

Manual For Local Planning Boards:

A Legal Perspective

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Introduction

Serving on a municipal planning board is one of the most important contributions that a citizen can make toward shaping the community's future. It can be a very rewarding experience for a person who is interested in trying to help the municipality balance new development against the traditional character and quality of life of the community. But it also can be a frustrating experience—doing battle with the voters at town meetings who oppose a comprehensive plan or ordinance which the board has worked for months to develop, going head to head with an uncooperative subdivision developer or his attorney over information requested by the board, or wondering whether the board has legal authority to approve a particular project.

This manual has been prepared in an effort to lay out the basic legal information which every planning board member should know in order to feel confident in performing the board's responsibilities. It is a general discussion of the planning board's legal authority and duties. While it will apply to most municipalities, an individual municipality may have an ordinance or charter provision which imposes additional requirements for its planning board to follow.

Any person using this manual should always check the exact section numbers and provisions of any statutes, ordinances, or codes mentioned in the manual's text, sample forms or other material. The references included in the manual are intended to provide general guidance to the reader rather than to serve as a substitute for reading the actual law. In this way, a person using these materials can be sure that an applicable law or regulation has not been amended. After reading the whole law or regulation, rather than merely selected excerpts, the reader will have a better idea of whether the law or regulation covers a particular project or whether there are provisions which exempt the project.

This manual hopefully will be a valuable general reference tool for most boards. However, it is not intended to be a substitute for seeking legal advice from the municipality's private attorney or from the attorneys in MMA's Legal Services Department about how a specific State law, court decision, or local ordinance applies to the facts of a particular case which the board must decide.

The primary author of this manual is Rebecca Warren Seel, Esq. James Katsiaficas, Esq. contributed extensively to the 1999 revised edition. A special note of thanks goes to Rich Rothe for putting together a basic outline of planning board issues which was used in writing the original text of this manual. Thanks also to the following people for providing ideas on what to include in the original manual and for assisting in the editing: Barbara Welch, Teco Brown, John Maloney, Jacqueline Cohen, Fourtin Powell, Kay Carter, Susan Burns, Randall Arendt, Madge Baker, Lanier Greer, and Joseph Young. Special thanks to Christopher Neagle, Esq. and William Dale, Esq. and the Maine Bar Association for

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Terms and Abbreviations Used in This Manual

M.R.S.A. means the Maine Revised Statutes Annotated. An example of a reference to the Maine Statutes would be 30-A M.R.S.A. § 4401. The number “30-A” refers to Title 30-A. The number “§ 4401” refers to section 4401 of Title 30-A.

A.2d or **Me.** refers to the series of Maine Supreme Judicial Court or Law Court cases reported for this State and court region. “A.2d” means the Atlantic region reports, 2nd series. “Me.” means the Maine reports. An example of a case cite would be 111 Me. 119, (1913) and 579 A.2d 58. The numbers “111” and “579” refer to the volumes of the Maine and Atlantic court reports. The numbers “119” and “58” refer to the pages on which the case beings. The number “1913” refer to the year of the court’s decision.

Maine Rules of Civil Procedure means the rules governing non-criminal cases brought before the Superior Court. The rules cover such matters as who may be named as parties to a court action, the information which must be contained in a complaint, the issues which must be raised, time limits for filing certain court documents, and others. “Rule 80(B)” refers to a rule of Civil Procedure governing appeals from decisions made by local officials.

Et seq. means “and following sections.”

Legislative body means the town meeting or the town or city council.

Municipal officers mean the selectpeople or the town or city council.

Tort means an injury to a person or a person’s property which is the result of an action which is not a criminal act and which is not based on a contractual relationship.

Damages means money, which must be paid to a person as compensation for personal injury or property loss.

Note: Copies of the Maine statutes may be available at the town office or city hall. The statutes, court cases, and court rules of procedure also are available at the State Law Library, University of Maine law school library and possibly at the county courthouse. They are also available on the Internet.

Chapter 1

Planning Board Manual

Creation, Qualifications, and Liability

[Supplements # 1 & 2 are incorporated into the text of this chapter.]

Creation, Qualifications, and Liability

The powers and duties of local planning boards are governed by the provisions of State statutes, local ordinances and, in some cases, town or city charters. A planning board cannot take any legally enforceable actions unless it has been formally created and unless the action which the board wants to take is specifically or implicitly authorized by a statute, ordinance, or charter provisions. *Cf. Clark v. State Employees Appeals Board*, 363 A.2d 735 (Me. 1976). *Compare, Fisher v. Dame*, 433 A.2d 366 (Me. 1981). Therefore, board members should be sure that the board was created properly and should be familiar with the ordinances and statutes they will be using before trying to take any official action.

Creation of a Planning Board

The laws pertaining to the establishment of a planning board have been modified several times over the years. Consequently, in order to determine whether a board was created legally, it is important to know when it was created and how the law read at that time.

Boards Created Between 1957 and 1971. Between 1957 and September 23, 1971, Title 30 § § 4952 to 4957 of the Maine statutes (Chapter 405 of the 1957 Public Laws) governed how a city or town created its planning board, who could serve on the board, and the board's various powers and duties. (See Appendix 1) According to section 4952(1), the legislative body of the municipality (i.e., the town meeting or town or city council) had the authority to establish a planning board and the municipal officers (i.e., selectpersons or council) made appointments to the board. The board consisted of five members and two associate members serving five year staggered terms who elected a chairperson and secretary from the membership. Associate members could vote only if designated to do so by the chairperson because a voting member was absent or had a conflict of interest. The municipal officers could appoint someone to fill a permanent vacancy for the remainder of the term. A municipal officer could not serve on the board either as a member or an associate.

If a municipality voted at a town meeting to create a planning board under one of the old planning board statutes, the clerk's records should contain a vote approving a warrant article similar to the following: "To see if the Town will vote to establish a Planning Board pursuant to Title 30 § 4952."

In 1971, the Legislature repealed or revised the planning and zoning sections of Title 30 (which took effect on September 23, 1971). According to Title 30-A § 4324(2)(A), if a planning board was created pursuant to the repealed provisions of Title 30 § 4952(1), then it can continue to function as a legally constituted planning board under that section until the municipality decides to adopt a new ordinance or charter provision changing the composition of the board or its method of selection.

Boards Created After September 23, 1971. At the same time that the Legislature repealed section 4952 in 1971, it enacted Title 30 § 1917 (now 30-A M.R.S.A. § 3001), known as the “home rule” statute. Section 3001 provides authority for a municipality’s legislative body to adopt a “home rule” ordinance establishing a planning board. A sample ordinance and the procedure for adopting it is included in Appendix 1. This ordinance could be used to establish a new board or to reestablish one which was created under the old statutes, but it should be revised where necessary to meet the particular needs of the town or city adopting it. The Legislature repealed the old planning board statutes to allow municipalities to have more flexibility in creating a planning board which would meet local needs. Such things as the number of members and term of office can now be determined through an ordinance rather than by statute.

A new planning board also may be created in municipalities which have a charter by amending the charter using the home rule charter procedures contained in Title 30-A § 2104 and 2105 and Article VIII, part 2, § 1 of the Maine Constitution. Generally, the charter provision would be supplemented by a more detailed ordinance.

Boards Created Before 1957. Boards created before 1957 will need to refer to one of the following public laws, depending on when the board was formed: (1) Chapter 5, § 137 et seq. of the 1930 Revised Statutes; (2) Chapter 80, § 84 et seq. of the 1944 Revised Statutes; or (3) Chapter 91, section 93 et seq. of the 1954 Revised Statutes.

Ordinance or Article Wording. It is important to remember that a planning board has no authority to act as an official arm of municipal government unless it has been legally established by one of the methods described above. After September 23, 1971, a simple article in the warrant, such as “To see if the town will vote to establish a planning board,” is not a sufficient procedure by itself to create a board because it leaves unanswered such questions as the number of board members and their terms of office. Nor is a provision in the town’s shoreland zoning ordinance or other ordinance which simply states that a board is established “as provided in State law” sufficient to create a legal board. Sample ordinances to establish a board and to reestablish one which was improperly created and sample warrant article wording to adopt the ordinance appear in Appendix 1.

Elected Board Members

A number of Maine towns have established elected planning boards, including Denmark, Bridgton, Windsor, Weld, Whitefield, Naples, Sweden, Monroe, China, Harrison, Greene, Edgecomb, Bremen, and Searsmont.

If a municipality already has an appointed planning board and wants to change to an elected board, it must enact an ordinance or charter provision which provides that the appointed

board will be phased out by replacing the appointed members with elected members as the terms of the appointed members expire. See generally, McQuillin, *Municipal Corporations* (3rd ed. rev.) § § 12.117-12.119, 12.121. If the positions are to be filled by written ballot election from the floor at open town meeting, the ordinance or charter provision should be adopted at least 90 days prior to the annual meeting at which the first election will occur. 30-A M.R.S.A. § 2525. If election will be by secret (pre-printed) ballot, then the ordinance or charter provision also must be adopted at least 90 days prior to the election at which it will take effect. 30-A M.R.S.A. § 2528. The enactment of a charter provision also must conform to 30-A M.R.S.A. § § 2101-2109. The ‘90 day’ rules described above also apply where an elected board is being changed to an appointed one.

Qualifications for Office

Age, Residency, Citizenship. Title 30-A § 2526(3) states generally that a person must be 18 years old, a resident of the State, and a U.S. citizen to hold a municipal office. Most municipal officials, including planning board members, do not have to be registered voters or legal residents of the town or city in order to serve in an elected or appointed position, unless required by local ordinance or charter; the selectpeople or Council and school board members are the exceptions to this rule under State law.

Oath. Whether a board member is elected or appointed, he or she must be sworn into office by someone with authority to administer oaths, such as the clerk, the moderator (if during open town meeting), a notary public, dedimus justice, or an attorney, before performing any official duties as a board member, according to Title 30-A § 2526(9). The oath must be taken at the beginning of each new term; it does not need to be administered each year if a member is serving a multi-year term.

Incompatible Positions. A person serving on the planning board may not hold another office which is “incompatible” with the planning board position. Two offices are “incompatible” if the duties of each are so inconsistent or conflicting that one person holding both would not be able to perform the duties of each with undivided loyalty. *Howard v. Harrington*, 114 Me. 443, 446 (1916); McQuillin, *Municipal Corporations* (3rd ed. rev.) § 12.67. An example of incompatible positions would be if one person served on both the planning board and zoning board of appeals, since the same person would be involved in making the initial decision and then deciding whether that decision was correct on appeal. (One Superior Court justice has held that it also is not legal for a husband to serve on the planning board and his wife to serve on the appeals board. *Inhabitants of Town of West Bath v. Zoning Board of Town of West Bath*, CV-91-19 (Me. Super. Ct., Sag. Cty, May 7, 1991).) The positions of an appointed planning board member and selectperson probably are incompatible, since the board of selectpeople have the power to remove an appointed planning board member for just cause under Title 30-A § 2601. For a planning board established under the old planning board statute, 30 M.R.S.A. § 4952 prohibited a municipal officer (a selectperson or councilor) from

being a member or associate member of the planning board. The positions of local plumbing inspector and local code enforcement officer also may be incompatible with the position of planning board member if the planning board generally must pass judgment on a decision of the LPI or CEO in the process of making its own decision regarding an application or a violation of the ordinance.

In accepting and taking an oath for an office which is incompatible with one already held, the courts have ruled that the person automatically vacates the first office, as though he or she had actually resigned it. *Stubbs v. Lee*, 64 Me. 195 (1914); *Howard v. Harrington*, *supra*.

