



TOWN OF KITTERY

Planning & Development Department
200 Rogers Road, Kittery, ME 03904
Telephone: 207-475-1307 Fax: 207-439-6806

Jason Garnham, AICP
Director

TO: KITTERY PLANNING BOARD
FROM: JASON GARNHAM, DIRECTOR OF PLANNING AND DEVELOPMENT
SUBJECT: 181 STATE RD. SKETCH PLAN REVIEW
DATE: AUGUST 24, 2023

SUMMARY:

On behalf of Mitchell Delaney of Indico, applicant Craig Burgess, P.E., of Sebago Technics submitted a Sketch Plan Review application to Kittery's Planning & Development Department for a prospective cannabis retail business located at the property identified as Lot 4 of Map 22 and located at 181 State Rd on June 2, 2022. The application includes a cover letter, vicinity map, trip generation memo, recorded site plan, and conceptual development plan for the proposed use and is therefore "complete" per Kittery Town Code Section 16.7.10. The Planning Board reviewed the application and supporting information during the July 28, 2022 and November 17, 2022 meetings. After extensive discussion, the board voted 3-4-0 against accepting the sketch plan application based on a majority opinion that the traffic impacts from the proposed use would adversely impact health and safety in the community and that the use would therefore fail to comprise an allowed Special Exception Use as defined in Town code.

The Board erred in "denying" the Sketch Plan Review application at that time. The applicant stated a clear intention to prepare a complete traffic analysis for Preliminary Site Plan Application review during the meeting and in the application materials. A traffic analysis would provide the data for existing conditions and similar uses to enable the Board, with the assistance of qualified professionals, to determine those impacts that can reasonably be anticipated from the proposed use. Absent the data presented in a traffic analysis and verified by qualified professionals, the board did not possess the **evidence to support a finding** related to the standards or criteria applicable to the project. Further, Sketch Plan Review is not generally an appropriate phase for making conclusive decisions on a project, as explained further below.

The applicant filed an appeal of the Board's November 17, 2022 decision to Superior Court. After weighing the matter and discussing with legal counsel, the Town Manager agreed to return the Sketch Plan Review application to the Planning Board to avoid the significant legal expenses which would have been incurred by the Town to defend the case. Through the attached Settlement Agreement, the applicant agreed to dismiss the case provided the Town and the Planning Board:

1. Consider Mr. Delaney's Sketch Plan Review application to be complete and review the application during the July 13, 2023 meeting, and;
2. Continue review of this Sketch Plan Review application to the October 12, 2023 meeting to provide the applicant time to re-engage their consultant for preparation of supporting plans and

studies. The applicant may request this application to be placed on the agenda for a meeting before October 12 if/ when the additional information becomes available.

The Sketch Plan Review application for the proposed use is therefore back before the Board, to be treated as a new Sketch Plan Review application. This is an opportunity for new board members to become acquainted with the proposal and for all board members to **advise the applicant about prospective issues to consider** prior to preparing additional plans and studies or submitting a Preliminary Site Plan application.

BACKGROUND:

Sketch Plan Review is advisory in nature and is non-binding on both parties and is therefore optional for a vast majority of applications. As a discreet step in a permitting process, Sketch Plan Review was created to help potential applicants determine whether to purchase property or pursue a project by confirming whether a use that is subject to quasi-judicial (board) review is allowed by zoning and whether significant obstacles to development are present. It also benefits board members by providing information about a potential project in advance, an opportunity to express concerns, and general information about current market trends. Sketch Plan Review is therefore not a vesting permit, is not governed under state law, and is not applicable to any by-right permit application types such as building permits.

As such, the Planning Board is strongly encouraged to ask questions and highlight potential issues perceived with a project proposed via Sketch Plan Review. Comments are especially useful when tied to a specific standard or criteria for approval in Kittery Town Code, a policy or goal expressed in the Town's Comprehensive Plan, or Maine law. Expression of majority or consensus opinions on related matters is certainly appropriate and helpful. However, decisions to "approve" or "deny" a proposal are not appropriate at the Sketch Plan Review phase, in part because neither party claims or acknowledges submittal of a complete vesting permit application or makes detailed findings related to applicable standards and criteria. It is my opinion that the board should not make final "decisions" on Sketch Plans and that Kittery Town Code should be amended accordingly.

The importance of Findings of Fact

Planning board members adopt a "quasi-judicial" role when reviewing development permit applications. Quasi-judicial decisions are based on "objective" standards and criteria. To be fair and defensible, a decision to approve or deny an application must therefore be determined through an assessment of applicable standards and criteria. It is incumbent on the review authority to present this assessment as "Findings of Fact" which form the basis of the decision and any conditions of approval. These findings are typically required to be in writing. (The planning board's practice of reading them into the record is optional). Findings which are based on opinions instead of facts, or decisions/ conditions that are not supported by the findings, are inconsistent with quasi-judicial decision-making and are vulnerable to successful – and costly - appeal by the applicant or party of standing. (Many observers misunderstand the true purpose of appeals procedures, which is to protect the applicant(s) from arbitrary or capricious decisions or conditions). A failure to present findings is likewise problematic where a quasi-judicial decision is made.

Several articles which describe the importance of findings of fact for a planning board are provided in the packet for this item for board review.

**Town of Kittery
Planning Board Meeting
August 24, 2023**

ITEM 1 – 181 State Road – Sketch Site Plan Review, Marijuana Business

Action: Accept application as complete, advise applicant on conceptual plans, continue review to November meeting. Pursuant to 16.4 Land Use Regulations, 16.4.21 Special Exception Use Request, 16.5.32 Marijuana Business, and 16.7 Site Plan Review of the Town of Kittery Land Use and Development Code, applicant IDC 5, LLC and agent Lew Chamberlain of Attar Engineering request approval for special exception use to construct a 2,000-sf Marijuana Business on real property with an address of 181 State Road (Tax Map 22, Lot 4) located in the Commercial (C-3) Zone and Business Local (BL) Zone.

