Zone’; D. Other

### **ITEM 5 – (15 minutes) - Town Planner Items:**

- A. Town Code Amendments- Quality Improvement Overlay Zone; Outdoor Seating; and others
- B. Town Comprehensive Plan Update Status
- C. Other Town Comprehensive Plan Implementation Activities
- D. Other

### **ADJOURNMENT - (by 10:00 PM unless extended by motion and vote)**

*NOTE: ACTION LISTED IN ABOVE AGENDA ITEMS IS FOR REFERENCE ONLY AND THE BOARD MAY DETERMINE A DIFFERENT ACTION.  
DISCLAIMER: ALL AGENDAS ARE SUBJECT TO REVISION ONE WEEK PRIOR TO THE SCHEDULED TOWN PLANNING BOARD MEETING.  
TO REQUEST A REASONABLE ACCOMMODATION FOR THIS MEETING PLEASE CONTACT STAFF AT (207) 475-1323 OR (207) 475-1307.*



1 TOWN OF KITTEERY, MAINE  
2 PLANNING BOARD MEETING  
3 Council Chambers  
4

UNAPPROVED  
January 9, 2014

5 Meeting called to order at p.m.  
6 Board Members Present: Tom Emerson, Susan Tuveson, Karen Kalmar, Bob Melanson, Ann Grinnell,  
7 Mark Alesse, Deborah Driscoll Davis  
8 Members absent: Susan Tuveson  
9 Staff: Gerry Mylroie, Planner; Chris DiMatteo, Assistant Planner  
10

11  
12 Pledge of Allegiance  
13

14 Minutes:

15 Ms. Grinnell moved to approve the minutes of December 12, 2013 as corrected

16 Ms. Kalmar seconded

17 Motion carries with 5 in favor and 1 abstention (Melanson)  
18

19 Public Comment:

20 Rachel Sparkowich, 22B Old Farm Road, representing Operation Blessing Limited Partnership, read a  
21 prepared statement (Attachment 1). Chairman Emerson stated the Board will be reviewing the right-of-  
22 way application from Operation Blessing at the next applicant Board meeting.

23 There was no further public comment.  
24

25 **ITEM 1 – Estes Bulk Propane Storage/U.S. Route 1 –Preliminary Plan Completeness Review.**

26 Action: hold public hearing, discuss site walk and, grant or deny preliminary plan approval. Owner M&T  
27 Realty, Applicant Estes Oil & Propane Company, propose a 60,000 gallon bulk propane storage facility at  
28 their property south of 506 U.S. Route 1, Tax Map 67, Lot 4, Mixed Use, Residential Rural and Shoreland  
29 Overlay zones. Agent is Edward Brake, ATTAR Engineering.

30 The scheduled site walk did not take place and will be re-scheduled.

31 Edward Brake, ATTAR Engineering introduced Jody Ameden and re-summarized the proposal. He noted  
32 the DEP performed a site walk as part of the NRPA application. Ken Woods investigated the site and  
33 found no vernal pools.

34 Jody Ameden explained her role was to prepare the fire safety analysis, and distributed the reports to the  
35 Board. She met with Chief O'Brien in November to review the design. The system is designed with  
36 automatic and manual shutoffs; everything is crash protected and secured from vandalism. She could find  
37 no evidence regarding bullet penetration of these style tanks made of 5/8" thick, curved steel exterior  
38 walls.

39 Public Hearing opened and closed at 6:21 p.m. There was no public comment  
40

41 Earldean Wells noted the Conservation Commission has submitted two letters to the Board, and questions  
42 whether the recent FEMA Floodplain maps will impact this property, and requested that CMA or a  
43 wetland specialist perform a vernal pool assessment. Mr. DiMatteo stated that CMA is not wetland  
44 scientists, but third party review could be requested by the Board. It is unclear if the wetlands have been  
45 re-certified by Michael Cuomo since the 1997 assessment, including vernal pool identification.

46 Ed Brake explained the draft FEMA mapping appears to be essentially the same. He is awaiting a  
47 response from FEMA as to whether the LOMR will be included in the mapping, or remain as is. Mr.  
48 Mylroie explained the LOMR would stand. Mr. DiMatteo explained the proposed FEMA mapping is still  
49 in the local review stage and final adoption, including any revisions, will not occur until 2015. He  
50 suggested the applicant confirm with FEMA the impact of these new plans on the existing LOMR.

51 Discussion followed regarding the existing vs. proposed flood maps. Mr. Melanson asked how far above  
52 the flood plain are the proposed tanks. Mr. Brake stated almost 20 feet based on the LOMR.

53 The proposal is the narrowest location to cross the wetland, and the amount of fill required will be  
54 approximately 2000 cubic yards. The installation of culverts will allow for animal crossing and water  
55 flow. Chief O'Brien stated he had no safety concerns with the project. Discussion followed regarding  
56 occasional gas plumes on Route 1 and Chief O'Brien explained there are propane tanks everywhere, but  
57 these large scale operations have few safety concerns because of the built-in safety precautions. He also  
58 explained a bullet into a propane tank will not cause an explosion without an accompanying fire. A hole  
59 would create a plume and alarms would go off, and the installation of an 8 inch water line will allow the  
60 fire department to adequately handle any leakage.

61 Ed Brake explained the sewer line will be installed under the proposed road, but it has yet to be determined  
62 whether it will be hooked up. The entire road is paved, with concrete saddles approximately three feet off  
63 the ground for the propane tanks. Discussion followed regarding provision of vegetation/tree buffering  
64 along Route 1 prior to potential development in the MU zone of the project, and timber harvesting.

65 Traffic: During peak periods, two delivery trucks per day and one semi supply truck once or twice per  
66 week.

67 Resource Protection Zone: This is a regulatory setback and should be ground confirmed. Applicant will  
68 survey and confirm.

69 In summary, the applicant needs to confirm with FEMA the status of the LOMR; re-verify the Resource  
70 Protection Zone; re-certify wetlands and vernal pools; wetland mitigation plan; review street tree code  
71 requirements.

72 Discussion followed regarding vernal pool certification and identification of pools off site. Documentation  
73 needs to be supplied demonstrating the methodology by which certification was determined. Discussion  
74 followed regarding a site walk.

75  
76 Ms. Driscoll Davis moved to schedule a site walk for Estes Oil & Propane Company, at 506 U.S. Route 1,  
77 Tax Map 67, Lot 4, on Wednesday, January 22 at 10:30 a.m., and to continue preliminary plan review.

78 Ms. Grinnell seconded

79 Unanimous by all members present

80  
81

## 82 **ITEM 2 – Roylos Development - Land Division – 32 Haley Road**

83 Action: hold public hearing, grant or deny plan approval. Owners, John and Beth Roylos request approval  
84 to divide their property (Map 47 Lot 18-4) located off Haley Road along Wilson Creek in the Residential  
85 Rural (R-RL) Zone, a portion of which is within the Shoreland Overlay Zone.

86 John Roylos, owner, stated he only received comments from the Conservation Commission prior to the  
87 meeting.

88 The Public Hearing opened and closed at 7:19 p.m. There was no public comment.

89 Mr. DiMatteo summarized the project to date, noting this is a lot-split and is before them because the prior  
90 approved plan required Board review for any changes. The proposed septic locations have been identified  
91 by Sweet Associates, and reserve septic locations have been identified off-site in a separate parcel, over an  
92 easement. This is allowed, and Mr. Roylos will have to record all necessary easements within 45 days or  
93 the approval becomes void. Additionally, the mitigation tied with this project will be required to be  
94 completed, and will be monitored by the Code Enforcement Officer. The owner is required to provide an  
95 escrow to cover the costs for the mitigation, as well as for a two-year inspection period by the landscape  
96 architect. Discussion followed regarding responsibility for the mitigation on Lot 1. Discussion followed  
97 regarding access to the reserve septic location via the ROW.

98 Earledean Wells asked about the verification of stump removal and cul-de-sac on the plan.

99 Note 11 on the proposed plan will be amended to state: "The paper cul-de-sac will not be built ...".

100

101 Bob Melanson moved to read the Findings of Fact for approval of the Roylos property division at Map 47,  
102 Lot 18-4.

103 Ms. Grinnell seconded

104 WHEREAS: Applicant Beth and John Roylos, Owners, propose to divide their property located on Map 47 Lot  
105 18-4, in the Residential - Rural (R-RL) Zoning District, a portion of which lies within the Shoreland Overlay  
106 Zone, parcel area is ±9.6 acres with address of 32 Haley Road, thereby amending the 1985 *Plan of Lots*  
107 *Haley Road, Kittery Maine for Howard Mann* recorded At the York County Registry of Deeds, Book 144, Page 36.

108

109 *Pursuant to the Plan Review meetings conducted by the Planning Board as duly noted; and pursuant to the*  
110 *Project Application, Plan and other documents.*

111

112 NOW THEREFORE, based on the entire record before the Planning Board and pursuant to the applicable  
113 standards in the Land Use and Development Code, the Planning Board makes the following factual findings:

114 **FINDINGS OF FACT**

115 **ITEMS 1-11 [by reference; items not read]**

116

117 NOW THEREFORE the Kittery Planning Board adopts each of the foregoing Findings of Fact and based on  
118 these Findings determines the proposed development will have no significant detrimental impact, and the  
119 Kittery Planning Board hereby votes to grant approval of the above referenced property, contingent upon the  
120 following conditions.

121 **Conditions of Approval:**

122

- 123 1. The Applicant must revise the final land division plan to include the following plan note:  
124 The purpose of this plan is to replace the *Land Division Plan prepared for John C. Roylos & Beth Nelson*  
125 *Roylos 32 Haley Road, Kittery Maine* with a revision date of 7/17/12, recorded at the YCRD, Bk362, Pg37,  
126 whereby substituting a sanitary force main with on-site subsurface waste water disposal systems.  
127
- 128 2. The Applicant must prepare a Roadway Agreement that incorporates the proposed lot's access rights and  
129 maintenance requirements to the existing ROW that connects to Haley Road. Within 45 days after  
130 Planning Board approval a copy of the agreement must be submitted to the Town Planner for review and  
131 must be recorded at the YCRD within 90 days.  
132
- 133 3. The Applicant must prepare an easement for the benefit of Lot 2 to furnish and maintain a septic  
134 system on a portion of Lot 1, as denoted on the Land Division Plan and to establish and maintain  
135 access to the waterfront. Within 45 days after Planning Board approval a copy of the access and utility  
136 easement must be submitted to the Town Planner for review and must be recorded at the YCRD within 90  
137 days.  
138
- 139 4. The Applicant shall remedy the cutting and removal in the Shoreland Zone of the property per the site  
140 restoration report recommendations by Terrance Parker, LA, dated July 20, 2011. Funds (estimated by  
141 Peer Review Engineer plus 3% to cover inflation) shall be deposited in escrow with the Town of Kittery in  
142 order to inspect restoration efforts and to insure the successful establishment of materials per report  
143 recommendations. Escrow to be established no later than 45 days after Planning Board approval. In the  
144 event that the approved plan is not executed and the escrow is not established the Applicant will be subject to  
145 action by the Code Enforcement Officer and associated fines related to the 2006 violation.  
146
- 147 5. Applicant must execute and record at the YCRD the submitted Easement Deed between John T.& Martha R  
148 Shaw and Beth Nelson Roylos that allows the construction of a reserve wastewater disposal field on a portion  
149 of the Shaw's property (Map47 Lot 18-1-2) fronting Haley Road no later than 90 days after the Planning  
150 Board approval.  
151
- 152 6. The Applicant, must pay in full all outstanding fees to the Town no later than 45 days after the Planning

153 Board approval.

154

155 7. The Applicant, prior to any earth moving or soil disturbance, must submit to the Town Planner one (1)  
156 mylar copy and two (2) paper copies of the recorded Plan, and any and all related state/federal permits or  
157 legal documents that may be required.

158 8. The Planning Board approval does not intend to change any conditions stated on the 1985 approved plan  
159 referenced in Finding #1 above.

160

161 9. The above conditions must be shown on the final plan. Any additional changes and modifications to the  
162 final plan must be approved by the Planning Board.

163

164 10. Existing Note 11 shall be amended to read: The paper cul-de-sac will not be built...”.

165

Vote of 6 in favor 0 against 0 abstaining

166

167

168 Board members agreed to review Item 5 next, out of sequence.

169

170

## 171 OLD BUSINESS

172

### 173 **ITEM 3 – Town Code Amendment – Title 16.7.8 Land Not Suitable for Development.**

174 Action: review amendment and schedule a public hearing. An amendment to the Town Code to address  
175 the applicability the *Soil Suitability Guide for Land Use Planning in the State of Maine* referenced in Title  
176 16.7.8.1 Locations of Sewage, item 5, which pertains to soils related to septic sewage. The proposed  
177 amendment also includes changes to the net residential area calculations.

178

179 Ms. Kalmar noted that in Falmouth, net residential area is addressed: “to determine Net Residential Area,  
180 the following shall be subtracted from the parcel’s gross area: ...”. This method leaves out the whole issue  
181 of suitability or non-suitability. Board members discussed items to be subtracted from the gross acreage  
182 and suggested amendments to be incorporated.

183 Jeff Clifford, Altus Engineering, it would be helpful if the Board could describe the process by which this  
184 amendment proceeds through the Planning Board and Council, and address the projects that are still  
185 pending before the Board and how this process impacts their review.

186 Chairman Emerson stated the Planning Board would review, hold a public hearing and recommend  
187 adoption by Council. Depending upon the period before Council, he feels this would be a minimum two-  
188 month process. Mr. Myroie stated the Council will most likely have a workshop on this issue and this  
189 should be pre-scheduled, before formal submittal to Council. Mr. Melanson suggested the appropriate  
190 guidance to pending applicants is there will be no change before the spring. Discussion followed  
191 regarding the review process with or without Council. John Watts stated he does not believe it is fair to  
192 applicants to have to wait until this is resolved. Development has been accomplished in Town that has  
193 been environmentally conscious under the existing ordinance. What has been working should still be able  
194 to work, and not penalize property owners. Discussion followed regarding the Watts subdivision submittal  
195 that was not accepted. Mr. DiMatteo explained the Suitability Guide indicated none of his soils were  
196 suitable for development. A possible approach could be to focus on drainage class now, instead of net  
197 residential acreage. Members did not want to submit two amendments on the same issue to Council.  
198 Following review of the proposed amendment, staff will incorporate suggestions of changes and  
199 accompanying definitions as needed, and resubmit to the Board for further review.

200 Mr. Watts suggested if there are means to build on ledge, an applicant should not be prevented from doing  
201 so, as long as septic can be accommodated adequately. Chairman Emerson cited the Comprehensive Plan  
202 directs development to sewered areas, and development should conform to the character of the community,  
203 which cannot be done on ledge.

204

205 **ITEM 4 – Town Code Amendment – Title 16.7 Sewer System and Septic Disposal and 16.9.1.4 Soil**  
206 **Suitability.** Action: review amendment and schedule a public hearing. Amendments to the Town Code to  
207 address soil suitability as it pertains to septic disposal systems and other development.

208 **NEW BUSINESS**

209

210 **ITEM 5 – Landgarten/578 Haley Road Renovations – Shoreland Development Plan**

211 Action: accept or deny plan application Owner and applicant Michael Landgarten is requesting approval of  
212 revised approved plans to expand an existing non-conforming building located at Tax Map 26, Lot 36,  
213 Kittery Point Village and Shoreland Overlay zones. Agent is Jesse Thompson, Kaplan Thompson  
214 Architects.

215 **Jesse Thompson**, agent, summarized the project and explained it is before the Board because it has been  
216 reduced in size since the previous Board approval.

217

218 Ms. Grinnell moved to grant approval to the 2013 plan for 578 Haley Road in the KPV and Shoreland  
219 Overlay zones.

220 Ms. Davis seconded

221 Following discussion, Ms. Grinnell amended her motion to include “the Board waives the requirement for  
222 a Public Hearing as a public hearing was held previously, and the plan is not any further nonconforming  
223 than the previously approved plan”.

224 Mr. Melanson seconded

225 Motion carried unanimously

226

227 **WHEREAS:** Owner and applicant Michael Landgarten is requesting approval of their plans to expand an  
228 existing non-conforming building located at 578 Haley Road, Tax Map 26, Lot 36, in the Kittery Point Village  
229 and Shoreland Overlay zones. Agent is Jesse Thompson, Kaplan Thompson Architects  
230 Hereinafter the “Development”.

231 Pursuant to the Plan Review meetings conducted by the Planning Board as duly noted; and pursuant to the Project  
232 Application and Plan and other documents considered to be a part of the approval by the Planning Board in this  
233 finding consist of the following (Hereinafter the “Plan”).