Vacancy

As a general rule, when a permanent vacancy occurs in an appointed planning board position, the municipal officers have the authority to fill the vacancy for the remainder of the term. 30-A M.R.S.A. § 2602(3). The ordinance or charter provision creating the board should define what constitutes a “permanent vacancy” using § 2602 as a guide and adding other items, such as repeated absences. If a vacancy occurs on an elected planning board, the municipal officers may either appoint someone to fill the vacancy for the remainder of the term or leave the position unfilled, if there is no ordinance or charter provision to the contrary, but they do not have the authority to fill the position by calling an election. 30-A M.R.S.A. § 2602; *Googins v. Gilpatrick*, 123 Me. 23 (1932).

If the term of office of a board member expires and neither the person holding the office nor another person has been appointed or elected to fill the position, it is arguable that the person who was serving in that position (i.e., the incumbent) may continue to hold office under the previous term until he or she has been reelected or reappointed or until another person has been chosen and sworn in. An incumbent board member who continues to serve under those circumstances would be what is called a “de facto” member of the board. McQuillin, *Municipal Corporations* (3rd ed. rev.), § § 12.102, 12.105, 12.106. However, the legal basis for this “holdover” theory is stronger where an elected board is involved.

If board members are elected and the municipal officers fail to make a provision in the annual town meeting warrant and on the ballot for the election of a board member whose term was due to be filled at that election, the result would be a “failure to elect” a person for that position, creating a vacancy in that position under 30-A M.R.S.A. § 2602. The municipal officers have the authority to appoint someone to the position in that situation for the balance of the term. *Googins v. Gilpatrick*.

Removal

If a planning board position is one which is filled by an appointment made by the municipal officers, then the municipal officers may remove that person for just cause, after notice and

hearing. 30-A M.R.S.A. § 2601. An elected board member cannot be removed from office either by the municipal officers or the voters prior to the expiration of his or her term unless the municipality has adopted a recall provision by charter or by ordinance. 30-A M.R.S.A. § 2602.

Alternate Members of the Board

It is advisable to create one or more alternate or associate member positions by ordinance. Use of alternates can minimize attendance problems which many boards experience. It can also serve as a training ground for future full-voting members.

Liability of Board Members

Nonperformance of Duty. Title 30-A § 2607 states that a municipal official can be personally liable for a \$100 fine for neglecting or refusing to perform a duty of office. An example of neglect or refusal is where a person files an application with the board and the board fails to act on it because it misplaced the application or where the board has the application but continually tables action without a valid reason in the hope of discouraging the applicant.

Maine Tort Claims Act

- **Individual Board Members Generally Immune.** Under 14 M.R.S.A § 8104-D, members of the planning board generally are liable for their negligent acts or omissions occurring in the course and scope of their official duties. However, the exceptions to liability found in 14 M.R.S.A. § 8111 generally protect a planning board member from personal liability and having to pay monetary damages to an injured party. The statute provides immunity from liability for an action or failure to act which falls into one of the following categories: “quasi-legislative” (for example, adoption of bylaws or procedures); “quasi-judicial” (for example, granting or denying a permit); “discretionary” (for example, an ordinance provision which gives the board discretion whether to conduct a site visit or whether to conduct a public hearing); or intentional, as long as the board members acted in good faith and within the scope of their authority (for example, where a board member comments at a board meeting about the quality of work submitted by one of the applicant’s experts). The statute also provides immunity from claims based on the performance or failure to perform an administrative enforcement function.
- **Individual Liability for Negligence.** “However, an individual board member may be personally liable for his/her negligent or intentional act or failure to act if the act is ministerial (not involving any discretion), is an intentional act not undertaken in good faith, or is outside the scope of his/her authority. A possible example of a

negligent act is where the board approves a permit for a use which is expressly prohibited by the ordinance governing the board's review. An example of an action outside the scope of authority of a board member is where a board member is consulted by a member of the public about whether a certain permit is needed for a project, the board member provides advice which is wrong, and the person relies to his detriment on that advice. In order to recover damages as compensation for negligence, the person would have to show that he or she was injured and that the board member's negligence was the cause of the injury and not something else, such as the person's own negligence.

- **Municipal Liability and Immunity; Defense/Indemnification of Board Members.** Generally speaking, the municipality will be immune under the Tort Claims Act when a suit is brought against a board based on a decision by the board, since the municipality's liability must be tied to one of the categories in § 8104-A of the statute, all of which relate to negligence in connection with municipal equipment, buildings, pollution, or public works projects. However, § 8112 of the Act generally requires the municipality to provide insurance or to pay attorneys fees and damages on behalf of each of the board members in an amount up to \$10,000 (the statutory limit on personal liability) in cases where a board member is found liable for negligence. Where the members of the board are criminally liable, where they act in bad faith, or where they act outside the scope of their authority, they may be required to pay their own attorney fees and damages; these damages may exceed the \$10,000 cap under the Tort Claims Act and may be beyond the coverage of the town's public officials liability insurance. Generally, a municipality will stand behind its board members and pay such costs either by providing insurance or by appropriating money for that purpose, except where a board member is guilty of conduct in bad faith which is outside his or her authority and which the municipality does not want to condone. Examples of such conduct are physical assault of an audience member or repeated unilateral acts by a board member without majority approval.
- **Notice of Suit.** Board members who are sued under the Tort Claims Act should notify the town or city manager (if any) or the municipal officers *immediately*.

Maine Civil Rights Act. The Maine Civil Rights Act (5 M.R.S.A. § 4681- § 4683) prohibits a person from “intentionally interfer(ing) by threat, intimidation or coercion” with another person's exercise or enjoyment of rights secured by the U.S. Constitution or the laws of the United States or rights secured by the Maine Constitution or laws of the State. Unlike federal law (see discussion below), the State Civil Rights Act does not apply only to actions done “under color of law.” This means that a board member could be sued under this law whether or not he or she was acting in an official capacity if a violation of this law results from the board member's action. The Maine Attorney General is authorized to seek an injunction or other corrective action on behalf of the injured person in order to

protect that person in exercising his or her rights. The injured person also may pursue a civil action on his or her own behalf seeking appropriate monetary or corrective relief. The law also authorizes the successful party (other than the State) to recover its reasonable attorney fees and costs. For a case interpreting this law, see *Duchaine v. Town of Gorham*, CV-99-573 (Me. Super. Ct., Cum. Cty., June 15, 2001).

Federal Civil Rights Act of 1871. The federal Civil Rights Act of 1871 (42 U.S.C.A. § 1983) prohibits any violation of any individual right which is guaranteed by either the United States Constitution or a federal statute.

- **Individual Liability.** The planning board members would be immune from personal liability under federal law for damages resulting from a board decision if the board acted in “good faith.” “Good faith” means that the board did not know and should not have known that its decision would deprive the injured person of a federal or constitutional right. *Owen v. City of Independence*, 445 U.S. 622 (1980). For example, if the planning board denies an application, the applicant might try to sue the board and ask a court to order the board to approve the application and to pay damages to him as compensation for the loss of use of his property. As long as the board acted in good faith in interpreting the ordinance and denying the application, the court would not award damages against the members even if the court found that the application should have been approved. However, if, for example, the court found that the only reason that the board had for denying the application was that it wanted to prevent a family with a particular ethnic background from moving into the neighborhood, it probably would award damages against the board members personally.
- **Municipal Liability.** Even if the board members are not personally liable for damages, the municipality probably will be liable if the court finds that the person bringing the suit actually was deprived of a federal or constitutional right by the board’s decision and that decision was based on a town “policy, custom, or practice.” The municipality cannot rely on the board’s good faith in defending a suit against the municipality. A person who wins a case under the Civil Rights Act of 1871, whether against the municipality or the board, can recover attorney fees as well as damages. (42 U.S.C.A. § 1988). If the court finds that the suit was frivolous, however, it will be quick to require the person filing the suit to pay the municipality’s attorney fees. *Burr v. Town of Rangeley*, 549 A.2d 733 (Me. 1988). There is no statutory limit on damages under the federal law as there is under the Maine Tort Claims Act.
- **Defense and Indemnification.** Title 14, § 8112(2-A) states essentially that if board members are sued for violating someone’s rights under a federal law, the municipality must pay their defense costs and may pay any damages awarded against them for a violation of federal law, if they consent. This is not true if they are found criminally liable or if it is proven that they acted in bad faith.

- **Notice of Suit.** If sued under federal law, the board should notify the town or city manager (if any) or the municipal officers *immediately*.

Maine Freedom of Access Act (“Right to Know Law”)

The Maine Freedom of Access Act (FOAA) (1 M.R.S.A. § 401 et seq.) (also known as the “Right to Know Law”) requires the planning board to allow the general public to attend board meetings and workshops, to open its records for public inspection, and to give prior public notice of its meetings. If the board willfully violates the FOAA, the municipality could be liable to pay a \$500 fine. Also, the statute states that certain decisions made in violation of the FOAA are void. (See Chapter 2 for further discussion of this law.)

Records Retention and Preservation and Public Access

Title 5, § 95-B requires municipal boards and officials to comply with regulations adopted by the State Archives Advisory Board when destroying or disposing of public records. Those regulations set out specific retention periods for many public records and establish a general rule of indefinite retention for records not expressly covered. An excerpt from the Board’s regulations is included in Appendix 1. Any person who violates those rules is guilty of a Class D crime. Section 95-B also requires boards and officials to protect the public records in their custody from damage or destruction. An official who leaves public office has an obligation under this statute to turn over any public records in his or her possession to his or her successor.

Records in the custody and control of the planning board are public records under “Maine’s Freedom of Access Act, with rare exceptions. Any member of the general public has a right to inspect public records at a time that is mutually convenient for the custodian and the person wanting to inspect them. Inspection should be done with supervision of the custodian or someone designated by the custodian; a member of the public should never be allowed to remove public records and take them somewhere else to review and copy. If a person wants a copy of a public record, the municipality may charge a reasonable fee. When a person wants to inspect or obtain a copy of a record which might be confidential, the custodian has 5 working days to determine whether the record is public and to issue a written denial if it is not. 1 M.R.S.A. § § 402, 409. “Written, taped and computerized materials all generally fall within the definition of “public record” for the purposes of the Freedom of Access Act if they are received or made by the board in connection with the transaction of public business. Application materials, board minutes, email communications, computerized records, audio tapes and personal notes taken by board members at board meetings are all examples of “public records” for the purposes of the FOAA.”

Chapter 2

Planning Board Manual

The Decision-Making Process

[Supplements # 1 & 2 are incorporated into the text of this chapter.]

The Decision-Making Process

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

Forms

An important first step in establishing good decision-making procedures is the development of good application forms. The forms should let the applicant know what information the board wants and should require the applicant to sign the form once completed. Sample forms are included in Appendix 5. Others may be available from the regional planning commission or council of governments serving the area or from neighboring communities who have developed good systems of their own. Before using sample or borrowed forms, however, the board must review them carefully to be sure that they will fit the board's needs and are consistent with the town or city ordinance which governs the application. The form cannot require an applicant to do something not expressly or implicitly required by the ordinance. Application forms do not normally require the approval of the legislative body. The board generally has implicit authority to develop and use forms.

Bylaws/Rules of Procedure

In the absence of a local ordinance or charter provision to the contrary, any administrative board, like a planning board, can (and should) adopt written bylaws to govern non-substantive "housekeeping" matters. Such bylaws generally do not need to be approved by the legislative body. *In Re Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973); *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). This is because bylaws of this type are not the same as an ordinance. Examples of the kinds of things covered in bylaws are the election of officers, the time and place of meetings, how meetings are called and advertised, agenda items, and the rules of procedure which the board will use to run its regular meetings and public hearings, where not otherwise addressed in a local ordinance or charter. Issues such as the number of members needed to constitute a quorum, the number of votes needed to approve a motion, the number of absences allowed before a position can be declared vacant, and the deadline for filing an appeal generally should be contained in an ordinance or charter adopted by the legislative body rather than merely in bylaws

approved by the board. 1 M.R.S.A. § 71. A sample set of bylaws and hearing procedures is included in Appendix 1. In adopting bylaws, the board should be careful to stick to procedural kinds of provisions and avoid conflicts with a local ordinance, charter, or statute, such as the Maine Freedom of Access Act (1 M.R.S.A. § 401 et seq.) (see Appendix 1 for information on how to obtain a copy of MMA's 'Right to Know Law Information Packet.')