APPLICATION REVIEW PROCESS

REQ'D	ACTION	COMMENTS	ST AT US
No	Sketch Plan	Board must continue review to October 12, 2023 meeting per terms of Settlement Agreement between the Town and the applicant	Current
YES	Site Visit	TBD	TBD
YES	Preliminary Plan Review Completeness/Acceptance	TBD	TBD
YES	Public Hearing	TBD	TBD
YES	Preliminary Plan Approval	TBD	TBD
YES	Final Plan Review and Decision	TBD	TBD

Applicant: Prior to the signing of the approved Plan any Conditions of Approval related to the Findings of Fact along with waivers and variances (by the BOA) must be placed on the Final Plan and, when applicable, recorded at the York County Registry of Deeds. PLACE THE MAP AND LOT NUMBER IN 1/4" HIGH LETTERS AT LOWER RIGHT BORDER OF ALL PLAN SHEETS. As per Section 16.4.4.13 - Grading/Construction Final Plan Required. - Grading or construction of roads, grading of land or lots, or construction of buildings is prohibited until the original copy of the approved final plan endorsed has been duly recorded in the York County registry of deeds when applicable.

Summary:

181 State Road (“Project”) is situated in the Commercial-3 (C-3) and Business Local (B-L) zoning districts with the majority being in the C-3 zone. The .48-acre lot fronts the traffic circle at the convergence of State Road and Route 236, has Route 1 Bypass at the rear (west) of the property, and is abutted to the north by a commercial real estate office in the C-3 zone. The site is currently developed with one 800 square-foot single-family dwelling and one 613 square-foot restaurant with associated parking, addressed as 185 State Road and 181 State Road, respectively. The site exhibits elevation changes from south to north, with higher elevations near the Route 1 Bypass roadway.

Mitchell Delaney of IDC5 LLC, represented by Lew Chamberlain of Attar Engineering, proposes to construct a 2,000 square foot retail building on the property with appurtenant parking and driveway areas for the purpose of operating an adult use cannabis retail business. Current plans indicate that the proposed business would be accessed from State Road/ US Route 1 at the traffic circle via a new entrance-only driveway. Visitors would exit from a driveway on State Road north of the traffic circle. The existing

27 restaurant, residence, and site improvements will be demolished. The purpose of sketch plan review is to
28 advise the applicant about prospective issues to consider prior to incurring the costs to prepare additional
29 plans or studies or submit a Preliminary Site Plan application.

30 The applicant submitted a sketch plan application to the Town on June 2, 2022 for a similar proposal that
31 was reviewed by the planning board and “denied” during the November 17, 2022 meeting. However, the
32 board did not prepare written findings to establish a basis for that decision and the project is again before
33 the board as a new sketch plan application. Terms of a legal settlement agreement between the Town and
34 the applicant require the board to continue review of this application to a future meeting and, provided the
35 required submission materials were provided by the applicant, accept the application as complete. This
36 continuation was agreed to because the applicant engaged a different consultant team who requires
37 additional time to develop plans and supporting information for the project, which differs from the original
38 proposal. A staff memo focused on the board’s prior actions and findings of fact, the Settlement
39 Agreement, excerpts from the Maine Municipal Association Planning Board Manual, and *Maine*
40 *Townsmen* articles pertaining to findings of fact are included in the packet for this item for reference by
41 members of the board.

42

43 **Staff Review Notes:**

44 Zoning: The lot is split zoned C-3 and BL, with the majority of the lot within C-3. The sketch plan depicts
45 the Marijuana Business use wholly within the C-3 zone. Per Section 16.1.8.B.(5), the Planning Board may
46 grant an extension of either zone up to 50 feet into the other zone. The applicant is not requesting such an
47 extension.

48 Marijuana business is a **special exception use** in C-3 zoning district and is **prohibited** in B-L zoning.

49 16.3.2 **Special Exception:** definition:

50 *A use that would not be appropriate generally or without restriction throughout the zoning district,*
51 *but which, if controlled as to number, area, location or relation to the neighborhood, would promote*
52 *the public health, safety, welfare, morals, order, comfort, convenience, appearance, prosperity or*
53 *general welfare.*

54 Other applicable provisions:

- 55 • The lot is legally nonconforming as to its size, as a 40,000 square foot lot is the standard in the C-
56 3 zone. BL zone has no minimum lot size requirement.
- 57 • Front setback (BL zone: max 20 feet, C3 zone: max 15 feet)
- 58 • Rear and side setbacks are 10 feet for the C-3 zone
- 59 • Parking requirement: (1 space per 175 sf gross floor area for retail).
- 60 • Impervious surfaces limit: 70% of lot. ALL STORMWATER MUST BE MANAGED ONSITE
- 61 • All utilities must be underground
- 62 • Parking must be visually screened via landscaping or fencing
- 63 • Building design guidelines apply. Street-facing façade must be designed as front of building.
- 64 Pitched roof strongly encouraged.

- 65 • Street trees and street-adjacent 15-foot landscape strip required.
- 66 • Street and internal sidewalks required and must connect.
- 67 • At least 20% of lot must be comprised of open space.
- 68 • **Utility plans, drainage plans, lighting plans, landscape plans, building elevations or**
- 69 **renderings, and a traffic impact analysis** are required for preliminary site plan submission.
- 70 Additional information may be presented for continued sketch plan review
- 71 • Area of customer access should be determined (minimum 400 sf; maximum 2,000 sf).
- 72 • Fire suppression, video surveillance security system, and exterior lighting required per 16.5.32
- 73 Marijuana businesses.

74

75 **Next Steps:**

76 Plans and supporting data are currently being developed by the applicant and their consultant team.
77 Additional detail will be presented at a subsequent meeting. The sketch plan should be accepted as
78 complete at that time. Both sketch plan review meetings present opportunities for the board members to
79 advise the applicant, who may choose whether to prepare and submit a preliminary site plan application.
80 The board may choose to schedule a site walk in the meantime, or may wait until preliminary site plan
81 application submission seems more certain.

82 **Suggested Motions:**

83 *Motion to accept the sketch plan application by applicant IDC 5, LLC and agent Attar Engineering*
84 *requesting approval for special exception use to construct a 1,100-sf Marijuana Business on real property*
85 *with an address of 181 State Road (Tax Map 22, Lot 4) located in the Commercial (C-3) Zone and Business*
86 *Local (BL) Zone.*

87 **Motion to schedule site walk** on ___ (insert date) ___ at ___ (insert time) ___ on real property with an
88 address of 181 State Road (Tax Map 22, Lot 4) located in the Commercial (C-3) Zone and Business Local
89 (BL) Zone with applicant IDC 5, LLC and agent Attar Engineering

90



ATTAR

ENGINEERING, INC

CIVIL ♦ STRUCTURAL ♦ MARINE

Mr. Jason Garnham, Director of Planning and Development
Town of Kittery
P.O. Box 808
Kittery, Maine 03904

August 16, 2023
Project No.: 23072

**Re: 181 & 185 State Road
Adult-Use Marijuana Retail
Tax Map 22, Lot 4**

Dear Mr. Garnham:

On behalf of applicant IDC5 LLC, I have enclosed a revised sketch plan and letter of agent authorization for the above-referenced project.

