Maine Municipal Association

#1

Five Common Violations of 'Open Meetings' Law

Maine Townsman "Legal Note" - April, 2017

Maine's Freedom of Access Act (FOAA) or "Right to Know" law requires most meetings of governmental bodies to be publicly noticed and open to public attendance and recording (see 1 M.R.S.A. §§ 406 and 403, respectively). This is the core of the "open meetings" part of the law. ("Open records" is the other part.) After advising municipal boards for many years, we've come to recognize some of the more common types of open meetings violations. Here are five of them:

Meeting by email. Discussing substantive business by email, social media or other means instead of at a public board meeting is likely a FOAA violation – because the public has the right to know about and to hear and observe such discussions (see "Emailing Board Members Outside Public Meetings," Maine Townsman, Legal Notes, April 2012). Administrative communications, however – to schedule a meeting or forward materials for discussion at the next board meeting, for example – are permissible.

Meeting by chance. Discussing board matters when a majority of members just happens to be present at the same place – at the town office or the store or at a social event, for instance – is also a violation of FOAA. This amounts to an unscheduled board meeting, but without public notice or an opportunity for the public to attend, both of which are required.

Unadvertised workshops. There is a common misconception that workshops, which are usually for discussion only, are somehow different (for FOAA purposes) from official business meetings; in fact, the law draws no distinction. Whether a board is engaged in decision-making or discussion only, it is transacting public business and its meeting must be publicly noticed and open to the public (see "'Workshops' Are Public Proceedings Under FOAA," Maine Townsman, Legal Notes, June 2007).

Insufficient notice. FOAA requires that public notice of public proceedings be given in ample time and in a reasonable manner (see 1 M.R.S.A. § 406). This is a flexible standard that accommodates a wide variety of circumstances and relies on the good faith and sound judgment of officials. The law prescribes neither a minimum time period nor a specific method for giving notice. But giving only, say, 48 hours' notice, or posting notice only on the town's website, is probably not sufficient.

Improper executive sessions. FOAA authorizes executive (closed-door) sessions, but only for eight specific subjects and only under very strict ground rules (see 1 M.R.S.A. § 405). Going into executive session for an unauthorized purpose or without a proper motion made in a public meeting, or making final decisions in executive session, are all clear violations of FOAA.

Incidentally, we call these "common" FOAA violations not because they are frequent but because they are typical. On the whole, actually, we think local officials have a good track record of complying with the open meetings law. For more on FOAA, see our "Information Packet" on the Right to Know law, available free to members at www.memun.org. (By R.P.F.)

#2

Maine Revised Statutes

Title 1: GENERAL PROVISIONS

Chapter 13: PUBLIC RECORDS AND PROCEEDINGS

§403. MEETINGS TO BE OPEN TO PUBLIC; RECORD OF MEETINGS

1. Proceedings open to public. Except as otherwise provided by statute or by section 405, all public proceedings must be open to the public and any person must be permitted to attend a public proceeding.

[2011, c. 320, Pt. C, §1 (NEW) .]

2. Record of public proceedings. Unless otherwise provided by law, a record of each public proceeding for which notice is required under section 406 must be made within a reasonable period of time after the proceeding and must be open to public inspection. At a minimum, the record must include:

A. The date, time and place of the public proceeding; [2011, c. 320, Pt. C, §1 (NEW).]

B. The members of the body holding the public proceeding recorded as either present or absent; and [2011, c. 320, Pt. C, §1 (NEW).]

C. All motions and votes taken, by individual member, if there is a roll call. [2011, c. 320, Pt. C, §1 (NEW).]

[2011, c. 320, Pt. C, §1 (NEW) .]

3. Audio or video recording. An audio, video or other electronic recording of a public proceeding satisfies the requirements of subsection 2.

[2011, c. 320, Pt. C, §1 (NEW) .]

4. Maintenance of record. Record management requirements and retention schedules adopted under Title 5, chapter 6 apply to records required under this section.

[2011, c. 320, Pt. C, §1 (NEW) .]

5. Validity of action. The validity of any action taken in a public proceeding is not affected by the failure to make or maintain a record as required by this section.

[2011, c. 320, Pt. C, §1 (NEW) .]

6. Advisory bodies exempt from record requirements. Subsection 2 does not apply to advisory bodies that make recommendations but have no decision-making authority.

[2011, c. 320, Pt. C, §1 (NEW) .]

SECTION HISTORY
1969, c. 293, (AMD). 1975, c. 422, §1 (AMD). 1975, c. 758, (RPR).
2009, c. 240, §1 (AMD). 2011, c. 320, Pt. C, §1 (RPR).

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(#3)

Board Member's Affidavit Regarding Missed Meeting

Now comes (insert board member's name), who, being duly sworn, deposes and says:

1. I am a member of the board of appeals of the town/city/plantation (choose one) of (insert name of the municipality).
2. The board is in the process of hearing and deciding an application submitted by (insert name of applicant) and dated (insert date of application) seeking approval of (describe subject matter of the application).
3. On (insert date of missed meeting) I was unable to attend the board meeting at which this application was discussed.
4. Since that meeting I have done the following in an effort to familiarize myself with the information presented and discussed at that meeting: (provide a summary of what documents, cassette tapes, video tapes, etc. have been reviewed by the board member and when this was done).
5. Having reviewed the above-described material, I believe that I have become sufficiently knowledgeable about the information presented and discussed at that board meeting to allow my continued participation in the proceedings related to this application in an informed and objective manner.
6. Accordingly, I make this affidavit as a record of the facts recited in it.

Date: _____ _____

(Signature of Board Member)

_____

(Printed name of Board Member)

State of Maine Date: _____

_____

_____ , ss.

Then personally appeared before me the above-named affiant, (insert name of board member), who swore that the facts recited in the foregoing affidavit are true of his/her own knowledge, and who executed the same in my presence.

_____

Notary Public/Attorney at Law

_____

(Printed name of notary/attorney)

My commission expires:_____

(#4)

NATURAL RESOURCES HIGHLIGHTS

MAINE'S PUBLIC LAW 761: IMPROVING PUBLIC WATER SUPPLY PROTECTION

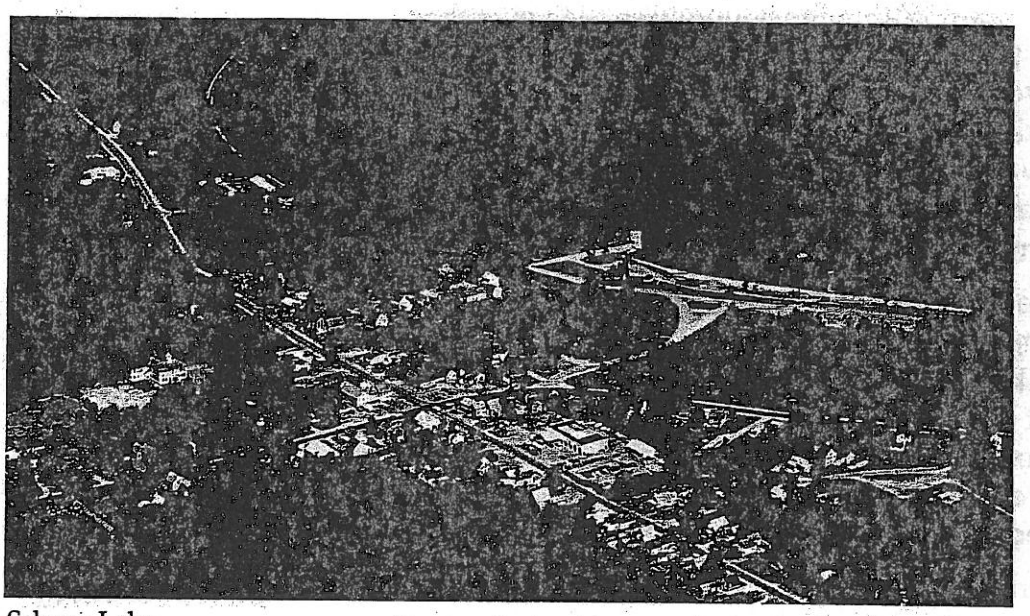
An information digest prepared and distributed by the SENATOR GEORGE J. MITCHELL CENTER, THE UNIVERSITY OF MAINE

in cooperation with the

DIVISION OF HEALTH ENGINEERING, MAINE DEPARTMENT OF HUMAN SERVICES.

The digest was prepared by Catherine Schmitt and John Peckenham, assisted by Sherman Hasbrouck.

February, 2002



Sebago Lake

The state of Maine has more than 2,200 public water supply systems. These provide drinking water for a substantial portion (66%) of Maine's population. About 60 of these public water systems are served by surface water supplies, and the rest are served by groundwater.

Clearly, protection of water sources—groundwater, lakes, ponds, and rivers—is essential to safeguard public health. Land use activities throughout contributing watershed areas can affect water quality, making water protection a challenge for utilities, municipalities, and private residents. In the past it has been difficult for water managers to keep track of land use changes affecting their watersheds. Since some changes can have a direct effect on water quality and public health, it is important that water suppliers participate in review of such activities.

A new law enacted in 2000 (P.L. 761) gives public water suppliers an opportunity to review proposed development projects within a given source protection area. The law gives the suppliers "abutter status" for certain activities that require a permit application review:

- automobile recycling facilities or junkyards;
- expansion of structures using subsurface waste disposal systems;
- conditional and contract rezoning;
- subdivisions; and
- other land use projects.

In each case the law requires that the water supplier be notified of certain proposed land use activities that could impact the drinking water source. This digest is intended to help municipal officers, drinking water suppliers, land-use consultants, and developers understand how the law will affect them.

GEOGRAPHICAL DIGEST SERIES
THE UNIVERSITY OF MAINE

Public Law 761 (Cont.)

P.L. 761 mandates a greater level of involvement for public water suppliers to ensure the highest quality drinking water for their communities. Drinking water quality was not previously considered during approval of land use activities. Yet these activities can have a direct effect on the drinking water source.

Common drinking water pollutants and their sources

These include

- Herbicides/Pesticides: home and agricultural use
- Petroleum/Hydrocarbons: underground and aboveground storage tank leaks, vehicle and boating accidents, vehicle maintenance/repair facilities, junkyards, road and parking lot runoff, industrial and commercial development
- Sedimentation/Nutrients: construction sites, erosion, land clearing
- Bacteria/Pathogens: animal waste, wastewater treatment plants, septic systems

If an activity on one individual lot can lower the quality of the drinking water source, then it impacts everyone who drinks water from that source. Source water protection is the most efficient and cost-effective tool to insure that future generations have safe, clean drinking water. This is why it is important that Public Water Suppliers be notified of activities that have the potential to affect the water supply and that the suppliers be given the opportunity to comment on the proposal in the interests of the public.

How P.L. 761 affects you if you are a Municipal officer or county commissioner:

Under the law, the Public Water Supplier is to be treated as an abutter to all properties that fall within the Source Water Protection Area of the water body. The Supplier must be notified of certain activities occurring on nearby properties. It is important that the water supplier be made aware of activities that could potentially impact the quality of the drinking water. As a municipal officer, preservation of water quality is of utmost importance for protection of public health. The costs for towns of restoring drinking water quality after it has been degraded are much greater than the costs of preventing pollution of the source before it happens. The economic and ecological benefits of preserving water quality extend to other areas as well, including recreational activities like fishing and boating, aesthetics and enhanced property values, and supporting diverse and healthy ecosystems.

Public water suppliers must be notified if certain proposed projects will occur within the Source Water Protection Areas of their water supplies:

- Automobile graveyard, automobile recycling business, or junkyard (30-A MRSA §3754)
- Rezoning ordinances (30-A MRSA §4352)
- Subdivisions (30-A MRSA §4403)
- Septic system expansions or replacements (30-A MRSA §4211, sub-§3, ¶B)
- Other land use projects (30-A MRSA §4358-A)
- Natural Resources Protection Act permitted activities and Stormwater (38 MRSA §420-D)

Also, if abutter notification is required as part of an application process (*i.e.* for activities governed by local ordinances), the Public Water Supplier must also be notified as an abutter.

Maine Center for Disease Control and Prevention
An Office of the Department of Health and Human Services

Paul R. LePage, Governor Mary C. Mayhew, Commissioner

Drinking Water Protection in Maine

A Summary of Regulatory Authority to Protect Drinking Water in Maine

Maine CDC Drinking Water Program • 11 SHS Augusta, ME 04330 • 287-2070 • www.medwp.com

History

Public water systems have worked to protect drinking water for over 100 years in Maine. The earliest efforts involved locating sources of drinking water that were better protected than the large rivers, which often contained cholera from upstream sewage discharges. Most early public water systems located aquifers, lakes, and ponds with good water quality and worked to protect them from human influence, particularly sewage. Systems worked with both local government and the state legislature to enact private and special laws (charters) and ordinances that reduced their risk of contamination.

Protecting Public Water Systems

Most public water systems possess limited resources to reduce their risks. The most effective tool is to purchase the land that provides the water. For most systems, acquiring the entire aquifer or watershed proves well beyond their means. The next, most common, option is to work with entities holding regulatory authority, to manage specific activities and development patterns in helping keep water clean. The table on the reverse side of this document shows the cumulative effect of efforts over the last 30 years, which provides a state framework of protection for drinking water. Most land use decisions are made at the town level; therefore, municipalities have the best opportunity to keep drinking water safe.

Regulatory Authority

With the passage of the Federal Safe Drinking Water Act, Maine adopted new laws to implement drinking water protection at the state level. One of the provisions explicitly authorized municipalities to adopt ordinances that protect public water sources. There are about 380 community water systems. Of those, 80 larger ground water systems and most of the 45 surface water systems have worked with one or more towns to adopt some municipal protection. For surface water systems, shore land zoning in resource protection is the most common measure. Many smaller community systems, and nearly all non-community systems, rely on state-level protections to reduce risks to their drinking water. As noted in the table on the reverse, most of these barriers are aimed at specific activities that pose a threat to water quality. These protections have evolved over time, mostly in response to specific contamination issues. Many focus on fuel storage and use, which has required significant investments in clean-up efforts, as well as developing new water systems that serve areas contaminated by gasoline and oil products. The regulations, coupled with technical assistance, have started to reduce spill response costs and help keep drinking water clean.

Impact from Farming & Forestry

On a broader scale, farm and forest owners' management choices significantly impact drinking water quality. Well-managed agriculture and silviculture provide better drinking water, as well as better results for the landowner. State level standards for farming and forestry set a baseline. Voluntary, incentive-based programs encourage landowners to implement practices that benefit both their lands and drinking water. When these land uses are supported by the community and prove economically viable, unplanned development is also less likely.

The table on the reverse side summarizes the legislative authority for drinking water protection, organized by type of threat to drinking water source. It is a distributed system, with responsibilities and authority at many levels. Ongoing communication and coordination between water systems and state and local agencies facilitates safer and more secure drinking water.