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

Jurisdiction of the Board/Other 'Assignments'

In a municipality which has established a planning board, 30-A M.R.S.A. § 403 requires the planning board to serve as the municipal reviewing authority for subdivisions requiring local approval. Title 30-A § 4324 authorizes the municipal officers to appoint the planning board as a comprehensive planning committee, but the planning board does not automatically serve in that capacity. Where a new zoning ordinance or shoreland zoning ordinance or amendment is being proposed, 30-A M.R.S.A. § 4352 (9) and (10) require the planning board to conduct a public hearing on the proposal before it is scheduled for a vote of the legislative body.

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

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

Standing to Apply

If the ordinance or statute under which an application for a permit or other approval is being submitted does not state who has a sufficient legal interest in the property being developed (i.e., "standing") to apply for approval to conduct the project, the Maine

Supreme Court has ruled that the applicant must be a person who has some “right, title, or interest” in the property. *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974); *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40 (Me. 1983). This could include a written option or contract to purchase the property or a leasehold or easement interest. However, whether these documents/interests are sufficient for the purposes of conferring standing to apply for a permit to conduct a particular use will depend on the language of the document/deeded interest. The document/deed must give the applicant a “legally cognizable expectation” of having the power to use the property in the ways that would be authorized by the permit if approved. See *Murray v. Town of Lincolnville*, supra. For example, where a person who had an easement for ingress and egress to a lake did not have a right to build and use a dock by virtue of the language of that easement, that person lacked standing to apply for a permit. *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). See also, *Badger v. Hill*, 404 A.2d 222 (Me. 1979), and *Picker v. State of Maine Department of Environmental Protection*, AP-01-75 (Me. Super. Ct., Kenn. Cty., April 6, 2002) (restrictive covenant didn’t deprive landowner of standing to apply for permit and prove that he could conduct the proposed use within the restricted area without violating the deed covenant). This could include a written option or contract to purchase the property or a leasehold interest. A title dispute will not automatically deprive a person of standing to apply for a permit. *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). The board should reject an application if it determines that the applicant does not have standing to apply. The burden is on the applicant to present written evidence sufficient to satisfy the board, such as a copy of the property deed, written lease, or written option agreement. If the person filing the application is acting as the authorized agent of the owner, that person should give the board a written letter of authorization signed by the owner. Where property is jointly owned, all owners need not be parties to the application in order for the “standing” test to be met. *Losick v. Binda*, 130A. 537 (NJ 1925).

Freedom of Access Act (“Right to Know Law”)

General. Under the Freedom of Access Act (“Right to Know Law”) (1 M.R.S.A. § 401 et seq.), the public has a right to be present any time a majority of the board or a majority of a subcommittee of the board (comprised of three or more members) meets, even if the meeting is just a “workshop” or a “strategy meeting.” Any meeting of a majority of the full board at which the members will discuss official business or vote must be preceded by public notice. The same is true for subcommittees of the board comprised of three or more members, *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988); some attorneys are of the opinion that a subcommittee of any size is governed by the public notice requirements if the body which has designated the subcommittee is itself comprised of 3 or more members. This law also gives the public the right to record, film and take notes of the meeting without first seeking permission, as long as it is done in a non-disruptive manner. It does not guarantee the public a right to speak. The right to speak is based on whether the meeting has been advertised as a public hearing, absent a local ordinance or bylaw to the contrary.

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

Board Member Discussions/Email. To avoid violations of the Freedom of Access Act (FOAA) and the constitutional right to due process, board members should not have discussions with other board members regarding an application or other board business outside an advertised board meeting. The FOAA requires discussion, deliberation and voting by the board to be done at a public meeting so that the public can hear and observe what is said and done by the board. Discussion between board members about board business outside a public meeting should not occur, whether or not a majority of the board is involved, and whether or not the discussion occurs by phone, by email, at a sports event or grocery store or after the board meeting has adjourned. Any such communications should be limited to nonsubstantive issues; for example, calling or emailing board members to set a meeting date or agenda items. Delivery of substantive information between meetings by email may be permissible as long as no discussion of the information occurs outside the meeting by email or otherwise, and as long as it is noted in the record of the next board meeting and all parties are given access to the information and provided a reasonable opportunity to review it and offer comments.

Executive Sessions. One exception to the rule that meetings are open to the public is where the board wants to consult with its lawyer in executive session "concerning the legal rights and duties of the (board), pending or contemplated litigation, settlement offers, and matters where (the attorney/client privilege between the board and its lawyer would be jeopardized) or where premature public knowledge would clearly place the municipality at a substantial disadvantage." To fall within this exception, the board's attorney should be at the meeting, either in person or by telephone conference call. Section 405 of the Freedom of Access Act only allows the board to conduct discussion with its attorney in an executive session and only if the board first (1) takes a vote to go into executive session during a public meeting which was preceded by public notice, (2)

follows the procedures in Section 405 for taking that vote, and (3) does not make any final decisions in executive session. In *Underwood v. City of Presque Isle*, 715 A.2d 148 (Me. 1998), the court found that the planning board had conducted impermissible discussions about the merits of the land use proposal which it was reviewing while in executive session with its attorney to receive advice regarding the board's legal rights and duties. The court noted that "it may be difficult at times for a board convening in executive session (with its attorney) to determine when its permissible consultation with counsel has ended and impermissible deliberations on the merits of a matter have begun. We cannot offer any bright line to eliminate that difficulty. We can, however, remind public boards and agencies of the Legislature's declaration in the (Freedom of Access Act) that 'their deliberations be conducted openly,' and that the (law) 'be liberally construed . . . to promote its underlying purposes.' Consistent with these declarations, any statutory exceptions to the requirement of public deliberations must be narrowly construed. The mere presence of an attorney cannot be used to circumvent the (Right to Know Law's) open meeting requirement." Section 405 authorizes other subject matter to be discussed in an executive session, but those other subjects generally are not relevant to planning boards.

Common Violations. Practices which violate the Right to Know Law include the following:

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

Site Visits. If a majority of the board is going to visit the site of a proposed project, the board should be aware that such on-site meetings are meetings which must be preceded by public notice and at which the public has a right to be present under the Freedom of Access Act ("Right to Know Law"). Site visits conducted by individual board members or by a subcommittee comprised of less than a majority of the full board arguably would not be subject to the public notice requirements of the law. However, site visits by individual members or by subcommittees of less than a majority of the full board can raise due process problems which the board may wish to avoid, especially where the site visit occurs after the board has closed its record to additional public comment and has

begun to make its decision. Compare, *City of Biddeford v. Adams*, 1999 ME 49, 727 A.2d 346 (Me. 1999), and *Fitanides v. Lambert*, CV-92-662 (Me. Super. Ct., York Cty., July 30, 1992), with *Armstrong v. Town of Cape Elizabeth*, AP-00-023 (Me. Super. Ct., Cum. Cty., Dec. 21, 2000). Many private municipal attorneys advise the municipal boards that they represent that site visits conducted by less than a majority of the board should never occur and insist that the board only conduct site visits as a public meeting of a majority of the board.

During a site visit which is not conducted as part of a public meeting recorded in board minutes, the individual board members have an obligation not to discuss substantive issues about the site or the application either with each other or with the applicant. Nor should the applicant or any one else be conducting demonstrations to prove a point which might be in controversy about the application. Such discussions or demonstrations would constitute illegal “ex parte” communications and would cause due process problems for the parties not present. The individual board members also need to be sure to note for the written record at the next board meeting the fact that a site visit was conducted and what information the visit generated that might affect the visiting board member’s vote on the application. It is crucial that a site visit conducted by less than a majority of the full board occur before the board closes the record to further public comment. *Adams, supra*. It also is crucial that the ultimate findings and conclusions prepared by the board in making its decision address the evidence from the site visit and that the findings in general are sufficiently detailed to allow a court to determine how the board evaluated all the evidence. *In Re Villeneuve*, 709 A.2d 1067 (Vt. 1998).

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

Sometimes a board decides to conduct a site visit and will set a date for the site visit to occur at a later date while it is at a public meeting on the application which will be the subject of the site visit. It arguably is enough for the purpose of giving notice under the FOAA for the board to announce the date, time and place of the site visit without also providing additional public notice by some other means, if the announcement is made at a meeting which itself complied with FOAA notice requirements. However, to be safe, the board also should provide notice to the public in the manner usually followed, for the benefit of the people who were not at the meeting where the site visit is announced.

Board Records

All board records are public records, unless a particular record is made confidential by a specific statute or is governed by a court order protecting it from public inspection. 1 M.R.S.A. § 401 et seq. (Freedom of Access Act). This is true regardless of the form in which they are maintained (paper records, audio or video tapes, computer disks or files, email). Any member of the general public has a right to inspect and copy public records of the board at a time which is mutually convenient. If a person requests a copy of a public record, the municipality may charge a reasonable fee.

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

Conflict of Interest

Definition. This section discusses what is legally called a “conflict of interest.” It is a different type of “conflict” than the “incompatibility of office” rule discussed in Chapter 1 of this manual.

- **Statutory Test.** There are several tests of what constitutes a conflict of interest. One is established by statute in Title 30-A, Section 2605. The statutory test applies only to a board member who (1) is an “officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity” which is making the application to the board and (2) is “directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity.” If a board member falls into one of the relationships listed in category 1 but does not have the 10% interest covered by category 2, then that board member does not have a legal conflict of interest.
- **Case Law Test.** For a board member whose conflict of interest is not governed by Title 30-A (because that board member does not fall within both categories discussed in the preceding paragraph), there is a common law (case law) standard defining activity which may constitute a conflict of interest. That standard is “whether the town official by reason of his interest, is placed in a situation of temptation to serve his own personal pecuniary interest to the prejudice of the interests of those for whom the law authorized and required him to act. . .” *Lesieur v. Inhabitants of Rumford*, 113 Me. 317 (1915), as cited in *Tuscan v. Smith*, 130 Me. 36 (1931).

Examples. Under the statutory test, if a board member were an employee of a company which had a subdivision application before the board, there would be no legal conflict of interest requiring that board member to abstain unless he or she also had a 10% stock or ownership interest in that company. An example of an indirect conflict of interest controlled by the statute is where a board member owned a company which owned 10% of the stock of a private corporation which was making an application to the board. Under the case law test, a board member who is also the applicant would have a conflict of interest. A court probably would find that a board member also had a conflict of interest under that test where the board member was a real estate agent trying to sell the property which was covered by the application and his or her commission on the sale hinged on whether the board granted approval of the proposed use. Likewise, if the board member is a secured creditor of the applicant whose security interest will be affected by the board's decision on the application or an abutting property owner whose property value will be affected by the board's action, a court might find that the board member has a common law conflict of interest. If someone from a board member's family who lives with that board member and contributes to household expenses is employed by the person applying to the board for a permit, a court might find that a common law conflict of interest exists if approval or denial of the application will directly affect that family member's job. See *Hughes v. Black*, 156 Me. 69, 160 A.2d 113 (1960).

Failure to Abstain. If a board member who has a legal conflict of interest fails to abstain from the discussion and from the vote and fails to note the nature of his or her interest in the record of the meeting, a court could declare the vote void if someone challenged it. This abstention and reason must be permanently recorded with the town or city clerk.

Appearance of Impropriety. Even if no legal conflict of interest exists, a board member would be well advised to avoid even the appearance of a conflict by abstaining from the board's discussion and voting in order to maintain the public's confidence in the board's work. *Aldom v. Roseland*, 42 NJ Super. 495, 127 A.2d 190 (1956); 30-A M.R.S.A. § 2605.