This project is subject to a settlement agreement (attached) between IDC5, LLC and the Town of Kittery, in reference to the Planning Board's denial of the sketch plan review on 11/17/22.

We understand that this submittal will continue the previous application and, based on the settlement agreement, the application will be found complete and continued for ninety days at the 8/24/23 meeting.

The applicant has opted to utilize a new team of consultants which currently includes Attar Engineering, Inc. (Eliot, ME) for site/civil engineering and Vanasse & Associates, Inc. (Andover, MA) for traffic engineering. Vanasse & Associates will be providing traffic information for subsequent meetings.

The revised sketch plan improves on the previously reviewed plan as follows:

- The entire site is utilized for the proposed use. The previous plan sought to continue the existing residential use (single family dwelling) on the site.
- A one-way traffic pattern is proposed, providing additional on-site queuing and a loading area which is separate from customer traffic.
- Traffic exiting the site will exit to State Road. Traffic entering the site will enter from the traffic circle. This eliminates the previously proposed two-way access on the circle.
- Increased parking is available.

We look forward to discussing this project at the 8/24/23 Planning Board meeting. If any additional information is required, please contact me. Thank you for your assistance.

Sincerely,

Lewis Chamberlain, PE

23072_IDC5 KITTERY sketch cover.doc

**IDC 5 LLC
Mitchell Delaney
120 State Road
Kittery, ME 03904**

August 16th, 2023
Project No.: 23072

Mr. Jason Garnham, Director of Planning & Development
Mr. Maxim Zakian, Town Planner
Town of Kittery
200 Rogers Road
Kittery, ME 03904

Dear Mr. Garnham & Mr. Zakian:

Please be informed that Lewis S. Chamberlain, P.E. and other assigned staff at Attar Engineering, Inc. will be acting as the agent for the applications and permitting of the project on State Road in Kittery, Maine.

Please contact me if I can provide any additional information.

Sincerely,


Mitchell Delaney

cc: Lewis S. Chamberlain, P.E, Attar Engineering, Inc.

Settlement Agreement

05/15/2023

This Settlement Agreement is entered into the ___ day of May, 2023, by and between IDC 5, LLC, and Mitchell Delaney (collectively the "Applicant"), and the Town of Kittery ("Town")(hereinafter collectively referred to from time to time as "Parties");

WHEREAS, On June 2, 2022, Plaintiffs, by and through its agent Craig Burgess of Sebago Technic, Inc., filed with the Town of Kittery through its online portal an application for "Site or Subdivision Sketch Plan Review" seeking approval for a proposed project and change of use authorization for real property located at 181 State Road, Town of Kittery, Maine.

WHEREAS, Mitchell Delaney ("Mr. Delaney"), is the sole owner and operator of IDC 5, LLC; and, possesses an interest in real property located at 181 State Road, Town of Kittery, Maine, by way of a certain Purchase and Sale Agreement with Penn Concessions, LLC, dated December 30, 2021, and as may be from time to time amended.

WHEREAS, on November 17, 2022, the Town of Kittery Planning Board ("KPB") held a meeting at which time the KPB found the Applicant's application incomplete and thus denied Applicant's application for Site Sketch Plan Review. Applicant was represented at the hearing by Owens McCullough, P.E., of Sebago Technics, Inc.

WHEREAS, on information and belief no written decision evidencing the denial exists.

WHEREAS, in response to the KPB's denial of Applicant's application for Site Sketch Plan Review Applicant filed a Rule 80B Appeal of that action in the York County Superior Court on or about January 3, 2023, which appeal is currently pending in York Superior Court, State of Maine, Docket No. AP-2023-001.

NOW THEREFORE, in consideration of the complete execution of this Agreement by the parties, the covenants and promises contained herein, and the final and irrevocable effectiveness of this Agreement, the Parties agree to the following terms and conditions:

1. The Town, by and through the KPB, shall set the Applicant's application on the KPB agenda for the purpose of withdrawing its determination of "denial" of Applicant's application; and, shall find that the Applicant's application for Site Sketch Plan Review is "complete". The Applicant's application shall be placed on the first KPB meeting agenda during the month of July, 2023; provided, however, that said KPB meeting shall be at least thirty (30) days following the execution of this Agreement.
2. The Applicant's application having been restored, and found to be "complete", said application for Site Sketch Plan Review shall proceed forward with the KPB process pursuant to the Town of Kittery ordinances and code. The parties agree that, upon the KPB's vote finding that the Applicant's application is "complete", further review of the application shall be continued for ninety (90) days as good and sufficient reason for said continuation exists.

3. The Parties shall file a Stipulation of Dismissal pursuant to M.R. Civ. P. 41(a)(ii) in York Superior Court, State of Maine, Docket No. AP-2023-001 as to all parties and all claims without prejudice and without costs.

IN WITNESS WHEREOF, the Parties have read and agree to be bound by the above terms and conditions and enter into this Agreement effective as of the date first written above.

IN THE PRESENCE OF: _____
Witness

Authentisign
Mitchell Delaney
5/15/2023 5:01:25 PM EDT
Mitchell Delaney, o/b/o
IDK 5, LLC

STATE OF MAINE
County of _____, ss

Personally appeared the above-named Mitchell Delaney, on behalf of IDK 5, LLC, on _____ (date) and acknowledged the foregoing instrument to be his free act and deed and the free act and deed of IDK 5, LLC.

Before me, _____ (Attorney at Law/Notary Public)

IN WITNESS WHEREOF, the Parties have read and agree to be bound by the above terms and conditions and enter into this Agreement effective as of the date first written above.

IN THE PRESENCE OF: _____
Witness

Authentisign
Mitchell Delaney
5/15/2023 5:01:27 PM EDT
Mitchell Delaney,
Personally

STATE OF MAINE
County of _____, ss

Personally appeared the above-named Mitchell Delaney and acknowledged the foregoing instrument to be his free act and deed.

Before me, _____ (Attorney at Law/Notary Public)

IN WITNESS WHEREOF, the Parties have read and agree to be bound by the above terms and conditions and enter into this Agreement effective as of the date first written above.