234

- 235 1. Shoreland Overlay Zone Project Plan Review Application, dated 12/18/13  
236 2. Site and Area Plans (A-0.0 and A-0.1) entitled Renovation Michael Landgarten and Sam Curren dated  
237 12/18/2013  
238 3. *Standard Boundary Survey & Existing Conditions Plan for 578 Haley Road...* prepared by Easterly survey  
239 dated 1/18/13 REV 4/8/13

240

241 **NOW THEREFORE**, based on the entire record before the Planning Board as and pursuant to the applicable  
242 standards in the Land Use and Development Code, the Planning Board makes the following factual findings:

243

244 **FINDINGS OF FACT**

245

246 **I. Standards in the Shoreland Overlay Zone**

**Title 16.3 LAND USE ZONE REGULATIONS have been met.**

The existing, total impervious area is 5,713 sf, or 5.4% of lot area (105,800 sf). The increase in total impervious area with the proposed project is 5,961 sf, or 5.6%. The proposed addition does not exceed 20% of the lot area.

Vote: 6 in favor 0 against 0 abstaining

247

248 **II. Standards for Non-Conforming Structures (within and outside the Shoreland Overlay Zone)**

**Title 16.7 GENERAL DEVELOPMENT REQUIREMENTS have been met**

**16.7.3.1 Prohibitions and Allowances.**

The proposed development is no closer than the existing structure to the protected resources (freshwater wetland to the north and the tidal Barters Creek to the south).	
<b>16.7.3.5.5 Nonconforming Structure Repair and/or Expansion</b>	
The proposed development and barn addition are within 100 feet of the freshwater wetland (to the north), though not any closer than the existing structure. The proposed development meets the standard to be <i>no more nonconforming than the existing condition</i> .	
<b>16.7.3.6 Nonconforming Structures in Shoreland and Resource Protection Zones.</b>	
<b>Volume:</b> Existing Total: 21,363 CU FT* <b>Proposed Expansion 1,485 CF</b> 7.0% (Allowance is 30%) * There were no previous expansions after 1/1/1989	<b>Square Footage (Total Floor Area):</b> Existing Total: 2,865 SF* <b>Proposed Expansion: 306 SF</b> 10.7% (Allowance is 30%) * There were no previous expansions after 1/1/1989
The development proposal does not include a full replacement.	
The development proposal does not include any expansion or replacement of the building's foundation.	
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining	

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**III. Procedures for Administering Permits For Shoreland Development Review**

**16.10.10.2 D.** An Application will be approved or approved with conditions if the reviewing authority makes a positive finding based on the information presented. It must be demonstrated that the proposed use will:

<b>1. maintain safe and healthful conditions;</b>
The proposed development does not appear to have an adverse impact
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>2. not result in water pollution, erosion or sedimentation to surface waters;</b>
The proposed development does not appear to have an adverse impact. A Note on the final plan should include the Maine DEP's BMP's, including erosion control measures to be followed during site and building renovations.
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>3. adequately provide for the disposal of all wastewater;</b>
The proposed development does not appear to have an adverse impact. Property has recently been inspected and an adequate system is in place.
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>4. not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;</b>
The proposed development does not appear to have an adverse impact
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>5. conserve shore cover and visual, as well as actual, points of access to inland and coastal waters;</b>
The proposed development does not appear to have an adverse impact
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>6. protect archaeological and historic resources;</b>
The proposed development does not appear to have an adverse impact
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>7. not adversely affect existing commercial fishing or maritime activities in a commercial fisheries/</b>

<i>maritime activities district;</i>
Not applicable.
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>8.     <i>avoid problems associated with floodplain development and use</i></b>
The proposed development does not appear to have an adverse impact
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>9.     <i>is in conformance with the provisions of this Code;</i></b>
The proposed development appears to be in conformance to the Town Code, see sections I and II above.
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining
<b>0. <i>recorded with the York County Registry of Deeds.</i></b>
After Final plan is signed the Applicant must record the plan at the York County Registry of Deeds within 90days of the approval.
Vote: <u>6</u> in favor <u>0</u> against <u>0</u> abstaining

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254  
255 **NOW THEREFORE** the Kittery Town Planning Board adopts each of the foregoing Findings of Fact and based on  
256 these Findings determines the proposed development will have no significant detrimental impact, contingent upon  
257 the following condition(s):

258 **Conditions of Approval:** (All conditions must be included on the final plan prior to signature by the Planning  
259 Board Chairman)

- 260  
261 1. Final Plan must include notes that reflect adherence to the Maine DEP *Best Management Practices* for all work  
262 associated with site and building renovations to ensure adequate erosion control and slope stabilization.  
263 2. Any additional changes and modifications to the final plan must be approved by the Planning Board.  
264

265 Move to accept the above *Findings of Fact* as read, *Application Waivers* and *Conditions of Approval* if any, and  
266 approve the proposed *Development* in the Shoreland Overlay Zone on property located at 578 Haley Road, Tax Map  
267 26, Lot 36 and authorize the Planning Board Chairman to sign the Final Plan and Findings of Fact after said  
268 conditions have been met.

269 style="text-align: right;">Vote: 6 in favor 0 against 0 abstaining

270  
271 **Break**

272  
273

274 **ITEM 6 – Board Member Items / Discussion**

275 A. Election of Officers

276 Ms. Kalmar nominated Tom Emerson as Chairman

277 Ms. Grinnell seconded

278 Motion carried unanimously by all members present

279

280 Mr. Melanson nominated Susan Tuveson as Vice Chairman

281 Ms. Grinnell seconded

282 Motion carried with 5 in favor; 1 opposed (Alesse); 0 abstentions

283

284 Ms. Grinnell nominated Debbie Driscoll Davis as Secretary

285 Mr. Melanson seconded

286 Motion carried with 5 in favor; 0 opposed; 1 abstention (Driscoll Davis)

287 Board Representative to the other Committees/Boards:

288 Ann Grinnell nominated Debbie Driscoll Davis as representative to the Shore and Harbor Plan  
289 committee

290 Bob Melanson seconded

291 Motion carried unanimously by all members present

292

293 Ms. Grinnell nominated Bob Melanson as representative to the Kittery Port Authority for another year,  
294 and requested a monthly KPA update with Board packets

295 Mr. Alesse Seconded

296 Motion carried with 5 in favor; 0 opposed; 1 abstention (Melanson)

297

298 • Bike / Pedestrian Plan Committee – Chairman Emerson asked to participate with this committee.  
299 Board members concurred.

300 • Destination Marketing – Board members need to keep a clear separation between economic  
301 development and planning. Discussion followed regarding parking in the Foreside and the role of  
302 planning in this process. A Parking subcommittee of the Board was formed to study parking in the  
303 Foreside, to include Susan Tuveson, Debbie Driscoll Davis, and Ann Grinnell. Mr. Mylroie explained  
304 there is a Foreside Committee in existence. Board members agreed the subcommittee will be dealing  
305 with areas other than just the Foreside.

306

307 B. Set Time for Board Retreat/Workshop (January 24 – 9:00-Noon) Board members only; no staff. Ms.  
308 Tuveson was to prepare the materials from the MMA workshop as handouts.

309 C. Board By-Laws (Bring By-Laws from 11/14/13 meeting). Ms. Tuveson will bring the draft to the  
310 January 23 Board meeting.

311 D. Other: Board members concurred they would like to continue with the monthly meeting set-up for  
312 applications and administrative issues.

313

314 **ITEM 7 –Town Planner Items:**

315 A. Quality Improvement Overlay Zone;

316 B. Frisbee Holdings LLC: KPA application for proposed float extension. Mr. Melanson reported that the  
317 Frisbee Holdings LLC plan was not accepted by the KPA, but extended for further review.

318 C. When Pigs Fly minor site plan amendment. No plan change for building footprint or parking  
319 requirements. Approved by the CEO and Planner.

320 D. Other

321

322 Ms. Wells asked to be included in the Soil Suitability Subcommittee meetings when held. Chairman  
323 Emerson stated when the subcommittee is set up, they will let her know.

324

325 Chairman Emerson: Reserve parcels and timber harvesting need to be added to the

326

327 Ms. Grinnell moved to adjourn

328 Mr. Melanson seconded

329 Motion carried by all members present

330

331

332

333 The Kittery Planning Board meeting of January 9, 2014 adjourned at 9:45 p.m.

334 Submitted by Jan Fisk, Recorder, January 14, 2014

335

336  
337

ATTACHMENT 1

Enclosure (1)

Thursday Night 1/9/2014 - Rachel Sparkowich (O.B. Ltd. P.) KPB Narrative  
1 message

(1 Page)

My name is Rachel Sparkowich, 22B Old Farm Road, Kittery Maine.

I am speaking in behalf of Operation Blessing Ltd. Partnership's 11/21/2013 Application submitted to the Kittery Planning Dept. requesting approval of a 50 ft.R.O.W., so we can sell the back 43 Acres of Lot 61-8 to a willing buyer, that has been waiting in the wings for a year and a half.

I really felt a need to share some things that have been on my heart for quite some time.

We've been very saddened by the many attacks and false accusations that have come against us, again and again. - How long are we supposed to allow this kind of abuse to go on?

Neighbors of ours on Highpointe Circle, have not allowed my husband to clarify the many issues that they have shared with other neighbors, that are totally false.

In the past, one of the neighbors repeatedly threatened to ruin my husband. First, he used inappropriate language and put his fist to my husband's face. He told my husband that, everyone on the street hated us, which we don't believe for a minute. Then this neighbor said, he'd do everything to drive us out of Town. And we believe he's also trying to break us financially, through the process.

If that wasn't enough, this neighbor tried to just about run over my husband, with his car. - My husband moved backwards very quickly, and the neighbor just missed crushing his feet by the car. - How bad is that? - My husband was just obeying the Planning Board. - The Board had required 3 road signs to be installed, reading "PRIVATE WAY - NOT A THRU STREET".

When my husband came home and shared what had happened, I just started crying. - I thought, "What next - is this neighbor going to take a gun and shoot my husband?" - It shook me up pretty bad. I didn't sleep too good that night.

In 1978, I felt led to help hurting families, from my home. - I helped people for more than 3 years, out of our Portsmouth home. That's ~~the~~ where we lived, at the time. Then this Helps Ministry, now called Operation Blessing, (O.B.) grew and grew. Eventually, the O.B. Center was built, with construction finishing in 1988. It's located next to the Crossroads Transitional Shelter, south of Portsmouth, on Route 1. - Thousands of families in crisis have been helped with food, furniture, clothing, appliances, household items, gas and automobiles at times.

I share this with you, just to make a point! - Does this sound like we're people that would lie and break the laws? - Just the opposite. We are very honest people, always ready to give a helping hand, when somebody is hurting. It's been over 30 years of giving of ourselves, to help others. - Why? - Because we care and love people.

In closing, I want to share something, and this is not to brag about ourselves but to bring a point across, of what type of people we are. - In 1988, my husband and I were chosen to be "Man and Woman of the Year" by Portsmouth Magazine.

In 1998 we were the recipients of "The Americas Award" receiving the "Nobel Prize for Goodness", with a 3 day, all expense paid trip to Washington, D.C. - I was asked to share about how Operation Blessing started, and this actually took place on the steps of the U.S. Capitol. Then we were honored to dine with the reigning Miss America, in the Lincoln Room of the Capitol.

Now, I ask you to answer this question, in your own mind. Do we seem like criminals? - Because, we feel like we've been treated so unfairly, for so many years. I believe this has to come to an end. We've waited 10 years to build a home - do we have to wait another 10 years? - It might be too late, we might be in the ground by then.

Thank you for allowing me to share my heart with you.

Rachel Sparkowich



## Town of Kittery Maine Town Planning Board Meeting January 23, 2014

**Town Code Amendment - Chapter 7, Article 3 Nonconformance, Title 16 Land Use Development Code.** Amendment includes changes to 16.7.3.5.10. *Contiguous Non-Conforming Lots* that would allow for more consistent adjustment to lot-lines. Applicants Mary Thron and Ray Arris, Kittery residents.

**PROJECT TRACKING**

REQ'D	ACTION	COMMENTS	STATUS
YES	Discussion	Held 6/27/13 and 10/24/13 Continued to future date to allow time to work with MDEP.	
YES	Schedule Public Hearing	Scheduling conditioned on outcome with MDEP	
YES	Public Hearing		TBD
YES	Review/Recommendation to Town Council		

**Staff Comments**

**Background**

On February 12, 2013, Mary Thron and Raymond J Arris received approval from the BOA to alter a lot line between two contiguous non-conforming lots. The applicant's original goal was to simply transfer property from one non-conforming lot (M58 L42) to the abutting non-conforming lot (M58 L42A) to accommodate a new septic field without the need of an easement.

The BOA did not grant this request because the outcome would yield a non-conforming lot becoming greater in non-conformance. Property M58 L42 is currently 35,415 Square feet in size, less than the 80,000 square feet required in the Residential Rural Conservation zone. Transferring land would reduce the already undersized lot making the property more non-conforming.

The BOA did grant an equal land swap which created an irregular property line between the lots, something the applicant is trying to avoid with this proposed code amendment.

**Review**

At the June meeting it was presented to the Board that in addition to the Town Land Use and Development Code, the State's Mandatory Shoreland Zone (MRSA 38, Chapter 3, and Subsection 435-449) is applicable to those properties that are located within the Shoreland and Resource Protection Overlay Zones. The State's minimum standards include the provision to prohibit creation of a "more non-conforming" condition.

At the meeting Staff advised the Board that the State of Maine Department of Environmental Protection (MDEP) had worked with towns in the past to draft code amendments specific to a particular Town. The Board continued the application to allow time to work with the State MDEP on an amenable code amendment. Prior to the October meeting Staff worked with Shoreland Zoning Coordinator, Michael Morse, with developing an amendment and shared this with the Applicant's attorney, however, this proposed amendment was not supported by the MDEP. At

the October meeting, Staff had informed the Board that the applicant's attorney had recent conversations with Mr. Morse and was hopeful on the Department's support of another draft amendment.

Essentially the MDEP minimum standards for the Shoreland Zoning are two-fold: one that applies to legally non-conforming developed lots, and one that applies to new/undeveloped lots. Standards for the former include 20,000 SF lot size and 100 feet of shore frontage, and for the latter; 30,000 SF lot size and 150 feet of shore frontage. The issue, particularly with the Thron/Arris case, is that the MDEP considers the legally non-conforming lot a "new lot" once the boundary is changed, as with a lot-line adjustment.

The Board may recall that one of the lots that Thron/Arris were trying to modify was under 20,000 SF in size and could never reach 30,000 SF through a proposed change in the common property line.

The revised proposed amendment addresses the issue that the applicant has brought forward and Staff has confirmed with the MDEP that the attached amendment is supported. The only comment Mr. Morse has pertains to the reference *Maine Department of Environmental Protection (MDEP) Mandatory Shoreland Zoning minimum lot standards for residential dwelling units* that is included in the draft amendment E.b)i. He suggests not including it, or at a minimum, referencing as a Note. Staff reviewed the amendment with CEO and Town Attorney as well.

**Recommendation**

If the Board supports the new code provision Staff recommends a public hearing be scheduled at the next meeting.

**6.7.3.5.10 Contiguous Non-Conforming Lots.** (Ordained 1-23-12; Effective 2-23-12)

A. Contiguous Nonconforming Lots. If two or more contiguous nonconforming lots or portions thereof are in common ownership and if a combination of such lots or a portion thereof constitutes a lot of nearer conforming size, such combination is deemed to constitute a single lot.



B. Contiguous Built Upon Nonconforming Lots. If there exists a legally created principal structure on each of the contiguous nonconforming lots or portions thereof that would otherwise require the lots to be combined as provided herein, the contiguous lots need not be combined to create a single lot as required by Section A above.



C. Contiguous Partially Built Upon Lot. If one or more of the contiguous nonconforming lots is vacant or contains no principal structure, the lots must be combined to the extent necessary to meet the purposes of this Code as required by Section A above.



This subsection does not apply:

1. to any Planning Board approved subdivision which was recorded in the York County Registry of Deeds on, or before July 13, 1977;
- 2.. if one or more of the contiguous lots is served by a public sewer, or can accommodate a subsurface sewage disposal system in conformance with this Code Section 16.8.7.1 – Septic Waste Disposal, and the State of Maine Subsurface Wastewater Disposal Rules; and
  - i. if each lot contains at least 100 feet of shore frontage and at least 20,000 square feet of lot area; or
  - ii. if any lot(s) that do not meet the frontage and lot size requirements of Section 16.3.2.17D.1 are reconfigured or combined so each new lot contains at least 100 feet of shore frontage and 20,000 square feet of lot area.

DG. Single Lot Division.

If two principal structures existing on a single lot legally created when recorded, each may be sold on a separate lot provided the Board of Appeals determines that each resulting lot is as conforming as practicable to the dimensional requirements of this Code. If three or more principal structures existing on a single lot legally created when recorded, each may be sold on a separate lot provided the Planning Board determines that each resulting lot is as conforming as practicable to the dimensional requirements of this Code. (Ordained 1-23-12; Effective 2-23-12)

E. Adjustment of Property Boundary.

The Common property line of two abutting non-conforming lots of record, each with legally created principal structures, can be adjusted if:

a) the resulting yard and lot areas and other dimensional requirements are no more non-conforming as determined by the Code Enforcement Officer, or

b) i. each resulting lot is as conforming as practicable to the Maine Department of Environmental Protection (MDEP) Mandatory Shoreland Zoning minimum lot standards for residential dwelling units: minimum 30,000 S.F. lot size and minimum 150 feet of shore frontage, as determined by the Board of Appeals when the property is located outside of the Shoreland or Resource Protection Overlay Zones or Planning Board when the property is located in the Shoreland or Resource Protection Overlay Zones, and

ii. each resulting lot is not less than 20,000 S.F. in lot size and not less than 100 feet in shore frontage, and

iii. a lot that is conforming to the MDEP Mandatory Shoreland Zoning minimal lot standards for residential dwelling units: minimum 30,000 S.F. lot size and minimum 150 feet of shore frontage, remains conforming to those requirements.