Defined by Ordinance or Charter; Authority of Board to Determine. A municipality may define what constitutes a conflict of interest by including such a provision in a local charter or ordinance. Even without such a provision, the courts have recognized that a board has general authority to determine whether one of its members has a legal conflict. Such a decision can be made either at the request of the affected board member or on the initiative of the rest of the board.

Former Board Member Representing Clients Before the Board. Another conflicts issue addressed by § 2605 arises in the situation where a board member who leaves the board attempts to represent a private client before the board. If the board member is trying to represent the client on a matter in which he or she had prior involvement as a board member, the statute establishes certain waiting periods before

this representation would be legal. If the matter was completed at least one year before the board member left office, then there is a one-year waiting period from the time the board member left. If the matter was still pending at the time the board member left and within one year of leaving, then the board member is absolutely prohibited from representing a client on that matter.

Current Board Member Representing Clients Before the Board. Title 30-A M.R.S.A. § 2605 requires that a member of a board refrain from ‘otherwise attempting to influence a decision in which that official has an interest.’ While it would not be reasonable to interpret this law as prohibiting a board member from abstaining and stepping down as a board member to present his/her own application to the board, it probably does prohibit a board member (including alternate members) from representing another applicant who is seeking the board’s approval or some other party to the proceeding.

Bias

Bias Based on Blood/Marital Relation to Appellant or Other Party. Title 1, § 71 (6) of the Maine statutes states that a board member must disqualify himself or herself if a situation requires that board member to be disinterested or indifferent and the board member must make a quasi-judicial decision which involves a person to whom the board member is related by blood or marriage within the 6th degree (parents, grandparents, great-grandparents, great-great grandparents, brothers, sisters, children, grandchildren, great-grandchildren, aunts, uncles, great aunts/uncles, great-grand aunts/uncles, first cousins, first cousins once removed, first cousins twice removed, second cousins, nephews, nieces, grand nephews/nieces, great grand nephews/nieces). (See chart in Appendix 1) See also, *Widewaters Stillwater Co. LLC v. City of Bangor*, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001), where the court refused to find that a letter written in support of a zone change constituted evidence of a board member’s bias regarding the application which was being reviewed by the board.

Bias Against a Party Based on State of Mind. Various court decisions also have established a rule requiring a board member to abstain from the discussion and the vote if the board member is so biased against the applicant or the project that he or she could not make an impartial decision, thereby depriving the applicant of his or her due process right to a fair and objective hearing. *Gashgai v. The Board of Registration In Medicine*, 390 A.2d 1080 (Me. 1978). *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990). (See discussion in *Grant’s Farm Associates v. Town of Kittery*, 554 A.2d 799, 801, fn. 1 (Me. 1989) where the developer alleged that proceedings were tainted by the board’s predisposition against development of the site, but the court found that there was ample record evidence to support the board’s decision to deny approval).

Burden of Proof; Examples. The burden of proving bias is on the applicant. *In Re*

Maine Clean Fuels, Inc., 310 A.2d 736 (Me. 1973). If a board member reaches a conclusion based on the application and other information in the record and expresses that opinion to the press before the board has voted, a court probably would not find that the board member was biased against the project. This also would be true where a board member had expressed an opinion regarding the proper interpretation of an applicable ordinance or statute. Cf. *New England Telephone and Telegraph Co. v. Public Utilities Commission*, 448 A.2d 272, 280 (Me. 1982) and *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410 (Me. 1984). However, if for example, the applicant could show (1) that the board member had a personal grudge against him because they were involved in a lawsuit relating to another matter or (2) that the board member in question had repeatedly stated in public that he personally found all projects of that type to be offensive and had stated fur

Investigations Conducted by Board Members. Sometimes board members want to collect information to help the board make its decision rather than relying on information presented by the applicant or other parties. Such a practice could be viewed as evidence of bias on the part of that board member, so probably should be avoided except where publicly authorized by a vote of the board. If a board member does engage in such conduct, he or she should be sure that it is done in an objective way and that any information collected is entered into the board's record. The board should provide an opportunity for the applicant and other interested parties to respond. 18 A. L. R. 2d 562. Local Ordinance Definition of Bias; Authority of Board to Decide. As with conflict of interest, a municipality may attempt to define what constitutes bias through a provision in a local ordinance. In the absence of an ordinance, the board may decide.

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

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

If a board member does not believe that he or she has a conflict or bias but the majority of the board believes otherwise, the majority of the board may vote on that issue. *State Taxpayers Opposed to Pollution v. Bucksport Zoning Board of Appeals* (and *AES-Harriman Cove, Inc. v. Town of Bucksport*), CV-91-217 and 92-41 (Me. Super. Ct., Han. Cty., January 21, 1993). If the board finds that a conflict or bias does exist based on the facts, then the board may order the conflicted or biased board member not to participate as a board member. If a board member thinks that he or she may have a conflict or bias which would legally disqualify him or her but isn't sure, that board member may ask the rest of the board to consider the facts and vote on the matter. *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577.

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

Conducting a Meeting

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

There is no statute requiring that notice be given to the municipal CEO. Public drinking water suppliers must receive notice that an application has been filed in the following situations: (1) a junkyard, automobile graveyard, or auto recycling business which is located within a source water protection area of a particular public drinking water supplier as shown on maps prepared by the Department of Human Services (30-A M.R.S.A. § 3754); (2) an expansion of a structure using subsurface wastewater disposal where the lot is within a mapped drinking water source protection area (30A M.R.S.A. § 4211(3)(B)); (3) a proposed land use project which is within a mapped source water protection area, is reviewed by the planning board, and notice to abutters is required as part of that review (30-A M.R.S.A. § 4358-A); and (4) a subdivision which is within a mapped source water protection area (30-A M.R.S.A. § 4403(3)(A)). A sample notice

form is included in Appendix 5 of this manual.” Also add the following new second paragraph to this section: “Even if the chairperson believes that the board has no jurisdiction over the application which has been submitted for the board’s review and approval, the chairperson still must schedule an initial board meeting on the application in order for the board to make that decision by majority vote. The chair cannot simply refuse to call the meeting, refuse to place the item on the agenda, or require the applicant to withdraw the application.

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

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

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

- Use of Alternate Members. If alternate board member positions have

been created by the legislative body, and if those positions have been filled, then the chairperson may designate an alternate to take the place of a regular voting member at a particular meeting when a regular member is absent or disqualified due to a conflict of interest or otherwise. (See related discussion later in this chapter entitled “Participation by Board Members Who Miss Meetings.”) An alternate **who has not been designated to take the place of a regular member** at a particular meeting is not legally a board member for the purposes of that meeting; the alternate is really no different than a member of the public, since he/she has no right to make motions, second them, or vote. It is safest from a due process standpoint to allow alternate members to make comments or ask questions only to the extent that members of the public are allowed to do this. Neither alternates nor members of the public should be allowed to make comments once the board has closed its record and begun its deliberations and decision-making process, unless the board is prepared to reopen its record and allow both comments and rebuttal. By treating alternates as members of the public for the purposes of their ability to participate in the board’s discussion, it will ensure that only voting board members are involved in making the findings and conclusions that are legally required for a decision on an application and will also make it easier for a judge to determine which board members’ comments and votes were legally relevant for the purposes of the final decision if it is appealed.

- **Required Notices Given.** The chairperson should indicate whether required notices of the meeting have been given to the press, abutters, or anyone else.
- **Summarize Application.** If a quorum exists, then the chairperson should summarize for those present the nature of the application and any documents submitted in support of or in opposition to the application.
- **Jurisdiction.** He or she also should indicate to the board which provisions of the applicable ordinance or statute give the board jurisdiction over the application.
- **Conflict of Interest or Bias.** The chairperson should advise the board members that if any of them has a direct or indirect pecuniary interest in the subject matter of the application, that member must make his or her interest known in the minutes of the meeting and must abstain from participating in any discussion and the vote taken in relation to that application. Otherwise, if someone challenged the board’s decision in court, the court could void the decision. 30-A M.R.S.A. § 2605. See earlier discussion in this chapter.)
- **Standing.** If the board decides that it does have authority to review the application, it also must decide whether the applicant has “standing” to apply. (See related discussion in this chapter and in Chapter 3.)

- **Complete Application Submitted; Fees.** The board must also determine as a preliminary matter whether the basic application form has been completed properly or whether there is information missing; this is not a substantive review of the information provided to determine whether the applicant has satisfied all the ordinance requirements. As part of this process, the board should determine whether required application fees have been paid.

If the board decides that the applicant has met these kinds of requirements, then it can proceed with its substantive review. Should the board determine that it does not have jurisdiction, that a complete application (including required fees) was not submitted by the required deadline (*Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., Apr. 8, 1998), or that the applicant lacks standing, the board should deny the application, expressly stating the reasons.

Procedure. At this point the chairperson should explain the rules of procedure which the board must follow during its meeting and the extent to which public comments and questions will be allowed. The chairperson, using the procedures adopted by the board or by the town, regulates the conduct of the meeting—recognizing members of the board and audience who want to speak, entertaining motions, ruling on the relevance of questions asked, and otherwise keeping the meeting in order if tempers start to flare, even to the extent of having an unruly person removed by a law enforcement officer. Sample procedures are included in Appendix 1. The Maine Supreme Court has recognized that boards generally have inherent authority to adopt their own rules of procedure. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). Board procedures do not need to provide an applicant with a full adjudicatory hearing complete with direct cross examination and rebuttals in order to satisfy due process requirements. *Fichter v. Board of Environmental Protection*, 604 A.2d 433 (Me. 1992). The rules should address the effect of a tie vote. Unless an ordinance or the board’s rules say otherwise, the chairperson’s right to vote is not limited to breaking ties.

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

Public Participation

- General. If the meeting has not been advertised as a “public hearing,” members of the general public may attend and listen but have no statutory right to ask questions or to comment verbally under the Freedom of Access Act. (The law also allows the public to take notes, tape record, film, or make similar records of the meeting as long as it is not disruptive of the proceedings.) However, the planning board may have bylaws which require that the public be given at least a limited opportunity to speak at any planning board meeting. If the bylaws contain no express provision requiring public comment, it still may be to the board’s benefit to allow a reasonable amount of relevant comment and questions from the public, despite the fact that a particular meeting has not been advertised as a “public hearing.” Besides being a good public relations strategy, it will help ensure that the board has the information it needs to make a sound decision, provided the applicant is given adequate opportunity to address this information. Several State laws may require notice to public drinking water suppliers. (See the earlier discussion in this chapter.)
- Deciding Whether to Hold a Hearing. Whether the board should conduct a “public hearing” as the means by which it obtains public input will depend in part on whether the applicable ordinance or statute requires a public hearing. Where no hearing is required, the board still may decide to hold one to maximize public input and provide the applicant with more of an opportunity to prepare a response to any criticism of the proposal. The following excerpt from *Municipal Planning Perspectives: A Handbook* (1982) was written by Joseph Young, Associate Planner, North Kennebec Regional Planning Commission as a guide for planning boards in determining when to call a public hearing and what notice to give:

“From time to time a planning board finds that because of the large scale or possible far reaching effects of a proposal before it, a public hearing is in order. There are no hard and fast rules for deciding when a public hearing is necessary. However, because of the impact planning board decisions can have on a neighborhood or town, a public hearing should be called for any proposal that promises to effect the lines and property of anyone other than the applicant. Any large development such as a new store, shopping center or industrial development should probably go through a public hearing process. At a very minimum, abutting property owners should be notified so that they may review the plans and generally protect their own interests. Generally speaking, shoreland zoning permits, building permits or small scale subdivisions probably do not warrant a public hearing. But, a large scale subdivision of 50 or 100 lots might. One indicator of when to hold a public hearing is the amount of interest an application generates when it is submitted. If the board gets a lot of phone

calls or a large group of people (ex. 6-12) show up for the regular planning board meeting, then a public hearing is probably in order. Conversely, if no one calls or shows up at a meeting, even though the application has received attention in the press and abutting land owners have been notified, you can most likely do without a public hearing.”