IN THE PRESENCE OF:

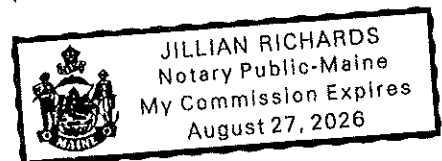
Witness

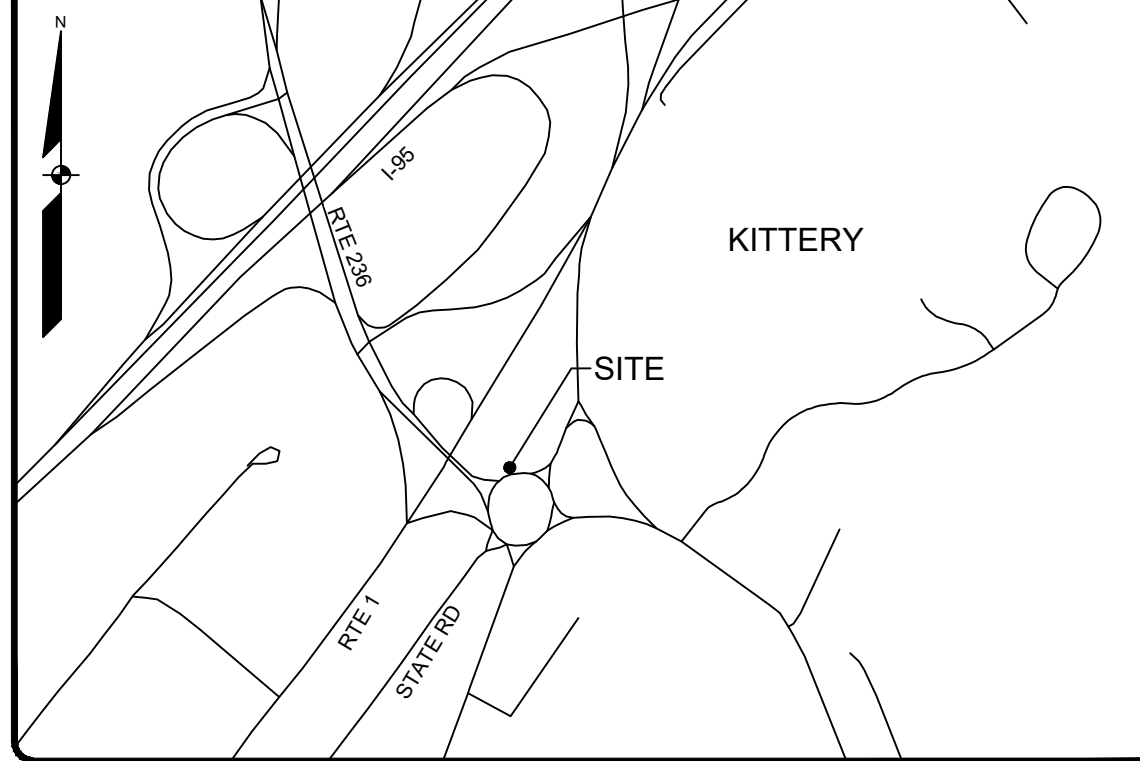
Town of Kittery

STATE OF MAINE
County of York, ss

Personally appeared the above-named Kendra Amara in their capacity as _____ for the Town of Kittery and acknowledged the foregoing instrument to be their free act and deed and the free act and deed of the Town of Kittery.

Before me, J. Richards (Attorney at Law/Notary Public)

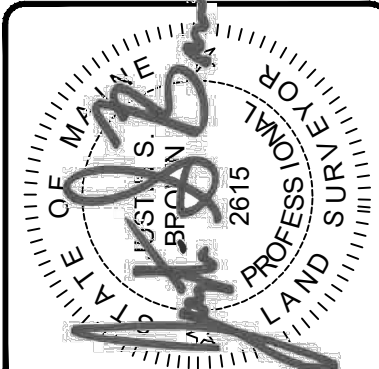




LOCATION MAP N.T.S.

GENERAL NOTES:

- THE RECORD OWNER OF THE PARCEL IS PENN CONCESSIONS, LLC BY DEED DATED MAY 27, 2004 AND RECORDED AT THE YORK COUNTY REGISTRY OF DEEDS (YCRD) IN BOOK 14106, PAGE 2. THE OWNER OF UNIT 1, AS SHOWN ON PLAN REFERENCE 6D, IS OSCAR D. BORETH BY DEED DATED APRIL 20, 2005 AND RECORDED AT THE YCRD IN BOOK 14440, PAGE 653.
- THE PROPERTY IS SHOWN AS LOT 4 ON THE TOWN OF KITTERY TAX MAP 22 AND IS LOCATED IN THE COMMERCIAL 3 DISTRICT.
- SPACE AND BULK CRITERIA FOR THE C-3 DISTRICT ARE AS FOLLOWS:
 NET RESIDENTIAL DENSITY: 40,000 SQUARE FEET
 MINIMUM LOT SIZE: 40,000 SQUARE FEET
 MINIMUM STREET FRONTAGE: NO MINIMUM
 MINIMUM FRONT YARD: 15 FEET
 MINIMUM SIDE YARD: 10 FEET
 MINIMUM REAR YARD: 10 FEET
 MAXIMUM BUILDING HEIGHT: 40 FEET
 MAXIMUM BUILDING COVERAGE: 70%
 * SEE ORDINANCE FOR MORE PARTICULAR INFORMATION.
- TOTAL AREA OF PARCEL IS APPROXIMATELY 0.48 ACRES.
- THIS IS NOT A BOUNDARY SURVEY. THE BOUNDARY INFORMATION SHOWN HEREON IS SOLELY FROM PLAN REFERENCE 6D, THE CURRENT DEED, AND MONUMENTS SHOWN. TOPOGRAPHIC INFORMATION SHOWN HEREON IS BASED UPON FIELD WORK PERFORMED BY SEBAGO TECHNICS, INC. IN JUNE OF 2022.
- PLAN REFERENCES:
 A. "MAINE STATE HIGHWAY COMMISSION RIGHT OF WAY PLAN STATE HIGHWAY A-10 KITTERY SHEET 4, DATED JULY, 1941 AND RECORDED AT THE Y.C.R.D. IN PLAN BOOK 16 PAGE 57.
 B. "STATE OF MAINE DEPARTMENT OF TRANSPORTATION RIGHT OF WAY MAP, LAND OF MAINE - NEW HAMPSHIRE BRIDGE AUTHORITY TO STATE (M.D.O.T.), SHEET NO. 5 OF 6 D.O.T. FILE NO. 16-297, DATED DECEMBER, 1938 AND REVISED THROUGH SEPTEMBER, 1985 AND RECORDED AT THE Y.C.R.D. IN PLAN BOOK 155 PAGE 68.
 C. "MAINE - NEW HAMPSHIRE INTERSTATE BRIDGE AUTHORITY PISCATAQUA RIVER BRIDGE KITTERY, MAINE - PORTSMOUTH, NEW HAMPSHIRE RIGHT OF WAY MAP - MAINE APPROACH", SHEET 3 OF 3 DATED NOVEMBER, 1938, RECORDED AT THE Y.C.R.D. IN PLAN BOOK 12 PAGE 73.
 D. "PENN CONDOMINIUM PLAN FOR PENN CONCESSIONS, LLC ROUTE 236 - STATE ROAD (U.S. ROUTE 1) KITTERY, MAINE", DATED SEPTEMBER, 2004 AND RECORDED AT THE Y.C.R.D. IN CONDOMINIUM FILE BOOK 631 PAGE 1.
- BOUNDARY NOTES
 A. THIS BURIED PIPE, AS SHOWN ON PLAN REFERENCE 6D, IS PAVED OVER. THE POSITION OF THIS MARKER WAS ESTABLISHED VIA METAL DETECTOR AND HELD.
 B. THIS 1 INCH PIPE IS FLUSH WITH THE GROUND AND IS APPROXIMATELY 1 FOOT FARTHER IN DISTANCE AWAY FROM THE MARKER IN NOTE 7A AS SHOWN ON PLAN REFERENCE 6D. WITHIN A 5 FOOT RADIUS ANOTHER 1 INCH PIPE 1 FOOT LONG WAS FOUND PRONE WITH A YELLOW IDENTIFICATION CAP STAMPED "ANDERSON". IT IS THIS SURVEYOR'S BELIEF THAT THIS CAPPED PIPE IS THE TOP HALF OF THE FLUSH 1 INCH PIPE. AS SUCH, THIS 1 INCH FLUSH PIPE IS BEING HELD FOR LINE.
 C. THE TWO PIPES REFERENCED ABOVE WERE THE ONLY MONUMENTS FOUND AS SHOWN ON PLAN REFERENCE 6D. RECENT CIVIL WORK WAS PERFORMED SINCE THE ISSUANCE OF THE PLAN. IT IS BELIEVED BY THIS SURVEYOR THAT THE OTHER MONUMENTS HAVE BEEN DISTURBED OR DESTROYED.
- PLAN ORIENTATION IS GRID NORTH. MAINE STATE PLANE COORDINATE SYSTEM, WEST ZONE 1802-NA03S. ELEVATIONS DEPICTED HEREON ARE NAVD88, BASED ON DUAL FREQUENCY GPS OBSERVATIONS.
- BENCHMARK:
 BM-1 BOX CUT IN LIGHT POLE BASE ELEVATION: 33.08' (NAVD88)
- UTILITY INFORMATION DEPICTED HEREON, UNLESS OTHERWISE NOTED, IS OF QUALITY LEVEL D PER AMERICAN SOCIETY OF CIVIL ENGINEERS (ASCE) STANDARD GI/ASCE 38-02. UTILITIES DEPICTED HEREON MAY NOT NECESSARILY REPRESENT ALL EXISTING UTILITIES. CONTRACTORS AND/OR DESIGNERS NEED TO CONTACT DIG-SAFE SYSTEMS, INC. (1-888-DIG-SAFE) AND FIELD VERIFY EXISTING UTILITIES WITHIN THE PROJECT AREA PRIOR TO CONSTRUCTION AND/OR EXCAVATION.
- THE LOCUS PROPERTY AS DEPICTED HEREON DOES NOT FALL WITHIN A SPECIAL FLOOD HAZARD AREA AS DELINEATED ON THE FLOOD INSURANCE RATE MAP FOR TOWN OF KITTERY MAINE, YORK COUNTY, COMMUNITY PANEL NUMBER Z301710004 C, HAVING AN EFFECTIVE DATE OF JULY 5, 1994. THE LOCUS FALLS WITHIN AN AREA IDENTIFIED AS ZONE C, AREAS OF MINIMAL FLOODING.



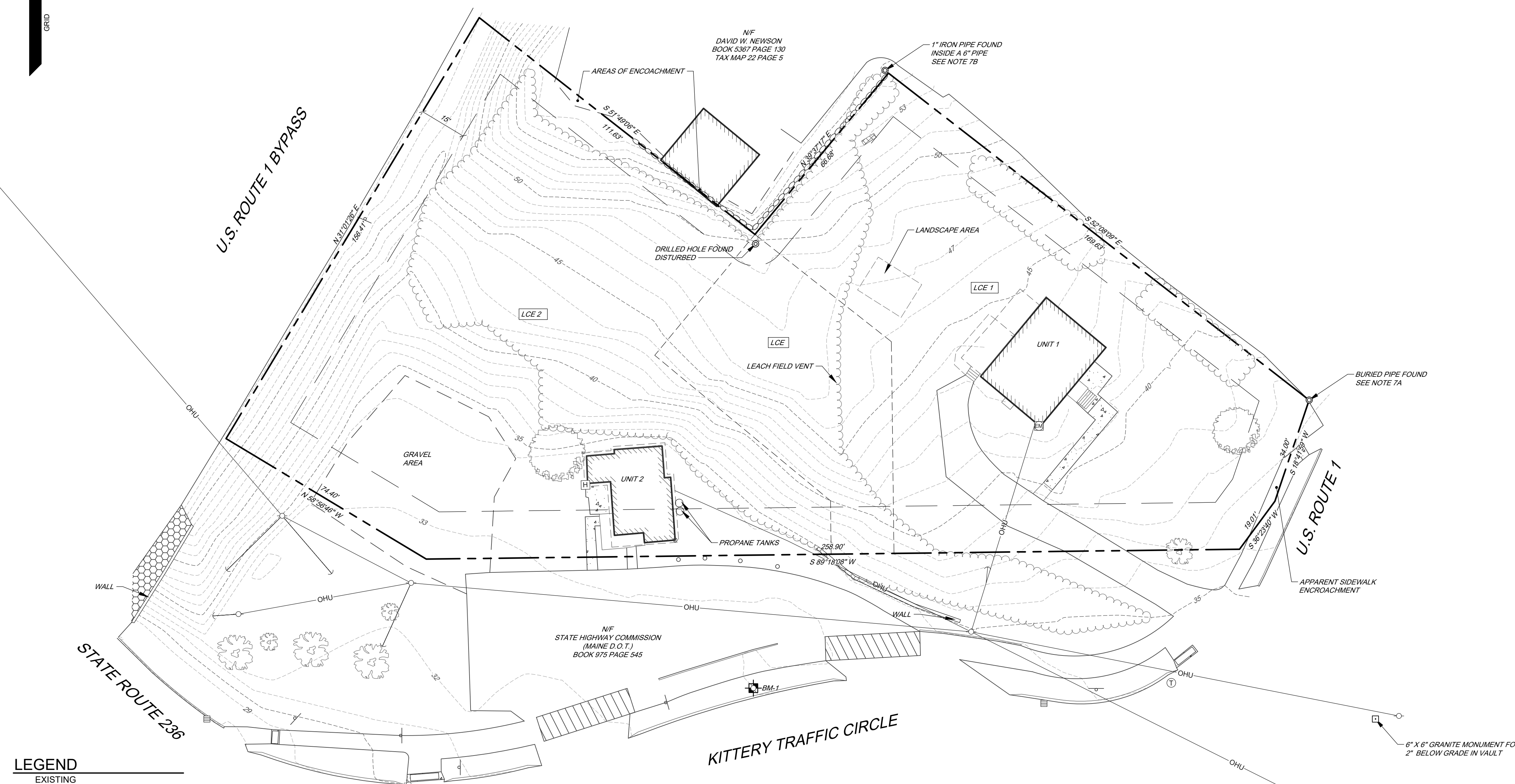
REV.	BY	DATE	STATUS	ISSUED TO CLIENT FOR REVIEW
B	JSB	10/18/2022	UPDATED TRAFFIC CIRCLE OWNERSHIP AND ROADSIDE SETBACKS	
A	JSB	07/11/2022	ISSUED TO CLIENT FOR REVIEW	

