

September 25, 2019

Mr. Adam Causey, Director  
Kittery Planning and Development  
200 Rogers Road  
Kittery, ME 03904

Re: Cluster Subdivision Ordinance

Adam:

You've asked me to address the following question:

Can the Planning Board modify the minimum  
land area per dwelling unit to determine the  
maximum number of dwelling units allowed in a  
cluster development?

My response follows:

Waiver or Modification v. Variance

Established Maine case law provides that a land use ordinance may empower a planning board to grant modifications or waivers to the subdivision ordinance requirements provided the ordinance standards for such are satisfied and the appropriate supportive factual findings are made.

Case law is equally established that planning boards are without authority or jurisdiction in subdivision reviews to grant variances to applicable zoning ordinance provisions. Jurisdiction for granting such variances rests solely within the

Mr. Adam Causey, Director  
Re: Cluster Subdivision Ordinance  
September 25, 2019  
Page 2

province of the municipal board of appeals (BOA) upon a finding of undue hardship.<sup>1</sup>

30-A M.R.S. 4353(4-C)

The general case law as noted above regarding the grant of waivers, modifications, or variances during subdivision review has been modified in certain respects by 30-A M.R.S. 4353(4-C). This statute authorizes municipalities to adopt ordinances permitting planning boards the authority to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance would cause a "practical difficulty" and when certain conditions set forth in the statute are met.

4353(4-C) goes on to state:

As used in this subsection, "dimensional standards" means and is limited to ordinance provisions relating to lot area, lot coverage, frontage and setback requirements.  
[Emphasis added]

4353(4-C) continues:

. . . A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals

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<sup>1</sup>The statutory components for establishing "undue hardship" are set forth in 30-A M.R.S. § 4353(4).

Mr. Adam Causey, Director  
Re: Cluster Subdivision Ordinance  
September 25, 2019  
Page 3

that do not meet the dimensional standards otherwise required, in order to promote cluster development, to accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a variance.

. . .  
[Emphasis added]

In short, the State Statute extends to the planning board the authority to modify what basically amounts to a variance to the dimensional standards in this limited area of those standards as defined in the Statute.

#### Discussion

Pursuant to the enabling authority of 30 M.R.S. § 4353(4-C), it appears that Kittery adopted or at least modified Sec. 16.8.11.3 to allow the Planning Board the authority to modify the dimensional standards of our Zoning Ordinance when dealing with a cluster development. Without 4353(4-C) expressly authorizing a planning board to make "modifications" to the "dimensional standards" (lot area, coverage, frontage and setback requirements) in its review of a cluster development, the Planning Board would be without such authority to do so. Without 4353(4-C),

Mr. Adam Causey, Director  
Re: Cluster Subdivision Ordinance  
September 25, 2019  
Page 4

such "modifications" to the zoning ordinance would constitute variances and would fall within the exclusive jurisdiction of the BOA under established case law. Importantly, therefore, 4353(4-C) authorized the Planning Board's authority to modify the dimensional standards in the Zoning Ordinance but limited this authority to those modifications set forth in 4353(4-C) involving "lot area, lot coverage, frontage and setback requirements."

Notwithstanding the broad sweep of 16.8.11.3, I do not interpret the State enabling Statute as vesting the Planning Board with the authority to make modifications to the dimensional standards of our Zoning Ordinance beyond "lot area, lot coverage, frontage and setback requirements." 16.8.11.3 cannot broaden the Planning Board's authority to modify the dimensional standards of our Zoning Ordinance beyond that expressly authorized by 4353(4-C).

#### Conclusion

For the reasons stated above and based on the intent, purpose, and provisions of our Code, it is my opinion that the Planning Board cannot modify the minimum land area per dwelling unit in order to determine the maximum number of dwelling units

**McEACHERN & THORNHILL**  
Attorneys at Law

Mr. Adam Causey, Director  
Re: Cluster Subdivision Ordinance  
September 25, 2019  
Page 5

allowed in a cluster development under the present provisions of  
Title 16.

Should you have any further question of me concerning this,  
don't hesitate to contact me.

Very truly yours,



Duncan A. McEachern

DAMcE/cn  
Copy to Mr. Jamie Steffen, Kittery Town Planner  
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