- Sequence of Presentations. If the board’s bylaws do not indicate the sequence in which the chairperson should recognize speakers, the chairperson could use the following as a “rule of thumb”:
 - a. presentation by applicant and his or her attorney and witnesses, without interruption
 - b. questions through the chairperson to the applicant by board members and people who will be directly affected by the project (eg., abutters) and requests for more detailed information on the evidence presented by the applicant
 - c. presentations by abutters or others who will be directly affected by the project and their attorneys and witnesses
 - d. questions by the applicant and board members through the chairperson to the people directly affected and the witnesses who made presentations
 - e. rebuttal statements by any of the people who testified previously
 - f. comments or questions by other interested people in the audience

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

Taking Adequate Time to Make a Decision; Seeking Technical and Legal Advice. Although the board should avoid unreasonable delays in making a decision and should not “string the applicant along,” the board should not feel pressured into making a decision at the first meeting, if not required to do so by a deadline in the applicable ordinance or statute or its bylaws, unless the matter involved is routine. This is especially true where the meeting has been very emotional because of a controversial proposal. The board should temporarily table further action on the application to allow the board to visit the site of the proposed project and double check the information presented by the applicant verbally or in writing. The board members should consider seeking technical advice from its regional planning commission, from a State agency (such as the Department of Environmental Protection), or private consultants and legal advice from

the municipality's lawyer, particularly if the applicant is represented by a lawyer. (If the municipality is unwilling to budget money for the board to use to hire its own consultants or lawyer, it may be willing to adopt ordinance provisions which require an applicant to set aside an amount of money in escrow which can be used by the board to hire consultants to help the board review the application. A sample ordinance provision appears in Appendix 3.) If the board anticipates that the application will be controversial and that the board's decision ultimately will be challenged in court, it should consider having its professional technical and legal advisers present at future meetings at which the application is discussed. The board must be careful to introduce into the record any information provided by its advisers, whether the information is provided orally or in writing, especially if the information is provided outside the public board meeting. In at least one Maine Supreme Court case, a board found that an application was complete and then circulated it to paid staff for comments while it began its substantive review. The staff identified problems with the application and after a year of repeated attempts to get more information from the applicant, the staff sent a letter saying that the application was incomplete, spelling out in detail why and what was needed to make it complete. The developer appealed and the court found that his appeal was premature and that there was nothing wrong per se with the staff's and board's process. *Philric Associates v. City of South Portland*, 595 A.2d 1061 (Me. 1991).

Minutes and Record of the Meeting. It is very important that the board's secretary take reasonably complete and accurate minutes of when and where the meeting occurred, who was present, the subject of the application, what was said and by whom, what votes were taken, and any agreements made regarding procedures or other issues at the board meeting. The minutes, any documents submitted by the applicant or others (such as the application, a report from a professional engineer, or a letter from an abutter), plans, maps, photographs or diagrams, and the board's findings of fact and conclusions regarding whether the applicant has complied with the statute or ordinance in question will comprise the "record" for that case. Any information in whatever form which is presented to the board as a basis for the board's decision must be entered into the official record. Tape recording the meeting is not legally required. In taping a meeting (either audio tape or video tape), it is important to use high quality equipment and to make sure that anyone speaking is close enough to a microphone to pick up his/her statements on the tape. A tape which is full of inaudible statements is of no use to the board or a reviewing court. *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916. There is no law requiring that board minutes contain a verbatim account of the entire meeting. The amount of detail included in the minutes by the board's secretary will be dictated in part by the desires of a majority of the board and in part by the complexity of the application being reviewed and how controversial it is.

Town Attorney Advising More Than One Municipal Board or Official on Same Matter. In cases where the municipality's regular attorney has been advising the CEO or planning board in the matter which becomes the subject of an appeal, that

attorney may be unable to advise the board of appeals on that matter because of provisions in the ethical codes governing lawyers, as well as to avoid due process issues. The attorney will make that judgment call; some attorneys believe that it is legally and ethically necessary to use a different attorney for the appeal process and others do not, focusing on the fact that it is the municipality that is the attorney's client and not any single board or official. If the attorney decides that he/she cannot also advise the board of appeals, the municipality will need to retain a different attorney for the board of appeals if the board needs legal advice.

Making the Decision

Checklist for Reviewing Evidence. Before the board decides whether to approve or deny the application, it should ask itself the following questions:

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

Basis for the Board's Decision

- General Rule. Once the board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute. The board should not base its decision merely on the amount of public opposition or support displayed for the project. Nor should its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met his or her burden of proof and complied with the provisions of the statute/ordinance. *Brak v. Town of Georgetown*, 436 A.2d 894(Me. 1981); *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768. If the board does not believe that the applicant's project meets

each of the requirements of the ordinance/statute based on the evidence in the record, the board must deny the application. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554A.2d 799 (Me. 1989). Where a proposed project complies with all of the relevant ordinance requirements, the board must approve the application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994). At least one court has expressly warned board members that they must not “abdicate (their) responsibility, ignore the ordinance and approve an application regardless of whether it meets the conditions of the ordinance or not” and that board members who are “philosophically hostile to zoning should address their concerns to the local and State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance.” *Fraser v. Town of Stockton Springs*, CV-88-97 (Me. Super. Ct., Waldo Cty., August 10, 1989).

- **“Ex Parte” Communications.** The board’s decision, whether it approves, denies, or conditionally approves an application, must be supported by substantial evidence in the record. Individual board members should not allow themselves to be influenced by information provided to them outside an official board meeting (i.e., an “ex parte communication”) unless they enter that information into the board’s record and all parties to the proceeding receive notice of the additional information and are given an opportunity to respond to it. A board member who is approached by an individual wanting to provide him or her with information outside a public meeting setting should actively discourage the person from doing so and encourage the person to submit the information to the board in writing or through oral testimony at a board meeting. The board member should explain that, by providing information outside the public meeting, the person may be causing constitutional due process problems with the board’s process and that the board may not legally be able to consider the information the person is trying to present. Under no circumstances should board members meet with someone representing just one side of an issue outside a public meeting setting. *Mutton Hill Estates, Inc. v. Inhabitants of Town of Oakland*, 468 A.2d 989 (Me. 1983). Board members should not even discuss an application with the code enforcement officer outside a public board meeting in order to avoid due process problems. *White v. Town of Hollis*, 589 A.2d 46 (Me. 1991). (But see *Maddocks v. Unemployment Insurance Commission*, 2001 ME 60, 768 A.2d 1023, where the court held that a party who was aware of the ex parte communication and failed to object during the Commission hearing waived the due process issue on appeal to court.) For additional discussion of this issue, see “Site Visits” and “Board Member Discussions/Email” earlier in this chapter under “Freedom of Access Act.”
- **Substantial Evidence.** “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” The fact that two inconsistent conclusions can be drawn from the recorded evidence

related to a specific performance standard does not mean that the board's conclusion regarding that standard is not supported by "substantial evidence." *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1296 (Me. 1985). Where the board denies an application on the basis that the record shows that the "proposed project would have specific adverse consequences in violation of the criteria . . . for approval," a court will uphold the decision unless the applicant can demonstrate both that the board's findings are unsupported by record evidence and that the record compels contrary findings. *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989).

- **Conditional Approval.** A planning board has inherent authority to attach conditions to its approval of an application. See generally, *In re: Belgrade Shores, Inc.*, 371A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). A conditional approval "which has the practical effect of a denial . . . must be treated as a denial." *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., Jan. 12, 1990). Any conditions which the board wants to impose on the applicant's project must be clearly stated in its decision and noted or cross-referenced on the face of any plan to be recorded to ensure their enforceability. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). (See Appendix 5 for sample language.) If it is the municipality's intention to render a permit void if the permit holder fails to comply with conditions of approval within a certain timeframe, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., July 1, 1994).

If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter, the board should be certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the board may find itself later on with a situation where the applicant has not met the conditions, forcing the municipality to go to court to convince a judge to enforce the conditions of approval. Unless the board and applicant can reach an agreement on reasonable conditions to impose which are both technically and financially feasible for the applicant and adequate to satisfy the ordinance requirements, the board should not approve the application. Cf., *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990).

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

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

- Relevance of Deed Restrictions, Title Disputes, Constitutional Issues, Other Code Violations, and Related Lawsuits. The board cannot deny an application because the proposed use would violate a private deed restriction if the use otherwise would be in compliance with the applicable ordinance/statute. *Whiting v. Seavey*, 188 A.2d 276 (Me. 1963). Cf., *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). The board has no legal authority to resolve boundary or title disputes as part of its decision on an application. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises*, 531 A.2d 1272 (Me. 1987). (See sample language in Appendix 5 which the board can insert into its decision in a case where a title or boundary issue has been raised to make it clear that the board's granting of approval in no way resolves the title problem.) If the board is presented with credible written expert evidence by both the applicant and an opponent which is in direct conflict and which involves a title/boundary issue, the board probably has the option of either tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order) or denying approval on the basis that the board is unable to find that the applicant has met the required burden of proof. The board also cannot resolve constitutional problems with an ordinance in deciding an application. Cf., *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). The fact that the property involved is already the subject of other code violations would not constitute a basis for denial, absent language in the ordinance to that effect. *Bauer v. Town of Gorham*, CV-89-278 (Me. Super. Ct., Cum. Cty., Nov. 21, 1989). Nor may

the board refuse to act upon or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*, 663 A.2d 41 (Me. 1995). Even if the board cannot legally resolve some of these issues, if a party to the board's proceedings raises such a challenge, the board should note the challenge and its response in the record of the case so that it is preserved in the event of an appeal.

- **Expert vs. Non-Expert Testimony; Personal Knowledge of Board Members; Investigations by Board Members.** The board may base its decision on non-expert testimony in the record if it finds that testimony more credible than expert testimony presented on the same issue. *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717 (Me. 1983). If two conflicting expert opinions are offered for the record, the board has the option of making its own independent finding of fact. *Cf., Gulick v. Board of Environmental Protection*, 452 A.2d 1202, 1208 (Me. 1982). In the absence of expert testimony, the board may rely on the testimony of anyone personally familiar with the site and conditions surrounding the application and on its own investigations. *American Legion v. Town of Windham*, 502 A.2d 484 (Me. 1985); *Grant's Farm Associates v. Town of Kittery*, 554 A.2d 799 (Me. 1989); *Goldman v. Town of Lovell*, 592 A.2d 165 (Me. 1991). Board members may rely on their own expertise and experience and that of their professional staff, provided that information is formally entered into the record. *Pine Tree Telephone and Telegraph Co. v. Town of Gray*, 631 A.2d 55 (Me. 1993); *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577. If members of the board do conduct independent investigations in order to generate the information needed to help the board analyze an application and reach a decision, those members must be careful to be objective in their quest; otherwise, the applicant may have grounds to cite one or more members for bias. See generally, 18 A.L.R. 2d § 4.
- **Staff Interpretations.** Where a municipal official or staff person whose principal job is to interpret an ordinance offers statements about the proper interpretation of the ordinance and whether the applicant's evidence was sufficient to comply with the ordinance, the court has said that the opinion of that staff person or official is entitled to some deference. *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990).
- **Participation by Board Members Who Miss Meetings.** If a board

member has not been able to attend every meeting at which the board conducted a public hearing or received and discussed substantive evidence regarding a particular application, it is arguable that such a board member cannot participate in making the decision on the application because it would violate due process. *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me.1990); *Fitanides v. City of Saco*, 684 A.2d 421 (Me. 1996).