(#4)

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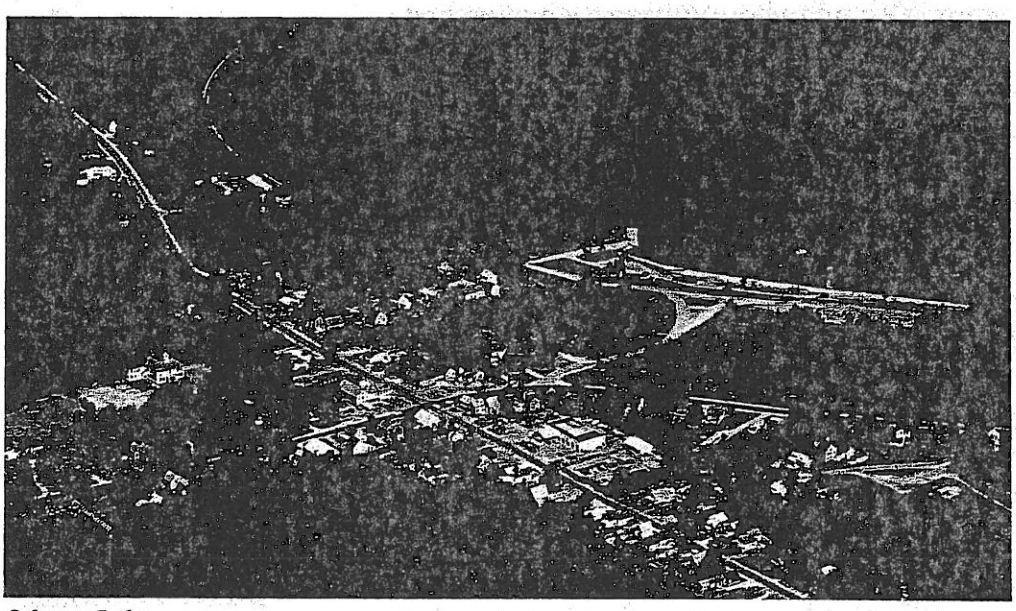

Sebago Lake

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Also, if abutter notification is required as part of an application process (*i.e.* for activities governed by local ordinances), the Public Water Supplier must also be notified as an abutter.

Municipality of _____

Public Water Supplier Notification Form

Date:

To: _____
Public Water Supplier Name

_____
Public Water Supplier Address

_____
Public Water Supplier phone/fax/e-mail

The municipality has received a proposal from _____
(Name of Applicant)

To: (Please check all that apply)

- ❒ Change zoning or land use district ★
- ❒ Develop or subdivide ★ property *(please describe)* _____
- ❒ Expand an existing use/structure *(★ if structure uses subsurface wastewater disposal)*
- ❒ Install a subsurface wastewater disposal system
- ❒ Build a new ❒ single family ❒ multi family home
- ❒ Operate a ❒ business ❒ home occupation ❒ industrial facility
- ❒ Operate a junkyard, automobile graveyard or auto recycling business ★
- ❒ Store or use fuel or other chemicals
- ❒ Extract gravel, topsoil, or other resources
- ❒ Harvest timber
- ❒ Farm or keep livestock
- ❒ Grade or fill land
- ❒ Discharge, manage, or impound storm water
- ❒ Install utilities (power, water, sewer)
- ❒ Other *(please describe)* _____

Located (where) _____, Tax Map _____ Lot _____,

❒ in ★❒ near the source water protection area of your water supply.

A copy of the proposal is available for inspection _____
(where)

by contacting _____.

The municipality ❒ will ❒ will not hold a public hearing on this proposal.
The public hearing will be held on _____
(date)

at the _____ at _____.
(place) *(time)*

For additional information, please contact _____.

Sent by: _____ Telephone: _____.

★ *Required notification under Maine P.L. 761. Notice is also required for land use projects reviewed by the municipality that require notification of abutters. Please check the statute and local ordinances.*

Maine Rural Water Association

(#5)

from Legal Notes Archive Collection

Minutes Are Not 'Findings'

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

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.)*

#6

from Legal Notes Archive Collection

CONCLUSORY FACT FINDING INSUFFICIENT ON APPEAL

(from *Maine Townsman*, "Legal Notes," March 2002)

CONCLUSORY FACT FINDING INSUFFICIENT ON APPEAL

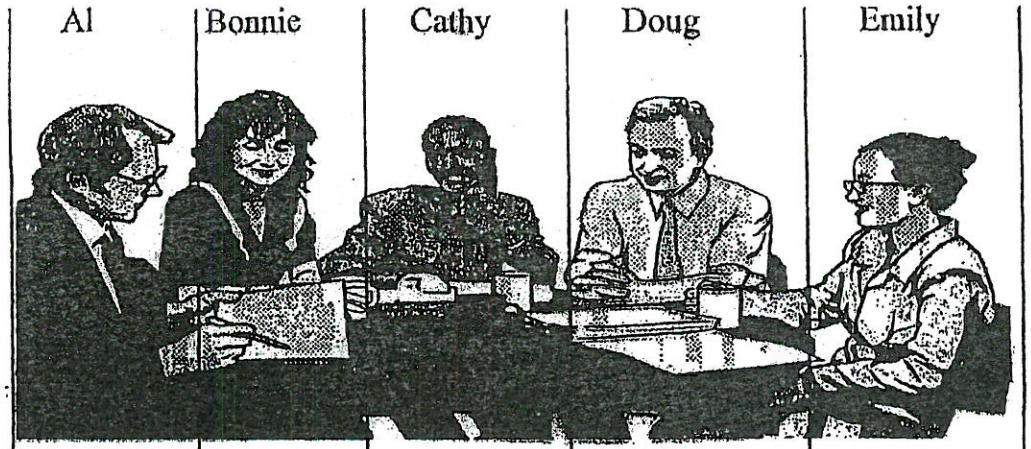
Most planning boards, boards of appeals and other local administrative agencies (such as boards of assessment review and, sometimes, the municipal officers) understand that when they conditionally approve or deny an application, license, certificate or any other type of permit, they must make "findings 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.)*



Review Criteria						
Erosion	Y	Y	Y	Y	N	4-1
Traffic	N	N	Y	Y	Y	3-2
Financial and Technical Capacity	Y	Y	Y	Y	Y	5-0
Ground Water	Y	Y	Y	Y	Y	5-0
Storm Water	Y	Y	Y	Y	N	4-1

Does Project Meet All Criteria?	N	N	Y	Y	N	2-3

Prepared by William Plouffe, Esq. for Maine Bar Association seminar entitled "Land Use and Environmental Regulation" (Nov. 1, 2002). Used with the permission of the author and MSBA. All rights reserved.

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Note: The photos in this handout are of actual buildings and locations, but they do not depict actual violations. They are used here for illustrative purposes only.

MMA Planning Board/Board of Appeals Workshop
"Undue Hardship Test" Slides With Commentary

I. "The Land in Question Cannot Yield a Reasonable Return Without a Variance"

Example #1:

This slide is designed to illustrate the classic variance request. The landowner has a principal dwelling structure and wants one or more setback variances or a lot size variance in order to build an accessory structure, such as a garage, or to expand the principal structure to add an extra bedroom, a porch or deck, or even a second dwelling unit. Where a principal structure exists, it is virtually impossible to satisfy the "undue hardship" test. Proposed accessory structures or expansions would generally constitute maximizing the owner's return on the land rather than seeking a reasonable return on the land. The existing use is usually sufficient to provide the owner with a reasonable return.

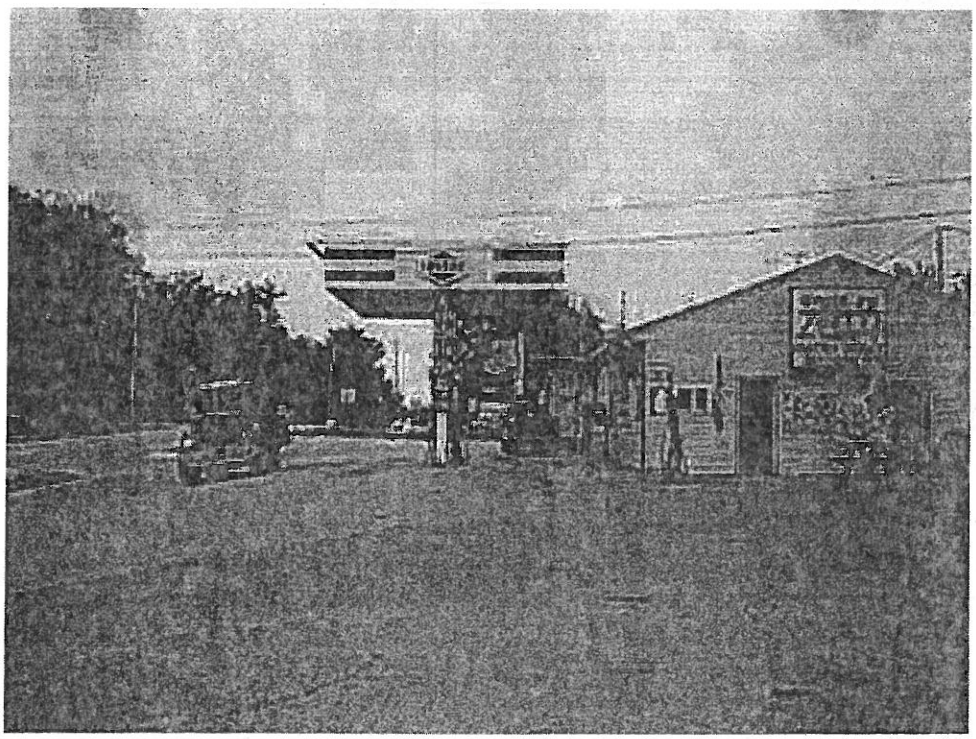
Example #2:

This photo shows an undersized vacant lot not adjoined by other land in the same ownership. Such lots usually are "grandfathered" as to lot area and shore frontage/road frontage requirements under the applicable zoning or shoreland zoning ordinance. While it is possible that in some cases the owner may be able to prove undue hardship and obtain a setback variance to build a reasonable size principal structure, that is not always the case.

A number of Maine court cases have dealt with this issue or a related "takings" issue. In *Hall v. Board of Environmental Protection* (Maine Supreme Court) the landowners (Hall) lost their seasonal cottage due to severe beach erosion. They bought an adjoining vacant lot for $200; the owners of that lot had removed their cottage because of erosion. The Halls began using their two lots as one from that point. They obtained a building permit from the town to build a new seasonal cottage, but their application to the BEP under the Sand Dune Law to build a new cottage was denied. The court found that the Halls had been using their property by living in a large motorized camper that was connected to various utilities on the site; the property could accommodate an even larger mobile unit. It also found that both the Halls and others in the area had rented trailer and RV sites in the neighborhood for a reasonable price. There was also evidence in the record that properties comparable to the Halls' lot had sold for substantial sums even though only used for such seasonal uses. The court found that the denial of the Sand Dune permit did not constitute a taking of the Hall property because mobile units would still be a legal, beneficial use of the property. In *Drake v. Town of Sanford* (Superior Court), the owner of two adjoining nonconforming lots on a peninsula wanted a setback variance to allow the construction of a seasonal camp. The board of appeals reviewed the shoreland zoning

ordinance and found that there were a number of permitted non-structural uses (mineral exploration, wildlife management activities, harvesting wild crops) and denied the variance application on the basis that the owner could realize a reasonable return without a variance by conducting one of those uses. The court upheld the denial, finding that the evidence in the record suggested that the land could be used for swimming, picnicking and access to the water; however, the court criticized the board for taking a "short cut" and basing its findings just on its reading of the ordinance rather than making an analysis of the actual property. In *Toomey v. Town of Frye Island* (Maine Supreme Court), Toomey owned two non-adjoining lots, a developed inland lot and a smaller, vacant waterfront lot. He applied for a water setback variance in order to build a residential structure on the vacant lot. The board of appeals denied the application and the court upheld the denial. The court found that the recreational uses of the lot for boating and swimming and the fact that there was an existing dock provided Toomey with a reasonable and valuable use of the lot without the need for a water setback variance to build a residential structure.

Example #3:

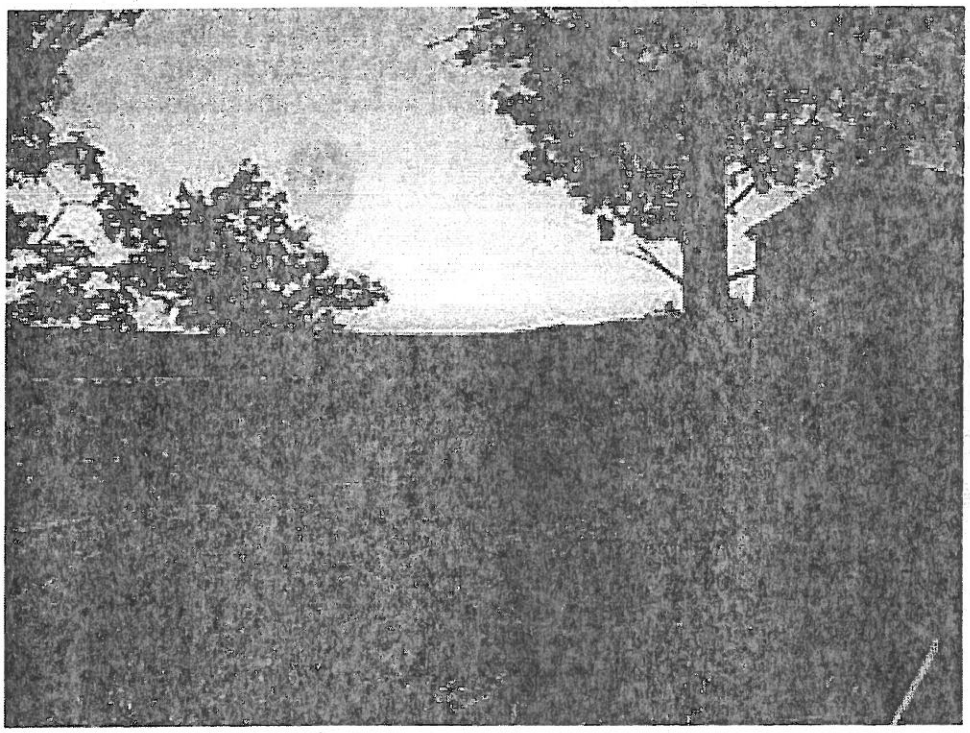


In *Brooks v. Cumberland Farms*, the owner of a Cumberland Farms applied for a setback variance to construct a canopy over an island of gasoline pumps in order to protect customers in inclement weather. The Maine Supreme Court found that the owner didn't satisfy the "undue hardship" test because he didn't offer proof that there was no other legal use of the property permitted by the town's ordinance which could be conducted and provide a reasonable return on the land without a variance. A solution in a case like

this would be for the town to consider amending the ordinance to create a smaller setback or eliminate the setback requirement for a canopy-type structure.