It is not the intention of the above subsection (*Adjustment of Property Boundary*) to allow for the creation an additional lot.

**Town of Kittery Maine  
Town Planning Board Meeting  
January 23, 2014**

**ITEM 2 – Town Code Amendment – Title 16.7 Sewer System and Septic Disposal and 16.9.1.4 Soil Suitability.** Amendments to the Town Code to address soil suitability as it pertains to septic disposal systems and other development.

**PROJECT TRACKING**

REQ'D	ACTION	COMMENTS	STATUS
YES	Discussion	1/9/14 deferred to 1/23/14	
	Workshop	December 3, 2013	HELD
YES	Schedule Public Hearing		TBD
YES	Review/Recommendation to Town Council		

**BACKGROUND**

The issues related to the *Soil Suitability Guide for Land Use Planning in the State of Maine* generated an enquiry into other soil related references in the Town's Land Use and Development Code, especially the those sections that pertain to septic disposal. In addition, the Planning Board has discussed the requirement in the cluster ordinance (16.8.11.6.C) that states only public or privately shared sewer and water must be provided unless alternatives are approved by the Board. Discussions around this provision have focused on the pros and cons of community septic disposal systems and if there are any related soil constraints. The Board received input from the invited soil scientists and engineers at the 12/3 workshop and may want to consider some of the comments to ensure a common subsurface wastewater disposal system to be suitable for cluster developments. See attached minutes.

**RECOMMENDATION**

At this time limited changes have been proposed to the Septic Disposal and Soil Suitability sections of the Code. These focus primarily on consistency of terms. The entire subsections of the related code chapters have been included for your reference for context and may not be necessary to amend.

There are two amendments (highlighted in yellow) that may be significant in nature and should be discussed by the Board.

- 1) 16.8.7.4.C. increases the minimum depth of natural soils for passing test pits from 9 inches (State of Maine Subsurface Wastewater Disposal Rules) to 15 inches. 15 is required in the Shoreland Overlay Zone. The thought is that a great portion of the non-sewered land in Kittery is environmentally sensitive and may benefit from the higher standard.
- 2) An additional requirement in 16.8.7.4 (listed below as 'G') allows the Planning Board to require pretreatment to subsurface wastewater disposal systems proposed in or near significant sand and gravel aquifers. Protection of this type of resource is a goal of the Town's adopted Comprehensive Plan.

## Article VII. Sewage Disposal

### 16.8.7.1 Sanitary Sewer System and Septic Subsurface Wastewater Disposal.

A. Public sanitary sewer disposal system connections must be installed, in accordance Article VII o Chapter 16.8, with proposal and construction drawings reviewed and approved in writing by the servicing sanitary sewer agency.

B. If, in the opinion of the Board, service to each lot by a sanitary sewer system is not feasible, the Board may allow individual subsurface waste disposal, or a separate central sewage collection system to be used in accordance with Section 16.8.7.4.

~~C. In no instance may an initial installation septic disposal system be allowed in soils rated poor or very poor for such purpose by the Soil Suitability Guide for Land Use Planning in Maine.~~

~~C.D.~~ If the developer proposes individual subsurface waste disposal or central collection system and waste generated is of a "significant" nature, or if waste is to be discharged, treated or untreated, into any body of water, approval must be obtained in writing from the Maine Department of Environmental Protection.

~~D.E.~~ Sanitary sewer disposal systems must be installed, at the expense of the developer, to the individual lot boundary line.

~~E.F.~~ All required approvals of a sewage disposal system must be secured before official submission of a final plan.

~~F.G.~~ All subsurface sewage disposal systems must be installed in conformance with the State of Maine Subsurface Wastewater Disposal Rules. The Maine Subsurface Wastewater Disposal rules require new systems, excluding fill extensions, to be constructed no less than one hundred (100) feet, horizontal distance, from the normal high water line of a perennial water body. The minimum setback distance for a new subsurface disposal system may not be reduced by variance. The following also apply:

1. Clearing or removal of woody vegetation necessary to site a new system and any associated fill extensions, must not extend closer than one hundred (100) feet, horizontal distance, from the normal high water line of a water body or the upland edge of a wetland and,

2. Holding tanks are not allowed for a first-time residential use in the Shoreland Overlay Zone.

G. Planning Board may require a developer to employ advanced pre-treatment to proposed subsurface wastewater disposal systems that are located over or within 100 feet of a significant sand and gravel aquifer as indicated on the Maine Department of Agriculture, Conservation and Forestry (DACF) Geological Survey Maps or determined by Maine DACF staff.

### 16.8.7.2 Design and Standards.

A developer must submit plans for sewage disposal designed by a Maine licensed site evaluator in full compliance with the requirements of the State of Maine Plumbing Code and/or Subsurface Wastewater Disposal Rules.

### 16.8.7.3 Public Sewer Connection Required.

Where a public sanitary sewer line is located within one thousand (1,000) feet of a proposed development

at its nearest point, the developer must connect with such sanitary sewer line with a main as required by the sewer department, and provide written certification to the Board from the department that the proposed addition to service is within the capacity of the system's collection and treatment system.

#### **16.8.7.4 Private Systems; on Unimproved Lots Created after April 26, 1990.**

A. Where public sewer connection is not feasible, the developer must submit evidence of soil suitability for subsurface ~~sewage~~ wastewater disposal system, i.e. test pit data and other information as required by the State of Maine Subsurface Wastewater Disposal Rules. Additionally, on lots with a limiting factor identified as being within twenty-four (24) inches of the surface, a second site with suitable soils must be shown as a reserve area for future replacement should the primary site fail. Such reserve area is to be shown on the plan; not be built upon; and, comply with all the setback requirements of the *Subsurface Wastewater Disposal Rules* and this Code.

B. In no instance may a disposal ~~area~~ system be permitted on soils or on a lot which requires a ~~new~~ First-Time sSystem vVariance Request from per the Subsurface Wastewater Disposal Rules.

C. Test pits must be of sufficient numbers (a minimum of two) and so located at representative points within the disposal area (primary and reserve sites) to assure that the proposed disposal ~~area~~ system can be located on soils and slopes which meet the criteria of the *State of Maine Subsurface Wastewater Disposal Rules* and the State Plumbing Code. Passing test pits must have a minimum of 15 inches of natural mineral soil above the limiting factor.

#### **16.9.1.4 Soil Suitability.**

A. The requirements and standards of the State of Maine Department of Environmental Protection, Department of Health and Welfare, the latest edition of the State Plumbing Code and this Code must be met.

B. Any proposed subdivision requires a soil survey covering the development. Where the soil survey for York County shows soils with severe restrictions for development, a Class A high intensity soils report by an accredited soils scientist, registered in the state of Maine, using the standards of high intensity soil mapping as established by the ~~Society of Soil Scientists of Northern New England~~ Maine Association of Professional Soil Scientists must be provided.

C. Lot size determination is as follows:

1. Areas containing hydric soil may be used to fulfill twenty-five (25) percent of the minimum lot size required by this Code, provided that the non-wetland area is sufficient in size and configuration to adequately accommodate all buildings and required utilities such as sewage disposal and water supply (including primary and reserve leach field locations within required zoning setbacks).

2. Lots served by municipal water and sewer may use areas of poorly drained soil to fulfill up to fifty (50) percent of the minimum required lot size.

3. No areas of surface water, wetlands, right-of-way, or easement, including utility easements or areas designated as very poorly drained soil may be used to satisfy minimum lot sizes, except as noted above.

D. If the soil classification is challenged by the applicant, an abutter, a landowner, the CEO, or the Conservation Commission, petition must be made in writing to the Planning Board. With such petition, or

a challenge by the Board, the Planning Board shall determine whether a qualified soil scientist should conduct an on-site investigation and at whose expense. The soil scientist shall present evidence in written form to the Planning Board, which evidence forms the basis for the Board's decision.

E. All land uses must be located on soils in or upon which the proposed uses or structures can be established or maintained without causing adverse environmental impacts, including severe erosion, mass soil movement, improper drainage, and water pollution, whether during or after construction. Proposed uses requiring subsurface waste disposal, and commercial or industrial development and other similar intensive land uses, require a soils report based on an on-site investigation and must be prepared by state-certified professionals. Certified persons may include Maine certified soil scientists, Maine registered professional engineers, Maine certified geologists and other persons who have training and experience in the recognition and evaluation of soil properties. The report must be based upon the analysis of the characteristics of the soil and surrounding land and water areas, maximum ground water elevation, presence of ledge, drainage conditions, and other pertinent data which the evaluator deems appropriate. The soils report must include recommendations for a proposed use to counteract soil limitations where any exist.

**Town of Kittery Maine  
Town Planning Board Meeting  
January 23, 2011**

**Town Code Amendment – Title 16.7.8 Land Not Suitable for Development.**

An amendment to the Town Code to address the applicability the *Soil Suitability Guide for Land Use Planning in the State of Maine* referenced in Title 16.7.8.1 Locations of Sewage, item 5, which pertains to soils related to septic sewage.

**PROJECT TRACKING**

REQ'D	ACTION	COMMENTS	STATUS
YES	Discussion/	8/22/2013, 1/9/2014	HELD
	Workshop	December 3, 2013	HELD
YES	Schedule Public Hearing		TBD
YES	Review/Recommendation to Town Council		

**BACKGROUND**

Through the review of recent proposed subdivision projects an issue with the application of 16.7.8.1.5 has been raised. Apparently the referenced document *Soil Suitability Guide for Land Use Planning in the State of Maine* is out of date and is no longer applicable according to the Maine State Soil Scientist. The Planning Board initiated discussions on the matter with input from the Town's Peer Review Engineer, Bill Straub with CMA. His assessment of the document is that use of the referenced document for regulatory purposes is not appropriate.

This portion of the Town Code is referenced in Title 16.2 Definitions.

**Net residential acreage** means the gross available acreage less the area required for streets or access and less the areas of any portions of the site which are unsuitable for development as outlined in Article VIII of Chapter 16.7.

Before the December 3<sup>rd</sup> Workshop, the Board last discussed the proposed amendment at the September 26<sup>th</sup> meeting. At the workshop specifics related to the amendment and the issues surrounding soil suitability and its applicability to net residential area and septic were discussed. (Minutes were provided). The Board made some changes to the draft amendment at the 1/9/14 meeting which are included in the attached draft amendment. The Board was interested in further discussion on items F and G in the draft amendment.

**REVIEW**

The attached amendment, initially based on how other towns in Maine address soils associated with suitability for development and the application of calculating net residential acreage in general, includes some of the comments from the 1/9/14 meeting. The Board expressed an interest in scheduling a public

hearing for the 2/27/14 meeting. The latest draft also includes a change to the portion of the Code, 16.8.11.5, where "Land Not Suitable for Development" is referenced.

## **RECOMMENDATION**

Staff recommends that in addition to addressing the reference to the out-of-date *Soil Suitability Guide for Land Use Planning in the State of Maine*, the Planning Board take the opportunity to revise the entire portion of the town code related to net residential calculations (Title 16.7.8 Land Not Suitable for Development).

The Board should discuss the amendment and consider the input from the soil scientists and engineers that have been invited to attend and provide comments to Staff so a revised amendment can be ready for a public hearing at the February 27, 2014 meeting.

1 **Proposed Amendment**

2 ~~**Article VIII. Land Not Suitable for Development**~~

3

4 ~~**16.7.8.1 — Locations and Sewage.**~~

5 ~~The Planning Board may not approve portions of any proposed development that:~~

6 ~~1. Are situated below sea level;~~

7 ~~2. Are located within the one hundred (100) year frequency floodplain as found in the definition;~~

8 ~~3. Are located on land which must be filled or drained, or on land created by diverting a watercourse,~~  
9 ~~except the Planning Board may grant approval if central sewage collection and disposal system is~~  
10 ~~provided.~~

11 ~~4. Has any part of the development located on filled tidal wetlands.~~

12 ~~5. Employs septic sewage disposal and is located on soils rated poor or very poor by the Soil Suitability~~  
13 ~~Guide for Land Use Planning in the State of Maine.~~

14

15 Article VIII. Net Residential Area

16

17 16.7.8.1 Net Residential Area is that land identified for regulatory purposes as developable. The Net  
18 Residential Area determines the maximum number of dwelling units allowed on a parcel. To calculate the  
19 Net Residential Area the following land area must be subtracted from a parcel's gross area:

20

21 A. All land that is located below the Highest Annual Tide elevation per Maine DEP HAT levels for the  
22 most current year.

23 B. All land that is located within the 100-year floodplain as defined in Title 16.2, Flood, One Hundred  
24 (100) Year.

25 C. All wetlands as defined in Title 16.2 Wetland, as well as vernal pools, ponds, lakes, streams and  
26 other water bodies.

27 D. All land that is located on filled tidal lands, per Title 16.2 Tidal Land, Filled.

28 E. All land located within existing easements and right-of-ways, and, in consideration of proposed  
29 streets, parking and access.

30 F. Any isolated portion of the parcel that is cut-off from the main portion of the parcel by a road,  
31 street, existing land uses, or significant stream or similar physical feature such that it creates a  
32 major barrier to the common use or development of the site.

33 G. All land that is two (2) or more contiguous acres with sustained slopes of 20% or greater.

34 H. All land that is characterized as exposed bedrock, or soils with a drainage class of *poorly drained,*  
35 and/or *very poorly drained* as defined in Title 16.2 Soils.

36 I. For land that is characterized with a drainage class of *somewhat poorly drained,* 50% of the area  
37 is subtracted, unless public sewer is utilized, in which case no land area is deducted.

38 J. All land area within a cemetery/burying ground as defined in Title 16.2, including associated  
39 setback per MRS Title 13 §1371-A. *Limitations on construction and excavation near burial sites.*

40 K. All land that lies within the Resource Protection Overlay Zone that is not included in 16.7.8.2.A  
41 through J.

42

43

44

45 **16.2 Definitions**

46

47 Tidal Land, Filled: means portions of the submerged and intertidal lands that have been rendered by  
48 human activity to be no longer subject to tidal action or below the natural low-water mark after October 1,  
49 1975.

50

51 Soils

52 1. ~~“Poorly drained soils” means soils where water is removed so slowly that the water table is at or~~  
53 ~~within twelve (12) inches of the ground surface for six to nine months of the year.~~

54

55 2. ~~“Very poorly drained soils” means soils in an area where water is removed so slowly that the water~~  
56 ~~table is at or within twelve (12) inches of the ground surface for nine to ten (10) months of the year.~~

57 A soil’s drainage class must be determined by a Maine Certified Soil Scientist and based on the *NRCS*  
58 *Supplemental Key for the Identification of Soil Drainage Class* based on the Maine Association of  
59 Professional Soil Scientists, Key to Drainage Classes, March 5, 2002 or subsequent revisions.

60

61 Cemetery and Burying Ground: A private or public place set apart for the interment of the dead. In the  
62 absence of an apparent boundary, i.e. fence, stone wall, survey markers, survey plan, or information from  
63 the Kittery Historical and Naval Society or other reliable historic sources, the perimeter of the internment  
64 area is determined by a 10-foot distance from existing tombstones.

65

66

67 **16.8.11.5 Application Procedure.**

68 All development reviewed under this Article is subject to the application procedures in Chapter 16.10,  
69 Development Plan Application and Review, and the following:

70 A. In addition to the requirements of Chapter 16.10, the following are required at submittal of the Sketch  
71 Plan:

72

73 1. Calculations and maps to illustrate:

74 a. proposed dimensional modifications and the dimensional standards required in the zone in which the  
75 development will be located;

76 b. non-buildable area (land ~~not suitable for development area~~ as defined in ~~Article VIII of Chapter Title~~  
77 ~~16.7.8~~);

78 c. net residential acreage and net residential density; and

79 d. open space as defined in Section 16.8.11.6.D.2 of this Article.

80



**Town of Kittery, Maine**

*Town Planning and Development Department  
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**KITTERY TOWN PLANNING BOARD  
BYLAWS**

Adopted January 17, 1974  
Revised and approved, November 19, 1987  
Revised and Approved, May 23, 1991  
Revised and Approved October 11, 2007  
Revised and Approved February 28, 2008

*[ 4/2013 edits per Frank Dennett, for discussion ]*

*[12/2013 edits, S. Tuveson]*

The Planning Board of the Town of Kittery has been established under the Town Charter adopted 1967, according to HP 521-LD768, Revised Planning and Zoning Statutes in Maine, 1969, and other applicable State Statutes.