However, in a case where so many of the board members have an attendance problem that the board will never have a quorum if a strict reading of *Pelkey* were applied, and there is no other body authorized to act on the matter, the board may be forced to allow the affected members to participate in making the decision under the common law “rule of necessity.” *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410-411 (Me. 1984). (But see *Cyr v. Town of Wallagrass*, AP-00-14 (Me. Super. Ct., Aroost. Cty., March 1, 2001 and April 26, 2001), where a new board of appeals was appointed to hear a particular case, and *Dunnells v. Town of Parsonfield*, CV-95-515 (Me. Super. Ct., York Cty., February 7, 1997).) In *Pelkey*, the court placed great importance on the need for individual board members to hear the evidence and assess the credibility of witnesses in order to afford due process to the parties to the board’s proceedings; board members who didn’t do that were disqualified from participation in the board’s decision-making process on that application.

A recent Maine Supreme Court decision, *Green v. Commissioner of Department of Mental Health, Mental Retardation, and Substance Abuse Services*, 2001 ME 86, 776 A.2d 612, is being interpreted by many municipal attorneys as a modification of the “perfect attendance” requirement for board members established in *Pelkey*. The court in *Green* found that “as long as a decision-making officer both familiarizes himself with the evidence sufficient to assure himself that all statutory criteria have been satisfied and retains the ultimate authority to render the decision, he can properly utilize subordinate officers to gather evidence and make preliminary reports.” On the basis of *Green*, *Lemont v. Town of Eliot*, CV-91-577 (Me. Super. Ct., York Cty, November 11, 1992, and in I, 709 A.2d 1067 (Vt., 1998), many municipal attorneys are advising board members who miss a public hearing or other board meeting at which substantive discussions of an application occur that they may continue to participate in the decision-making process without violating due process if they take the following steps: (1) read hearing and meeting minutes, review any documents or other evidence submitted at those meetings, and listen to/watch any audio or video recordings of those meetings, (2) prepare a written statement describing what the board member did to educate himself/herself about what occurred at the missed meeting, (3) sign the statement (preferably in notarized form), and (4) enter it into the record at the next meeting. (See Appendix 5 for sample affidavit form.) If the applicant and other parties to the proceeding agree that this is adequate, then this should be noted in the record too. Some municipal attorneys advise board members who have missed a substantive meeting that they may not participate

without the consent of all parties in order to avoid a due process challenge.

If a board member senses when an application is first submitted that it will take many months to review and decide and that he/she will have to miss many of the meetings due to family needs or job-related reasons, it would be advisable for that member to step aside and allow an alternate member to be designated to serve in his/her place in connection with that application, assuming that alternate positions on the board have already been created and filled.

If there are no alternate positions and there is not time to have them legally established, then the board member will have to attend when possible and follow the guidelines above for dealing with missed meetings.

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

Approval and Form of Decision

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

procedure or applicable local ordinance to avoid confusion.

- **Findings and Conclusions.** When taking a final vote, the board should prepare a written statement of the “findings of fact” which appear in the written record and a written explanation of the “conclusions of law” which it has drawn about whether the facts show that the project is in compliance with the ordinance/statute.

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

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

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

The practical purpose behind preparing findings and conclusions is that it helps the board ensure that it has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another

purpose is to provide a written statement of the reason for the board's decision which is detailed enough to enable the applicant or anyone else who is interested (1) to judge whether they agree or disagree with the board and (2) to decide whether there are sufficient grounds on which to appeal the decision. Probably the most important purpose is to provide a clear statement for the Superior Court of the facts which were submitted for the board's consideration and the facts on which the board relied in concluding that the review standards were/were not met by the applicant. This is particularly important where the board must choose between conflicting evidence which has been introduced to prove that a particular standard has/has not been met. If the board fails to make written findings of fact and conclusions, it appears now that the court will remand the case to the board for the preparation of findings and conclusions before reaching a decision, rather than reading through the board's minutes and other records to determine the basis for the decision. (E.g., *Carroll v. Town of Rockport*, 2003 ME 135, 837 A.2d 148; *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916; *McGhie v. Town of Cutler*, 2002 ME 62, 793 A.2d 504; *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834; *Widewaters Stillwater Co., LLC v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597; *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me.1983); *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660; compare, *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991). (See Appendix 5 for excerpts from some of these cases.) The "standard of review" which governs the Superior Court in deciding whether to uphold the board's decision is the "substantial evidence in the record" test, i.e., is there sufficient credible evidence in the record of the case created by the board to support the board's decision? The court also will determine whether the board applied the proper law and whether the board applied that law correctly or acted arbitrarily or capriciously. *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013.

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

finding either in favor of the applicant or against the applicant.

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

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

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

The chairperson should explain during the course of discussing and approving findings and conclusions that, if any board member thinks the applicant has not met his or her burden of proof and that some information is missing or not convincing, that board member should state those concerns during the findings and conclusion phase. The final vote on whether to approve/reject the application is really a formality; the important, binding decisions are those regarding the individual findings and conclusions. If the board members do not cite problems with the evidence at that stage, the board will have no legal basis for denying the

application.

If the board feels overwhelmed on a particular application and wants to wait until another meeting to go through the formal process for voting on each criterion as outlined above, it may do so as long as the members bear in mind any deadline for making a final decision which must be met under the relevant ordinance. This may necessitate calling a special meeting to take a final vote in time to meet the deadline. In the meantime, the individual board members can be thinking about what facts and conclusions the board should vote to approve. Board members must not discuss these issues outside the board meeting, however, in order to avoid problems under the Freedom of Access Act. Once the board has reconvened and has formulated rough findings and conclusions, it can then either take time at that meeting to prepare formal written findings and conclusions and approve a final decision at that meeting or it can conduct a discussion of each ordinance criterion and the evidence presented and then delegate to one person (i.e. one member of the board, a paid secretary, the board's attorney or similar person) the task of writing draft findings and conclusions to be reviewed and approved by the board at another meeting, held within any decision-making deadline established by the ordinance or by statute. If the board takes what it considers a "preliminary vote" to be finalized at a subsequent meeting following the preparation and review of a final draft of its findings, then the board should make this clear for the record. Several sample written decisions and a number of excerpts from Maine Supreme Court cases indicating the kind of detail that a court expects in a board decision appear in Appendix 5.

Several problems can result if the board delegates the responsibility for developing a tentative draft of findings and conclusions before it has gone through the list of criteria and developed its own. The board runs the risk of "rubber-stamping" a decision that could have been formulated by less than a majority of the board or by a non-board member. *Brown v. Inhabitants of the Town of Bar Harbor*, CV-83-56 (Me. Super. Ct., Han. Cty., Jan. 19, 1984). Another risk is that if a subcommittee of the board is asked to develop tentative findings and conclusions, the subcommittee members may not realize that they must comply with the notice requirements of the Maine Freedom of Access Act (1 M.R.S.A. § 406). *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). They also run the risk that someone may try to introduce new information which was not presented at the full board meeting and to which the applicant and other parties may not have had an opportunity to respond, thereby depriving the applicant and those parties of their right to due process under the Constitution. *Mutton Hill Estates, Inc. v. Inhabitants of the Town of Oakland*, 468 A.2d 989 (Me. 1983). Where a board lacks secretarial staff, it may invite interested parties to submit proposed written findings of fact and conclusions of law to assist the board in its preparation of a decision.

After Making the Decision; Notice of Decision. Once the board has made its decision, the secretary should incorporate the findings and legal conclusions and the

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

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

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

Vague Ordinance Standards; Improper Delegation of Legislative

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

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

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

It is not legally permissible to include a review standard in the ordinance which requires a board to find that a project will be "compatible with the neighborhood" or "harmonious with the surrounding environment." Compare, *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987) with *American Legion, Field Allen Post #148 v. Town of Windham*, 502 A.2d 484 (Me. 1985), *In Re: Spring Valley Development*, 300 A.2d 736, 751-752 (Me. 1973), and *Secure Environments, Inc. v. Town of Norridgewock*, 544 A.2d 319 (Me. 1988). A standard that requires a board or official to determine whether a development "will conserve natural beauty" has also been declared unconstitutional. *Kosalka v. Town of Georgetown*, 2000 ME 106, 752 A.2d 183. Compare, *Conservation Law Foundation, Inc. v. Town of Lincolnville*, 2001 ME 175, 786 A.2d 616. The court has upheld an ordinance review standard that requires a determination that "the proposed use will not adversely affect the value of adjacent properties." *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1992). A shoreland zoning ordinance provision requiring a board to find that a proposed pier, dock or wharf would be "no larger than necessary to carry on the activity" has also been upheld, *Stewart v. Town of Sedgwick*, 2002 ME 81, 797 A.2d 27, as has ordinance language requiring a finding that a pier, dock or wharf would not "interfere with developed areas." *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996).

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

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

Time Limit on Use of Permit. Generally, once the board has issued a permit or approval, the holder of the permit or approval has an unlimited amount of time within which to complete the work covered by the approval or permit. However, the board should check the applicable ordinance or statute to be sure. (See discussion in Chapter 5

regarding “Applicability of New Laws.”) Some ordinances provide that a permit expires if work is not begun within a certain period of time. This sort of time limit has been upheld by the Maine Supreme Court. *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993) (interpretation of “significant progress of construction” within six months of obtaining a permit); *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998) (interpreting meaning of “the work authorized . . . is suspended or abandoned at any time after the work is commenced . . .”). See also *DeSomma v. Town of Casco*, 2000 ME 113, 755 A.2d 485, regarding the interpretation of an ordinance expiration clause and whether it applied to a particular variance or permit.”

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

The board should look carefully at the administrative procedures and appeals procedures contained in the ordinance and statute (if any) governing its review. Often, the steps which an applicant must follow to obtain the necessary planning board approval, building permit from the code enforcement officer (CEO), and variances from the board of appeals before a project can be constructed are not what the board may think. The initial decision as to whether an applicant needs planning board approval or not is often delegated by the ordinance to the code enforcement officer, who generally is authorized to make many substantive decisions regarding completeness of the application, the type of use actually being proposed, and the specific performance standards which must be satisfied. e.g., *Ray v. Town of Camden*, 533 A.2d 912 (Me. 1987). Many planning boards incorrectly assume that the ordinance gives them the authority to make those judgments, resulting in an illegal decision as well as resentment and confusion on the part of the board members and the applicant when this is later brought to their attention.

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

Reviewing Conditional Use/Special Exception Permit Applications

General. If a general or shoreland zoning ordinance authorizes the planning board to decide whether to issue conditional use or special exception permits, the board should be guided by the standards of review which the ordinance provides. (Shoreland zoning ordinances usually refer to these as “planning board permits.”) In passing the ordinance and designating certain uses as “conditional uses” or “special exceptions,” the legislative body has made a decision that those uses are ordinarily not injurious to the public health, safety, and welfare or detrimental to the neighborhood, but that they may be detrimental under certain circumstances if restrictions are not placed on how those uses are conducted. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It is the board’s job to review the application, to decide whether the ordinance allows the proposed use on a conditional basis in that zone, to determine whether the application complies with each of the standards of review and whether to approve or deny the application.

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

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

Selected Statutes Which Might Affect a Project Being Reviewed

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

Seasonal Conversion Law. Title 30-A, § 4215(2) requires a permit from the local plumbing inspector before a seasonal dwelling can be converted to a year-round dwelling in the shoreland zone. A “seasonal dwelling” is defined in 30-A M.R.S.A. § 4201(4) as “a dwelling which has not been utilized as a principal or year-round dwelling during the period from 1977 to 1981.” Listing that dwelling as the occupant’s legal residence for the

purposes of voting, payment of income tax, or automobile registration or living there for more than 7 months in any calendar year is evidence of use as a principal or year-round dwelling. Before issuing a conversion permit, the LPI must find that the applicant has met one of four conditions.