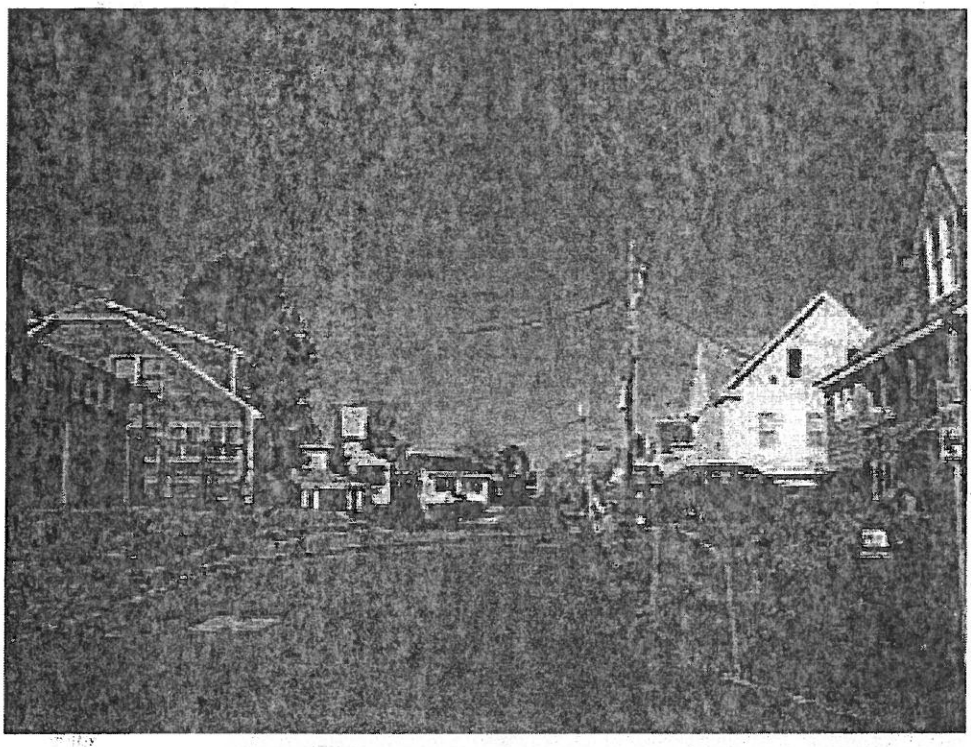
II. "The Need for the Variance is Due to the Unique Circumstances of the Property and Not to the General Conditions in the Neighborhood"

Example #1:



Due to the slope of the land and the owner's desire to take advantage of the beautiful view from the higher part of the lot, the owner of the land depicted above wants to build his house close to the adjacent town road, even though there is plenty of flat land on the lower part of the lot. However, building on the lower part of the lot would require a much longer driveway and there would be no view of the lake. In relation to other lots in the neighborhood, this lot is fairly unique as far as the slope of the land. The variance application arguably satisfies the "unique circumstances" part of the "undue hardship" test. However, if the owner has the option of building in another location on the lot that is conforming, even though it is less desirable, wouldn't that mean that he is seeking more than a reasonable return on the land under the first prong of the "undue hardship" test?

Example #2:



The owner of an existing lot wants a variance from the road and side setback requirements in order to build a porch on the front and side of her existing cottage. In a crowded neighborhood such as this, it is difficult to prove that the lot and cottage in question are unique, since virtually all of the buildings in the neighborhood are too close to the road and side lot line, and all of the lots are undersized. Without a feature like a wetland or ledge outcropping on the lot which is not found on other lots in the area or without evidence that the lot in question is smaller than others in the neighborhood, the owner would be hard pressed to meet the "unique circumstances" prong of the "undue hardship" test.

The solution may be for the town to take a look at the ordinance setback requirements for this neighborhood and see if they are realistic, given the existing land use patterns. It may make sense to adopt smaller setback distances for such a neighborhood. That is a legislative decision, not one that the board of appeals can make.

III. "Granting a Variance Will Not Alter the Essential Character of the Locality"

In the previous photo, the granting of a variance to allow a building to expand closer to the road or to the side property line probably will not alter the character of this particular neighborhood. However, if the variance sought is from a height restriction in order to allow a building to expand vertically, such a variance might alter the neighborhood character in some cases, depending on how much of a variance is sought.

IV. "The Hardship is Not the Result of Action by the Applicant or a Prior Owner"

The landowner obtains a permit from the town to build a garage on the lot above. The lot is large enough to allow the garage to be built in a spot which conforms to all setback requirements. Before beginning construction, the owner's contractor takes measurements from the side property line and is off by several feet. The garage is completed and then the error comes to light. The owner submits an application to get "after-the-fact" approval for a variance to allow the garage to remain where it is, arguing that it wasn't his fault and that in any case it is only a minor encroachment into the required setback. In the case of such an after-the-fact application, the board must review the application as though nothing had been constructed. If the landowner's project would have met the "undue hardship" test for a setback variance originally, then the board can grant a variance after-the-fact. However, if the building could have been built in compliance with setback requirements, but for the contractor's error, then no variance is justified after-the-fact, regardless of how minor the violation is. The Maine Supreme Court made such a finding in *Rowe v. City of South Portland.*

(RWS 1-3-18)

Workshop for Local Planning Boards and Boards of Appeal

Maine Municipal Association

(revised 3-7-19)

Freedom of Access Act (FOAA)

- Also known as the "Right to Know" law
- Purpose of law:
  - **Open meetings**
  - **Open records**
- Liberal construction in favor of public rights

Public "Proceedings" (Meetings)

- Broad definition: 1 MRS § 402(2)
  - Public "Proceedings" include meetings of any municipal board/ committee/ subcommittee where a board function is transacted
  - No board decision may be made outside of a public proceeding, unless allowed by statute

Notice

- Advance notice required
  - Notice must be given in **ample time** and in a manner **reasonably calculated** to notify the public
- FOAA provides minimum notice
- Emergency meetings
- Agendas

Public Rights

- Public has right to attend and observe PB/BOA meetings
- May take notes, film, and record meeting
  - But, no right to be disruptive
- No right to participate, unless by local ordinance/rule or advertised as "public hearing"

Executive Sessions

- Discussions are limited to topics listed in 1 MRS § 405 and other statutes
  - PB and BOA generally can't justify executive sessions
- Must begin in properly noticed public meeting
- Motion for executive session- must cite statutory authority
- Discussion only, no voting

Other Public Proceedings Issues

- Chance meetings/social gatherings
- Site visits
- Email and telephone conversations

Public Records

- Broad definition: 1 MRS § 402(3)
  - A "record" includes information a municipal official has in their possession that relates to municipal business
  - Records are public unless law makes confidential
- Public has a right to inspect and copy records
- Public Access Officer

Public Records (continued)

- Record of Meetings
  - Boards must create a "record" of each meeting
  - Minutes not required, unless by local ordinance or policy
- Record Retention
  - Boards have a duty to preserve/retain records (5 MRS § 95-B)
  - Destroy only if consistent w/ Local Government Record Retention Schedules and state law
  - http://www.maine.gov/sos/arc/records/local/localschedules.html

Decision-Making Process

When the Planning Board or Board of Appeals acts as the "original decision-maker"

In applying for a variance does the applicant need a prior decision?

Original Decision-Maker

- A Planning Board or CEO acts as an original decision-maker when reviewing and issuing permits & approvals
- A Board of Appeals acts as an original decision-maker when:
  - Issuing variances
  - Hearing Appeals "*De Novo*"

?

Preliminary Issues

Generally, a board must first determine:

- Is there a "Quorum"?
- Does the board have "Jurisdiction"?
- Does the applicant have "Standing" to apply?
  - "Right, title, or interest" in the property

Procedural Issues

- Conduct of the Meeting
  - Rules of Procedure, see board bylaws
  - Absent Board Members Procedure
- See Applicable Statute or Ordinance for:
  - Public hearing requirements (e.g. § 30-A MRS 4403)
  - Abutter notice
    - Notice to public drinking water suppliers
  - Deadlines and requirements for notice of the decision (e.g. 30-A MRS § 4403, 2691, 4353)

Making a Decision

- Board must identify applicable ordinance or state law provisions
- Apply facts of application to EACH applicable review criterion or substantive requirement in the ordinance or law
- Determine whether applicant satisfies EACH applicable review criterion or substantive requirement

Evidence

- Applicant has burden of proof
- Evidence must be **substantial, credible, relevant**
  - Expert vs. lay person's testimony
  - Personal knowledge of board member
  - "Ex parte" communications
- Authority to address title/boundary issues

Form of Decision

- Must link decision to facts in the official record ("**findings of fact**")
- Must state whether those facts support a legal conclusion that the applicant has satisfied the standard ("**conclusions of law**")
  - Including all subparts
- Majority vote rule: 1MRS § 71(3)

Sample Subdivision Standards

1. **Pollution**. The proposed subdivision will not result in undue water or air pollution.
2. **Sufficient water**. The proposed subdivision has sufficient water available for the reasonably foreseeable needs of the subdivision;
3. **Municipal water supply**. The proposed subdivision will not cause an unreasonable burden on an existing water supply, if one is to be used;
4. **Erosion.** The proposed subdivision will not cause unreasonable soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results;
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 . . .
6. **Sewage disposal.** The proposed subdivision will provide for adequate sewage waste disposal and will not cause an unreasonable burden on municipal services if they are utilized;
7. **Municipal solid waste disposal**. The proposed subdivision will not cause an unreasonable burden on the municipality's ability to dispose of solid waste, if municipal services are to be utilized;

Subdivision Standards (continued)

8. **Aesthetic, cultural and natural values.** The proposed subdivision will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, significant wildlife habitat . . . or rare and irreplaceable natural areas or any public rights for physical or visual access to the shoreline;
9. **Conformity with local ordinances and plans.** The proposed subdivision conforms with a duly adopted subdivision regulation or ordinance, comprehensive plan, development plan or land use plan, if any.
10. **Financial and technical capacity**. The subdivider has adequate financial and technical capacity to meet the standards of this section;
11. **Surface waters; outstanding river segments**. Whenever situated entirely or partially within the watershed of any pond or lake or within 250 feet of any wetland, great pond or river . . . the proposed subdivision will not adversely affect the quality of that body of water or unreasonably affect the shoreline of that body of water;
12. **Ground water.** The proposed subdivision will not, alone or in conjunction with existing activities, adversely affect the quality or quantity of ground water;
13. **Flood areas.** Whether the subdivision is in a flood-prone area. . . [If so] . . . the subdivider shall determine the 100-year flood elevation and flood hazard boundaries within the subdivision. The proposed subdivision plan must include a condition . . . requiring that principal structures in the subdivision will be constructed with their lowest floor, including the basement, at least one foot above the 100-year flood elevation;

Sample Review Standards
Model Shoreland Zoning Guidelines

After the submission of a complete application to the planning board, the board shall approve the application or approve it with conditions if it makes a positive finding based on the information presented that the proposed use:

1. Will maintain safe and healthful conditions;
2. Will not result in water pollution, erosion, or sedimentation to surface waters;
3. Will adequately provide for the disposal of all wastewater;
4. Will not have an adverse impact on spawning grounds, fish, aquatic life, bird or other wildlife habitat;
5. Will conserve shore cover and visual, as well as actual, points of access to inland and coastal waters;
6. Will protect archaeological and historic resources as designated in the comprehensive plan;
7. Will not adversely affect existing commercial fishing
8. Will avoid problems associated with flood plain development and use; and
9. Is in conformance with the provisions of Section 15, Land Use Standards.

Approaches to Making a Decision

One Approach:

- Make a motion on each review standard or criteria; prepare findings during meeting
- Votes on each review standard must be consistent with the "bottom line" vote to approve or deny the application
- May have different board members comprising the majority on each motion

Voting on Each Standard

Review Criteria						
Erosion	Y	Y	Y	Y	N	4-1
Traffic	N	N	Y	Y	Y	3-2
Financial and Technical Capacity	Y	Y	Y	Y	Y	5-0
Ground Water	Y	Y	Y	Y	Y	5-0
Storm Water	Y	Y	Y	Y	N	4-1
Does Project Meet All Criteria?	N	N	Y	Y	N	2-3

Prepared by William Plouffe, Esq. For Maine Bar Association seminar entitled "Land Use and Environmental Regulation" (Nov. 1, 2002). Used with the permission of the author and and the MSBA.

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Approaches to Making a Decision (continued)

Another approach:

- Have general discussion as a board on each review standard, but do not make a decision
- Delegate task of preparing draft findings of fact and conclusion of law
  - Clearly label decisions as tentative
- At next the next public meeting board reviews draft, discuss in detail and votes to adopt written decision

Conditions of Approval

- When making findings, board may attach reasonable conditions of approval
- Conditions must:
  - Be related to the relevant requirements of the statute/ordinance
  - Have reasonable connection to the project's impact
- State conditions clearly in the decision or clearly note conditions on the approved plan
  - Make clear no changes can be made without board approval

Conditions of Approval (continued)

- Covenants
  - Distinguish between conditions of approval imposed by board pursuant to statute or ordinance criteria AND
  - Covenants proposed by applicant that are not required
- Conditions that retain board's jurisdiction

Reconsideration

- Planning Board has inherent right to reconsider a decision
  - No Statute, look to board bylaws or ordinance
- Board of Appeals may reconsider a decision under state law or local ordinance
  - 30-A MRS § 2691: board may reconsider within 45 days of original decision; applicant may request reconsideration within 10 days
- Provide direct notice of reconsideration to everyone that participated in original proceedings

VARIANCES

Nature and Purpose

- A variance is a reduction or waiver of certain ordinance requirements
  - It is not a permit
- Purpose: to avoid an unconstitutional "taking" of property

Authority to Issue

- Zoning/Shoreland Zoning ordinance: BOA has exclusive authority to issue variance
  - Except: PB may be authorized to reduce zoning standards (i.e. for cluster developments)
  - Except: CEO may be authorized to grant disability variance (30-A MRS § 4353-A)
- Non-zoning ordinance: may designate other official/board

Types of Zoning Variances

- Five types (30-A MRS § 4353)
- Two apply to all zoning/shoreland zoning ord.
  - Undue Hardship variance- § 4353(4)
    - Default test
  - Disability variance- § 4353(4-A)(A)
    - BOA in any municipality may grant variance to alter dwelling for access/egress to building for person with disability that lives there/regularly uses
    - CEO may grant permit if municipality adopts ordinance (§ 4353-A)

Types of Zoning Variances (cont'd)

- Three types of variances listed in § 4353 apply *only* if adopted by local ord.
  - Disability variance for vehicle storage: variance for accessory garage for personal car with disability plates – § 4353 (4-A)(B)
  - Special setback reduction: variance for single family residences - § 4353(4-B)
  - Practical difficulty variance- § 4353(4-C)

Filing and Recording

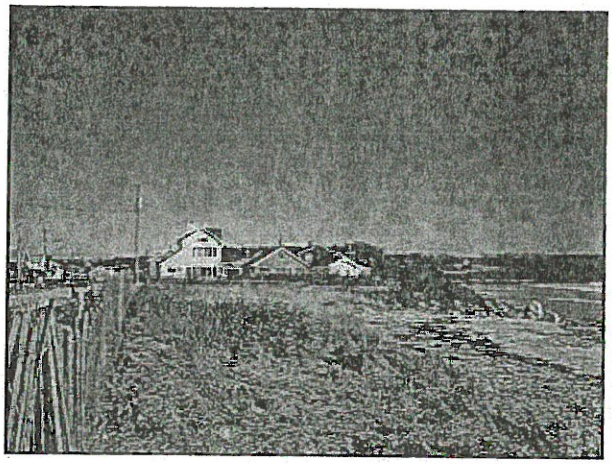
- All variances must be recorded in Registry of Deeds by applicant within 90 days of approval
  - Waiver granted from subdivision approval standard must be recorded within 2 years (30-A MRS § 4406)
- Filing Shoreland Zoning Variances:
  - Send copy of variance application to DEP at least 20 days before taking action on application
  - Send copy of decision to DEP within 7 days of decision

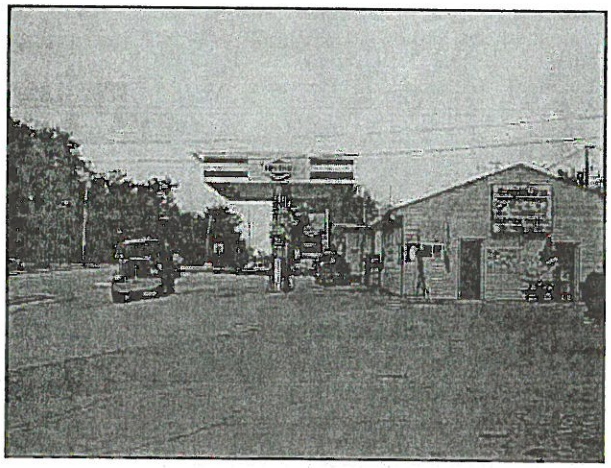
Undue Hardship Variance

- Four part test: 30-A MRS § 4353(4):
  1. Land in question cannot yield reasonable return without variance
  2. Need for variance is due to unique circumstances of property, not general neighborhood conditions
  3. Granting variance won't alter essential character of locality
  4. Hardship is not result of action by applicant or prior owner
- May add restrictions/standards by ordinance