**Proposed edits in PURPLE text. Comments follow Sections in *Italics*.**

Section 1. The Planning Board shall consist of seven (7) ~~permanent~~ members appointed by the Town Council in accordance with the Town Charter adopted in 1967 and revised on June 11, 2002. ~~Members shall be residents of the Town for at least one (1) year prior to their appointment.~~ The term of office of a member is three (3) years. ~~The Town Clerk will swear in all members.~~ All members will take and subscribe to the oath of office as administered by the Town Clerk or any other person authorized by law to administer an oath.

**Section 1.** The Planning Board shall consist of seven (7) members appointed by the Town Council in accordance with the Town Charter, adopted 1967, revised June 11, 2002. The term of office of a member is three (3) years. Upon appointment by the Town Council, and upon

renewal of term, each member will take and subscribe to the oath of office as administered by the Town Clerk or any other person authorized by law to administer an oath.

Section 2. At the first regularly scheduled meeting in December, the Board shall elect a Chair, Vice-chair, and Secretary from its ~~regular~~ members for the ensuing year.

**Section 2.** At the first regularly scheduled meeting in December, the Board shall elect officers from among its membership, a Chair, Vice-chair, and Secretary. Term of service is one year.

Section 3. The regular meetings of the Planning Board ~~shall be~~ held in the Town Office at 6:00 p.m. on the second and fourth Thursdays of each calendar month, except for November and December ~~of each year~~, when the regular meetings ~~shall be~~ held on the second and third Thursdays of those months. When a regularly scheduled Planning Board meeting falls on a holiday, the regular meeting for that date shall be set by the Board at its last regular meeting prior to the holiday. The date, time or location of any regular meeting may be changed by a vote of the Board at a previous meeting upon an affirmative vote of four (4) members ~~of the Board~~.

**Section 3.** Meetings of the Planning Board shall be held in the Town Office at 6:00 p.m., on the second and fourth Thursdays of each calendar month, except November and December, when regular meetings shall be held on the second and third Thursdays. Where a regularly scheduled meeting occurs on a holiday, the regular meeting for that date shall be set by the Board at its last regular meeting prior to the holiday. The date, time, or location of any regular meeting may be changed by an affirmative vote of four (4) members, taken at any regular meeting of the Board, in accordance with (Maine meeting notice provisions), (citation).

Section 4. Special meetings may be called by the Chair and, in case of his/her absence, disability or refusal, may be called by the Vice-Chair or by four (4) members of the Board. Notice of said meeting to Board Members ~~shall~~ must be made by telephone at least 12 hours before the meeting. The telephone call ~~shall~~ will set forth the matters to be voted on, and nothing else ~~shall~~ may be considered at such a special meeting.

**Section 4.** Special meetings may be called by the Chair; or, in the case of the Chair's absence, disability, or refusal to participate, may be called by the Vice-chair, or by four (4) members of the Board. Notice of such special meeting shall be made to Board Members by telephone no fewer than twelve (12) hours before the start time of the meeting. The telephone call will set forth the matter, or matters, to be discussed, and none other(s) shall be considered at such special meeting.

**Section 5.** The Chair, or in the absence of the Chair, the Vice-Chair, shall take the chair at the time appointed for the meeting, call the members to order, have the roll called, and on determining a quorum is present, proceed with the business of the meeting. Following roll call, the order of business shall be as follows

**Section 5.** At the appointed time, the Chair shall call the meeting to order, lead the Pledge of Allegiance, call the roll, and upon determining whether a quorum of members is present, shall proceed with the business of the meeting. The order of business shall be as follows: (a) approval of the minutes of the preceding meeting, (b) public comment, (c) old regular business, (d) new regular business, (e) Board members' time, (f) Planner's time, (g) adjournment.

**Section 6.** Minutes of all meetings and workshops shall be recorded. Said minutes shall be reviewed, corrected and approved by the Board at the first meeting following transcription by the recorder. Copies of said approved minutes shall be furnished to the Town Manager, Town Council Chair, the Chair of the Zoning Board of Appeals, and the Conservation Commission following approval.

**Section 6.** Minutes of all meetings, workshops and site walks shall be recorded. Review, correction and approval by the Board of such minutes shall occur at the first meeting following transcription by the recorder, and distribution to Members. Upon approval, copies shall be furnished to the Town Manager, Town Council Chair, Board of Appeals Chair, and the Conservation Commission Chair.

Section 7. A quorum consists of four (4) members. All decisions ~~shall be made by~~ require a minimum of four (4) like votes, except on procedural matters.

**Section 7.** A quorum consists of four (4) members. Where only four members are present, all decisions must be made upon four (4) like votes, except on procedural matters. Where more than four members are present, decisions shall be made upon a minimum of four (4) like votes.

Section 8. If a member has a conflict of interest, and is not allowed to vote on a matter, that member ~~shall~~ may not be counted by the Board in establishing the quorum for the matter in which he or she has a conflict. Public disclosure of such conflict shall be made before discussion of the agenda item in question. To a limited extent, as determined by the Chair, members of the public may be allowed to comment on this matter at this time. A majority vote of the Board members present (except the member being challenged) shall decide whether an alleged conflict in question is such that it: (a) may reasonably interfere with the affected member's ability to hear and act on the item impartially; and (b) whether it would give the appearance to the public of an inappropriate conflict of interest so as to undermine public confidence in the fairness of the meeting.

**Section 8.** Where a member may possess a conflict of interest pertaining to a matter before the Board, that member shall not be permitted to vote on said matter, and shall not be counted for the purpose of establishing quorum in the matter. Public disclosure of any possible conflict shall be made before any discussion of the agenda item in question. To an extent determined by the Chair, members of the public may be permitted to comment on such conflict at this time. A majority vote among Board members present, minus the member under challenge, shall decide whether the alleged conflict exists such that it may reasonably interfere with the affected member's ability to render an impartial hearing and decision, and whether such participation by the member in question, under the influence of a conflict of interest, may give appearance as to undermine the public's confidence in the fairness and impartial treatment of the subject matter.

Section 9. Attendance of members is expected at all regular and special meetings. If a member is absent from more than three (3) consecutive regular meetings, the Board may then vote to recommend to the Town Council that the position be declared vacant.

**Section 9.** Members are expected to attend all regular and special meetings. Where a member is absent from more than three (3) consecutive regular meetings, the Board may vote to recommend to the Town Council that the position be declared vacant.

Section 10. Site walks called by the Chair or majority of the Board in accordance with ordinance requirements are considered public meetings; however no formal motions ~~shall~~ may be made nor votes taken at a site walk. ~~Public~~ Public and abutter notice ~~shall~~ must be given of all site walks, and proper minutes taken. The Planner, or designee, is responsible for minutes of site walks. Site walk minutes ~~shall~~ must be included in the records of applications before the Board.

**Section 10.** Site walks called by the Chair and voted upon by a majority of the Board are considered public meetings and shall be properly noticed to applicants, abutters and the general public according to requirements of ordinance (*citation?*). No formal motions, nor votes, shall be made or taken at a site walk. Proper minutes of site walks shall be the responsibility of the Planner or Planner's designee, and shall be included in the records of applications before the Board.

*Comment: Should there be a formal approval requirement?*

Section 11. The Chair shall preserve order, may speak to points of order in preference to other members, and shall decide all questions of order subject to appeal to the Board by motion, regularly seconded, and no other business ~~shall~~ may be transacted until the question on appeal is decided.

**Section 11.** At meetings the Chair shall preserve order, may speak to points of order in preference to other members, and shall decide all questions of order subject to the appeal to the

Board by motion, seconded, and no other business shall be transacted until the question on appeal is decided.

Section 12. The Chair shall declare all votes, but if any member doubts a vote, the Chair shall cause a recount of the vote without debate.

**Section 12.** (No change recommended)

Section 13. When a question is under debate, the Chair shall receive no motion but to adjourn, or to move the previous question, or to lay on the table, or to postpone to a specified date, or to refer to a committee or some administrative official, or to amend, or to postpone indefinitely: which several motions shall have precedence in the order in which they stand arranged.

**Section 13.** (No change recommended)

Section 14. The Chair shall consider a motion to adjourn as always in order except on immediate repetition; and that motion, and the motion to lay on the table, or to take from the table, ~~shall~~ must be decided without debate.

**Section 14.** The Chair shall consider a motion to adjourn as always in order, except on immediate repetition; the motion to remain on the table, or to remove from the table, shall be decided without debate.

*Comment: I am not sure whether my restatement/simplification somehow changes the meaning of this section*

Section 15. When a vote is passed, it ~~shall be~~ is in order for any member who voted on the prevailing side, to move a reconsideration thereof at the same meeting, or at the next succeeding meeting; and when a motion of reconsideration is decided, that vote ~~shall is~~ is be final and may not be considered further.

**Section 15.** When a vote is passed it shall be deemed in order for any member who voted on the prevailing side to move reconsideration thereof at the same meeting, or at the next succeeding meeting. When a motion of reconsideration is made and seconded, the subsequent vote shall be final.

Section 16. During a public hearing, any other person in attendance at the meeting wishing to address the Planning Board on an item, shall so signify by raising his/her hand and, when recognized by the Chair, such person shall request permission to address the Board, stating his/her name, address and the subject matter on which they desire to address the Board. At any other time during a meeting, the Chair may, at his/her discretion, invite further public comment. The Chair, with consent of the Board, may set reasonable time limits on members of the public choosing to address the Board. The Chair may also limit public testimony to that deemed to be relevant and material to a pending issue or other Board concern.

**Section 16.** During a public meeting, at the time appointed on an agenda for a particular matter before the Board, any person in attendance wishing to address the Board on said matter shall signify by raised hand. When recognized by the Chair, and before addressing the subject matter at hand, such person shall approach the lectern, or other designated place or manner for addressing the board, shall state his or her name and address for the record, and shall enter this same data in writing where and when requested. At any other time during a meeting, the Chair retains the discretion to invite further public comment. In all cases, the Chair, with the consent of the Board, may set reasonable time limits on members of the public who choose to address the Board. Likewise, the Chair may limit public testimony to that deemed relevant and material to the subject matter of the hearing, or other Board concern.

Section 17. All meetings of the Board shall be public. However, the Board, upon majority vote, may recess for executive session, consistent with the Maine Right to Know Law (MRSA Title 1, Sections 401-410), provided that the motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business, and that final action not be taken by the Board except in regular sessions.

**Section 17.** All meetings of the Board shall be public. The Board may recess for executive session, upon majority vote, consistent with the Maine Right to Know Statute, MRSA Title 1, §401-410, provided the motion to recess for executive session indicates the precise nature of business to be conducted in such closed session, including any and all relevant statutory reference to such power to recess, and that final action not be taken by the Board except in public session.

*Comment: The final clause in this paragraph regarding final actions pertaining to executive session appears vague, that is, a particular matter is discussed privately, and voted on before the public, minus any rationale offered the public beforehand. Do I read this correctly? Also, what are the requirements for minutes recorded during executive session, and should statutory authority be stated herein?*

**Section 18.** These Bylaws may be revised by submission of a proposed change in writing to the Board, and consideration in at least two meetings of the Board. The change shall be effective upon adoption by the Board.

**Section 18.** These Bylaws may be revised upon submission in writing of a proposed change or changes, and scheduled for consideration in at least two meetings of the Board. Any change shall be effective upon ratification by the Board.

**Section 19.** Planning Board meetings shall be conducted according to Robert's Rules of Order. Conflicts shall be resolved in favor of the Bylaws.

**Section 19.** Planning Board meetings shall be conducted according the Robert's Rules of Order. Any and all conflicts shall be resolved in favor of these Bylaws.

## CHAPTER 4 – Variances and Waivers

### Authority to Grant Variances or Waivers

#### Zoning Variances

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

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

#### Non-Zoning Variances

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

described above. *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58. See also *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172.

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

## **Procedure for Obtaining a Variance**

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

## **Recording Variances/Waivers**

State law (30-A M.R.S.A. § 4353 and § 4406) requires the board of appeals and the planning board to prepare a certificate which can be recorded in the Registry of Deeds and provide it to the applicant for recording whenever they grant a zoning variance or a subdivision variance or waiver. In the case of the planning board waiver, where a subdivision plan will be recorded, the required information must be noted on the plan. A sample subdivision variance form is included in Appendix 5. To be valid, these certificates or plans must be recorded within 90 days of the decision on a zoning variance or within 90 days of the final approval of a subdivision plan. If they are not recorded within the stated deadlines, they become void. The only way to "reactivate" the variance or waiver in that case is for the person wishing to rely on the variance or waiver to submit a new application on which the board may act. The board's review would be governed by the ordinance in effect at the time of the new application. The board is not obligated to grant the variance or waiver automatically the second time around; if it determines that it made a mistake the first time, it should deny the new request. *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998). If the board of appeals is only authorized to hear a variance request as an appeal from a decision by another board or official, then the person who wants the variance would need to reapply for the permit/approval and be denied again in order for the board of appeals to hear the new variance request, absent language in the ordinance to the contrary.

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

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

Special exception and conditional use provisions in a zoning ordinance deal with uses which the legislative body generally has decided to permit in a particular area of the community. The purpose of the special exception or conditional use review procedure is to allow the planning board or board of appeals (whichever one is authorized by the ordinance) to determine whether conditions should be imposed on the way the use is conducted or constructed, in order to ensure that the use is consistent with and has no adverse impact upon the surrounding neighborhood. This decision must be guided by specific ordinance standards.

## **Effect of Variance Decision**

When the board of appeals grants a zoning variance, the effect is to waive or modify some requirement(s) of the ordinance which the applicant was unable to meet. Without the variance from the board of appeals waiving or modifying the ordinance requirement, the planning board or CEO would have had no legal authority under the ordinance to approve the application. The variance itself does not constitute a “permit,” however. Generally, once a variance is granted, the applicant must return to the planning board or some other local official for a permit authorizing the project as a whole. The granting of the variance removes an obstacle to the issuance of the permit or other approval by the planning board or the code enforcement officer.

Once granted, a variance “runs with the land,” meaning that the variance is transferred automatically to a new owner if the property subsequently changes hands. It has an indefinite life unless the municipality has set a time limit by ordinance after which the variance will expire if not used. Young, *Anderson’s American Law of Zoning* (4<sup>th</sup> ed.) § 20.02, pages 412-416; *Inland Golf Properties v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., Yor. Cty., May 11, 2000).

After a variance is granted and a building is constructed or activity conducted based on that variance, the building or activity thereafter should be treated as a legally conforming

structure or use for the purposes of deciding which ordinance provisions govern it in the future. *Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. This probably is true even if the variance was granted illegally, if it is not appealed. *Wescott Medical Center v. City of South Portland*, CV-94-198 (Me. Super. Ct., Cum. Cty., July 15, 1994). A building or activity that is conforming because of the granting of a variance may later become legally nonconforming as a result of an ordinance amendment.

## **Shoreland Zoning Variances**

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

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

The Maine Supreme Court has interpreted 30-A M.R.S.A. § 4353 and 38 M.R.S.A. § 439-A(4) as allowing a municipal board of appeals to grant a dimensional variance to permit an expansion within the shoreland zone as long as the applicant proves undue hardship and the dimensional variance and expansion are not otherwise prohibited by the ordinance. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

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**McEachern & Thornhill**

**Attorneys At Law**

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December 1, 2005

Copy via e-mail

Mr. James Noel  
Kittery Town Planner  
P. O. Box 808  
Kittery, ME 03904-0808

Re: Planning Board Waivers

Dear Jim:

At the request of the Planning Board, you have asked for an opinion on whether the Planning Board has the authority under the Land Use and Development Code to allow waivers that would result in reduced lot sizes, frontage, and other dimensional requirements found in the Land Use and Development Code Zoning Ordinance [Zoning Ordinance] with regard to the Suburban Residence and Village Residence Districts.

My opinion in a nutshell is that the Planning Board has no jurisdiction to grant waivers to any of the dimensional requirements of the Zoning Ordinance.

In Perkins v. Town of Ogunquit et al., 1998 ME 42, our Supreme Court had before it a case where the Ogunquit Planning Board granted a waiver to the 75-foot street frontage requirement under the Ogunquit Zoning Ordinance. The lot in question had

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Re: Planning Board Waivers  
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only 74.26 feet of frontage. After the ZBA had denied a request for a variance to the frontage requirement, the Planning Board granted a waiver thereby allowing the landowner to utilize the lot with frontage of only 74.26 feet. In deciding the case on appeal, the Maine Supreme Court said:

To the extent, however, that, pursuant to Chapter I section 1505.3 of the Ogunquit Zoning Ordinance, the Planning Board's authority to grant a waiver is in reality the power to grant a variance, such authority is prohibited by clear implication. Such a scheme would permit a town to circumvent the Legislature's express and implicit exclusive grant of variance-granting authority to boards of appeals.

It is clear from the Supreme Court's decision in Perkins that the Planning Board cannot grant waivers that, in effect, amount to the grant of a variance from any dimensional requirements contained in the Zoning Ordinance. The only board that can grant such relief is the Kittery Board of Zoning Appeals upon a proper showing that such relief is justified under the criteria for granting a variance.

The Planning Board has the authority to waive the strict application of subdivision Design and Performance Standards in certain circumstances where there is a proper basis to do so but

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it should not be confused with a grant of a variance regardless of what it is called.