Entrance Permit. Title 23, § 704 requires a permit from the Department of Transportation or from the municipal officers for new entrances on a State or State-aid highway. The permit is issued by the municipal officers if the entrance will be in the “compact” area, which is defined in 23 M.R.S.A. § 754(2).

Road Setback. Title 23, § 1401 requires structures on land adjoining a State or State-aid highway to meet certain setback requirements from the centerline or edge of the right-of-way. See Appendix 6 for a copy of the law and a Legal Note discussing other statutory setback requirements. Many local ordinances do not clearly state the point from which setbacks must be measured. Title 33, § 465 states that a person who owns land abutting a town road owns to the center line of the road, absent a deed to the contrary. It may be advisable for local ordinances to state that setback will be measured from the centerline rather than from the property line or from the right-of-way edge, which also can be hard to establish.

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

Construction or Expansion of Structure Requiring Subsurface Disposal. Title 30-A, § 4211(3) requires any person erecting a structure requiring subsurface disposal to provide documentation to the municipal officers that the system can be constructed in accordance with the State’s Subsurface Wastewater Disposal Rules. Any person expanding a structure using subsurface disposal must provide documentation to the municipal officers that a legal replacement system can be installed in the event of a future malfunction. Notice of that documentation must be recorded in the Registry of Deeds with copies sent to all abutters. Abutters are then prohibited from installing a well in a location which would prevent installation of the replacement system. The landowner also is prohibited from erecting a structure or conducting an activity which would prevent installation of the replacement system. Notice to the public drinking water supplier is also required if the lot is within a source water protection area mapped by the Department of Human Services. (See Appendix 5 for a sample notice.)

Farmland. Title 7, § 56 generally prohibits a municipal official from issuing a building or use permit which would allow “inconsistent development” on land of more than one acre if the development will be within 100 feet of “farmland” which is registered with the municipality.

Small Gravel Pits. Title 30-A, § 3105 requires municipalities to enforce certain minimum standards against “small borrow pits” which do not fall within DEP’s jurisdiction.

Maine Endangered Species Act. Title 12, § 7753 authorizes the Department of Inland Fisheries and Wildlife to designate and map sites which are essential habitat for the conservation of endangered or threatened species. Municipal boards and officials are prohibited from granting any license or approval for projects within a designated habitat area without the Department’s approval. *An Atlas of Essential Habitats for Maine’s Endangered and Threatened Species*, which shows the locations of all currently designated “essential habitats,” is available from the Department.

Regulation of State, Federal, County, and Municipal Projects. Title 5, § 1742-B requires a municipality to notify the State Bureau of Public Improvements if the municipality intends to require State compliance with its building code. If so requested, the State must comply, if the local code is as stringent as or more stringent than the State’s building code governing State projects.

With regard to zoning ordinances, 30-A M.R.S.A. § 4352 requires that State agencies comply with zoning ordinances which are consistent with a comprehensive plan which is consistent with the Growth Management Act in the development of any building, parking facility, or other publicly owned structure. The governor, or his/her designee, is authorized to waive any use restrictions in a zoning ordinance after giving public notice, notice to the municipal officers, and opportunity for public comment as required by § 4352(6) and making five specific findings relating to the public benefits of the project and available alternatives. Zoning ordinances continue to be advisory to the State if they are not consistent with a comprehensive plan which is consistent with the Growth Management Act. The Maine Supreme Court has held that a private project conducted on land leased from the State may be exempt from municipal zoning regulations if it is shown that the use of the State’s land “furthers a State purpose or governmental function,” that there is a “compelling need” for the exemption and that there is State involvement of a substantial nature in the project. *Senders v. Town of Columbia Falls*, 657 A.2d 93 (Me. 1994). Zoning ordinances are not simply advisory when the municipality or county or a quasi-municipal corporation is conducting the project.

According to Title 40, § 619 of the United States Code, federal agencies proposing to

construct or make alterations are required to “consider” the requirements of local zoning and other building ordinances and “consult” with the appropriate local officials. They also are required to submit plans for review by local officials and permit local inspections. But municipalities are prohibited from prosecuting a federal agency for failing to comply with local ordinances or failing to follow local recommendations.

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

Minimum Lot Size. Title 12, § 4807 et seq. establishes a statewide minimum lot size for land use activities which will dispose of waste by means of a subsurface disposal system. The minimum lot size for new single family residential units (including mobile and seasonal homes) is 20,000 square feet. For multi-unit housing and other land use activities, a proportionately greater lot size is required based on a statutory formula. This law is administered and enforced by the Department of Human Services. (See Appendix 6 for an explanation of the formula.) Municipalities may establish larger lot size requirements by local ordinance. Many ordinances do not clearly state whether the lot size applies on a per unit, per structure, or per lot basis.

Reviewing Conditional Use/Special Exception Permit Applications

General. If a general or shoreland zoning ordinance authorizes the planning board to decide whether to issue conditional use or special exception permits, the board should be guided by the standards of review which the ordinance provides. (Shoreland zoning ordinances usually refer to these as “planning board permits.”) In passing the ordinance and designating certain uses as “conditional uses” or “special exceptions,” the legislative body has made a decision that those uses are ordinarily not injurious to the public health, safety, and welfare or detrimental to the neighborhood, but that they may be detrimental under certain circumstances if restrictions are not placed on how those uses are conducted. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It is the board’s job to review the application, to decide whether the ordinance allows the proposed use on a conditional basis in that zone, to determine whether the application complies with each of the standards of review and whether to approve or deny the application.

Conditional Approval. If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed and what kinds the ordinance allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter at least, the board should be very certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the board may find itself later on with a situation where the applicant has not met the conditions, forcing the municipality to go to court to convince a judge to enforce the conditions of approval. Unless the board and applicant can reach an agreement on reasonable conditions to impose which are both technically and financially feasible for the applicant, adequate for the purpose of satisfying the ordinance and supported by the record, the board should not approve the application. *Cf., Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990).

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

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

Sorting Out Which Board or Official Has Jurisdiction Over Which Part of a Project and at What Point in the Process. The board should look carefully at the administrative procedures and appeals procedures contained in the ordinance and statute (if any) governing its review. Often, the steps which an applicant must follow to obtain the necessary planning board approval, building permit from the code enforcement officer (CEO), and variances from the board of appeals before a project can be constructed are not what the board may think. The initial decision as to whether an applicant needs planning board approval or not is often delegated by the ordinance to the code enforcement officer, who generally is authorized to make many substantive decisions regarding completeness of the application, the type of use actually being proposed, and the specific performance standards which must be satisfied. e.g., *Ray v.*

Town of Camden, 533 A.2d 912 (Me. 1987). Many planning boards incorrectly assume that the ordinance gives them the authority to make those judgments, resulting in an illegal decision as well as resentment and confusion on the part of the board members and the applicant when this is later brought to their attention.

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

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

With increasing frequency boards are being asked to grant approval of a land use application on the basis that the municipal ordinance is in violation of the Federal Fair Housing Act Amendments (FFHAA) relating to group homes for individuals with disabilities or that the ordinance violates the Americans With Disabilities Act (ADA). (See Appendix 6 for related Legal Notes from the *Maine Townsman* magazine) The applicant's position is that the ordinance illegally requires the group home project to undergo a conditional use or special exception review when similar housing for non-disabled individuals and families is not subjected to the same approval process. Often these claims are valid, but they put the board in the position of having to approve something which is contrary to the express language of a local ordinance. Since the municipality could be faced with civil rights liability under federal law if its ordinances do illegally discriminate against people with disabilities, the board should consult with the municipality's private attorney when one of these issues is raised.

The same dilemma will also arise under 30-A M.R.S.A. § 4357-A with regard to group homes. A copy of this law and a related Legal Note appear in Appendix 6. The law was recently amended to make it clear that group homes which are operated essentially as single family homes must be treated the same as single family homes for non-disabled people. Again, if the local ordinance is in conflict with this statute, consult with the municipality's private attorney before making a decision.

Chapter 3

Planning Board Manual

Appeals

[Supplements # 1 & 2 are incorporated into the text of this chapter.]

Appeals

Jurisdiction

General Rule. If an ordinance or statute does not expressly authorize an appeal to the board of appeals, then the person wishing to challenge a planning board or code enforcement officer decision must appeal directly to the Superior Court under Civil Rule of Procedure 80B. 30-A M.R.S.A. § 2691; *Lyons v. Board of Directors of SAD No. 43*, 503 A.2d 233 (Me. 1986); *Levesque v. Inhabitants of Town of Eliot*, 448 A.2d 876 (Me. 1982). When an appeal is from a permit decision made under a zoning or shoreland zoning ordinance, the board of appeals has exclusive authority to hear and decide the appeal, even if the ordinance doesn't expressly grant jurisdiction to the board. 30-A M.R.S.A. § 4353. When a non-zoning ordinance grants jurisdiction to the board of appeals, it must specify the precise subject matter that may be appealed to the board and the official(s) whose action or non-action may be appealed to the board. 30-A M.R.S.A. § 2691.

Enforcement Decision. When an appeal involves an enforcement decision by a code enforcement officer rather than a decision regarding a permit application, the board of appeals will have to study the ordinance provisions carefully to determine whether it has jurisdiction. Some ordinances say that "any decision of the code enforcement officer or planning board" may be appealed to the board of appeals. Others say that "decisions in the administration of this ordinance" may be appealed. Some ordinances authorize appeals from "decisions made in the administration and enforcement" of the ordinance. The first and third examples above authorize appeals from decisions regarding the enforcement of the ordinance, while the language of the second example is intended to authorize only appeals from decisions regarding the approval or denial of a permit ("administration"). However, one Superior Court justice has interpreted the phrase "administration of this ordinance" to include both decisions on permit applications and enforcement orders/stop work orders. *Inhabitants of Levant v. Seymour*, AP-02-26 (Me. Super. Ct., Pen. Cty., June 9, 2003). Other cases which have addressed this issue include: *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991); *Town of Freeport v. Greenlaw*, 602 A.2d 1156 (Me. 1992) (where ordinance language authorized an appeal from any decision by the CEO); *Seacoast Club Adventure Land v. Town of Trenton*, AP-03-04 (Me. Super. Ct., Han. Cty., June 10, 2003); *Pepperman v. Town of Rangeley*, 659 A.2d 280 (Me. 1995) (where it was held that the appeals board decision was advisory because the enforcement section of the ordinance did not provide for an administrative appeal of an enforcement order and because the administrative appeal section limited the board's authority to recommending that the CEO reconsider the decision being appealed if the board disagreed with the CEO's decision); *Herrle v. Town of Waterboro*, 2001 ME 1, 763 A.2d 1159 (where the court concluded that, under the language of the ordinance, the board of appeals' decision was purely advisory regarding violation determinations of the CEO and therefore was not subject to judicial review); and *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598 (holding that a decision to issue or deny a certificate of occupancy was appealable). A municipality which does not want to allow an appeal to

the board of appeals from a CEO's notice of violation, stop work order, cease and desist order, or similar type of enforcement notice must be fairly explicit in its ordinance.

Appeal of Failure to Act. Where the basis for an appeal is the alleged failure of the CEO or planning board to act on a zoning permit application by a required deadline, at least one court has held that the board of appeals has jurisdiction over such an appeal based on language in 30-A M.R.S.A. § 4353(1), which states that "the board of appeals shall hear appeals from any failure to act." *Shure v. Town of Rockport*, AP-98-005 (Me. Super. Ct., Knox Cty., May 11, 1999).

Appeal of Failure to Enforce. The court will allow a person with legal standing to file a direct legal challenge in court where a municipality refuses to bring an enforcement action because it believes that the ordinance is not being violated. *Richert v. City of South Portland*, 1999 ME 179, 740 A.2d 1000; *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063.