1. Reasonable Return Standard

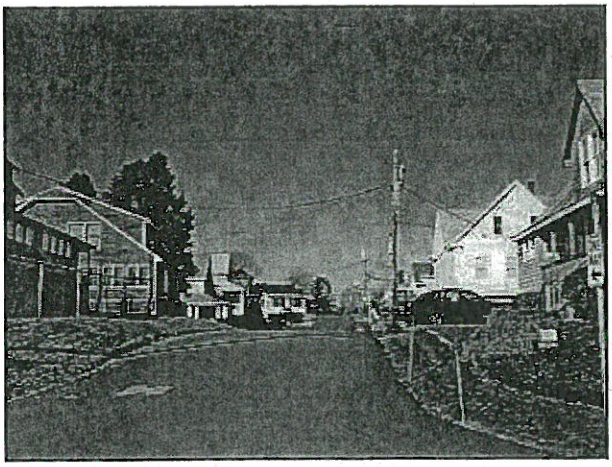
- Not entitled to maximum return, only reasonable return; grant only the minimum reduction needed
- Need to prove no other legal use could be conducted without variance and that property is unmarketable in its present condition
- Virtually impossible to meet this test where variance sought for an accessory structure or for an addition to existing building (e.g., garage, shed, deck, porch, extra bedroom)





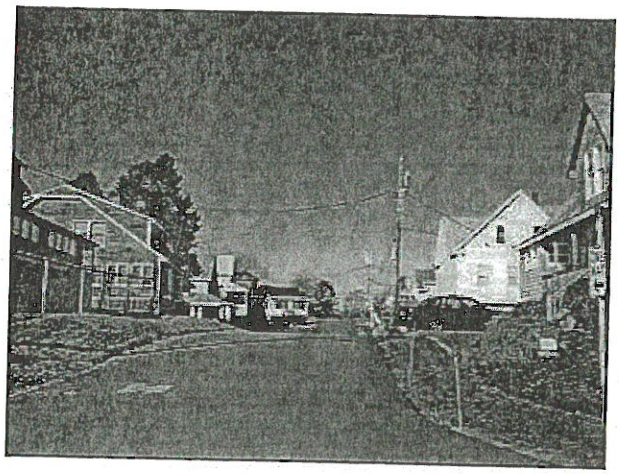
2. Unique Circumstances Standard

- The need for a variance is due to unique circumstances of the property and not to general conditions in the neighborhood
- Personal hardship/medical condition not relevant here
- Neighborhood issues should be addressed in zoning ordinance



3. Essential Character of the Locality Standard

- Granting a variance will not alter the essential character of the locality
- More relevant for a use variance than a dimensional variance

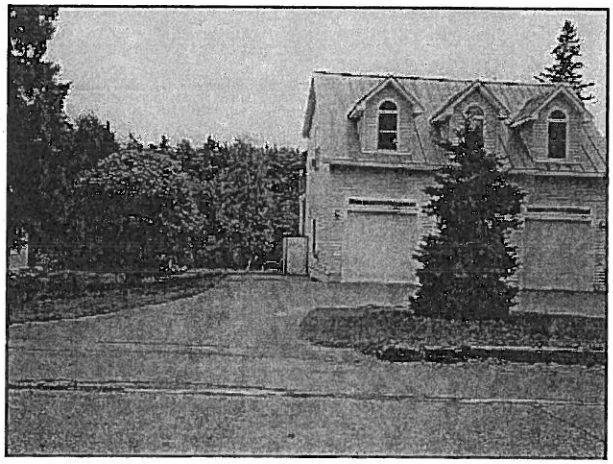


4. Self- Created Hardship Standard

- The hardship is not the result of action by the applicant or a prior owner (or the agent of the owner)
- Knowledge of existing zoning at the time property acquired is relevant but does not automatically mean that the hardship was self-created

After-the-Fact Applications

- Board may grant an after-the-fact variance only when the applicant can show they would have met the undue hardship test before the violation occurred.
- Otherwise, it's an enforcement issue for CEO and municipal officers via consent agreements/no action letters or court
- Variances are NOT a solution to land use violation



Appeals

Preliminary Issues

- BOA Jurisdiction:
  - Appeals of zoning & shoreland zoning permit decisions & variance applications (30-A MRS § 4353)
  - CEO enforcement decisions – unless expressly stated by charter/ordinance (30-A MRS § 2691)
  - By local ordinance where expressly provided (30-A MRS § 2691); e.g., no automatic appeal to BOA from subdivision decisions by PB
- Test for "standing" to appeal:
  - (1) Actual participation in original proceeding
  - (2) Show particularized injury

Timely Appeal

- Deadline for appeal to BOA:
  - See applicable ordinance/statute;
  - If silent, then within 60 days of decision being appealed
- How to count appeal period:
  - See applicable ordinance
  - Absent ordinance, for CEO decisions time runs from date permit issued
  - Absent ordinance, for PB decisions, time generally runs from date of final board vote (voice/show of hands); but PB subdivision decision runs from date of written decision.

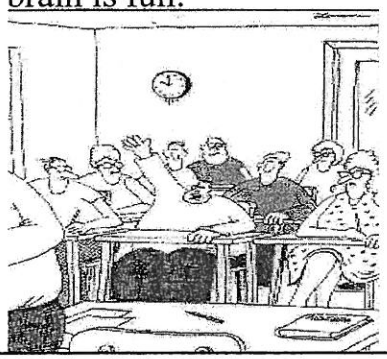
Appeal to Superior Court

- Appeal deadline if no local appeal available:
  - Appeal to Superior Court within 30 days of notice of PB/CEO decision
- If appealed to BOA:
  - Appeal to Superior Court within 45 days of BOA decision or within 15 days of BOA reconsideration
- As of 2017: new definition of "final decisions" that may be appealed to Superior Court (30-A MRS § 2691(3)(H))

Nature of Review: *De Novo* or Appellate?

- *"De novo"* : BOA steps into shoes of original decision-maker and begins the process again, creating own record/preparing own decision
- "Appellate": BOA simply reviews record created by original decision-maker; upholds original decision if substantial evidence in record to support/not contrary to ordinance
- BOA conducts *de novo* review, unless ordinance provides otherwise, but may need to amend ordinance to clearly state nature of review

Mr. Osbourne, may I be excused?
My brain is full.



Excerpt #8

Town of Turner Planning Board Site Plan Review Decision-March 10, 2010

11 Turner Center Road
Turner, Maine 04282

* Findings of Fact	* Hannaford Bros. Co.
* &	* Hannaford Supermarket &
* Conclusion of Law	* Pharmacy

Project Overview

The applicant proposed to construct a 36,000 square foot supermarket and pharmacy in Turner, Maine. The project site is approximately 7.8 acres in size and comprised of Lots 21, 26 and 27 as depicted on Tax Map 40. Approximately 5.6 acres of the project site will be altered for structures, access, parking, stormwater systems, subsurface wastewater disposal and landscaping. The project site is currently comprised of undeveloped forest land, pasture, two residential structures with associated lawns and a barn. Existing structures on the site will be removed to allow for development.

Access to the development will be via the Snell Hill Road which is a paved town road. There will be a primary entrance/exit located approximately 210' west of the Route 4/Snell Hill Road intersection and a pharmacy drive up window and delivery entrance approximately 420' west of the Route 4/Snell Hill Road intersection. The project is forecast to generate 107 trip ends in the AM peak hour, 416 trip ends in the PM peak hour and 456 trip ends during the Saturday peak hour.

The proposed building would be 220' x 160' with a flat roof except on the east elevation. The maximum height of the building would be 24' at the entrance area and 21' all other sides. The east and portions of the south roof lines will have pitched roofs. The pitch of the two main roof slopes (covered walkway and entry) would be 14/12 and the front gables roof pitches would be 6/12. Gable elements have been designed into the colonnade. There will be pitched roof over the drive through pharmacy window. Werzalit clapboards will be used on all sides of the building with bricks on a portion of the east elevation. The horizontal siding will be painted Sherwin Williams Downing Straw, trim and columns will be painted Sherwin Williams Roycroft Suede, exterior exit doors will be painted Sherwin Williams Downing Straw, window frames to be medium bronze, entrance door brushed aluminum, brick wainscot Morin Brick-Hannaford Smooth (red) and pitched roofs are to be covered by asphalt Certainteed Woodscape Shingles/Driftwood.

Off-site improvements associated with the development include the installation of a traffic signal at the intersection of Route 4 and Snell Hill Road, a south bound turning lane on Route 4 to the Snell Hill Road, a turning lane on Snell Hill Road onto Route 4 south and Snell Hill Road improvements.

The Planning Board received a sketch plan on May 13, 2009 and conducted an onsite inspection on May 27, 2009. On July 8, 2009 the Planning Board received the Site Plan Review Application. Public hearings were conducted on July 9, 2009 and October 7, 2009, and the Planning Board continued to receive both written and oral public comment at subsequent meetings. On August 18, 2009 the applicant signed an Agreement to Extend the Site Plan Review Period to October 14, 2009. The Planning Board voted to find the Site Plan Review application complete on October 14, 2009. The applicant verbally agreed to extend the site plan review period beyond the October 14, 2009 time period on October 14, 2009.

On February 10, 2010 the Planning Board completed its preliminary review of the standards contained in Section 5.E and F. of the Town of Turner, Maine Zoning Ordinance.

On March 10, 2010 the Planning Board considered the standards contained in Section VII of the Town of Turner, Maine Street Construction Ordinance. On that same date the planning Board voted to approve the Site Plan Review application with conditions.

Findings and Conclusions

General Review Standards/Section 5.E Town of Turner Zoning Ordinance

Standard

1. **Preservation of Landscape.** The landscape will be preserved in its natural state, insofar as practical, by minimizing tree and soil removal, retaining existing vegetation where desirable, and keeping any grade changes in character with the general appearance of neighboring areas. If the site contains a scenic site and/or view as identified in the Town of Turner Comprehensive Plan, special attempts should be made to preserve the natural environment of the skyline and view.

Environmentally sensitive areas which include wetlands, significant wildlife habitat, areas of two or more contiguous acres with sustained slopes greater than 20 percent, unique natural features and archaeological sites as identified in the Town of Turner Comprehensive Plan shall be conserved to the maximum extent.

The Board shall assess the proposed activities impact upon scenic areas and views as identified in the Town of Turner Comprehensive Plan. Where the Board finds that the proposed activity would have an undue adverse effect on identified scenic views, the Board shall require the applicant to minimize such effects.

Findings/Minimizing Tree and Soil Removal, Retaining Existing Vegetation and Grade Changes

The project site is approximately 7.8 acres in size. The site is currently comprised of undeveloped forest land, pasture, two residential structures with associated lawns and a barn. At the present time the site contains approximately 0.2 acres of impervious surface, 3.0 acres of lawn/pasture and 4.6 acres of woodland. Existing structures on the site will be removed to allow for site development. The applicant proposes to utilize 5.6 acres of the overall site for project development. This would include approximately 3.2 acres of impervious area for the buildings, parking and in internal site movement and 2.4 acres of lawn and stormwater systems. Approximately 2.7 acres of forest land would be removed to provide for site development. Portions of the site located within 250 feet, horizontal distance, of the Nezinscot River within the Resource Protection District are proposed to be preserved.

The project site will require filling to prepare it for development. The amount of fill ranges from 2' to 5' in the location of the building and from 5' to 8' in the parking lot area.

Conclusion

Based on the above information and information in the record the Planning Board finds that the landscape will be preserved in its natural state, insofar as practical, by minimizing tree and soil removal, retaining existing vegetation where desirable, and keeping any grade changes in character with the general appearance of neighboring areas.

Vote: Yes 6 No 0 Abstain 0

Findings/Wetlands

The applicant proposes to fill approximately 27,700 square feet of forested wetlands. The filled area is to be used for parking and access drives. The filled area of wetlands represents approximately 27% of the new impervious surface area needed for access and parking.

The applicant engaged Stantec Consulting (Stantec) to delineate wetlands and conduct vernal pool surveys. Wetlands were determined using the technical criteria established by the Army Corps of Engineers and the Maine Department of Environmental Protection. The applicant

submitted, as supplemental information, the NRPA Permit-By-Rule Application and NRPA Tier 2 Wetland Permit Application dated July 2009, including an Alternatives Analysis describing the applicant's efforts to avoid and minimize wetland impacts on the site. Stantec described the wetlands to be filled as a palustrine forested wetland with well developed shrub and herbaceous layers.

The applicant provided information that the Maine Department of Inland Fisheries and Wildlife and the Maine Department of Environmental Protection determined that wetlands to be filled did not meet the criteria to be designated as Wetlands of Special Significance.

In the NRPA Tier 2 Wetland Permit application the applicant initially proposed to compensate wetland filling by paying $95,348.00 to the Maine Department of Environmental Protection under the Department of Environmental Protection' In Lieu Fee Compensation Program. The money paid to the Department of Environmental Protection would be used in some other location for wetland mitigation.

In supplemental information dated September 23, 2009 the applicant proposed as an alternative to the in lieu fee to secure the rights to purchase and preserve a 20-acre parcel in Buckfield adjacent to Jersey Bog and conserve approximately 0.5 acres of land on the project site through deed restrictions prohibiting future development. The Buckfield parcel would be transferred to the Androscoggin Land Trust. This proposal will replace the compensation plan filed with the original application and the NRPA Tier two Wetland Permit application. The 0.5 acres proposed to be conserved on the project site is currently zoned Resource Protection.

At the October 7, 2009 public hearing the applicant was asked to consider the impact to the wetland area that lies north of the proposed parking lot and east of the stormwater pond's outlet control structure. Comments question whether this wetland area could be affected by a reduction of water to maintain wetland characteristics.

In supplemental information dated October 14, 2009 the applicant provided additional information on the potential impact on this portion of the wetland. In that information Stantec reported that the wetland is primarily groundwater fed and impacts to upgradient wetland area should not significantly affect the hydrology of the wetland.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

To permit development and other land use activities only upon or in soils which are suited for such use, unless technological advances remove the possibility of any environmental harm and such activities which are permissible under the Department of Environmental Protection criteria.

To conserve the integrity of wetlands so that their overall benefits and values are maintained.

To maintain wildlife travel corridors, along streams, rivers, ponds and wetlands.

Conclusion

Based on the above information and information in the record the Planning Board finds that wetlands will be conserved to the maximum extent.

Vote : Yes 6 No 0 Abstain 0

Findings/Significant Wildlife Habitat

Based on the material submitted by the applicant, four vernal pools were identified and mapped that are located in the area to be disturbed by the project. These vernal pools were identified and assessed by Stantec to determine if they met the criteria for designation as significant vernal pools. Significant vernal pools are considered significant wildlife habitat. Stantec reported that three of the vernal pools were man-made and one was a natural pool. Using the criteria included in the Natural Resource Protection Act for determining if a vernal pool is a significant vernal pool, Stantec reported none of the four pools met that criteria.

The Maine Department of Inland Fisheries and Wildlife has identified high/moderate waterfowl and wading bird habitat within 250', horizontal distance, of the Nezinscot River. This is considered to be significant wildlife habitat. Land owned by the applicant includes areas within 250', horizontal distance, of the Nezinscot River. The portion of the applicant's property within 250', horizontal distance, from the River is designated Resource Protection under the Town of Turner Zoning Ordinance, and is proposed by the applicant to be preserved.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

To maintain wildlife resources through habitat conservation and/or enhancement.