SEBAGO
 TECHNICS
 WWW.SEAGOTECHNICS.COM
 75 John Roberts Rd.
 Suluks, ME 04108
 South Portland, ME 04106
 Tel. 207-200-2100

RECORD OWNER:
 PENN CONCESSIONS, LLC
 P.O. BOX 465
 KITTERY, ME

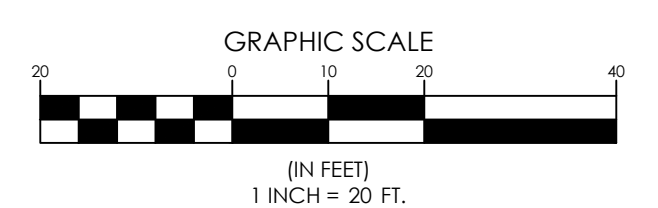
EXISTING CONDITIONS PLAN
 OF:
 INDICO KITTERY
 181 STATE ROAD
 KITTERY, ME
 FOR:
 INDICO, LLC
 120 STATE ROAD
 KITTERY, ME

DESIGNED	-
DRAWN	CNG
CHECKED	TSL/JSB
DATE	07/11/2022
SCALE	1" = 20'
PROJECT	220066



LEGEND

EXISTING	
---	PROPERTY LINE R.O.W.
---	DEED LINE R.O.W.
---	SETBACK
□	MONUMENT
○	IRON PIPE/ROD
○	NOW OR FORMERLY
+	BENCHMARK
▭	BUILDING
▭	DECK/STEPS/ OVERHANG
▭	LEDGE
▭	EDGE PAVEMENT
▭	EDGE CONCRETE
▭	PAVEMENT PAINT
▭	EDGE GRAVEL
▭	CURB LINE
▭	TREELINE
---	CONTOURS
---	CHAIN LINK FENCE
---	STONE WALL
---	MULCH LINE
○	BOLLARD
+	SIGN
▭	CATCH BASIN
OHU	OVERHEAD UTILITY
⊠	ELECTRIC METER
⊠	HVAC UNIT
⊠	TELEPHONE MANHOLE
+	LIGHT POLE
+	UTILITY POLE
+	GUY WIRE
○	CONIFEROUS TREE
○	DECIDUOUS TREE
○	RIPRAP



Maine
Municipal
Association

Manual for Local Planning Boards:
A Legal Perspective

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Making the Decision

Checklist for Reviewing Evidence

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

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

Basis for the Board's Decision

- **General Rule.** Once the board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute. The board should not base its decision on the amount of public opposition or support displayed for the project. Nor should its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met his or her burden of proof and complied with the provisions of the statute/ordinance. *Bruk v. Town of Georgetown*, 436 A.2d 894 (Me. 1981); *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768; *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. If the board does not believe that the applicant's project meets each of the requirements of the ordinance/statute based on the evidence in the record, the board should deny the application. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). Where a proposed project complies with all of the relevant ordinance requirements, the board must approve the application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994). At least one court has expressly warned board members that they must not "abdicate (their) responsibility, ignore the ordinance and approve an application regardless of whether it meets the conditions of the ordinance or not" and that board members who are "philosophically

hostile to zoning should address their concerns to the local and State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance.” *Fraser v. Town of Stockton Springs*, CV-88-97 (Me. Super. Ct., Waldo Cty., August 10, 1989).

- ***Ex Parte Communications.*** The board’s decision, whether it approves, denies, or conditionally approves an application, must be supported by substantial evidence in the record. Individual board members should not allow themselves to be influenced by information provided to them outside an official board meeting (i.e., an *ex parte* communication) unless they enter that information into the board’s record and all parties to the proceeding receive notice of the additional information and are given an opportunity to respond to it. The Maine Supreme Court has observed that if the parties are given a full opportunity to respond to such information, the *ex parte* communication may not be egregious enough to cause a court to overturn the board’s decision on due process grounds. *Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148. See also, *Passadumkeag Mountain Friends v. Board of Environmental Protection*, 2014 ME 116, 102 A.3d 1181. A board member who is approached by an individual wanting to provide him or her with information outside a public meeting setting should actively discourage the person from doing so and encourage the person to submit the information to the board in writing or through oral testimony at a board meeting. The board member should explain that, by providing information outside the public meeting, the person may be causing constitutional due process problems with the board’s process and that the board may not legally be able to consider the information the person is trying to present. Under no circumstances should board members meet with someone representing just one side of an issue outside a public meeting setting. *Mutton Hill Estates, Inc. v. Inhabitants of Town of Oakland*, 468 A.2d 989 (Me. 1983). Board members should not even discuss an application with the code enforcement officer outside a public board meeting in order to avoid due process problems. *White v. Town of Hollis*, 589 A.2d 46 (Me. 1991). (But see *Maddocks v. Unemployment Insurance Commission*, 2001 ME 60, 768 A.2d 1023, where the court held that a party who was aware of the *ex parte* communication and failed to object during the Commission hearing waived the due process issue on appeal to court.) For additional discussion of this issue, see “Site Visits” and “Board Member Discussions/Email” earlier in this chapter under “Freedom of Access Act.”
- ***Substantial Evidence.*** “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” The fact that two inconsistent conclusions can be drawn from the recorded evidence related to a specific performance standard does not mean that the board’s conclusion regarding that standard is not supported by “substantial evidence.” *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Silsby v. Allen’s Blueberry Freezer, Inc.*, 501 A.2d 1290, 1296 (Me. 1985). Where the board denies an