The Supreme Court again addressed and reaffirmed this waiver/variance issue in York v. Town of Ogunquit, 2001 ME 53. This appeal dealt with several "waivers" granted by the Ogunquit Planning Board. In that case, the Supreme Court went on to say:

The Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances, on a Board finding of extraordinary and unnecessary hardship or because of the special circumstances of a plan. (9) The record is replete with evidence that there are special circumstances associated with Young's plan necessitating these four waivers. This is true even though some of the rationale for the waivers could apply to any plan. For example, the steepness of the property caused significant concerns regarding stormwater runoff and retention, and resulted in the Board permitting a seven rather than a six percent road grade. The waivers also operate to preserve more of the natural features of the property, which is aesthetically desirable, and better for the environment because they reduce the impact on clam beds and vegetation. The waivers also are beneficial in reducing the property's potential flooding problems. Four of the waivers were therefore granted by the Board pursuant to its authority under State statute and municipal ordinance. These four waivers were based on substantial evidence of special circumstances as is required by the Subdivision Standards.

The Supreme Court did strike down a fifth waiver issued by the Ogunquit Planning Board dealing with the width of a street. The Court concluded that the 32-foot width for streets was

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mandated "not just by the subdivision standards, but also by the Ogunquit Zoning Ordinance itself, which provides ". . . paved traveled surface shall be at least thirty-two feet in width."

[Citing the Ogunquit Zoning Ordinance] The Court concluded:

Although the Board may waive Subdivision Standards requirements, it is not granted the authority to waive Zoning Ordinance provisions. This is the basis of our holding in Perkins, that Zoning Ordinance provisions are specifically subject to the variance analysis mandated by the state statute in 30-A M.R.S.A. § 4353(4) (Supp. 2000). Perkins, 1998 ME 42, ¶ 12, 709 A.2d at 110. Thus, deviation from Zoning Ordinance provisions may be obtained only when the requisite finding is made by the Zoning Board of Appeals. There is no dispute that the Board of Appeals made no such finding in this case. The Planning Board's grant of a waiver of the street width requirement, therefore, was beyond its authority.

Finally, in the recent case of Sawyer v. Town of Cape Elizabeth, 2004 ME 71, the Supreme Court concluded:

Perkins and York establish that a Planning Board may be vested with power to waive municipal subdivision standards so long as the waiver does not, in effect, grant a variance from zoning standards that otherwise govern the zone. . . . As we have held in Perkins and York, a Planning Board's modification of a binding zoning requirement is, in effect, a variance that must instead be committed to the discretion of the ZBA.

#### Conclusion

Any effort to vary a Zoning Ordinance standard as distinct from a Planning Board Design and Performance Standard through the

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issuance of a waiver by the Planning Board rather than a variance granted by the ZBA should not be permitted by the Planning Board and would be rejected by a court.

Should you have any follow-up questions as a result of this opinion, don't hesitate to give me a call.

Best regards,



Duncan A. McEachern

DAMcE/cn  
Copy to  
Mr. Jonathan L. Carter

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**McEachern & Thornhill**

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Attorneys At Law

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March 27, 2003

Mr. James Noel  
Kittery Town Planner  
P. O. Box 808  
Kittery, ME 03904

Re: Planning Board Waivers

Dear Jim:

This will follow-up our discussion on March 24th with regarding to the Planning Board's authority to grant waivers to certain requirements imposed on certain development applications pending before the Board for approval. During the course of our discussion, you pointed out certain provisions of the ordinance which have apparently served as the source of the Planning Board's authority to consider waiver requests. For example, one of the Zoning Ordinance provisions contained under the "standards" section of several of the Zoning Districts provides:

**In the case of clustered residential developments, the above standards may be modified in accordance with the special provisions of Article XIII of Chapter 16.32 and with the conditions that: . . . . [emphasis added]**

The whole issue of the Planning Board's authority to grant waivers versus the Zoning Board's authority to grant variances is an important issue and has been well covered in two fairly recent cases decided by the Maine Supreme Court. One is Perkins v. Town of Ogunquit et al., 1998 ME 42. The other is York et al. v. Town of Ogunquit et al., 2001 ME 53. A brief review of these cases may be helpful in pointing out those waivers that the Planning

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Mr. James Noel  
March 27, 2003  
Page 2

Board has authority to grant and those requests characterized as waivers that are beyond the jurisdiction of the Planning Board to grant.

Perkins v. Town of Ogunquit

Perkins involved the Planning Board's authority to "waive" certain performance standards in the Design Review section of the Town's Zoning Ordinance. Specifically, it involved a waiver to reduce the 75-foot street ordinance frontage requirement. The Perkins applicant first filed a request for a variance with the Ogunquit Board of Appeals to allow a variance to the 75-foot street frontage requirement. The variance was denied because the landowner failed to satisfy the strict 4-prong hardship requirements for a variance under the Zoning Ordinance. The landowner next applied to the Ogunquit Planning Board seeking the same relief but characterizing the request as that of a waiver to the same 75-foot frontage requirement. The Standards section of the Limited Business District of the Ogunquit Zoning Ordinance authorized the Planning Board to grant waivers. It provided the following:

[t]he Planning Board may waive the . . . street frontage . . . requirements of this article . . . when the proposed use involves a structure or building that existed in 1930 . . . where such structures are required to comply with the design review standards. . . .

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The provision in the Ogunquit Zoning Ordinance empowering the Planning Board to grant "waivers" appears identically in the Standards section for each zoning district and allowed the Planning Board to waive the land area, street frontage, front yard setback, and building coverage requirements under certain circumstances.

Based on its waiver authority, the Planning Board waived the frontage requirement. The Planning Board's decision was appealed by another property owner to the York County Superior Court on the basis that the Ogunquit Planning Board lacked authority to waive certain performance standards set out in the Town's Zoning Ordinance. Judge Fritzsche heard the matter in the York County Superior Court and reversed the Ogunquit Planning Board's waiver of the frontage requirement. The case was then appealed by the property owner to the Maine Supreme Court. In its decision, the Maine Supreme Court stated:

To the extent, however, that, pursuant to Chapter I, Section 1505.3 of the Ogunquit Zoning Ordinance, the planning board's authority to grant a waiver is in reality the power to grant a variance, such authority is prohibited by clear implication. Such a scheme would permit a town to circumvent the Legislature's express and implicitly exclusive grant of waiver-granting authority to board of appeals.

The Maine Supreme Court concluded in Perkins "that a waiver whose direct effect is to circumvent a zoning requirement

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[should] be deemed a variance subject to the statutory requirements."

The Court concluded its opinion by stating that:

The waiver provision frustrates the purpose of the zoning statute. Because 30-A M.R.S.A. § 4352 and the statutory scheme of which it is a part impliedly preempt municipal authority from granting relief equivalent to a zoning variance, the waiver provision is invalid."

York et al. v. Town of Ogunquit et al.

The York case involved a challenge to the Ogunquit Planning Board's authority to grant waivers of Ordinance provisions. As part of its review procedure for a 39-lot subdivision, the Ogunquit Planning Board approved waivers of five Ogunquit Subdivision Standards requirements and one Ogunquit Zoning Ordinance requirement. Waivers were issued for a six percent road grade requirement, a cul-de-sac dead end street design requirement, a 2-street connections requirement, a 5-foot sidewalk width requirement, and a 32-foot road width requirement. The matter was appealed to the York County Superior Court and then to the Maine Supreme Court. Among the issues raised in York, the appealing party maintained that the waivers granted by the Ogunquit Planning Board were actually impermissible variances that the Planning Board had no authority to grant and that must, instead, be approved by the municipal zoning board of appeals.

Mr. James Noel  
March 27, 2003  
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The Supreme Court based its decision in York on its earlier holding in Perkins. The Court went on to state:

The Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances, the record is replete with evidence that there are special circumstances associated with Young's plan necessitating four waivers . . . The remaining fifth requirement, however, that streets must be 32 feet in width, is mandated not just by the Subdivision Standards, but also by Ogunquit Zoning Ordinance itself, which provides, ". . . paved traveled surface shall be at least 32 feet in width." . . . Therefore, in granting Young a waiver of the 32-foot street width requirement, the Board has granted Young a waiver of a provision mandated by the Ogunquit Zoning Ordinance. This is impermissible.

The Court went on to state:

Although the Board may waive Subdivision Standards requirements, it is not granted the authority to waive Zoning Ordinance provisions. This is the basis of our holding in Perkins, that Zoning Ordinance provisions are specifically subject to the variance analysis mandated by state statute and 30-A M.R.S.A. § 4353(4). Thus, deviation from Zoning Ordinance provisions may be obtained only when the requisite finding is made by the Zoning Board of Appeals. There is no dispute that the Board of Appeals made no such finding in this case. The Planning Board's grant of a waiver of the street width requirement, therefore, was beyond its authority.

#### Conclusion

It is clear from Perkins and York that a municipal planning board has no authority to waive standards contained in the Zoning Ordinance. As was seen in Perkins, the fact that ordinance language authorizing the Planning Board to grant waivers appears in the standards requirements of the Zoning Ordinance does not

**McEachern & Thornhill** Attorneys At Law

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change the fact that the Planning Board is without authority to grant the waivers. Thus, in my opinion, even if the Zoning Ordinance specifically authorizes the Planning Board to waive a frontage, setback, or other of the express zoning standard requirements contained in any of the Zoning Districts, such provisions would be held invalid and insufficient to authorize the Planning Board to grant such waivers. Any waiver issued under such circumstances would be subject to reversal by a court. Should the Planning Board be requested to waive certain requirements contained within the Zoning Ordinance, it should evaluate the substantial nature of the waiver request and if it is in the nature of a variance it should refer those requests to the Board of Zoning Appeals for a hearing. Both York and Perkins stand for the proposition that state statute "impliedly preempt(s) municipal [a planning board] authority from granting relief equivalent to a zoning variance" and, when it does so, "the waiver provision is invalid." Perkins, ¶ 15.

Should you wish to discuss this issue with me further, don't hesitate to give me a call.

Very truly yours,



Duncan A. McEachern

DAMCE/cn  
Copy to  
Mr. Philip O. McCarthy  
Ms. Heather Ross

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 2006 ME 127  
Docket: Yor-05-455  
Submitted  
on Briefs: February 27, 2006  
Decided: November 7, 2006

Panel: CLIFFORD, DANA, ALEXANDER, CALKINS, LEVY, and SILVER, JJ.

WILLIAM R. BODACK

v.

TOWN OF OGUNQUIT et al.

CLIFFORD, J.

[¶1] Ogunquit Village Estates, LLC, the Seafarer Development Group, and Stephen T. Hallett (the developers)<sup>1</sup> appeal from a judgment entered in the Superior Court (York County, *Fritzsche, J.*) vacating the decision of the Ogunquit Planning Board. The Planning Board granted preliminary approval to the developers to build a residential subdivision called Ogunquit Village Estates (the subdivision). The developers contend that the court improperly vacated the Planning Board's decision, and argue that the Board's determination that the subdivision would not cause an unreasonable impact on traffic, and its grant of a waiver of the access requirement in the Board's Subdivision Standards, are

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<sup>1</sup> Although the Town of Ogunquit participated in the proceedings before the Superior Court, it is not a party to this appeal.

supported by applicable law and substantial evidence in the record. Although for somewhat different reasons, we affirm the judgment of the Superior Court.

## I. BACKGROUND

[¶2] In September of 2002, the developers filed an application for subdivision approval with the Planning Board to build a retirement community for active adults over the age of fifty-five. The most recent plans call for thirty-five dwelling units to be constructed on two parcels of land totaling approximately fifty acres located on the southern and northern sides of Berwick Road in Ogunquit. William R. Bodack owns property immediately adjacent to the proposed subdivision's southern parcel. The Planning Board and the public, including Bodack, raised various concerns about the subdivision, noting, among other things, its size and potential impact on traffic, and specifically the level of service (LOS) at the intersection of Berwick Road and U.S. Route 1 (the intersection).<sup>2</sup>

[¶3] Also at issue was the access requirement found in section 10.3.1.11 of the Subdivision Standards that requires subdivisions containing fifteen or more lots to have at least two street connections with existing public streets. *See Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects* § 10.3.1.11

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<sup>2</sup> A level of service (LOS) rating denotes the time it takes a vehicle to pass through an intersection, and reflects the amount of traffic in the area. An intersection is rated on a scale of "A" to "F," with "F" being the lowest rating. An LOS of "F" signifies that it takes each vehicle greater than fifty seconds to pass through an intersection. Traffic studies conducted by the Planning Board and the developers confirmed that the intersection operates at an LOS of "F."

(Apr. 3, 2000). Because the subdivision's southern parcel contains fifteen lots, but has only one access road, a waiver of section 10.3.1.11 is required for subdivision approval.

[¶4] In March of 2005, the Planning Board issued a written decision approving the application to build the subdivision, and finding that, although the subdivision would cause an increase in traffic congestion at the intersection, such an increase would not result in an unreasonable impact on traffic. The Planning Board waived the two-street-connections requirement of section 10.3.1.11, but did not state the reasons for its waiver of the access requirement.

[¶5] Bodack appealed the Planning Board's decision to the Superior Court pursuant to M.R. Civ. P. 80B,<sup>3</sup> contending (1) that the subdivision would exacerbate existing traffic problems at the intersection; (2) that the application did not adequately provide for open space; and (3) that the developers should not have been granted a waiver of the access requirement. The Superior Court concluded that the Board erred in approving the subdivision because it misconstrued the Zoning Ordinance and Subdivision Standards pertaining to traffic control, and because no special circumstances exist that would permit a waiver of the access

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<sup>3</sup> Title 30-A M.R.S. § 4353(1) (2005) provides that a direct appeal of a planning board decision to the Superior Court is permissible only if provided for in the municipal zoning ordinance. Ogunquit's Zoning Ordinance does provide for such direct appeals. Ogunquit, Me., Zoning Ordinance § 6.5(B) (Apr. 4, 1998).

requirement. Accordingly, the court vacated the decision of the Planning Board. Both parties appealed.<sup>4</sup>

## I. DISCUSSION

### A. Standard of Review

[¶6] When the Superior Court is acting in its appellate capacity, we review the Planning Board's decision "directly for an abuse of discretion, error of law, or findings unsupported by substantial evidence in the record." *Herrick v. Town of Mechanic Falls*, 673 A.2d 1348, 1349 (Me. 1996). "Substantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion . . . ." *Forbes v. Town of Southwest Harbor*, 2001 ME 9, ¶ 6, 763 A.2d 1183, 1186. A Planning Board's decision is given deference and "[w]e will not substitute our own judgment for that of the Board." *Id.* The interpretation of a local ordinance, however, "is a question of law, and we review that determination de novo." *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 16, 868 A.2d 161, 166.

### B. Interpretation of the Zoning Ordinance and Subdivision Standards

[¶7] Bodack contends that the Planning Board's approval of the subdivision was error because the plain language of the Zoning Ordinance and Subdivision

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<sup>4</sup> We have considered Bodack's cross-appeal from that part of the Superior Court's judgment upholding the decision of the Planning Board that the developers were in compliance with municipal provisions governing open space. We discern no error in that portion of the court's judgment.

Standards prohibits any development that would create additional traffic at intersections that cannot absorb further traffic. The developers contend that the Planning Board correctly interpreted the Zoning Ordinance and Subdivision Standards to approve the subdivision if it would not cause any unreasonable congestion or unsafe conditions at the intersection.

[¶8] Before approving a subdivision permit, the Planning Board must consider and review traffic-related criteria pursuant to 30-A M.R.S. § 4404(5) (2005), the Ogunquit Zoning Ordinance, and the Planning Board's own Subdivision Standards. Section 4404 provides:

When adopting any subdivision regulations and when reviewing any subdivision for approval, the municipal reviewing authority shall consider the following criteria and, before granting approval, must determine that:

. . . .

**5. Traffic.** The proposed subdivision will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed . . . .

30-A M.R.S. § 4404. Section 1.1.5 of the Subdivision Standards mirrors section 4404(5) and provides that, before granting approval for a proposed subdivision, the Planning Board must determine that the subdivision “[w]ill not cause unreasonable highway or public road congestion or unsafe conditions with respect to use of the

highways or public roads existing or proposed.” Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects § 1.1.5 (Apr. 3, 2000).

[¶9] The Town’s Zoning Ordinance, however, imposes more stringent traffic requirements than the reasonableness standards found in the State of Maine statute or the Planning Board’s Subdivision Standards. Section 8.13(A)(3) of the Town’s Zoning Ordinance provides:

The street giving access to the lot and neighboring streets which can be expected to carry traffic to and from the development shall have traffic carrying capacity and be suitably improved to accommodate the amount and types of traffic generated by the proposed use. *No development shall increase the volume:capacity ratio of any street above 0.8 nor reduce the street’s Level of Service to “D” or below.*

Ogunquit, Me., Zoning Ordinance § 8.13(A)(3) (Apr. 4, 1998) (emphasis added).<sup>5</sup>

[¶10] In support of the Planning Board’s determination that the proposed subdivision would not create unreasonable traffic congestion at the intersection, the developers contend that section 8.13(A)(3) of the Zoning Ordinance should be construed in light of the reasonableness standard found in section 1.1.5 of the Subdivision Standards, as well as 30-A M.R.S. § 4404(5).<sup>6</sup> Bodack argues that

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<sup>5</sup> The developers urge us to take judicial notice, pursuant to M.R. Evid. 201(b), of a recent amendment to section 8.13(A)(3) of the Zoning Ordinance, which had not been enacted at the time of the Planning Board hearings. *See* Ogunquit, Me., Zoning Ordinance § 8.13(A)(3) (Jan. 24, 2005). Because the amendment was adopted after the Planning Board approved the developers’ application, however, we apply section 8.13(A)(3) as written at the time the Planning Board approved the subdivision.