To maintain wildlife travel corridors, along streams, rivers, ponds and wetlands.

Conclusion

Based on the above information and information in the record the Planning Board finds that the area of site development does not contain significant wildlife habitat.

Vote: Yes 6 No 0 Abstain 0

Findings/Unique natural features and archaeological sites

The review of the Town of Turner Comprehensive plan resulted in no identification of unique natural features or archaeological sites within the project area.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

To assure that before archaeological sites/areas are disturbed their values are fully assessed and preserved where appropriate.

Conclusion

Based on the above information and information in the record the Planning Board finds that this criteria is not applicable.

Vote: Yes 6 No 0 Abstain 0

Findings/Sustained slopes greater than 20 percent.

Based on the review of site plans provided as part of the application there are no areas of two or more contiguous acres with sustained slopes greater than 20 percent.

Conclusion

Based on the above information and information in the record the Planning Board finds that this criteria is not applicable.

Vote: Yes 6 No 0 Abstain 0

Findings/Scenic Views

Based on the initial review of the Town of Tuner Comprehensive Plan as adopted on April 8, 2006 the proposed project site was determined to be not located in a scenic view location.

In a letter dated September 30, 2009 and testimony received at the October 7, 2009 public hearing the Turner Village Preservation Committee questioned if the project site is in fact located in a scenic view location.

Based on the reexamination of the Scenic Areas Map as contained in the Turner Comprehensive Plan the project site is within a scenic view area. Based on a preliminary visual

inspection by John Maloney on September 24, 2009 the proposed structure would not be visible from Lower Street from the scenic view area.

In supplemental information dated October 14, 2009 the applicant provided information that the proposed project would not impact the scenic view.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

To recognize identified scenic views as a significant natural resource.

To minimize the loss of the values of significant scenic areas and sites by encroaching development.

Conclusion

Based on the above information and information in the record the Planning Board finds that the proposed activity would not have an undue adverse effect on identified scenic views.

Vote: Yes 6 No 0 Abstain 0

Standard

2. Relation of Proposed Buildings to Environment. Proposed structures should be related harmoniously to the terrain and to existing buildings in the vicinity that have a visual relationship to the proposed structures so as to have a minimally adverse affect on the environmental and aesthetic qualities of the developed and neighboring areas. The Planning Board shall consider the following criteria.

Criteria

Architectural style is not restricted. Evaluation of the appearance of a project should be based on the quality of its design and relationship to surroundings.

Findings

The applicant proposes to construct a 36,000 square foot building to house a supermarket and pharmacy drive-through. The proposed building was initially proposed to be 220' x 160' with a flat roof. The maximum height of the building would be 29' at the peak of the vestibule roof on the east elevation. The east elevation that faces Route 4 will be 220' wide and have an 80' x 15' vestibule. The vestibule will contain entrance doors and four windows. The remainder of the

east elevation will have one window and a door. The vestibule will have a gable roof. The south elevation visible from both Route 4 and the Snell Hill Road will be 160' wide and contain the pharmacy drive-up window and door. The west elevation will contain service entrances and the north elevation will have a door.

In supplemental information dated December 21, 2009 the applicant proposed changes to the exterior design of the building. The changes included a redesign of the east and south roof lines similar to a pitched roof. The pitch of the two main roof slopes (covered walkway and entry would be 14/12 and the front gables roof pitches would be 6/12. Gable elements have been designed into the colonnade. A pitched roof has been added over the drive through pharmacy window. As described above, the revised design includes horizontal clapboards on all sides of the building, with bricks on a portion of the east elevation, and a historic color palette. Pitched roofs are to be covered by asphalt shingles.

Relevant comprehensive plan statement(s) related to Review Standard 24 (The proposed activity is in conformance with the comprehensive plan)

That the architectural design of new commercial development and characteristics of advertising features including signs are compatible with the community and surrounding area.

Conclusion

Based on the above information and information in the record including that the applicant revised the exterior design of the structure in response to the Planning Board's requests to minimize the visual impression of a "Big Box Store" the Planning Board finds that this criteria will be met.

Vote: Yes 6 No 0 Abstain 0

Criteria

Buildings should have good scale and be in harmonious conformance with permanent neighboring development.

Findings

The applicant proposes to construct a 36,000 square foot building to house a supermarket and pharmacy drive-through. The proposed building was initially proposed to be 220' x 160' with a flat roof. The maximum height of the building would be 29' at the peak of the vestibule roof on the east elevation. Buildings in the vicinity of the proposed site on the Snell Hill Road west of

#9

Brooklin Planning Board
Shoreland Zone Findings of Fact and Decision

Applicant:_____ Address: _____
Project:_____ Date Considered:_____

Members:	Present	Recused	Designated
Susie Strout, Chair	_____	_____	_____
Linda Graceffa, V. Chair	_____	_____	_____
Bill Cohen, Sec. Alt. Member	_____	_____	_____
Eric Dow, Member	_____	_____	_____
Doug Hylan, Member	_____	_____	_____
Dana Candage, Member	_____	_____	_____
Richard Butts, Alt. Member	_____	_____	_____

It is found by the Board upon consideration of information presented that the proposed use:

1. Yes No N/A Will maintain safe and healthful conditions.

Comments:

2. Yes No N/A Will not result in water pollution, erosion, or sedimentation to surface waters.

Comments:

3. Yes No N/A Will adequately provide for disposal of all wastewater.

Comments:

4. Yes No N/A Will not have an adverse impact on spawning grounds, fish, aquatic life, bird and wildlife habitat.

Comments:

5. Yes No N/A

Will conserve shore cover and visual, as well as actual, points of access to inland and coastal waters.

Comments:

6. Yes No N/A

Will protect archaeological and historic resources as designated in the comprehensive plan.

Comments:

7. Yes No N/A

Will not adversely affect commercial fishing or maritime activities in a Commercial Fisheries Maritime Activities District.

Comments:

8. Yes No N/A

Will avoid problems associated with floodplain development and use.

Comments:

9. Yes No N/A

Will conserve water views as viewed from public facilities.

Comments:

10. Yes No N/A Is in conformance with the provisions of Section 15, Land Use Standards (applicable standards checked)

- o Minimum Lot Standards
- o Principle and Accessory Structures
- o Piers, Docks, Wharves, Breakwaters, Causeways, Marines, bridges and Other Structures and Uses Extending Over or Below the Normal High-Water Line of a Water Body or Within a Wetland
- o Campgrounds
- o Individual Private Campsites
- o Commercial and Industrial Uses (bordering great ponds)
- o Parking Areas
- o Roads and Driveways
- o Signs
- o Storm Water Runoff
- o Septic Waste Disposal
- o Essential Services
- o Mineral Exploration and Extraction
- o Agriculture
- o Timber Harvesting [repealed pursuant to Section 48]
- o Clearing or Removal of Vegetation for Activities Other than Timber Harvesting
- o Erosion and Sedimentation Control
- o Soils
- o Water Quality
- o Archaeological Sites

Comments:

Vote:

Members:	Approve	Deny	Approve w/ Conditions	Signature
Susie Strout				
Linda Graceffa				
Bill Cohen				
Eric Dow				
Doug Hylan				
Dana Candage				
Richard Butts				

Conditions:

#10

IN THE MATTER OF:

Eben & Cindy Dumaine
52 South Road
Readfield, Maine

Findings of Fact and Conclusions of Law
Decision: Approval with Conditions
(Wildwood Disc Golf Course)

Pursuant to the provisions of the *Readfield Land Use Ordinance* (last amended: June 14, 2012), The Town of Readfield Planning Board has considered the application of EBEN & CINDY DUMAINE ("Dumaines") including its supportive data, public hearing testimony, and other related materials contained in the record, and makes the following Findings of Fact and Conclusions of Law:

1. APPLICATION SUMMARY

The Dumaines propose to construct and operate an18-hole Frisbee golf (or "disc golf") course, including a 22' by 14' service shed, on a portion of their 8.54 acre parcel (Map 128 Lot 110) at 52 South Road. The Dumaine residence and a horse paddock are also currently located on the property. The parcel is located in the Village District as depicted on Readfield's Land Use Map.

2. APPLICATION REVIEW PROCESS

The application for Site Review was submitted on January 31, 2013 and was initially considered for completeness by the Planning Board on March 4, 2013. On March 21, 2013, a site visit was conducted, attended by Planning Board members, the Readfield code enforcement officer, the Dumaines, and several interested parties. Also on March 21, the public hearing on this application was opened. The public hearing was continued to April 2, 2013, at which time the Dumaines agreed to submit additional information concerning erosion/sedimentation control and stormwater management; site plan details; and, course operations. The public hearing was again continued to April 23, 2013, to provide opportunity for interested parties to provide comment on the new information. Subsequently, the public hearing was closed on April 23. During the course of the public hearing, many comments (verbal and written) were received from interested parties, both opposed to, and in support of the project. The Planning Board met on May 1, 2013 and voted to approve the application with conditions.

3. SITE REVIEW CRITERIA

A. Aesthetic, Cultural and Natural Values

The disc golf course itself is proposed to be developed on a wooded portion to the rear of the Dumaine property. Tree removal will be minimized as fairways and footpaths are constructed, and the parcel will remain primarily wooded. Several

interested parties expressed concerns regarding potential visual impact of the proposed parking areas that are closer to the South Road. The Board finds that it is appropriate to require additional vegetative screening to address this concern.

The Board finds that the proposed project will not have an undue adverse effect on the scenic or natural beauty of the area, or aesthetics, provided that in addition to the vegetative screening proposed by the applicant, 2 rows of trees are planted parallel to the driveway, as selected by a landscape professional to provide year-round screening of the parking area.

There are no known historic sites, archeological sites, significant wildlife habitat identified or defined by the Department of Inland Fisheries and Wildlife or the Town of Readfield, rare plant or animal species, critical habitat, significant or irreplaceable natural areas or resources identified by the Department of Conservation, on the subject property.

B. Conformity with Local Ordinances and Plans

The proposed project will be constructed and operated in conformity with the Town of Readfield's Land Use Ordinance (last amended: June 14, 2012), and is consistent with Readfield's Comprehensive Plan (adopted: June 11, 2009).

C. Erosion

A Stormwater, Erosion and Sedimentation Control Plan dated April 2013 and prepared by Maine Environmental Solutions of Hallowell, Maine ("the Plan") was submitted. Specifically, the Plan included a narrative; Site Plan A, depicting the location of parking areas, erosion/sedimentation control features and buffer planting detail; and, Site Plan B, depicting the configuration and features of the course on an aerial photo of the Dumaine property.

Several interested parties expressed particular concern regarding the ongoing potential for erosion and sedimentation problems at the site from the proposed footpaths connecting different parts of the course.

The proposed project will not cause soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results, provided that compliance with the above referenced Plan is maintained, including ongoing maintenance of foot paths with woodchips and erosion control mix.

D. Financial Burden on Town

The proposed project will not cause an unreasonable financial burden on the Town for provisions of public services and facilities.

E. Financial and Technical Capacity

The Dumaines intend to use personal financial resources to fund this project. They have engaged the services of Robert Enmon, a professional disc golf course design and development specialist; and Josh Platt of Maine Environmental Solutions, a consulting company providing erosion and sedimentation control expertise.

The applicant has adequate financial resources and technical capacity to construct and maintain the proposed improvements and meet the criteria of all applicable Ordinances.

F. Flood Areas

The proposed activity is not located in a flood plain area as depicted on the Federal Emergency Management Agency's Flood Insurance Rate Maps.

G. Wetlands

The proposed activity will not have an adverse impact on wetlands.

H. Groundwater

The proposed activity will not, alone or in conjunction with existing activities, adversely affect the quality or quantity of groundwater.

I. Municipal Solid Waste Disposal

The applicant proposes to dispose of the small amount of waste anticipated to be generated from the project (e.g. snack wrappers) at the Readfield Transfer Station.

The proposed activity will not cause a burden on the Town's ability to dispose of solid waste.

J. Water Supply

No public water supply is proposed to be used.

K. Adjacent Land Uses

The Dumaine property abuts the Readfield Elementary School property to the south, and residential properties on the north, east, and west sides. The Dumaine parcel lies within the Village District[1]; the properties directly across the South Road from the

[1] Article 7 of the Readfield Land Use Ordinance describes the purpose of the Village District designation in the following way: "The village district is comprised of areas that can support a range of land uses including higher density residential use, commercial, community and governmental facilities and light industry. The district designation is intended to promote a compact (rather than sprawling) pattern of development in the district areas, and to encourage the preservation, revitalization and expansion of Readfield's two village areas (Readfield Corner and Readfield Depot). The village district designation strives to accommodate the denser, mixed land use pattern

Dumaine property are zoned Village Residential[2]. Although properties in the immediate vicinity are primarily residential, there are several low impact commercial uses in the area.

The Planning Board received testimony from a number of interested parties who expressed concern regarding potential impacts from the proposed disc golf course on adjacent properties. Issues of concern identified included: noise and the extent of course hours of operation; trespass, privacy, and property security issues; errant discs; and adequacy of the size and nature of buffers. Concern was raised that the property on which the project is proposed (Dumaine parcel is 8.46 acres in total, with the disc golf course proposed to be developed on approximately 7 of those acres) is too small for this type of outdoor recreational project and any impacts on adjacent properties may be intensified as a result.

The Dumaines responded to a number of the concerns raised by providing additional and/or modified information concerning course design and operation. Information submitted included: a modified site plan for the course that changed the location of various baskets and t-boxes, a set of course rules to be posted for customers, and an operations plan.

The property of Keith and Nancy Leavitt abuts the Dumaine parcel on its north side and the Leavitt residence is in close proximity to the property boundary. The Board finds that several of the modifications proposed by the Dumaines address concerns raised by the Leavitts. However, the Board further finds that the installation of additional vegetative screening in the vicinity of the property boundary is appropriate in order to more effectively address the Leavitts concerns related to privacy.

The Board finds that a disc golf course is, by its nature, a substantially different type of land use than has previously been permitted/developed in the Village District or in areas that are predominantly residential. The close proximity of the proposed course to adjacent residential properties poses a number of challenges and questions, and has raised concerns on the part of nearby residential property owners. Although the Dumaines have been responsive to many of these concerns, questions remain about what, if any, impacts will occur, and the extent and magnitude of these impacts, when the course is actually operational.

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described above while seeking to maintain the character and historical integrity of the village areas, and to ensure that proposed development and land uses are compatible with existing uses in the village."

[2] Article 7 of the Readfield Land Use Ordinance describes the purpose of the Village Residential designation in the following way: "The village residential district includes areas where the primary use is for higher density residential neighborhoods. Non-residential uses are strictly limited in this district. The designation encourages a more compact pattern of residential development, and seeks to ensure that the existing character and visual quality of the village residential areas are maintained.

The Board considered the imposition of additional conditions such as requiring the installation of netting at various points around the course to potentially capture errant discs, and the planting of tree buffers adjacent to other property boundaries in addition to the Leavitt boundary (e.g.. the Readfield Elementary School property line) to further address concerns such as noise and trespass issues. Following consideration of these matters, the Board concluded that it may not be necessary to require such extensive measures, and that in lieu of imposing such conditions at this time, it would be reasonable and appropriate to reexamine the issues at such time that the course had some actual operational history.