application on the basis that the record shows that the “proposed project would have specific adverse consequences in violation of the criteria...for approval,” a court will uphold the decision unless the applicant can demonstrate both that the board’s findings are unsupported by record evidence and that the record compels contrary findings. *Grant’s Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989).

- ***Relevance of Deed Restrictions, Title Disputes, Constitutional Issues, Other Code Violations, and Related Lawsuits.*** The board cannot deny an application because the proposed use would violate a private deed restriction if the use otherwise would be in compliance with the applicable ordinance/statute. *Whiting v. Seavey*, 188 A.2d 276 (Me. 1963); *Our Way Enterprises, Inc. v. Town of Wells*, 535 A.2d 442 (Me. 1988). *Cf.*, *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). (But see the discussion of “**Standing to Apply**” earlier in this chapter.) The board has no legal authority to resolve boundary or title disputes as part of its decision on an application. *Rockland Plaza Realty Corp. v. LaVerdiere’s Enterprises*, 531 A.2d 1272 (Me. 1987). (See sample language in Appendix 3 which the board can insert into its decision in a case where a title or boundary issue has been raised to make it clear that the board’s granting of approval in no way resolves the title or boundary problem.) If the board is presented with credible written expert evidence by both the applicant and an opponent which is in direct conflict and which involves a title/boundary issue, the board probably has three options: (1) tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order); (2) approving the application on the basis that the applicant has provided substantial, relevant and credible evidence and letting the parties pursue the matter further in court; or (3) denying approval on the basis that the board is unable to find that the applicant has met the required burden of proof. The board also cannot resolve constitutional problems with an ordinance in deciding an application. *Cf.*, *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). But see, *Davis v. SBA Towers II, LLC*, 2009 ME 82, 979 A.2d 86. The fact that the property involved is already the subject of other code violations would not constitute a basis for denial, absent language in the ordinance to that effect. *Bauer v. Town of Gorham*, CV-89-278 (Me. Super. Ct., Cum. Cty., Nov. 21, 1989). Nor may the board refuse to act on an application or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*, 663 A.2d 41 (Me. 1995). Even if the board cannot legally resolve some of these issues, if a party to the board’s proceedings raises such a challenge, the board should note the challenge and its response in the record of the case so that it is preserved in the event of an appeal.
- ***Overlap with State and Federal Law.*** The planning board may be required by a local ordinance or State law to determine whether any State or federal laws apply to an applicant’s project before the board may grant its approval. The board can draw on the

Preserving Objections for Appeal

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

Approval and Form of Decision

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

Supreme Court has held that it is not enough simply to prepare detailed minutes. *Comeau v. Town of Kittery*, 2007 ME 76, 926 A.2d 189.

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

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

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

The practical purpose behind preparing findings and conclusions is that it helps the board ensure that it has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another purpose is to provide a written statement of the reason for the board’s decision which is detailed enough to enable the applicant or anyone else who is interested (1) to judge whether they agree or disagree with the board and (2) to decide whether there are sufficient grounds on which to appeal the decision. Probably the most important purpose is to provide a clear

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

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

ordinance, ask the board to vote whether it is applicable, and if they find that it is, ask whether it has been satisfied by the evidence in the record. The board must cite evidence which supports a finding either in favor of the applicant or against the applicant.

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

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

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

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

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

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

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

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

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

If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain

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

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

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

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

Reviewing Conditional Use/Special Exception Permit Applications

If a general or shoreland zoning ordinance authorizes the planning board to decide whether to approve conditional use or special exception applications, the board should be guided by

**Board Vacancy Update
Minutes Are Not 'Findings'
How Vacancies Occur
ATVs& Public Ways**

(from *Maine Townsman*, "Legal Notes," July 2007)

Board Vacancy Update

As we predicted last month (see "Legislature Overturns Board Vacancy Decision," *Maine Townsman*, June 2007), the Legislature finally enacted an MMA-initiated bill reversing the Maine Supreme Court's recent *Stevenson v. Town of Kennebunk* decision. (Stevenson held that a municipal board with a vacancy had no authority to act.) The bill (LD 1906) was enacted with an emergency preamble and took effect on June 21, 2007. (By R.P.F.)

Minutes Are Not 'Findings'

Boards such as planning boards and boards of appeals are regularly required by statute or ordinance to make written "findings of fact" to substantiate their decisions. We are often asked whether a board's minutes can serve as findings. A recent Maine Supreme Court ruling makes it clear that minutes alone are not enough - there must be explicit findings sufficient to apprise a court of the factual basis for the board's decision.

In *Comeau v. Town of Kittery*, 2007 ME 76, the planning board wrote detailed minutes in lieu of making specific findings, arguing there was sufficient evidence in the record to support its decision. But the minutes were simply a lengthy narrative of the board's discussion, which the Court characterized as "wide-ranging and not always in a logical progression." On this record, the Court found it impossible to discern what the board had actually decided were the facts, and the Court itself declined to perform this essential board function. As the Court explained, "[T]he task of an appellate court is to review the findings and conclusions of the administrative agency to determine if the findings are supported by the evidence. By skipping the step of making findings, the Board, in essence, invites a court to do the Board's job."