<sup>6</sup> In support of their interpretation of the Zoning Ordinance and Subdivision Standards, the developers rely on *Thacker v. Konover Dev. Corp.*, 2003 ME 30, 818 A.2d 1013. *Thacker* construed former 30-A M.R.S.A. § 4404(5) (Supp. 2002), which, like the current version, *see* 30-A M.R.S. § 4404(5) (2005),

section 8.13(A)(3) of the Zoning Ordinance prohibits the Planning Board from approving the subdivision because it establishes specific minimum standards that govern the more general “reasonableness” provision of the Subdivision Standards.

[¶11] The Zoning Ordinance and Subdivision Standards each contain provisions regarding how to reconcile conflicting provisions within the Ordinance and Standards. Section 1.5 of the Zoning Ordinance provides: “Whenever the requirements of this Ordinance are in conflict with the requirements of any other lawfully adopted rules, regulations, or ordinances, the *most restrictive or that imposing the higher standards shall govern.*” Ogunquit, Me., Ogunquit Zoning Ordinance § 1.5 (Apr. 4, 1998) (emphasis added). Similarly, section 10.1.1 of the Subdivision Standards provides that “the *most rigid requirement* of either this standard, the zoning or other ordinance shall apply whenever they may be in conflict.” Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects § 10.1.1 (Apr. 3, 2000) (emphasis added).

[¶12] Section 8.13(A)(3) of the Zoning Ordinance, as applied in the instant case, imposes a more restrictive standard than, and thus is in conflict with, the

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required only a standard of reasonableness. *Thacker*, 2003 ME 30, ¶ 12, 818 A.2d at 1019. Here, the subdivision would worsen the LOS at the intersection, and the applicable regulation, section 8.13(A)(3) of the Zoning Ordinance, mandates that “[n]o development shall increase the volume:capacity ratio of any street above 0.8 nor reduce the street’s Level of Service to “D” or below.” Ogunquit, Me., Ogunquit Zoning Ordinance § 8.13(A)(3) (Apr. 4, 1998). Section 8.13(A)(3) does not utilize the reasonableness standard found in 30-A M.R.S. § 4404(5), making *Thacker* distinguishable.

reasonableness standard found in section 1.1.5 of the Subdivision Standards. To conclude that the reasonableness standard found in section 1.1.5 and section 4404(5) of title 30-A applies, and that the specific numerical requirements of section 8.13(A)(3) do not apply would render those requirements a nullity. Rules of statutory construction require zoning ordinances and subdivision standards to be interpreted “so as [not] to render a provision a surplusage.” *Kimball v. Land Use Regulation Comm’n*, 2000 ME 20, ¶ 26, 745 A.2d 387, 394. It is the burden of the developers, as applicants, “to demonstrate that the proposed subdivision will satisfy every requirement of the . . . town ordinance,” namely, that the subdivision will not exacerbate the traffic problems at the intersection in violation of section 8.13(A)(3). *Grant’s Farm Assocs., Inc. v. Town of Kittery*, 554 A.2d 799, 801 (Me. 1998). The traffic studies performed on the intersection found that it had an LOS of “F.” Adding any traffic to this already failing intersection would adversely impact its LOS, as Bodack correctly asserts. Because the Planning Board improperly applied the reasonableness standard found in section 1.1.5 of the Subdivision Standards and section 4404(5) of the State statute, as opposed to the more restrictive standard found in section 8.13(A)(3) of the Zoning Ordinance, the Superior Court correctly vacated the Board’s approval of the subdivision. See *Herrick*, 673 A.2d at 1349.

### C. Waiver of the Access Requirement

[¶13] The developers contend that the Planning Board's decision to grant a waiver of the access requirement in the Board's Subdivision Standards was supported by the evidence because special circumstances exist to justify the waiver. Bodack contends that the Planning Board's decision never made a specific finding that the developers met the standards for a waiver of the access requirement, and that the Superior Court correctly concluded that the evidence did not support such a waiver.

[¶14] The findings of a planning board must be "sufficient to apprise either us or the parties of the basis for their conclusion." *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16, ¶ 10, 769 A.2d 834, 837. Although an agency is not always required to issue a complete factual record, written factual findings must be sufficient to show the applicant and the public a rational basis of its decision.<sup>7</sup> *York v. Town of Ogunquit*, 2001 ME 53, ¶ 14, 769 A.2d 172, 178. Section 10.3.1.11 provides, in relevant part: "Subdivisions containing fifteen (15) lots or more shall have at least two street connections with existing public streets . . . ." Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects § 10.3.1.11 (Apr. 3, 2000). Section 12.1 of the

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<sup>7</sup> Although in certain circumstances we may conclude that, "[i]f there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings," *Forester v. City of Westbrook*, 604 A.2d 31, 33 (Me. 1992), this does not negate the requirement that the Board make written factual findings with respect to waivers or that such findings must be supported by record evidence.

Subdivision Standards allows the Planning Board to waive or vary this requirement “[w]here the Planning Board finds that extraordinary and unnecessary hardships may result from strict compliance with these standards or where there are special circumstances of a particular plan . . . .” Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects § 12.1 (Apr. 3, 2000).

[¶15] We have previously addressed a waiver of the same regulation at issue in the present case: section 10.3.1.11 of the Subdivision Standards. *See York*, 2001 ME 53, 769 A.2d 172. In upholding the Planning Board’s waiver of the access requirement, we noted that “[t]he Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances, on a Board finding of extraordinary and unnecessary hardship *or* because of the special circumstances of a plan.” *Id.* ¶ 10, 769 A.2d at 176. There, the Planning Board had issued twelve pages of findings of fact approving the plan and granting the developers a waiver of the access requirement, in which it “disclosed the lengthy considerations underlying each waiver.” *Id.* ¶ 4, 769 A.2d at 174. We further noted: “There was sufficient competent evidence, including evidence supporting a finding of the special circumstances of [the developer’s] plan, on which the Board could have based its ample findings of fact.” *Id.* ¶ 15, 769 A.2d at 178.

[¶16] In this case, the Planning Board never made a finding that the waiver was granted due to extraordinary and unnecessary hardships or the special

circumstances attendant to the developers' plan, nor did it disclose the considerations or factual findings supporting the waiver. The Planning Board is required to make written factual findings sufficient to show the parties, the public, and an appellate court the basis for its decision to grant the waiver. Although the evidence did not preclude the Planning Board from making such findings,<sup>8</sup> because the Planning Board failed to make any written factual findings as to why it granted the waiver, the Planning Board's decision granting a waiver of the access requirement was correctly vacated.

The entry is:

Judgment affirmed.

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<sup>8</sup> We disagree with the Superior Court's conclusion that the evidence is insufficient as a matter of law to allow the Planning Board to find the existence of extraordinary and unnecessary hardships or special circumstances necessary to support a waiver of the access requirement.

Perkins v. Town of Ogunquit, corrected 3-18-98

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MAINE SUPREME JUDICIAL COURT

Reporter of Decisions

Decision: 1998 ME 42

Docket: Yor-97-407

Argued: December 3, 1997

Decided: March 2, 1998

Panel: ROBERTS, CLIFFORD, RUDMAN, and LIPEZ, JJ.

RENA W. PERKINS et al.

v.

TOWN OF OGUNQUIT

and

ROBERT W. SCANLON, JR.

CLIFFORD, J.

[¶1] Robert W. Scanlon(1) appeals from a judgment entered in the Superior Court (York County, Fritzsche, J.) vacating the Town of Ogunquit's waiver of a frontage requirement granted to Scanlon. Scanlon contends that the court erred in deciding that the Ogunquit Planning Board lacked authority to waive certain performance standards set out in the Town's zoning ordinance. Finding no error, we affirm the judgment.

[¶2] Robert Scanlon owns improved property in the Town of Ogunquit at 9 Beach Street on which is located a building (the Fox House). Scanlon's property is a non-conforming lot with frontage of between 74.26 and 74.94 feet in a zoning district requiring seventy-five feet of frontage.(2) Rena Perkins, Roger and Lee LaPierre, and Lilly Andrews are abutting property owners.

[¶3] In the summer of 1995, the 100-year-old Worster House located across the street from the Fox House was scheduled for demolition by its owner in order to build a parking lot. Scanlon submitted numerous proposals to the Town to move the Fox House to the rear of his lot, and to move the Worster House from across the street to the front of the Fox House lot to save it from destruction.

[¶4] On May 16, 1996 the Town's Board of Appeals denied Scanlon a variance from the 75-foot street frontage requirement on the Fox House lot because he was unable to establish hardship pursuant to 30-A M.R.S.A. § 4353 (1996 & Supp. 1997).(3) The Board did grant him a special exception to store the Worster House on the Fox House Lot, apparently contingent upon his securing a waiver from the frontage requirement pursuant to alternate authority, at issue in this litigation, which a local ordinance vests in the Planning Board. On June 3, 1996 the Planning Board granted Scanlon a waiver, pursuant to the Standards section for the Limited Business District, that provides that "[t]he Planning Board may waive the . . . street frontage . . . requirements of this article . . . when the proposed use involves a structure or building that existed in 1930 . . . where such structures are required to comply with the Design Review Standards. . . ."(4) The Town Code Enforcement Officer then issued a permit, and Scanlon moved the Worster House to the Fox House lot.

[¶5] Pursuant to 30-A M.R.S.A. § 4353(1)(5) and M.R. Civ. P. 80B, the Perkins and the LaPierres filed complaints in the Superior Court. The court vacated the Town Planning Board's grant of the waiver, concluding that the Town Board of Appeals, not the Planning Board, is the sole source of authority to grant such relief from a town zoning ordinance. When the Superior Court functions as an appellate court reviewing the action of a town board, "we review the record directly to determine if the Board abused its discretion, committed an error of law, or made findings not supported by substantial evidence." LaBay v. Town of Paris, 659 A.2d 263, 265 (Me. 1995); see also Town of Union v. Strong, 681 A.2d 14, 17 (Me. 1996) ("Interpretation of provisions in a zoning ordinance is a question of law.").

[¶6] Scanlon argues that the home rule statutory provisions in 30-A M.R.S.A. § 3001(6) grant municipalities plenary authority to enact regulations, and that the Legislature has neither expressly nor by clear implication removed the power of a town to delegate authority to its Planning Board to waive zoning requirements in narrowly defined circumstances. We disagree with Scanlon's contentions.

[¶7] Our standard on preemption in the home rule context is clear:

[T]he Legislature has conveyed a plenary grant of the

state's police power to municipalities, subject only to express or implied limitations supplied by the Legislature. . . . Municipal legislation will be invalidated, therefore, only when the Legislature has expressly prohibited local regulation, or when the Legislature has intended to occupy the field and the municipal legislation would frustrate the purpose of state law.

International Paper Co. v. Town of Jay, 665 A.2d 998, 1001-02 (Me. 1995).

[¶8] The first section of the subchapter on Land Use Regulation, which authorizes local zoning regulation and zoning boards of appeals, is entitled "§ 4351 Home rule limitations," and provides that "[t]his subchapter provides express limitations on municipal home rule authority." Title 30-A M.R.S.A. § 4351 (West 1996 & Supp. 1997). Pursuant to that subchapter, local zoning ordinances are authorized to "provide for any form of zoning consistent with this chapter . . . ." 30-A M.R.S.A. § 4352 (1996 & Supp. 1997). A municipality adopting a zoning ordinance "shall establish a board of appeals subject to this section." 30-A M.R.S.A. § 4353 (emphasis added). The board of appeals is expressly empowered to grant a variance "in strict compliance with subsection 4." Id. at § 4353(2)(C).

[¶9] Section 4353(2)(B) does not expressly preclude other local bodies from all matters concerning a municipality's zoning ordinance. In fact, it provides for a municipality to allow its planning board to issue "special exception and conditional use permits." Id. To the extent, however, that, pursuant to Chapter I section 1505.3 of the Ogunquit Zoning Ordinance, the Planning Board's authority to grant a waiver is in reality the power to grant a variance, such authority is prohibited by clear implication. Such a scheme would permit a town to circumvent the Legislature's express and implicitly exclusive grant of variance-granting authority to boards of appeals. Exclusivity is also clearly implied in the language of 30-A M.R.S.A. § 4353(2)(B), describing the powers of planning boards: to "approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance." Id. The Legislature had no trouble specifying the precise and limited circumstances in which planning boards would be accorded limited powers. The statutory language is clear that allowing planning boards variance-granting powers would frustrate the purpose of the statute.(7)

[¶10] Scanlon contends that the waiver is distinct from the Town's zoning provisions and therefore is not a variance.(8) He argues that the waiver is an integral part of the Design Review article that is a local legislative ordinance that applies uniformly throughout the town. Like a special exception,(9) Scanlon argues, the waiver policy allows that which would otherwise be prohibited, e.g., less than 75 feet of frontage, once there has been a legislative determination that a particular use must be granted, e.g., pre-1930's buildings that the reviewing board finds have met certain standards.(10)

[¶11] It is true that our cases have distinguished ordinances that are "general and uniform city-wide" from those that by statutory definition necessarily divide a municipality into different zones in which different proscriptions apply. Benjamin v. Houle, 431 A.2d 48, 49 (Me. 1981) (city-wide permit procedure for gravel excavation was not "zoning" and thus not reviewable by zoning board of appeals); LaBay, 659 A.2d at 265 (Me. 1995) (building ordinance that regulates uniformly throughout municipality does not constitute zoning); see also 30-A M.R.S.A. § 4301(15-A) (1996) ("Zoning ordinance" means a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district."). We have also sustained "blanket" ordinances under the general police power, even when "the subject could have been approached by the less restrictive alternative of a zoning ordinance. . . ." Town of Boothbay v. National Adver. Co., 347 A.2d 419, 423 (Me. 1975).

[¶12] None of these cases, however, supports Scanlon's position that a mechanism that offers relief from zoning requirements in the form of a uniform town-wide ordinance escapes the limitations applicable to a variance. The ordinances at issue in the cases relied on by Scanlon did not negate the restrictions imposed by the zoning scheme. The independence from the statutory zoning scheme that we have accorded to non-zoning municipal prohibitions does not mean that a waiver whose direct effect is to circumvent a zoning requirement should not be deemed a variance subject to the statutory requirements.

[¶13] The circumvention in this case is illustrated by the failure of the waiver policy to take into account the purposes of the frontage requirements of the zone. Scanlon's theory suggests that if a pre-1930's building satisfies the Design Review standards--a set of essentially aesthetic considerations(11)--the Planning Board has then been provided with standards to decide whether or not to waive frontage, land area, and setback requirements.(12) Yet merely meeting the aesthetic standards in no way ensures that a waiver proposal will satisfy the fundamental purposes of the zoning requirements. See Arden H. & Daren A. Rathkopf, 3 The Law of Zoning and Planning § 34.06 (4th ed. 1993) (principal purpose of frontage requirement is usually access for fire and other emergency vehicles).(13)

[¶14] Equally significant is the actual experience of Scanlon in this case. The Zoning Board of Appeals denied Scanlon a variance from the 75-foot street frontage requirement on the ground that he could not establish hardship pursuant to 30-A M.R.S.A. § 4353(4). Less than three weeks later, the Planning Board afforded him the same relief he had sought from the Board of Appeals by granting a waiver without findings of fact or articulation of a standard. {14}

[¶15] The owner of a pre-1930's structure who is denied a variance from the Board of Appeals pursuant to undue hardship standards set out in 30-A M.R.S.A. § 4353(4) cannot seek a waiver from the Planning Board unencumbered by that statute's variance criteria. The waiver provision frustrates the purpose of the zoning statute. Because 30-A M.R.S.A. § 4352 and the statutory scheme of which it is a part impliedly preempt municipal authority from granting relief equivalent to a zoning variance, the waiver provision is invalid.

The entry is:

Judgment affirmed.