In view of these circumstances, the Board finds that it is appropriate for the Board to review operations of the course following start up and a period of active use; specifically, by October 31, 2014. The purpose of this review is to evaluate whether the measures taken by the Dumaines in development and operation of the course, in combination with the conditions of this Site Review approval, adequately address any detrimental effects to adjacent land uses that may be identified. The Board expressly reserves the right to modify the conditions of this approval if it is determined, based upon review of the course's operational history, site visits and information gathered by the code enforcement officer, and any other relevant data, that course operations are causing detrimental effects to adjacent land uses.

The Board further finds that Site Review approval of the development and operation of an outdoor recreational facility such as this disc golf course, in its proposed location, raises a number of questions and concerns that are distinctly different from those typically raised during review of commercial business applications more routinely seen. In certain respects, this proposal is akin to a "home occupation" as described in the Readfield Land Use Ordinance which provides that home occupation permits are subject to annual renewal and are not transferrable.

Operation of this facility in a manner that is in conformance with the conditions of this approval and that successfully avoids detrimental effects on adjacent land uses is, in significant part, dependent upon the technical ability and actions of the course owner/operator. For this reason, the Board finds that it is reasonable and appropriate to modify Standard Condition of Approval #10[3] to provide that this Approval does not "run with the land", and is not transferrable to another party with any transfer of right, title or interest of the subject property. The Readfield Planning Board Standard Conditions of Site Review and Subdivision Approval provide that: "The following

[3] Standard Condition #10 states, in relevant part that: "This permit shall 'run with the land' unless it expires pursuant to Article 4, Section 7. The permittee may transfer any or all interest in this permit with any transfer of right, title or interest to this land. The purchaser or lessee may assume all permissions granted by the permit and shall be responsible for complying with all standard and special conditions of approval."

standard conditions shall apply to all Site Review and subdivision approvals granted by the Readfield Planning Board, unless otherwise specifically stated in the permit".

The proposed disc golf course will not have a detrimental effect on adjacent land uses or other properties that might by affected by waste, noise, glare, fumes, smoke, dust, odors or other effects, provided that: additional vegetative screening is selected by a landscape professional and planted along the Leavitt boundary as specified in the conditions of this approval; there is no amplified sound at the site and exterior lighting is limited to a down-directional light on the service shed; all trash is properly disposed of; all elements of the "operations plan" and "rules of use" as submitted by the applicant are adhered to; approved hours of operation are followed, including opening no earlier than 10 AM on Sundays and cessation of course play no later than 30 minutes after sunset; course is closed on day per week; in the event a t-box or basket is relocated, there is no further encroachment on any property boundary in any direction; any errant discs leaving the course property will be retrieved by the course owners, not by players; the course has on-site supervision by the owners/operators at all times it is open for business.

L. Pollution

The proposed activity will not result in water or air pollution.

M. Waterbodies

The 14th Fairway is that area of the proposed project that lies closest to a waterbody. An adjacent intermittent stream is located 79 feet from the fairway.

The proposed activity will not have an undue impact on any waterbody.

N. Wastewater Disposal

The applicant proposes the use of portable toilets at the site, to be serviced by the toilet rental company. No wastewater will be disposed at the site.

O. Stormwater

A Stormwater, Erosion and Sedimentation Control Plan dated April 2013 and prepared by Maine Environmental Solutions of Hallowell, Maine ("the Plan") was submitted (See Paragraph C: "Erosion" above).

The proposal adequately addresses stormwater management provided that compliance with the Plan is maintained.

P. Sufficient Water

The proposed project does not require a water supply.

Q. Traffic

The applicant has proposed to provide a total of 33 on-site parking spaces (15 of which are located in an "overflow" parking area) for course customers. An area of sufficient size and configuration for bus turnaround has been incorporated into the site plan.

A number of interested parties expressed concern about the potential for unsafe conditions and roadway congestion if customer parking occurred on the South Road. Concerns were also raised with regard to a general increase in the amount of traffic on the South Road as a result of the proposed project. The Board finds that on-road customer parking would create potentially unsafe conditions. The Board further finds that the overall increase in traffic anticipated is not sufficient to warrant a traffic impact study. The Readfield Land Use Ordinance requires a traffic impact study if during any one-hour period, traffic attributable to the development equals or exceeds 50 trips at the project driveways.

The proposed activity will not cause highway or road congestion or unsafe conditions with respect to the use of the highways or roads existing or proposed provided that: customer parking is restricted to on-site designated parking areas and no on-road parking is permitted.

R. Legal Access

The site has legal and reasonable means of access sufficient to meet all proposed uses.

S. Impact of Adjoining Municipality

The proposed development does not cross the Town's boundaries.

T. Life and Fire Safety

The Planning Board has not required review of this development by the Readfield Fire Department.

U. Violations

The proposed development is not on property currently in violation of any requirements of this Ordinance.

V. Compliance with Timber harvesting Standards

Not applicable

W. Road Construction

Not applicable

THEREFORE, the Planning Board approves, subject to the following Conditions, the application of Eben and Cindy Dumaine to construct and operate a disc golf course along with its associated 22' by 14' service shed and parking areas, on a portion of their 8.54 acre property on the South Road, as described in the Findings above.

CONDITIONS OF APPROVAL

1. A vegetative screening plan developed by a landscape professional will be submitted no later than May 31, 2013. The plan is subject to review and approval of the Planning Board prior to implementation and will include:
   - A proposal for effective vegetative screening (species and spacing) to be installed along the northerly property boundary extending from the northeasterly corner (rear) of the Dumaine's house, easterly approximately 70 feet in the direction of the center of the Leavitt's shed. Plantings must be a minimum of 4 feet in height and of a species expected to attain 6 feet in height within 3 years, and;
   - A proposal for two rows of trees, parallel to the driveway, sufficient in terms of size (within 3 years) and species to provide adequate year-round screening of the proposed parking area;

2. Compliance with the provisions of the "Stormwater, Erosion and Sedimentation Control Plan (April 2013) as prepared by Maine Environmental Solutions of Hallowell, Maine, shall be maintained, including ongoing attention to the maintenance of course foot paths with woodchips and erosion control mix;

3. No amplified sound will be used in association with any aspect of operation of the disc golf course;

4. Exterior lighting associated with operation of the disc golf course is limited to a down-directional light on the service shed;

5. All trash and waste must be properly disposed of at an appropriate off-site facility;

6. All elements of the "operations plan" and course "rules of use", as approved by the Board, shall be adhered to;

7. The proposed hours of operation are modified by the Board to include Sunday opening time no earlier than 10 AM, cessation of course play no later than 30 minutes after sunset, and closure of the course for at least one day per week;

8. If t-boxes or baskets are relocated within the area of the course, the new locations will not encroach further on any property boundary in any direction;

9. Any errant discs that leave the course property will be retrieved by the course owners and not by players/customers;

10. The disc golf course will have on-site supervision by the owners/operators at all times it is open for business;

11. All parking associated with operation of the course will be in the on-site designated parking areas; no on-road parking will be permitted;

12. The Board will review operations of the Wildwood Disc Golf Course by October 14, 2014, following start up and a period of active operation. The Board expressly reserves the right to modify the conditions of this approval if it is determined, based upon review of the course's operational history, site visits and information gathered by the code enforcement officer, and any other relevant data, that course operations are causing detrimental effects to adjacent land uses;

13. The Board hereby modifies Standard Condition of Approval #10 in the case of this Approval, to specifically provide that this Approval does <u>not</u> "run with the land", and is <u>not</u> transferrable to another party with any transfer of right, title or interest of the subject property unless granted prior approval by the Planning Board;

14. Compliance with all other Standard Conditions of Approval will be maintained.

_____ _____

Paula M. Clark, Chair
Readfield Planning Board

Date

(#11)

Maine Revised Statutes

Title 30-A: MUNICIPALITIES AND COUNTIES

Chapter 187: PLANNING AND LAND USE REGULATION

§4353. ZONING ADJUSTMENT

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

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, unless only a direct appeal to Superior Court has been provided by municipal ordinance. The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.

[1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW) .]

2. Powers. In deciding any appeal, the board may:

A. Interpret the provisions of an ordinance called into question; [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

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, agency or department to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and [2011, c. 655, Pt. JJ, §24 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF).]

C. Grant a variance in strict compliance with subsection 4. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

[2011, c. 655, Pt. JJ, §24 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF) .]

3. Parties. The board shall reasonably notify the petitioner, the planning board, agency or department and the municipal officers of any hearing. These persons must be made parties to the action. All interested persons must be given a reasonable opportunity to have their views expressed at any hearing.

[2011, c. 655, Pt. JJ, §25 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF) .]

4. Variance. Except as provided in subsections 4-A, 4-B and 4-C and section 4353-A, 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; [1991, c. 47, §1 (AMD).]

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

C. The granting of a variance will not alter the essential character of the locality; and [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

D. The hardship is not the result of action taken by the applicant or a prior owner. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.

[2013, c. 186, §1 (AMD) .]

4-A. Disability variance; vehicle storage. A disability variance may be granted pursuant to this subsection.

A. The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this paragraph solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability.

The board may impose conditions on the variance granted pursuant to this paragraph, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this paragraph, the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure. [2009, c. 342, §1 (NEW).]

B. If authorized by the zoning ordinance establishing the board, the board may grant a variance to an owner of a dwelling who resides in the dwelling and who is a person with a permanent disability for the construction of a place of storage and parking for a noncommercial vehicle owned by that person and no other purpose. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle. The owner shall submit proposed plans for the structure with the request for the variance pursuant to this paragraph to the board.

The person with the permanent disability shall prove by a preponderance of the evidence that the person's disability is permanent.

For purposes of this paragraph, "noncommercial vehicle" means a motor vehicle as defined in Title 29-A, section 101, subsection 42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, section 521 and owned by the person with the permanent disability. [2009, c. 342, §1 (NEW).]

The board may impose conditions on the variance granted pursuant to this subsection.

All medical records submitted to the board and any other documents submitted for the purpose of describing or verifying a person's disability are confidential.

For purposes of this subsection, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.

[2015, c. 152, §1 (AMD) .]

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a set-back variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a set-back requirement only when strict application of the zoning 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 need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [1991, c. 659, §3 (NEW).]

B. The granting of a variance will not alter the essential character of the locality; [1991, c. 659, §3 (NEW).]

C. The hardship is not the result of action taken by the applicant or a prior owner; [1991, c. 659, §3 (NEW).]

D. The granting of the variance will not substantially reduce or impair the use of abutting property; and [1991, c. 659, §3 (NEW).]

E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available. [1991, c. 659, §3 (NEW).]

An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.

[1993, c. 627, §1 (AMD) .]

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board 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:

A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood; [1997, c. 148, §2 (NEW).]

B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties; [1997, c. 148, §2 (NEW).]

C. The practical difficulty is not the result of action taken by the petitioner or a prior owner; [1997, c. 148, §2 (NEW).]

D. No other feasible alternative to a variance is available to the petitioner; [1997, c. 148, §2 (NEW).]

E. The granting of a variance will not unreasonably adversely affect the natural environment; and [1997, c. 148, §2 (NEW).]

F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435. [1997, c. 148, §2 (NEW).]

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

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals 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. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B.

[2005, c. 244, §2 (AMD) .]

5. Variance recorded. If the board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the local registry of deeds within 90 days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.

[1989, c. 642, (AMD) .]

SECTION HISTORY
1989, c. 104, §§A45,C10 (NEW). 1989, c. 642, (AMD). 1991, c. 47, §§1,2 (AMD). 1991, c. 659, §§1-3 (AMD). 1993, c. 627, §1 (AMD). 1995, c. 212, §1 (AMD). 1997, c. 148, §§1,2 (AMD). 2005, c. 244, §2 (AMD). 2009, c. 342, §1 (AMD). 2011, c. 655, Pt. JJ, §§24, 25 (AMD). 2011, c. 655, Pt. JJ, §41 (AFF). 2013, c. 186, §1 (AMD). 2015, c. 152, §1 (AMD).

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Maine Revised Statutes

Title 30-A: MUNICIPALITIES AND COUNTIES

Chapter 187: PLANNING AND LAND USE REGULATION

§4353-A. CODE ENFORCEMENT OFFICER; AUTHORITY FOR DISABILITY STRUCTURES PERMITS

Notwithstanding section 4353, a municipality by ordinance may authorize a code enforcement officer to issue a permit to an owner of a dwelling for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. If the permit requires a variance, the permit is deemed to include that variance solely for the installation of equipment or the construction of structures necessary for access to or egress from the dwelling for the person with a disability. The code enforcement officer may impose conditions on the permit, including limiting the permit to the duration of the disability or to the time that the person with a disability lives in the dwelling. [2013, c. 186, §2 (NEW).]

All medical records submitted to the code enforcement officer and any other documents submitted for the purpose of describing or verifying a person's disability are confidential. [2015, c. 152, §2 (NEW).]

For the purposes of this section, the term "structures necessary for access to or egress from the dwelling" includes ramps and associated railings, walls or roof systems necessary for the safety or effectiveness of the ramps. [2013, c. 186, §2 (NEW).]

For the purposes of this section, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A. [2013, c. 186, §2 (NEW).]

SECTION HISTORY
2013, c. 186, §2 (NEW). 2015, c. 152, §2 (AMD).

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Maine Revised Statutes

Title 30-A: MUNICIPALITIES AND COUNTIES

Chapter 187: PLANNING AND LAND USE REGULATION

§4353. ZONING ADJUSTMENT

Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

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, unless only a direct appeal to Superior Court has been provided by municipal ordinance. The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.

[1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW) .]

2. **Powers.** In deciding any appeal, the board may:

A. Interpret the provisions of an ordinance called into question; [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

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, agency or department to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and [2011, c. 655, Pt. JJ, §24 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF).]

C. Grant a variance in strict compliance with subsection 4. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

[2011, c. 655, Pt. JJ, §24 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF) .]

3. **Parties.** The board shall reasonably notify the petitioner, the planning board, agency or department and the municipal officers of any hearing. These persons must be made parties to the action. All interested persons must be given a reasonable opportunity to have their views expressed at any hearing.

[2011, c. 655, Pt. JJ, §25 (AMD); 2011, c. 655, Pt. JJ, §41 (AFF) .]

4. **Variance.** Except as provided in subsections 4-A, 4-B and 4-C and section 4353-A, 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; [1991, c. 47, §1 (AMD).]

B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

C. The granting of a variance will not alter the essential character of the locality; and [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

D. The hardship is not the result of action taken by the applicant or a prior owner. [1989, c. 104, Pt. A, §45 (NEW); 1989, c. 104, Pt. C, §10 (NEW).]

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.

[2013, c. 186, §1 (AMD) .]

4-A. Disability variance; vehicle storage. A disability variance may be granted pursuant to this subsection.

A. The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this paragraph solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability.

The board may impose conditions on the variance granted pursuant to this paragraph, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this paragraph, the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure. [2009, c. 342, §1 (NEW).]

B. If authorized by the zoning ordinance establishing the board, the board may grant a variance to an owner of a dwelling who resides in the dwelling and who is a person with a permanent disability for the construction of a place of storage and parking for a noncommercial vehicle owned by that person and no other purpose. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle. The owner shall submit proposed plans for the structure with the request for the variance pursuant to this paragraph to the board.

The person with the permanent disability shall prove by a preponderance of the evidence that the person's disability is permanent.

For purposes of this paragraph, "noncommercial vehicle" means a motor vehicle as defined in Title 29-A, section 101, subsection 42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, section 521 and owned by the person with the permanent disability. [2009, c. 342, §1 (NEW).]

The board may impose conditions on the variance granted pursuant to this subsection.