This is by no means the first time the Law Court has remanded a local board's decision due to inadequate fact-finding. In at least three other recent cases (*Widewaters Stillwater Co. v. Bangor Area Citizens Organized for Responsible Dev.*, 2002 ME 27; *Chapel Rd. Assocs. v. Town of Wells*, 2001 ME 178; *Christian Fellowship & Renewal Ctr. v. Town of Limington*, 2001 ME 16), the Court has painstakingly explained the critical importance of explicit findings of fact. Its relatively terse opinion in *Comeau* may signal the Court's growing impatience with this issue.

For more on why findings of fact are essential, see "Conclusory Fact-Finding Insufficient on Appeal," *Maine Townsman*, March 2002.

For advice on how to prepare adequate findings and conclusions, see MMA's Planning Board Manual and Board of Appeals Manual, both available on our website at www.memun.org. (*By R.P.F.*)

How Vacancies Occur

Question: How do vacancies in municipal office occur?

Answer: According to 30-A M.R.S.A. § 2602(1), a vacancy in municipal office, elected or appointed, can occur by any of the following means: non-acceptance; resignation; death; removal (relocation) from the municipality (where residency is a qualification for office); permanent disability or incompetency; failure to qualify within 10 days after written demand by the municipal officers; or failure of the municipality to elect a person to office.

Interestingly, this statute does not create a vacancy in the case of prolonged or repeated absence, but the laws governing school boards do. Municipal school committees, SAD directors and CSD trustees can declare a vacancy when a member is absent without excuse from three consecutive regular meetings, except in a municipality with a charter (see 20-A M.R.S.A. §§ 2305(3), 1254(1) and 1653(2), respectively).

Nor does this statute mention vacancies created by recall of elected officials. Perhaps this is because State law itself does not provide any process for the recall of elected municipal officials. Instead, § 2602(6) authorizes municipalities, under their home rule authority, to prescribe other means of creating vacancies, including, for example, by recall (see "Recall of Officials," *Maine Townsman*, May 2007).

Also, the most common reason for a vacancy - expiration of an official's term - is not mentioned in § 2602 because this statute governs the filling of unanticipated vacancies. For more on this subject, see "How Vacancies Are Filled" in next month's issue. (*By R.P.F.*)

ATV & Public Ways

All-terrain vehicles (ATV) generally may not be operated on public ways except under certain limited circumstances, such as to cross the road (see 12 M.R.S.A. § 13157-A (6)). As we reported two years ago, however, the law authorizes "the appropriate governmental unit" (the municipal officers in the case of municipal roads) to designate any public way as an "ATV-access route" provided certain findings are made and signs are erected (see "Designating Public Ways as ATV-Access Routes," *Maine Townsman*, May 2005). In fact, under a new law (PL 2007, c. 33, eff. Sept. 20, 2007), any portion of a public way, including the vehicle travel way, may be designated an ATV-access route.

We've received several inquiries lately about the role of the public (ATV riders and abutters) in this process, so let's reiterate something from the earlier piece: Whether or not the municipal officers (selectmen or councilors) designate a particular road as an ATV-access route is entirely within their discretion - the decision rests exclusively with them.

The public of course may attempt to influence their decision, but the municipal officers' choice is not delegable to or subject to override by the voters. When it comes to regulating the use of local roads, the municipal officers are in the driver's seat regardless of the municipality's form of government.

It also bears repeating that while factors such as safety, noise and dust may be legitimate considerations in making such a decision, potential liability is not. Under the Maine Tort Claims Act, neither municipalities nor their officials can be held liable for "discretionary" acts such as designating ATV-access routes.

A final point: State law preempts all other municipal regulation of ATV (including the operation of ATV on private property) except on municipal property and rights of way held by the municipality (see "Municipal Regulation of ATV Preempted by State," *Maine Townsman*, July 2003). (By R.P.F.)

Conclusory Fact Finding Insufficient on Appeal

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Most planning boards, boards of appeals and other local administrative agencies (such as boards of assessment review and, sometimes, the municipal officers) understand that when they conditionally approve or deny an application, license, certificate or any other type of permit, they must make “findings of... fact, in writing, sufficient to [apprise] the applicant and any interested member of the public of the basis for the decision” (Maine Freedom of Access Act, 1 M.R.S.A. § 407(1)). In its most recent decision on the subject, the Maine Supreme Court restates the reasons for this requirement and why nonexistent or conclusory findings of fact are legally insufficient to sustain administrative decisions on appeal.

In *Chapel Road Associates, L.L.C. v. Town of Wells*, 2001 ME 178, developers appealed the Planning Board’s denial of site plan approval for a fast food restaurant at the intersection of a side road and busy U.S. Route One. Both the developers’ and the Board’s traffic consultants had ultimately agreed that the revised site plan adequately addressed all traffic issues. Nevertheless, after hearing from some concerned citizens and discussing their own personal experiences with traffic in the area, Board members voted to deny approval. Their findings stated simply “that the applicant failed to demonstrate compliance with [the ordinance’s traffic standards].”

The developers argued on appeal that the Board improperly relied on lay opinions and its own members’ personal knowledge instead of the expert testimony offered. (Note that the Court has previously held that a board may rely on non-expert testimony if it finds that testimony more credible than expert testimony on the same issue, and that personal experience may be relied on as well so long as that information has been entered into the record.) The Court, however, noting that the Board’s findings in this case were “conclusory,” declined to speculate on the basis for its decision.

In the words of Court, “Meaningful judicial review of an agency decision is not possible without findings of fact sufficient to apprise the court of the decision’s basis.” Absent adequate findings, “a reviewing court cannot effectively determine if an agency’s decision is supported by the evidence, and there is a danger of ‘judicial usurpation of administrative functions.’” Findings “also assure more careful administrative considerations... and... keep [administrative] agencies within their jurisdiction.” Such statements not only serve to admonish administrative agencies to explain their decisions, they reveal a profound respect for the role and prerogatives of those that do. The courts will not second-guess an agency’s decision if it is based on substantial evidence in the record (even if there was also contrary evidence in the record or the court itself might have reached a different conclusion). But where, as here, it is impossible to ascertain the basis for the agency’s decision, the case will be remanded for further findings of fact.

NB: The Law Court has not always demanded detailed findings. Where the record as a whole reveals the basis for the decision (see, e.g., *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991)), or where subsidiary facts can be inferred from conclusory findings (see, e.g., *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371), “findings” have been upheld as sufficient. The risk of a contrary holding, however, is not worth taking. For specific guidance on preparing written findings and conclusions, consult MMA’s Planning Board Manual (October 1999) or Board of Appeals Manual (October 1999), both of which are available to members free-of-charge on MMA’s web site (www.memeun.org). (By R.P.F.)