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FOOTNOTES\*\*\*\*\* {1} The complaints brought by Rena W. Perkins, Newell S. Perkins, Roger and Lee LaPierre, and Lilly Andrews named the Town of Ogunquit as defendant and Scanlon as a party- in-interest. The separate complaints were consolidated on appeal to this Court. The Town does not appeal the decision of the Superior Court, and Scanlon is treated as a defendant. The LaPierres and Lilly Andrews are represented by the same attorney and are referred to as "the LaPierres." {2} The Zoning Ordinance of the Town of Ogunquit, Title X, Chapter 1, Limited Business District § 1505.3, provides in pertinent part: The following space standards shall apply: Minimum land area: 7500 sq ft Minimum street frontage: 75 ft . . . {3} Section 4353 provides in pertinent part: Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section. 1. Jurisdiction; procedure. The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance. . . . 2. Powers. In deciding any appeal, the board may: A. Interpret the provisions of an ordinance called into question; B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board . . . to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to the Superior Court if required by local ordinance; and C. Grant a variance in strict compliance with subsection 4. . . . 4. Variance. Except as provided in subsections 4-A and 4-B, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means: A. The land in question can not yield a reasonable return unless a variance is granted; B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; C. The granting of a variance will not alter the essential character of the locality; and D. The hardship is not the result of action taken by the applicant or a prior owner. {4} Zoning Ordinance of the Town of Ogunquit, Title X, Chapter 1, "Note" following § 1505.3. This provision empowering the Planning Board to grant "waivers" appears identically in the Standards section for each zoning district: The Planning Board may waive the land area, street frontage, front yard setback and building coverage requirements of this Article and the parking requirements of Chapter 2, Article 2, when the proposed use involves a structure or building that existed in 1930 . . . where such structures or buildings are required to comply with the Design Review Standards. . . . The Design Review Standards are part of a separate ordinance whose purpose is to preserve the historic values of buildings. See Zoning Ordinance of the Town of Ogunquit, Title X, Chapter 2, Art. 8. Chapter 1 § 604.8 empowers the Planning Board to "review building designs and issue Design Certificates" in accordance with the Design Review Standards ordinance. {5} 30-A M.R.S.A. § 4353(1) allows direct appeal from the decision of a Planning Board to the Superior Court on issues of zoning only if the municipal ordinance so provides. See Freeman v. Town of Southport, 568 A.2d 826, 828 & n. 3 (Me. 1990). Ch. 1 § 605.2 of the Ogunquit Zoning Ordinance provides for such a direct appeal. {6} Title 30-A M.R.S.A. § 3001 provides in pertinent part: § 3001. Ordinance power Any municipality, by the

adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter. . . . 3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law. 30-A M.R.S.A. § 3001 (1996 & Supp. 1997) {7} The predecessor statute to 30-A M.R.S.A. § 4353 provided for local boards of appeals in only slightly more mandatory language. See Former 30 M.R.S.A. § 4963(1) ("A board of appeals is established in any municipality which adopts a zoning ordinance.") (emphasis added). Scanlon argues that the Attorney General's 1981 opinion that Perkins relies on pre-dated the Legislature's 1987 home rule statute, and therefore it engaged in a "grant" approach to municipal law. That opinion, however, explicitly recognizes the existence of home rule, and more importantly cites the "clear implication" by the Legislature that municipalities are prohibited from vesting the power to grant variances in any other administrative bodies: The Legislature has therefore actually established a board of appeals, rather than merely authorizing a municipality to establish one. These restrictions are consistent with the Legislature's decision not to vest the power to grant variances in any other administrative bodies. . . . The Legislature has vested in these boards of appeal the authority to grant variances under certain strict conditions [that] reflect the general intent of the Legislature that limitations be imposed on granting exceptions to a general zoning scheme. Opinion of the Attorney General (April 23, 1981) (1981 WL 157143) (interpreting former 30 M.R.S.A § 4963(1)). {8} We note that the Design Review standards are within the Town's Zoning Ordinance. Scanlon contends, however, that this is the result of poor ordinance-drafting. {9} Scanlon does not argue that the waiver is a special exception, but rather that it is akin to one and therefore equally valid. See 30-A M.R.S.A. § 4353(2)(B) (authorizing planning boards to grant special exception permits). The Town of Ogunquit has provided its Board of Appeals, and not its planning board, with the power "to hear and decide only those special exceptions which are authorized by this chapter and which are specifically listed as special exceptions." Zoning Ordinance of the Town of Ogunquit, Title X, Chapter 1, § 502.2. {10} We have distinguished special exceptions from variances: A special exception use differs from a variance in that a variance is authority extended to a landowner to use his property in a manner prohibited by the ordinance (absent such variance) while a special exception allows him to put his property to a use which the ordinance expressly permits. *Cope v. Town of Brunswick*, 464 A.2d 223, 226-27 (Me. 1983) (citing *Stucki v. Plavin*, 291 A.2d 508, 511 (Me. 1970)). {11} The Design Guidelines for all Buildings within the District require "visual compatibility" with their surroundings. Chapter II § 806. The specific factors in this inquiry are: Scale of the Building. Height. Proportion of Building's Front Facade. Relationship of Solids to Voids in Front Facades. Proportions of Opening Within the Facility. Roof Shapes. Relationship of Facade Materials. Relationship of Spaces to Buildings on Streets. Site Features. Architectural, Historical or Neighborhood Significance. {12} The Perkins and the LaPierres argue that an applicant who meets all of the design criteria might or might not necessarily be entitled to a waiver, and that this lack of standards is constitutionally inadequate. See *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50, 52 (Me. 1968) ("The legislative body may specify conditions under which certain uses may exist and may delegate to the Board discretion in determining whether or not conditions have been met, [but it cannot] delegate to the Board a discretion which is not limited by legislative standards."). Our determination of state preemption makes resolution of the standards issue unnecessary. {13} See also *LaPointe v. City of Saco*, 419 A.2d 1013, 1015 ("Minimum area, width and frontage requirements are generally valid if reasonable. Their purpose is to eliminate overcrowding and to provide light and air."); *MacNeil v. Town of Avon*, 435 N.E.2d 1043, 1046 (Mass. 1982) (lack of frontage requirements may increase the amount and size of firefighting equipment required to respond to fire, create congestion and interfere with access by emergency vehicles); cf. *Barnard v. Town of Yarmouth* 313 A.2d 741, 746 (Me. 1974) ("The general rule is that minimum lot size requirements, when reasonable, are the proper subjects of the zoning power, since under appropriate circumstances they relate to the legitimate needs of the community in controlling congestion, assuring adequate health and safety by providing light and air, enabling sewage disposal, and minimizing the dangers from spread of fire."). {14} The language of the Planning Board waivers and the Zoning Board of Appeals variances is strikingly similar. The Zoning Ordinance's definition of variance provides: "As used in this ordinance, a variance is authorized only for height, area and size of structure or size of yards and open spaces." Zoning Ordinance of the Town of Ogunquit, Title X, Chapter 1 § 201. The Planning Board's waiver provision similarly addresses the size of yards and open spaces: "The Planning Board may waive the land area, street frontage, front yard setback and building coverage requirements . . ." Zoning Ordinance of the Town of Ogunquit, Title X, Chapter 1, "Note" following § 1505.3.

**Maine Supreme Judicial Court Reports**

YORK v. TOWN OF OGUNQUIT, 2001 ME 53

769 A.2d 172

CHARLES T. YORK et al. v. TOWN OF OGUNQUIT et al.

Docket Yor-00-392.

Supreme Judicial Court of Maine.

Argued December 13, 2000.

Decided April 4, 2001.

Appealed from the Superior Court, York County, Fritzsche, J.  
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Alan S. Nelson, Esq., (orally), Prescott Lemoine Jamieson & Nelson,  
P.A., Saco, for plaintiffs.

Roy T. Pierce, (orally), John P. McVeigh, Esq., Preti, Flaherty, Beliveau,  
Pachios & Haley, LLC, Portland (for Town of Ogunquit), Paul D. Cadigan,  
(orally), Wayne T. Adams, Kennebeunk, for defendants.

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER,  
and CALKINS, JJ.

CLIFFORD, J.

[¶ 1] Charles T. York and others<sup>[fn1]</sup> (York) appeal from a judgment entered in the Superior Court (York County, *Fritzsche, J.*) affirming the Ogunquit Planning Board's approval of Robert Young's final subdivision plan. York challenges Young's standing, the Planning Board's authority to grant waivers of ordinance provisions, the sufficiency of the findings of fact issued by the Board and the sufficiency of the evidence on which those findings were based, and the Board's approval of the plan without compliance with subdivision requirements. Although we are convinced of Young's standing and the sufficiency of both the evidence and the findings of fact, we vacate the judgment and remand for the limited reasons that are stated below.

[¶ 2] In July of 1998, Robert Young sought approval from the Ogunquit Planning Board for the development of a thirty-nine lot subdivision, the Windward Subdivision. At the time, Young's interest in the property consisted of his right to purchase

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the property pursuant to two purchase and sale agreements. Young has since purchased both parcels and conveyed title to a limited liability company, but does continue to hold a mortgage interest in both parcels.<sup>[fn2]</sup>

[¶ 3] The Board met and discussed the plan for the subdivision numerous times between August of 1998 and June of 1999. The Board held two public hearings and conducted one site review. Abutters participated in both public meetings and voiced various concerns. On June 21, 1999,

the Board voted to accept and approve the final plan for the subdivision on three conditions, one of which was the condition that "the developer will discuss bonding requirements with the Town Manager."

[¶ 4] The Board later issued twelve pages of findings of fact approving Young's application. Included in its approval were waivers of five Ogunquit Subdivision Standards requirements and one Ogunquit Zoning Ordinance requirement discussed at many of the meetings: a thirty-two foot road width requirement, a six percent road grade requirement, a cul-de-sac dead end street design requirement, a two street connections requirement, and a five foot sidewalk width requirement.[fn3] The Board disclosed the lengthy considerations underlying each waiver.[fn4] Finally, the findings included the statement that Young had not

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demonstrated a legal interest in the property. At a subsequent Board meeting on May 22, 2000, the findings of fact were amended to fix a "clerical error" by removing the word "not" from the statement that Young had not demonstrated an interest in the property. Thus, the Board found that Young *did* have a legal interest in the property for the proposed subdivision.

[¶ 5] On July 16, 1999, York filed a complaint in the Superior Court for review of the Board's decision pursuant to M.R. Civ. P. 80B.[fn5] The Superior Court affirmed the Ogunquit Planning Board's approval of Young's subdivision plan, and this appeal by York followed.

[¶ 6] Because the Superior Court acted in an appellate capacity, we review the decision of the Planning Board directly for "error of law, abuse of discretion or findings not supported by substantial evidence in the record." *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 8, 746 A.2d 368, 372 (quoting *Veilleux v. City of Augusta*, 684 A.2d 413, 415 (Me. 1996)). Substantial evidence is "evidence that a reasonable mind would accept as sufficient to support a conclusion." *Id.* We may not substitute our own judgment for that of the Board. *Brooks v. Cumberland Farms, Inc.*, 1997 ME 203, ¶ 12, 703 A.2d 844, 848.

#### I.

[¶ 7] York first contends that Young lacked the requisite standing to pursue a development application before the Board because he had no interest in the property he proposed to develop.[fn6] To have standing, that is, a sufficient personal stake in the outcome of a case, a party must have a "right, title or interest" in the property he or she seeks to develop. *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1381. Although the initial findings of fact by the Board indicated that Young did not have standing to pursue his development application, that finding was the result of a clerical error and was amended by the Board.

[¶ 8] Furthermore, various title documents submitted at oral argument clearly resolve the standing issue in favor of Young. Although gaps in his interest do appear in the form of short lapses in the agreements to extend the closing dates for the purchase and sale agreements, these temporary gaps appear only at noncrucial points in this litigation. At all crucial times—the submission of Young's plan to the Board, the plan's approval by the Board, the issuance of the Superior Court's decision, and the argument before us—Young's "right, title or interest" has been clearly established.

#### II.

[¶ 9] Relying principally on Perkins v. Town of Ogunquit,  
1998 ME 42, 709 A.2d 106,  
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York contends that the waivers granted by the Board were actually impermissible variances that the Planning Board had no authority to grant and that must instead be approved by the municipal Zoning Board of Appeals. In Perkins, a landowner was denied a variance from the seventy-five-foot lot frontage requirement of the Ogunquit Zoning Ordinance by the Ogunquit Board of Appeals because he could not establish undue hardship. [fn7] Perkins, 1998 ME 42, ¶ 4, 709 A.2d at 107. Three weeks later, the landowner requested and was granted a waiver of the same requirement by the Ogunquit Planning Board. Id. We held that the waiver was invalid because it circumvented zoning requirements by functioning as a variance granted in the absence of a finding of undue hardship. [fn8] Id. ¶ 12, 709 A.2d at 110. We also noted that the Planning Board is without power to grant such a variance because of "the Legislature's express and implicitly exclusive grant of variance-granting authority to boards of appeals." Id. ¶ 9, 709 A.2d at 108. Thus, only the board of appeals is vested with the authority to grant a variance of zoning ordinance provisions.]

[¶ 10] In this case, however, the waivers granted by the Board for four of the five requirements—the sidewalk width, cul-de-sac street end design, road grade, and street connections requirements—are waivers of Ogunquit Subdivision Standards alone. This is unlike the situation in Perkins, where the Board purported to waive an Ogunquit Zoning Ordinance provision. See id. ¶ 4, 709 A.2d at 107. The Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances, on a Board finding of extraordinary and unnecessary hardship or because of the special circumstances of a plan. [fn9] The record is  
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replete with evidence that there are special circumstances associated with Young's plan necessitating these four waivers. This is true even though some of the rationale for the waivers could apply to any plan. For example, the steepness of the property caused significant concerns regarding stormwater runoff and retention, and resulted in the Board permitting a seven rather than a six percent road grade. The waivers also operate to preserve more of the natural features of the property, which is aesthetically desirable, and better for the environment because they reduce the impact on clam beds and vegetation. The waivers also are beneficial in reducing the property's potential flooding problems. Four of the waivers were therefore granted by the Board pursuant to its authority under State statute and municipal ordinance. These four waivers were based on substantial evidence of special circumstances as is required by the Subdivision Standards.

[¶ 11] The remaining fifth requirement, however, that streets must be thirty-two feet in width, is mandated not just by the Subdivision Standards, but also by Ogunquit Zoning Ordinance itself, which provides, ". . . paved traveled surface shall be at least 32 feet in width." Ogunquit, Me., Ogunquit Zoning Ordinance § 10.2(B)(3) (Apr. 5, 1999). See supra note 3. This requirement is limited to "collector streets," defined in the Zoning Ordinance as, "Any street that carries the traffic to and from the major arterial streets to local access street, or directly to destinations or to serve local traffic generators." Ogunquit, Me., Ogunquit Zoning Ordinance § 2 (Apr. 5, 1999). At least one of the street width waivers granted by the Board was for a collector street; in fact, the Board's findings of fact

specifically state, "The Board approved the requested waiver from 32 feet to 24 feet from the collector road, Windward Way. . . ." Therefore, in granting Young a waiver of the thirty-two foot street width requirement, the Board has granted Young a waiver of a provision mandated by the Ogunquit Zoning Ordinance. This is impermissible.

*upon proper factual findings*  
[¶ 12] Although the Board may waive Subdivision Standards requirements, it is not granted the authority to waive Zoning Ordinance provisions. This is the basis of our holding in Perkins, that Zoning Ordinance provisions are specifically subject to the variance analysis mandated by state statute in 30-A M.R.S.A. § 4353(4) (Supp. 2000). Perkins, 1998 ME 42, ¶ 12, 709 A.2d at 110. Thus, deviation from Zoning Ordinance provisions may be obtained only when the requisite finding is made by the Zoning Board of Appeals. There is no dispute that the Board of Appeals made no such finding in this case.

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The Planning Board's grant of a waiver of the street width requirement, therefore, was beyond its authority.

[¶ 13] The Board's waiver of the street width requirement is the only waiver that was erroneously granted. This error does not require the disapproval of Young's plan in its entirety, but only that limited portion of the plan that violates the street width Zoning Ordinance requirement. In vacating the Superior Court judgment, we remand for compliance with the Ogunquit Zoning Ordinance requirement of a thirty-two foot road width on the collector street or streets, or for the Board of Appeals to consider a variance of the street width requirement for Young pursuant to 30-A M.R.S.A. § 4353(4) (Supp. 2000) and the Ogunquit Zoning Ordinance § 5.2(B)(2). [fn10]

### III.

[¶ 14] York also contends that the twelve pages of findings of fact issued by the Board regarding the five waivers as well as the criteria for subdivision approval enumerated in 30-A M.R.S.A. § 4404 (1996 & Supp 2000) [fn11] are both inadequate and based on insufficient evidence pursuant to 1 M.R.S.A. § 407(1) (1989). [fn12] We disagree. Although agencies are required to make written factual findings sufficient to show the applicant and the public a rational basis of its decision, the agency is not required to issue a complete factual record. Cook v. Lisbon Sch. Comm., 682 A.2d 672, 677 (Me. 1996). "If there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings." Forester v. City of Westbrook, 604 A.2d 31, 33 (Me. 1992). Substantial evidence exists if there is any competent evidence in the record to support a decision. Adelman v. Town of Baldwin, 2000 ME 91, 12, 750 A.2d 577, 583.

[15] The record before us reveals considerable evidence to support the Board's determinations, including the four properly granted waivers. All of the issues were addressed and discussed at numerous Board meetings held over the course of more than a year. There was sufficient competent evidence, including evidence supporting a finding of the special circumstances of Young's plan, on which the Board could have based its ample findings of fact.