All medical records submitted to the board and any other documents submitted for the purpose of describing or verifying a person's disability are confidential.

For purposes of this subsection, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.

[2015, c. 152, §1 (AMD) .]

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a set-back variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a set-back requirement only when strict application of the zoning 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 need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [1991, c. 659, §3 (NEW).]

B. The granting of a variance will not alter the essential character of the locality; [1991, c. 659, §3 (NEW).]

C. The hardship is not the result of action taken by the applicant or a prior owner; [1991, c. 659, §3 (NEW).]

D. The granting of the variance will not substantially reduce or impair the use of abutting property; and [1991, c. 659, §3 (NEW).]

E. That the granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available. [1991, c. 659, §3 (NEW).]

An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.

[1993, c. 627, §1 (AMD) .]

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board 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:

A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood; [1997, c. 148, §2 (NEW).]

B. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties; [1997, c. 148, §2 (NEW).]

C. The practical difficulty is not the result of action taken by the petitioner or a prior owner; [1997, c. 148, §2 (NEW).]

D. No other feasible alternative to a variance is available to the petitioner; [1997, c. 148, §2 (NEW).]

E. The granting of a variance will not unreasonably adversely affect the natural environment; and [1997, c. 148, §2 (NEW).]

F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435. [1997, c. 148, §2 (NEW).]

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

As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals 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. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B.

[2005, c. 244, §2 (AMD) .]

5. Variance recorded. If the board grants a variance under this section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the local registry of deeds within 90 days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.

[1989, c. 642, (AMD) .]

SECTION HISTORY
1989, c. 104, §§A45,C10 (NEW). 1989, c. 642, (AMD). 1991, c. 47, §§1,2 (AMD). 1991, c. 659, §§1-3 (AMD). 1993, c. 627, §1 (AMD). 1995, c. 212, §1 (AMD). 1997, c. 148, §§1,2 (AMD). 2005, c. 244, §2 (AMD). 2009, c. 342, §1 (AMD). 2011, c. 655, Pt. JJ, §§24, 25 (AMD). 2011, c. 655, Pt. JJ, §41 (AFF). 2013, c. 186, §1 (AMD). 2015, c. 152, §1 (AMD).

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Maine Revised Statutes

Title 30-A: MUNICIPALITIES AND COUNTIES

Chapter 187: PLANNING AND LAND USE REGULATION

§4353-A. CODE ENFORCEMENT OFFICER; AUTHORITY FOR DISABILITY STRUCTURES PERMITS

Notwithstanding section 4353, a municipality by ordinance may authorize a code enforcement officer to issue a permit to an owner of a dwelling for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. If the permit requires a variance, the permit is deemed to include that variance solely for the installation of equipment or the construction of structures necessary for access to or egress from the dwelling for the person with a disability. The code enforcement officer may impose conditions on the permit, including limiting the permit to the duration of the disability or to the time that the person with a disability lives in the dwelling. [2013, c. 186, §2 (NEW).]

All medical records submitted to the code enforcement officer and any other documents submitted for the purpose of describing or verifying a person's disability are confidential. [2015, c. 152, §2 (NEW).]

For the purposes of this section, the term "structures necessary for access to or egress from the dwelling" includes ramps and associated railings, walls or roof systems necessary for the safety or effectiveness of the ramps. [2013, c. 186, §2 (NEW).]

For the purposes of this section, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A. [2013, c. 186, §2 (NEW).]

SECTION HISTORY
2013, c. 186, §2 (NEW). 2015, c. 152, §2 (AMD).

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#12

Town of Bellville- Board of Appeals

Hypothetical Notice of Decision - Variance

To: Angela Smith
P.O. Box 908
Plainview, NH 05432

Dear: Ms. Smith:

This is to inform you that the Board of Appeals has acted on your application for a variance as follows:

A. Findings of Fact

1. Name of Applicant: Angela Smith

2. Mailing Address: P.O. Box 908

3. City or Town: Plainview State: NH

4. Telephone: 603-123-4576

5. Name of Property Owner (if different from applicant): same

6. Location of property for which variance is requested (street/road address):
21 Lakeshore Dr., Bellville

7. Zoning district in which property is located: L-R

8. Tax map and lot number of subject property: Map 3, Lot 51

9. The applicant has demonstrated a legal interest in the subject property by providing a copy of a deed (specify whether deed, purchase and sale agreement, lease, option agreement or other).

10. The applicant has proposed the following building, structure, use or activity on the subject property: 10 ft. by 20 ft. attached garage, 10 ft. by 20 ft. attached deck, and 12 ft. by 20 ft. addition to existing house.

11. The applicant seeks a variance(s) from the following dimensional standard(s): 28 ft. variance for deck and addition from the required 100 ft. water setback and 5 ft. variance for the garage from the required 30 ft. side setback which is/are contained in section(s) 15 (M) of the Zoning Ordinance.

12. The land is being used: as year-round residence. Existing house is 60 ft. from the water and is on a 32,000 sq. ft. lot which slopes steeply to the water and is heavily vegetated.

13. The conditions and character of the neighborhood are: houses comparable to applicant's existing house, situated further from the water and lots that are flatter and more open and larger than applicant's.

14. The conditions of the property are: steep slope to the water and heavy vegetation.

15. The applicant has requested the following type of variance (check appropriate one):

a. _X_ Undue Hardship Variance (30-A M.R.S.A § 4353 (4);
b. ___ Disability Variance (30-A M.R.S.A § 4353 (4-A));
c. ___ Setback Variance for Single-Family Dwellings ((30-A M.R.S.A § 4353 (4-B), **available only if the municipality has adopted an ordinance to authorize this variance**); or
d. ___ Practical Difficulty Dimensional Variance ((30-A M.R.S.A § 4353 (4-C), **available only if the municipality has adopted an ordinance to authorize this variance**).

16. On 07/06/10, the Board of Appeals conducted a public hearing(s) on this application for a variance and the Board also met on 08/03/10 to deliberate on this application and to prepare Findings of Fact and Conclusions of Law.

17. Additional Facts (other facts relevant to ordinance criteria):

B. Conclusions of Law

Based upon the facts stated above and for the reasons that follow, the Board concludes that:

1. **Undue Hardship Dimensional Variance.** The applicant has/has not (circle one) shown that strict application of the ordinance to the applicant and the applicant's property would cause undue hardship.

(To the Board— Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance.)

a. The land in question can/cannot (circle one) yield a reasonable return unless a variance is granted: The applicant provided no evidence regarding whether she has attempted to sell her property without the variance without success. She also has not shown whether there are other legal uses to which the property could be put without a variance. She is not entitled to maximum return on her investment, just a reasonable return.
b. The need for a variance is/is not (circle one) due to the unique circumstances of the property and is/is not (circle one) due to the general conditions in the neighborhood: Although the lot is steeper and more vegetated than others in the neighborhood, the need for the variance relates more to the applicant's heart condition and physical limitations.
c. The granting of a variance will/will not (circle one) alter the essential character of the locality: The size of the cottage with an addition, deck and garage will be consistent with the general neighborhood.
d. The hardship is/is not (circle one) the result of action taken by the applicant or a prior owner: The lot and cottage were in existence before the ordinance took effect and the applicant was the owner at that time.

2. **Disability Variance.** The applicant has/has not (circle one) shown that a variance is needed for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling.

(To the Board— Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance.)

a. A person with a disability resides/does not reside (circle one) in the dwelling: _____
b. A person with a disability regularly uses/does not (circle one) use the dwelling: _____
c. The installation of equipment or the construction of structures proposed under this application is/is not (circle one) necessary for access to or egress from the dwelling by the person with the disability: _____
d. The disability does/does not (circle one) have a known duration: (If applicable) that duration is: _____ _____

C. Decision

On the basis of the above Findings of Fact and Conclusions of Law, the Board of Appeals voted 3-2 to grant/deny (circle one) the application for variance, subject to the following Conditions of Approval, if any.

D. Conditions of Approval

1.

2.

3.

4.

E. Recording of Variance

As required by 30-A M.R.S.A. § 4353(5), the applicant must record a certificate of variance in the appropriate Registry of Deeds within 90 days of this notice or else this variance shall be void.

F. Appeals

Parties aggrieved by this decision may appeal it to Superior Court within 45 days from the date of decision pursuant to 30-A M.R.S.A. § 2691 and Maine Rules of Civil Procedure, Rule 80B.

Date: 8/03/10 _____
Chairman
_____

Member

Member

Member

Board of Appeals

#12

Town of Bellville- Board of Appeals

Hypothetical Notice of Decision - Variance

To: Angela Smith
P.O. Box 908
Plainview, NH 05432

Dear: Ms. Smith:

This is to inform you that the Board of Appeals has acted on your application for a variance as follows:

A. Findings of Fact

1. Name of Applicant: Angela Smith

2. Mailing Address: P.O. Box 908

3. City or Town: Plainview State: NH

4. Telephone: 603-123-4576

5. Name of Property Owner (if different from applicant): same

6. Location of property for which variance is requested (street/road address):
21 Lakeshore Dr., Bellville

7. Zoning district in which property is located: L-R

8. Tax map and lot number of subject property: Map 3, Lot 51

9. The applicant has demonstrated a legal interest in the subject property by providing a copy of a deed (specify whether deed, purchase and sale agreement, lease, option agreement or other).

10. The applicant has proposed the following building, structure, use or activity on the subject property: 10 ft. by 20 ft. attached garage, 10 ft. by 20 ft. attached deck, and 12 ft. by 20 ft. addition to existing house.

11. The applicant seeks a variance(s) from the following dimensional standard(s): 28 ft. variance for deck and addition from the required 100 ft. water setback and 5 ft. variance for the garage from the required 30 ft. side setback which is/are contained in section(s) 15 (M) of the Zoning Ordinance.

12. The land is being used: as year-round residence. Existing house is 60 ft. from the water and is on a 32,000 sq. ft. lot which slopes steeply to the water and is heavily vegetated.

13. The conditions and character of the neighborhood are: houses comparable to applicant's existing house, situated further from the water and lots that are flatter and more open and larger than applicant's.

14. The conditions of the property are: steep slope to the water and heavy vegetation.

15. The applicant has requested the following type of variance (check appropriate one):

a. _X_ Undue Hardship Variance (30-A M.R.S.A § 4353 (4);
b. ___ Disability Variance (30-A M.R.S.A § 4353 (4-A));
c. ___ Setback Variance for Single-Family Dwellings ((30-A M.R.S.A § 4353 (4-B), **available only if the municipality has adopted an ordinance to authorize this variance**); or
d. ___ Practical Difficulty Dimensional Variance ((30-A M.R.S.A § 4353 (4-C), **available only if the municipality has adopted an ordinance to authorize this variance**).

16. On 07/06/10, the Board of Appeals conducted a public hearing(s) on this application for a variance and the Board also met on 08/03/10 to deliberate on this application and to prepare Findings of Fact and Conclusions of Law.

17. Additional Facts (other facts relevant to ordinance criteria):

B. Conclusions of Law

Based upon the facts stated above and for the reasons that follow, the Board concludes that:

1. **Undue Hardship Dimensional Variance.** The applicant has/has not (circle one) shown that strict application of the ordinance to the applicant and the applicant's property would cause undue hardship.

(To the Board— Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance.)

a. The land in question can/cannot (circle one) yield a reasonable return unless a variance is granted: The applicant provided no evidence regarding whether she has attempted to sell her property without the variance without success. She also has not shown whether there are other legal uses to which the property could be put without a variance. She is not entitled to maximum return on her investment, just a reasonable return.
b. The need for a variance is/is not (circle one) due to the unique circumstances of the property and is/is not (circle one) due to the general conditions in the neighborhood: Although the lot is steeper and more vegetated than others in the neighborhood, the need for the variance relates more to the applicant's heart condition and physical limitations.
c. The granting of a variance will/will not (circle one) alter the essential character of the locality: The size of the cottage with an addition, deck and garage will be consistent with the general neighborhood.
d. The hardship is/is not (circle one) the result of action taken by the applicant or a prior owner: The lot and cottage were in existence before the ordinance took effect and the applicant was the owner at that time.

2. **Disability Variance.** The applicant has/has not (circle one) shown that a variance is needed for the purpose of making a dwelling accessible to a person with a disability who resides in or regularly uses the dwelling.

(To the Board— Please state the facts that support your decision that the subject property meets or does not meet each of the following criteria for this type of variance.)

a. A person with a disability resides/does not reside (circle one) in the dwelling:
_____
b. A person with a disability regularly uses/does not (circle one) use the dwelling:
_____
c. The installation of equipment or the construction of structures proposed under this application is/is not (circle one) necessary for access to or egress from the dwelling by the person with the disability:
_____
d. The disability does/does not (circle one) have a known duration:
(If applicable) that duration is:_____
_____

C. Decision

On the basis of the above Findings of Fact and Conclusions of Law, the Board of Appeals voted 3-2 to grant/deny (circle one) the application for variance, subject to the following Conditions of Approval, if any.

D. Conditions of Approval

1.

2.

3.

4.

E. Recording of Variance

As required by 30-A M.R.S.A. § 4353(5), the applicant must record a certificate of variance in the appropriate Registry of Deeds within 90 days of this notice or else this variance shall be void.

F. Appeals

Parties aggrieved by this decision may appeal it to Superior Court within 45 days from the date of decision pursuant to 30-A M.R.S.A. § 2691 and Maine Rules of Civil Procedure, Rule 80B.

Date: 8/03/10

_____
Chairman

_____

Member

Member

Member

Board of Appeals

(#13)

Town of Bar Harbor Appeals Board Decision, dated May 11, 2010

Date:	May 11, 2010
Appeals Board Application Number:	AB-10-03
Applicant:	North-South Corporation
Property Address:	West Street (Tax Map 104, Lots 113, 114, 115, 116, 117, 118, 122, 123, 143, 144, 146, 147, 149)
Application:	Appeal of a Decision by the Town of Bar Harbor Planning Board which denied and approved several aspects of the West Street Hotel SP-09-02.

The Witham Family Limited Partnership (hereafter "the Appellant") has appealed the March 17, 2010 decision of the Bar Harbor Planning Board denying the North-South Corp. a permit to build a large hotel on West Street in Bar Harbor, Maine. After giving the background of the appeal and briefly discussing the issues raised in it, we explain why we deny the appeal.

Background

On March 18, 2009, North-South Corp. applied to the Bar Harbor Planning Board for a permit to build a 120 room hotel on West Street in the Downtown Business I land use district in Bar Harbor. The Planning Board held multiple exhaustive hearings on the application over the next year and the proposed project went through several revisions that are not relevant to the issues raised in this appeal. The Appellant, through its attorney, Ed Bearor, participated in those hearings as an opponent of the project. The Appellant challenged multiple aspects of the project under several different parts of the Bar Harbor Land Use Ordinance ("LUO"). Ultimately, the Planning Board concluded that the project, a hotel of 102 rooms, complied with all of the requirements of the Bar Harbor Land Use Ordinance ("LUO") except the height requirements of LUO §125-21(G). Since the Planning Board concluded that the project did not comply with §125-21(G), it denied the application on March 17, 2010.

North-South Corp. appealed the Planning Board decision to this Board on March 23, 2010. The Board reversed the Planning Board's decision on April 22, 2010 and remanded the case back to the Planning Board with instructions to issue the permit. The Appellant filed an appeal from the Planning Board's March 17th decision on April 13, 2010, the last day within the LUO 30-day allowable appeal period, but before the Appeals Board's April 22nd decision reversing the Planning Board's decision. After receiving briefs from both parties[1], this Board held an "appellate review" hearing on the appeal on May 11, 2010.

[1] Counsel for the Planning Board, whose decision was being appealed, did not participate in the Witham Family Limited Partnership appeal. North-South Construction served as appellee is this appeal.

Issues

1. ***Appellant's Standing.*** North-South Corp. moved to dismiss the appeal on the grounds that the Appellant lacked standing to appeal the Planning Board's denial of the permit because the Appellant, as an *opponent* of the hotel, is not aggrieved by the *denial* of the permit. North-South Corp. recognizes that the Appellant participated in the Planning Board hearings, filed a Notice of Appeal within the appeal period, and is an abutting landowner. North-South Corp. does not contest that the Appellant will suffer a "particularized injury" if the hotel is built; further, it does not contest the fact that the Appellant would clearly have standing to appeal the Planning Board decision *if the Planning Board had granted the permit.* North-South Corp's argument is that if we look *only at the situation that existed on the day the Appellant file his appeal, which was April 13, 2010, the Appellant was not "aggrieved" on that day because the Planning Board decision denying the application had not yet been reversed by the Board of Appeals.*

Appeals Board viewed the issue of standing more broadly. Even if we were to focus only on that one day[2], North-South Corp. had already filed its appeal attacking the Planning Board's decision, so the decision was at least *at-risk* of being reversed, which is exactly what happened less than ten days later. Since: 1) the Appellant is an abutter with a personal stake in the outcome of this case; 2) the Appellant participated in the Planning Board proceedings; 3) files its Notice of Appeal within the 30-day appeal period; 4) will suffer a particularized injury if the hotel is built; and 5) the Appeals Board has reversed the denial of the permit and ordered the Planning Board to issue the permit, we hold that the Appellant has standing to pursue this appeal.

In addition to its arguments about the hotel's height, which we have precluded the Appellant from arguing in this appeal as it was fully considered in the North-South Corp. appeal, the Appellant challenges the Planning Board's parking calculations (basing this on a variety of arguments), and the width of Lennox Street. After discussing the standard of review, we will consider each of the Appellant's arguments.

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[2] North-South Corp. cited *Brooks v Town of North Berwick,* 1998 ME 146, 712 A2d 1050 for the proposition that one cannot appeal a favorable decision. But the favorable decision in *Brooks* was a *final* decision. In the instant case, the Planning Board decision was not only not final but was appealed by an opposing party and ultimately reversed on appeal. North-South Corp. also cited *Madore v LURC* 1998 ME 178, 715 A2d 156 for the proposition that standing must be determined at the time of the filing of the appeal. But *Madore* deals with the "personal stake" aspect of standing, not the particularized injury aspect. In *Madore*, the appellants show their "right, title and interest" to the property for which they wanted a permit by producing a Purchase and Sale Agreement. The problem was that the Purchase and Sale Agreement had expired and the Madores had not renewed it, saying they would renew if they won their appeal but did not want the expense of renewing it at that time because they might not win their appeal. The Law Court held that an appellant had to have a personal stake, such as right title or interest in the property, at the time the appeal is filed and keep that stake throughout the appeal lest the dispute becomes moot. In the case before us, there is no question that the Appellant owned the abutting land when he filed his appeal and continues to own it. At least for opponents of projects, the "particularized injury" aspect of standing is always futuristic and contingent: the injury only occurs if and when the project actually gets built.

In an appellate review hearing, we review the record on appeal to determine if the Planning Board misinterpreted the LUO, found facts that are not supported by substantial evidence, or abused its discretion. We defer to the Planning Board's findings of fact if they are supported by substantial evidence even if the record also contains substantial evidence that would support a contrary finding. We limit our review strictly to the record that was before the Planning Board and do not accept new evidence to be introduced during our hearing on the appeal.

The Appellant challenges the Planning Board's finding, that the hotel has 102 rooms and the requisite 102 parking spaces on several grounds. The Planning Board based its findings on an aggregate of actual parking spaces provided and LUO allowed green space credits.

First, the Appellant argues that the Planning Board erred when it counted each of the "deluxe suites" as a single unit requiring one parking space. He claims that since each deluxe suite has two bedrooms these bedrooms could be rented separately, and should be counted as two separate rooms, each requiring its own parking space. The Planning Board effectively foreclosed this argument by both prohibiting the Appellant from renting the rooms in a deluxe suite separately and by requiring the Appellant to put only one single lock on the outmost door that is serviced by a single key. These actions show that the Planning Board understood what the LUO requires and took reasonable steps to ensure that the deluxe suites could only be used as a single unit.

Second, the Appellant claims that the Planning Board should have required the accessory uses in the hotel, such as the restaurant, to meet the parking requirements for those uses in addition to the parking required for the hotel (Transient Accommodation 8 (TA-8)). He bases his entire argument on the definition of TA-8, which includes the sentence: "Accessory uses *subject to site plan review include* restaurant, cocktail lounge, gift shop, conference room, recreational facilities, such as swimming pool, game courts, and recreational rooms, and the like," (LUO § 125-109, "Transient Accommodations" (H), emphasis added). The LUO, however, has a special provision saying exactly how many parking spaces a TA-8 hotel must have, which is one parking space for each guest room, (LUO § 125-67 (D) (3)(b)[2]). We agree that it is not reasonable to interpret the LUO as requiring a TA-8 hotel to have more parking than required by that section if the hotel has accessories, especially those accessories that can either be used only by hotel guests, who already have parking spaces by virtue of their rooms, or uses open to the general public, which will probably be dominated by hotel guests. Requiring a hotel restaurant to provide the same amount of parking as a stand-alone restaurant makes little sense since the hotel is already providing parking for its guests who patronize the restaurant.

Third, the Appellant contends that the retail shops on the ground floor are not accessories because they "are separate and apart from the hotel gift shop and are to be leased to commercial tenants," (Appeal Application page 7). Therefore he concludes that the Planning Board should have required these shops to provide their own parking. The LUO's definition of "Use, Accessory," however, does not hinge on whether the space is leased; rather it is the relationship

of the accessory use to the principal use. We see no sign that the Planning Board misunderstood the definition of "Use, Accessory" and that its implicit finding that these shops are accessory to the hotel is supported by substantial evidence.

Fourth, the Appellant challenges the Planning Board's allotment of "green space" credits to the hotel. To give an incentive for developers to leave green space in the downtown area, the LUO provides a credit of one parking space for every "contiguous 200 square feet of vegetative cover located within the front yard..." (LUO § 125-67(B)(4)). In essence, the Appellant argues that the hotel has no front yard because part of the hotel extends to the front boundary line and LUO definition of "Yard, Front" says that the front yard is the area between the front boundary line and the "nearest part of any building" to the front line. He also points out that the LUO definition of "Building Front Line" says that porches, whether enclosed or not, are part of the building. The area at issue is an outdoor seating area for the hotel's restaurant. It is set off by a fence that surrounds it; the fence has a gate allowing entrance to the outdoor eating area. The Appellant claims that this gate constitutes a "door" and that the eating area is part of the "building." Since this eating area extends to the front boundary line, the Appellant concludes that the hotel has no "front yard" and its finding that this outdoor area did not constitute a "porch" or other part of the "building" is supported by substantial evidence.

Finally, the Appellant contends that the Planning Board incorrectly allowed North-South Corp. to remove 18 parking spaces allocated for use by an adjacent hotel (owned by the appellee) to this new hotel. He asserts that since these 18 spaces are part of the site plan approved for the other hotel, they cannot be used for this hotel without formally amending the other hotel's site plan. The record shows, however, that North-South Corp. presented the Planning Board with a report from the Bar Harbor Code Enforcement Officer confirming that those 18 parking spaces are not needed by the other hotel. This report constitutes substantial evidence supporting the Planning Board's finding that these parking spaces are free to be used by the new hotel.

Based on the above, we conclude that the Planning Board's parking calculations are not clearly contrary to the ordinance because the Planning Board interpreted the ordinance correctly and all its findings of fact are supported by substantial evidence.

For his final argument, the Appellant challenges the layout and use of Lennox Street. He recognizes, as he must, that the Planning Board does not have jurisdiction over the ownership or direction of Lennox Street. The Planning Board did approve North-South Corp's proposal to convert Lennox Street into a one-way lane, but made that approval conditioned upon North-South Corp's receipt of the necessary changes by the Bar Harbor Town Council, which is the municipal body with jurisdiction over the ownership and direction of town roads. The Appellant asserts, however, that the Planning Board does have jurisdiction to make sure the project complies with the LUO's width requirements set forth in § 125-67 (E)(26). The minimum width for a commercial driveway for a TA-8 hotel is 18 feet. Pointing out that Lennox Street is only 12

feet wide, the Appellant argues that using it as a driveway for the hotel violates the 18-foot width requirement. The Appellant, however, confuses the width of a lane in the entrance way with the overall width of the whole driveway. The LUO allows a two-way driveway that is 18 feet wide, which implicitly means that each lane in such a driveway is no more than 9 feet wide. The proposed hotel will (after getting the Town's permission) use the 12-foot wide Lennox Street as a one-way lane that is just one part of the overall driveway. In addition to the 12 foot wide one-way lane, North-South Corp. will construct another 12-foot wide lane running next to Lennox Street for drop-off and unloading sites, etc. Thus when these two side-by-side lanes are measured together, it is clear that nowhere are the combined lanes less than 18 feet wide. The plans showing the layout of these lanes provide a substantial basis for the Planning Board's conclusion that the driveway into the hotel complies with the requirements of LUO § 125-67 (E)(26).

Decision

Since the Appellant has failed to convince the Appeals Board that the record on appeal shows that the Planning Board's parking and Lennox Street calculations were based on either a misunderstanding of the LUO, findings of fact that are unsupported by substantial evidence, or an abuse of discretion, the Planning Board's decisions on those issue are not clearly contrary to the LUO and, therefore, we must **DENY** the appeal.

Date:

24 May 2010

Signed:

Ellen L. Dohmen

Ellen L. Dohmen, Chair

#14

Maine Revised Statutes

Title 30-A: MUNICIPALITIES AND COUNTIES

Chapter 123: MUNICIPAL OFFICIALS

§2691. BOARD OF APPEALS

This section governs all boards of appeals established after September 23, 1971. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

1. Establishment. A municipality may establish a board of appeals under its home rule authority. Unless provided otherwise by charter or ordinance, the municipal officers shall appoint the members of the board and determine their compensation.

[1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD) .]

2. Organization. A board of appeals shall be organized as follows.

A. The board shall consist of 5 or 7 members, serving staggered terms of at least 3 and not more than 5 years, except that municipalities with a population of less than 1,000 residents may form a board consisting of at least 3 members. The board shall elect annually a chairman and secretary from its membership. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

B. Neither a municipal officer nor a spouse of a municipal officer may be a member or associate member of the board. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

C. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting on that issue shall be decided by a majority vote of the members, excluding the member who is being challenged. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

D. The municipal officers may dismiss a member of the board for cause before the member's term expires. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

E. Municipalities may provide under their home rule authority for a board of appeals with associate members not to exceed 3. If there are 2 or 3 associate members, the chairman shall designate which will serve in the place of an absent member. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

[1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD) .]

3. Procedure. The following provisions govern the procedure of the board.

A. The chairman shall call meetings of the board as required. The chairman shall also call meetings of the board when requested to do so by a majority of the members or by the municipal officers. A quorum of the board necessary to conduct an official board meeting must consist of at least a majority of the board's members. The chairman shall preside at all meetings of the board and be the official spokesman of the board. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

B. The secretary shall maintain a permanent record of all board meetings and all correspondence of the board. The secretary is responsible for maintaining those records which are required as part of the various proceedings which may be brought before the board. All records to be maintained or prepared by the secretary are public records. They shall be filed in the municipal clerk's office and may be inspected at reasonable times. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

C. The board may provide, by regulation that must be recorded by the secretary, for any matter relating to the conduct of any hearing, except that the chair may waive any regulation upon good cause shown. Unless otherwise established by charter or ordinance, the board shall conduct a de novo review of any matter before the board subject to the requirements of paragraph D. If a charter or ordinance establishes an appellate review process for the board, the board shall limit its review on appeal to the record established by the board or official whose decision is the subject of the appeal and to the arguments of the parties. The board may not accept new evidence as part of an appellate review. [2017, c. 241, §1 (AMD).]

D. The board may receive any oral or documentary evidence but shall provide as a matter of policy for the exclusion of irrelevant, immaterial or unduly repetitious evidence. Every party has the right to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts. [1987, c. 737, Pt. A, §2 (NEW); 1987, c. 737, Pt. C, §106 (NEW); 1989, c. 6, (AMD); 1989, c. 9, §2 (AMD); 1989, c. 104, Pt. C, §§8, 10 (AMD).]

E. The transcript or tape recording of testimony, if such a transcript or tape recording has been prepared by the board, and the exhibits, together with all papers and requests filed in the proceeding, constitute the public record. All decisions become a part of the record and must include a statement of findings and conclusions, as well as the reasons or basis for the findings and conclusions, upon all the material issues of fact, law or discretion presented and the appropriate order, relief or denial of relief. Notice of any decision must be mailed or hand delivered to the petitioner, the petitioner's representative or agent, the planning board, agency or office and the municipal officers within 7 days of the board's decision. [1991, c. 234, (AMD).]

F. The board may reconsider any decision reached under this section within 45 days of its prior decision. A request to the board to reconsider a decision must be filed within 10 days of the decision that is to be reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within 45 days of the date of the vote on the original decision. The board may conduct additional hearings and receive additional evidence and testimony as provided in this subsection.

Notwithstanding paragraph G, appeal of a reconsidered decision must be made within 15 days after the decision on reconsideration or within the applicable time period under section 4482-A if the final municipal review of the project is by a municipal administrative review board other than a board of appeals. [2017, c. 241, §2 (AMD).]

G. Any party may take an appeal, within 45 days of the date of the vote on the original decision, to Superior Court from any order, relief or denial in accordance with the Maine Rules of Civil Procedure, Rule 80B. This time period may be extended by the court upon motion for good cause shown. The hearing before the Superior Court must be without a jury. [1991, c. 234, (AMD).]

H. For purposes of this section, a decision of the board is a final decision when the project for which the approval of the board is requested has received all required municipal administrative approvals by the board, the planning board or municipal reviewing authority, a site plan or design review board, a historic preservation review board and any other review board created by municipal charter or ordinance. If the final municipal administrative review of the project is by a municipal administrative review board other than a board of appeals, the time for appeal is governed by section 4482-A. Any denial of the request for approval by the board of appeals is considered a final decision even if other municipal administrative approvals are required for the project and remain pending. A denial of the request for approval by the board of appeals must be appealed within 45 days of the date of the board's vote to deny or within 15 days of final action by the board on a reconsideration that results in a denial of the request. [2017, c. 241, §3 (NEW).]

[2017, c. 241, §§1-3 (AMD) .]

4. Jurisdiction. Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required. No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board. Absent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is reviewable on appeal by the board of appeals and in turn by the Superior Court under the Maine Rules of Civil Procedure, Rule 80B. Any such decision that is not timely appealed is subject to the same preclusive effect as otherwise provided by law. Any board of appeals shall hear any appeal submitted to the board in accordance with Title 28-A, section 1054.

[2013, c. 144, §1 (AMD) .]

SECTION HISTORY
1987, c. 737, §§A2,C106 (NEW). 1989, c. 6, (AMD). 1989, c. 9, §2 (AMD). 1989, c. 104, §§A24,C8,C10 (AMD). 1991, c. 234, (AMD). 2003, c. 635, §1 (AMD). 2013, c. 144, §1 (AMD). 2017, c. 241, §§1-3 (AMD).

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