### IV.

[¶ 16] Finally, York contends that the Board violated Ogunquit ordinance requirements by approving Young's final plan in the absence of

the posting of a performance bond. [fn13] Young has discussed

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the bonding requirement with the Town Manager, but there is no dispute that this provision has not actually been fulfilled. Although some towns may permit their Planning Boards to approve a plan and leave the amount and details of the bond to the town, the plain language of the Ogunquit Subdivision Standards requires compliance with the bond conditions prior to the Board's approval of the final plan. The failure to comply with this technical provision is not fatal to Young's plan for proposed subdivision development, however, and does not require that the entire plan be disapproved. Accordingly, we remand only for fulfillment of the bond requirement and either compliance with or a variance from the street width requirement.

The entry is:

Judgment vacated and remanded to the Superior Court with instructions to remand the case to the Ogunquit Planning Board only for compliance with the street width requirement of the Ogunquit Zoning Ordinance and the bond requirement of the Ogunquit Subdivision Standards.

[fn1] The original plaintiffs included fourteen abutters, the first of whom named in the complaint was Steven H. Arnold. Thus, the name of this case in the Superior Court was Steven H. Arnold et al. v. Town of Ogunquit et al. Three of the original plaintiffs chose not to pursue this appeal before us, however, including Arnold. The name of the case has therefore been changed to Charles T. York et al. v. Town of Ogunquit et al., because York is the next named original plaintiff who participates in this appeal.

[fn2] Young conveyed title to Windward Ogunquit, LLC, and has taken back a mortgage on the parcels.

[fn3] The Subdivision Standards waived by the Board provide:

10.3.1.11. Subdivisions containing fifteen (15) lots or more shall have at least two street connections with existing public streets or streets shown on the Official Map as such exists, or streets on an approved Subdivision Plan for which a bond has been filed. 10.3.2. The following design standards apply according to street classification:  
. . . Minimum Pavement width [for collector streets is] 32'  
. . . Sidewalk width [for collector streets is] 5'  
. . . 10.3.4. Dead-end Streets. . . [D]ead-end streets shall be constructed to provide a cul-de-sac turn-around . . . . .

10.3.5.1. Grades of all streets shall conform in general to the terrain, and shall not be . . . more than . . . 6 percent for collector streets, or 6 percent for minor streets in residential zones . . . . Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects §§ 10.3.1.11, 10.3.2, 10.3.4, 10.3.5.1 (Apr. 3, 2000). The road width requirement also has a corresponding provision in the Ogunquit Zoning Ordinance itself which provides, "All collector streets shall be designed and constructed in accordance with the specifications for local residential streets, except that paved traveled surface shall be at least 32 feet in width." Ogunquit, Me., Ogunquit Zoning Ordinance § 10.2(B)(3) (Apr. 5, 1999).

[fn4] The waivers included: (1) a waiver of the six percent maximum road grade to seven percent in order to make an intersection safer by providing a grade platform, decrease soil disturbance, allow a wider vegetative buffer, and reduce the noise and time of construction; (2) a waiver of the street width from thirty-two feet to twenty-four feet in order to allow increased storm water absorption and retention, decrease storm water runoff, maximize natural storm water treatment, decrease impact on clam beds, decrease flooding potential, decrease overall environmental impact, decrease disturbance to soil and vegetation, allow more vegetative buffers to decrease noise and increase privacy, preserve the small town character of the area, reduce vehicle speed and make the area safer, and increase wetland and plant protection; (3) a waiver of the public street connection requirement from two connections to one in order to discourage traffic and thereby increase safety and leave natural features undisturbed; (4) a waiver of sidewalk width from five to four feet in one 250-foot area in order to permit installation of a sidewalk where it would otherwise be too narrow, decrease disturbance to existing traffic lanes, and allow placement of a sidewalk otherwise impossible to build along stonewalls and gardens; and (5) a waiver of the cul-de-sac street design in favor of a hammerhead or "T-shaped" street end on two streets to leave natural features and wetlands undisturbed while still allowing emergency vehicles to access those streets.

[fn5] Direct appeal of a Planning Board decision to the Superior Court is permissible only if so provided in the municipal zoning ordinance. **30-A M.R.S.A. § 4353**(1) (1996). The Ogunquit Zoning Ordinance does provide for such direct appeals. Ogunquit, Me., Ogunquit Zoning Ordinance § 6.5 (Apr. 5, 1999). See Perkins v. Town of Ogunquit, **1998 ME 42**, ¶ 5 n. 5, **709 A.2d 106**, 107-08 n. 5.

[fn6] Young contends that the plaintiffs lack standing as well. As abutters who have participated in the Board meetings and demonstrated the potential for particularized injury as a result of the approval of Young's plan, the plaintiffs clearly have standing to appeal the Board's decision. See Sproul, **2000 ME 30**, ¶ 7, 746 A.2d at 372.

[fn7] General variances may be granted only upon a finding of "undue hardship," defined as:

- A. The land in question can not yield a reasonable return unless a variance is granted;
- B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- C. The granting of a variance will not alter the essential character of the locality; and
- D. The hardship is not the result of action taken by the applicant or a prior owner. **30-A M.R.S.A. § 4353**(4) (Supp. 2000).

[fn8] The statute relevant to Perkins' claim has since been amended to include a new section for dimensional variances: 4-C. Variance from

dimensional standards. A municipality may adopt an ordinance that permits the board [of appeals] to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist: . . . As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements. **30-A M.R.S.A. § 4353**(4-C) (Supp. 2000). Thus, the lot frontage requirement at issue in Perkins is now specifically subject to this "practical difficulty" inquiry rather than the "undue hardship" standard in the general variance.

[fn9] The power of a municipality to grant such power to the Board is conferred by **30-A M.R.S.A. § 3001** (1996):

Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.

**30-A M.R.S.A. § 3001** (1996). The Town of Ogunquit has indeed granted such power to the Planning Board in its Subdivision Standards, which state in pertinent part: 12.1. Where the Planning Board finds that extraordinary and necessary hardships may result from strict compliance with these standards or where there are special circumstances of a particular Plan, it may vary these standards so that substantial justice may be done and the public interest secure; provided that such variations will not have the effect of nullifying the intent and purpose of the Official Map, the Comprehensive Plan, or the Zoning Ordinance, where such exist. 12.2. Where the Planning Board finds that, due to special circumstances of a particular Plan, the provision of certain required improvements is not requisite in the interest of public health, safety, and general welfare, or is inappropriate because of inadequacy or lack of connecting facilities adjacent or in proximity to the proposed subdivision, it may waive such requirements, subject to appropriate conditions. Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects §§ 12.1, 12.2 (Apr. 3, 2000). Therefore, pursuant to these two authorities, the Ogunquit Planning Board is permitted to waive non-Ordinance Subdivision Standards.

[fn10] We also note that to the extent that the Ogunquit Zoning Ordinance's thirty-two-foot road width requirement is greater than the width of any existing road in Ogunquit, Ogunquit remains free to amend that requirement to a more narrow width or to eliminate it altogether.

[fn11] The Board is required to consider nineteen factors such as water supply, traffic, pollution, and sewage disposal before approving any subdivision plans pursuant to **30 M.R.S.A. § 4404** (1996 & Supp. 2000).

[fn12] Specifically, **1 M.R.S.A. § 407**(1) (1989) provides in pertinent part:

1. Conditional approval or denial. Every agency shall make a written record of every decision involving the conditional approval or denial of an application, license, certificate or any other type of permit. The agency shall set forth in the record the reason or reasons for its decision and make finding of the fact, in writing, sufficient to appraise the applicant and any interested member of the public of the basis for the decision.



[fn13] The Subdivision Standards provide, "There shall be submitted to the board with the Final Plan . . . [a] performance bond to secure completion of all improvements required by the board and written evidence that the Municipal Officers are satisfied with the sufficiency of such bond." Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects § 7.3.2. (Apr. 3, 2000). In addition, the Subdivision Standards provide:

Before the Planning Board grants approval of the Final Plan, the subdivider shall, in an amount set by the Planning Board, either, file with the Municipal Treasurer a certified check to cover the full cost of the required improvements or the subdivider shall file with the Municipal Treasurer a performance bond to cover the full cost of required improvements. . . . The applicant shall present, as part of his complete application, a copy of the receipt from the Town Treasurer.

Ogunquit, Me., Standards for Reviewing Land Subdivisions and Other Projects § 7.1.7. (Apr. 3, 2000).

NON-CONFORMING STRUCTURE RECONSTRUCTION OUTSIDE OF THE SHORELAND ZONE

Punch list item: The Code Enforcement Officer has noted the following old ordinance language was omitted from the ordinance following complete re-codification in 2010. Reconstruction within shoreland zones is currently found in the ordinance (16.7.3.5.6), but reconstruction of nonconforming structures outside shoreland zones is unclear.

(The following section 16.28.140 is the previous ordinance version, including old ordinance numbering and references.)

**16.28.140 Reconstruction of nonconforming buildings.**

Any legally nonconforming building which is hereafter damaged or destroyed by fire or any cause other than the wilful act of the owner or his or her agent, may be restored or reconstructed in conformity with the dimensions of the original building within twelve (12) months of the date of said damage or destruction, provided, however, that such restoration or reconstruction shall not enlarge the size or make it more nonconforming than the prior nonconforming building. Nothing in this section shall prevent the demolition of the remains of any building so damaged or destroyed. (Ord. 12-99; land use and dev. code § 7.3.4, 1994)

Current Ordinance Language (following). The current ordinance does not clearly separate review of nonconforming structures inside vs. outside shoreland or resource protection overlay zones.

**16.7.3.5.6 Nonconforming Structure Reconstruction.**

A. Any nonconforming structure which is located less than the required setback from a water body, tributary stream, or wetland and which is removed, damaged or destroyed, by any cause, by more than 50% of the market value of the structure before such damage, destruction or removal, may be reconstructed or replaced provided that a permit is obtained within eighteen (18) months of the date of said damage, destruction, or removal, and provided that such reconstruction or replacement is in compliance with the water body, tributary stream or wetland setback requirement to the greatest practical extent as determined by the Planning Board (in cases where the structure is located in a Shoreland Overlay of Resources Protection Overlay Zone) or Code Enforcement Officer, in accordance with this Code.

B. In no case will a structure be reconstructed or replaced so as to increase its non-conformity. If the reconstructed or replacement structure is less than the required setback it may not be any larger than the original structure, except as allowed pursuant to Section 16.7.3.5.5, Nonconforming Structures Repair and/or Expansion, as determined by the nonconforming floor area and volume of the reconstructed or replaced structure at its new location.

C. If the total amount of floor area and volume of the original structure can be reconstructed beyond the required setback area, no portion of the reconstructed structure may be reconstructed at less than the setback requirement for a new structure. When it is necessary to remove vegetation to reconstruct a structure, vegetation will be replanted in accordance with Section 16.7.3.5.4.C, Nonconforming Structure Relocation. Application for a demolition permit for any structure that has been partially damaged must be made to the Code Enforcement Officer.

D. Any nonconforming structure which is located less than the required setback from a water body, tributary stream, or wetland and removed, damaged or destroyed by any cause through no fault of action by the owner by 50% or less of the market value of the structure before such damage, destruction or removal, may be reconstructed in-place if a permit is obtained from the Code Enforcement Officer or the Planning Board (in cases where the structure was located in the Shoreland Overlay or Resources Protection Overlay Zone) within twelve (12) months of the established date of damage or destruction.

E. In determining whether the structure reconstruction or replacement meets the setback to the greatest practical extent the Planning Board or Code Enforcement Officer must consider, in addition to the criteria in Section 16.7.3.5.4, Nonconforming Structure Relocation, the physical condition and type of foundation present, if any.

2012-2014  
PLANNING BOARD PUNCH LIST

<b>Mar 28, 2013</b>	Set up Workshop to discuss High Pointe Circle Issues: Road Extension & Gate and use of woods road; review prior approvals and minutes	2	Staff (GM) will attempt to resolve and report to KPB	4/25/2013
<b>Apr 11, 2013</b>	Format of Comp Plan		strike out and underline existing 3/25/2002 CP	4/25/2013 Complete
<b>Apr 25, 2013</b>	16.11.3 SHOREFRONT PLAN REVIEW	2	To Council for adoption	in progress
<b>COMPLETE</b>	<b>SPECIALTY FOOD AND BEVERAGE</b>	<b>Complete</b>	<b>Ordnained; 6/10/13</b>	<b>Complete</b>
	<b>ROADS / SIDEWALKS TO NOWHERE (ROW plans)</b>	1	Ongoing	
<b>10/24/13 Amendment</b>	DPW Road Cuts; Title 5 amendment; approved by PB 10/24; to Council 11/25		Pending Council Action	
	<b>COUNCILOR DENNETT'S PROPOSED CHANGES TO KPB BY-LAWS</b>	1	Markup provided; discussed 11/14; 12/12 (Susan 1/9)	
	Shoreland definition			
	HAT - Highest Annual Tide: no Elevation 6			
<b>8/22/2013</b>	No site work while application before Planning Board; site dev pre-meeting; CMA construction inspection;	1	January 2014	
	Definition: Substantially complete re: development vs. building permits			
	Soil Suitability Guide; discontinue; how do other communities handle?		Workshop scheduled December 3, 2013	
<b>11/14/2013</b>	Sidewalks 'to nowhere'; case by case basis; further discussion			
	Waivers; legal issue?		January 2014	
<b>11/14/2013</b>	Fines			
<b>11/14/2013</b>	16.7.3.5.6 Reconstruction periods			
<b>11/14/2013</b>	Structure replacement outside of shoreland zone (missing from code)	1		
<b>11/14/2013</b>	Federal standards, re: road design			
<b>11/14/2013</b>	Review flood hazard ordinance; 16.5.3.4		Coordinate w CMA	
<b>12/12/2013</b>	Structure replaement inside shoreland/excavation	1		
<b>12/12/2013</b>	Pedestrian / Bike paths			
<b>12/12/2013</b>	Minor subdivisions; density; septic			
<b>1/9/2014</b>	Reserve Parcels - Subdivisions			
<b>1/9/2014</b>	Timber Harvesting - State/Town			

2012-2014  
PLANNING BOARD PUNCH LIST

DATE	ITEM	PRIORITY	ACTION TAKEN	DATE
Aug 9, 2012	16.10.9.2 REDEFINE FIELD CHANGES; Major/Minor	1	Ongoing	
Oct 11, 2012	REVIEW 16.10 (WORKSHOP ITEM #1 FROM 10/11/12 WORKSHOP) Plan Application Review	3		
Jan 24, 2013	REVIEW REPORT TO COUNCIL (RTC) FORMAT	2		
Complete	LEGAL NOTICES IN PACKET OR EMAILED TO PB MEMBERS	Complete	email to PB @ same time sent to publication	Complete
Complete	UNBUNDLE ZONING AMENDMENTS	Complete	4/25/2013	Complete
Complete	BUILDING PERMIT LIST IN PACKETS	On-going	Ongoing; monthly updates	Complete
	(Post Building Permits on Web Site?)		Requested; Shelly Bishop; TBD	
	SUGGESTED ORDINANCE CHANGES BE AVAILABLE ONLINE	2		
	ABUTTER'S LIST TO PB EARLY ON, BEFORE PUBLIC HEARING	1	at sketch plan	4/25/2013
10/13/2012	DPW PROJECTS COME BEFORE PB; NEED UPDATED 2013 LIST	2	No DPW update submitted since October, 2012	4/25/2013
	BUSINESS OVERLAY ZONES: WHERE AND WHAT CHANGES; 16.3.2.20 Proposed Quality Improvement Overlay; form based code vs. individual ordinances (Bob M.)	1	Workshop; Sustain So ME; set up January 2014 workshop (1/24 AM)	4/25/2013
Feb 14, 2013	DEFINE COMMERCIAL RECREATION	2	In process	
	OUTDOOR SEATING/use of public ROW	1	Ongoing (Winter, 2014)	4/25/2013
Feb 28, 2013	UPDATE DESIGN STANDARDS FOR LED LIGHTING;	3		
Complete	FOLLOW UP ON CHANGE TO 16.8.24.2 F (LED lights)		APPROVED BY COUNCIL	3/25/2013
3/28/2013	CONTINUE WORKSHOP WITH KCPC, KOSC REGARDING 1 - 3 ACRE RR; discuss LD 220 and LD 1810 and potential impact on property values and future land use regulation; restrict # building permits issued per year		May 15, 2013 Workshop; December 3, 2013 workshop, w Soil Suitability; what is status of LD 220 and 1810?	
Complete	DISCUSS PUBLIC NOTICES; ABUTTER'S LIST EARLY, INCLUDE M/L AND PHYSICAL ADDRESS	Complete	Sales (assessor) close April 1; system update in Fall	
	WORKSHOP; Cluster Ordinance needs work	2	KOSC wants input	4/25/2013
	USABLE OPEN SPACE			
	RETAIN ROAD FRONTAGE (Buffers)			
	TRAFFIC STUDIES			
	PB Workshop Update (MMA?): training; education; conflict of interest; attendance/voting;	1	Retreat: January 10, 2014; Friday, a.m.	4/25/2013