Deadline for Filing Appeal

Appeal to Board of Appeals. If an ordinance or statute does not provide a time limit within which an appeal to the board of appeals must be filed, the court has held that a period of 60 days constitutes a reasonable appeal period. *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162; *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545 (CEO's issuance of stop work order nearly two years after permit issued by former CEO was deemed an untimely appeal of the original permit decision); *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598. However, the court may allow an appeal for "good cause" even if an appeal deadline provided in a local ordinance has expired. *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422. The Maine Supreme Court has held that in the case of the issuance of a building permit by a building inspector, the appeals period begins to run from the date of issuance of the permit, even though there was no formal public decision-making process. *Boisvert v. King*, 618 A.2d 211 (Me. 1992); *Otis v. Town of Sebago*, 645 A.2d 3 (Me. 1994); *Wright v. Town of Kennebunkport*, 715 A.2d 162 (Me. 1998); *Juliano v. Town of Poland*, 725 A.2d 545 (Me. 1999). The deadline for filing an appeal from a planning board decision on a subdivision application is governed by local ordinance, if the appeals board has been authorized to hear such an appeal; it runs from the date of the planning board's written order. *Hylar v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990).

Appeal to Superior Court. An appeal to the Superior Court from a decision of the appeals board must be filed within 45 days of the date of the board's original decision on an application (not the date of a decision to reconsider an earlier decision, where there has been a request to reconsider). 30-A M.R.S.A. § 2691. *Forbes v. Town of Southwest Harbor*, 2001 ME 9, 763 A.2d 1183. This means within 45 days of the meeting at which the board actually voted on the application, even though the applicant may not have received written notice of the decision. *Vachon v. Kennebunk*"; *Overlock v. Inhabitants v. Town of Thomaston*, AP-02-004 (Me. Super. Ct., Knox Cty., February 11, 2003); *Carroll v. Town of Rockport*, 2003 ME 135, 837 A.2d 148. It is possible that a court might allow these time periods to be extended under Rule 80B if the person filing the appeal can show good cause, but probably unlikely where a time period has been established by statute. *Reed v. Halprin*, 393 A.2d 160 (Me.1978). For an appeal which must go directly to Superior Court because there is no local appeal by statute or by ordinance, the appeal deadline is governed by Rule 80B and is 30 days from the date of the vote, except in the case of a subdivision decision, where the court has ruled that the deadline runs from the date of the planning board's written order. *Hylar, supra*. If the applicable local ordinance establishes a deadline for appealing a zoning decision by a planning board directly to Superior Court, then that deadline will control. *Woodward v. Town of Newfield*, 634 A.2d 1315,1317 (Me. 1993).

Untimely Appeal; Incomplete Appeal Application. The board of appeals has no authority to change an appeal period. When an appeal is filed late, the board of appeals must take a vote as a board at a public meeting of the board finding that the appellant missed the deadline and deny the application on that basis. The person who filed the appeal may then appeal to Superior Court. If the court finds that a flagrant miscarriage of justice would occur if the appeal were not heard, the court may remand the case to the board of appeals. *Wright, supra; Keating, supra; Gagne, supra.* As a general rule, the court will dismiss an appeal which was not filed within the applicable time limits.

An appeal to the board of appeals is not timely if it is not filed in accordance with the municipality's required procedures, including the completion of whatever appeal application form is required by the municipality and payment of any required fee. *Washburn v. Town of York*, CV-92-11 (Me. Super. Ct., York Cty., November 10, 1992); *Breakwater at Spring Point Condominium Assoc. v. Doucette*, AP-97-28 (Me. Super. Ct., Cum. Cty., April 8, 1998). The fact that a permit was void when issued does not have any bearing on the deadline for appealing the issuance of the permit or the board's jurisdiction. *Wright, supra.* But see, *Brackett v. Rangeley, supra.*

Indirect Attempts to Challenge an Appeals Board Decision Without Appealing; Refusal of Other Town Official(s) to Comply With Appeals Board Order. If a decision is not appealed, it cannot be challenged indirectly at a later date by way of another appeal on a related matter. Nor can one town official or board challenge a decision by another town official or board by refusing to issue a permit or approval on the basis that the other board's or official's decision was wrong. (For example, if a board of appeals grants a setback variance which the planning board believes is illegal, the planning board cannot refuse to grant its approval for the structure which was the subject of the variance solely on the basis that the variance should not have been granted. The planning board must "live with" the decision of the appeals board unless the planning board, municipal officers, or other "aggrieved party" successfully challenges the variance in Superior Court.) *Milos v. Northport Village Corporation*, 453 A.2d 1178 (Me. 1983); *Fisher v. Dame*, 433 A.2d 366 (Me. 1981); *Ocean Park Associates v. Town of Old Orchard Beach*, No. CV-87-396 (Me. Super Ct., Yor. Cty, Dec. 23, 1988). See also *Town of North Berwick v. Jones*, 534 A.2d 667 (Me. 1987), *Fitanides v. Perry*, 537 A.2d 1139 (Me. 1988), and *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989), and *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998) (dealing with collateral estoppel/res judicata) (Me. 1990); *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991). A planning board decision made under a local zoning ordinance must be appealed first to the local board of appeals, unless the ordinance expressly authorizes a direct appeal to court. This is also true for a site plan review decision where the site plan review is part of a zoning ordinance and not a separate ordinance. *Hodson v. Town of Hermon*, 2000 ME 181, 760 A.2d 221; *Thomas v. City of South Portland*, 2001 ME 50, 768 A.2d 595.

Exhaustion of Remedies

If a statute or ordinance requires appeals to be heard first by the board of appeals, a court generally will refuse to decide an appeal which has been filed directly with the court. This is true even where the municipality has not appointed anyone to serve on the board of appeals or where the municipality is required by State law to have a board of appeals but has not created one. The legal concept involved here is called “exhaustion of administrative remedies.” *Fletcher v. Feeney*, 400 A.2d 1084 (Me. 1979); *Noyes v. City of Bangor*, 540A.2d 1110 (Me. 1988); *Freeman v. Town of Southport* 568 A.2d 826 (Me. 1990); *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991).

Standing

“Particularized Injury” Test. When a citizen can demonstrate that he or she has suffered, or will suffer, a “direct and personal injury” as a result of a decision by the planning board or CEO, that citizen has “standing” to file an appeal with the board of appeals if the board has jurisdiction. To meet the “direct and personal injury” test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. *Brooks v. Cumberland Farms, Inc.*, 1997 ME 203, 703 A.2d 844; *Christy’s Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d 535 (Me. 1991); *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987); *New England Herald Development Group v. Town of Falmouth*, 521 A.2d 693 (Me. 1987); *Leadbetter v. Ferris*, 485 A.2d 225 (Me. 1984); *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91 (Me. 1984); *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983). The court has held that “particularized injury” for abutting landowners can be satisfied by a showing of ‘the proximate location of the abutter’s property, together with a relatively minor adverse consequence if the requested variance were granted’.” *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673. See also, *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266 (defining “abutter” to include “close proximity”); and *Drinkwater v. Town of Milford*, AP-02-08 (Me. Super. Ct., Pen. Cty., April 18, 2003) (son of landowners whose property abutted the applicants’ and who worked on his parents’ land failed to document that he had a future interest in his parents’ land sufficient to give him standing to appeal as an abutter).

Actual Participation in Proceedings Required. Anyone wishing to appeal from a planning board decision to the board of appeals or a board of appeals decision to Superior Court under Rule 80B must also be able to show actual participation for the record in the local hearing on the application or appeal. It is not enough for a person to express his/her concerns to board members or other officials outside the setting of the public hearing or to speak at a preliminary meeting of the board regarding the appeal. Participation must be at the official hearing in person or through someone there acting as the person’s official agent or by submitting written comments for the official hearing record. *Jaeger v. Sheehy*, 551 A.2d 841 (Me. 1989); *Lucarelli v. City of South Portland*, 1998 ME 239, 719 A.2d 534; *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371. Under 30-A M.R.S.A. § 4353, the municipal officers and the planning board are automatically made

“parties” to the appeals board proceedings, so they would not have to meet the test outlined above in order to file an appeal in Superior Court from an appeals board decision. *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989). The same is not true for other officials, like the code enforcement officer, who want to appeal the board of appeals’ decision; since those other officials are not statutory parties, they would have to satisfy the two-part test for standing. *Tremblay v. Inhabitants of Town of York*, CV-84-859 (Me. Super. Ct., York Cty., Oct. 3, 1985). However, any official wishing to appeal a decision of the planning board to the board of appeals must show actual participation for the record in the planning board’s public hearing to satisfy the test for standing, just like any other citizen. See, *Department of Environmental Protection v. Town of Otis*, 1998 ME 214, 716 A.2d 1023. If an appeal is brought by a citizens’ group or some other organization, the test for the organization’s standing to appeal is whether it can show that “any one of its members would have standing in his/her own right and that the interests at stake are germane to the organization’s purpose.” *Pride’s Corner Concerned Citizens Assn. v. Westbrook Board of Zoning Appeals*, 398 A.2d 415 (Me. 1979); *Widewaters Stillwater Co., LLC v. City of Bangor*, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001); *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978); *Penobscot Area Housing Development Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981); *Conservation Law Foundation Inc. v. Town of Lincolnville*, AP-00-3 (Me. Super. Ct., Waldo Cty., February 26, 2001).

Appeal by Permit Holder. If the person wishing to appeal is the person who applied for a permit from the planning board, that person has automatic standing to appeal, whether or not he/she attended or otherwise participated in the proceedings of the planning board or the appeals board; the written application for the permit or the appeal is sufficient participation. *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). However, where the applicant had allowed their purchase and sale agreement to lapse before filing an appeal, the court held that they had no standing to pursue a denial of their permit application. *Madore v. Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157.

Appeal by Municipality. See *City of Bangor v. O’Brian*, 1998 ME 130, 712 A.2d 517 for an example of a case where the municipality challenged a board of appeals decision in Superior Court.

Standard of Review. Unless a local ordinance expressly provides otherwise, when a planning board or code enforcement officer’s decision is appealed to the board of appeals, the board is not limited to reviewing the record prepared by the planning board or code enforcement officer in making its decision. The Maine Supreme Court has held that 30-A M.R.S.A. § 2691 requires a board of appeals to conduct a “de novo” review of the appeal, “unless the municipal ordinance explicitly directs otherwise.” *Stewart v. Town of Sedgwick*, 2000 ME 157, 757 A.2d 773; *Yates v. Town of Southwest Harbor*, 2001 ME 2, 763 A.2d 1168. (See also the Maine Superior Court decision in *Buell v. Town of Southwest Harbor*, AP-03-11 (Me. Super. Ct., Han. Cty., August 29, 2003). This means that the board of appeals starts the review process from scratch, holding its own hearings, creating its own record, and making its own independent judgment of whether a project

should be approved based on the evidence in the record which the board of appeals created. The record created by the planning board or code enforcement officer is relevant only to the extent that it is offered as evidence for the record of the board of appeals hearing. The board of appeals will weigh that evidence along with any other that it receives. The board of appeals does not use its record to judge the validity of the decision made by the planning board or code enforcement officer. The board of appeals almost must pretend that the planning board or code enforcement officer decision was never made. In a “de novo” proceeding, the board of appeals is not deciding whether the planning board or code enforcement officer decision was in conformance with the ordinance, whether it was supported by the evidence in the record, or whether it had procedural problems. The board of appeals is deciding only whether the new record which the board of appeals has created supports a finding by the board of appeals that the permit application should be approved or denied. It does this by following the procedures and using the performance standards/review criteria that governed the CEO or planning board in making the original decision.

When a local ordinance does expressly provide that the board of appeals’ role is strictly an “appellate review,” the board’s job is to review the record created by the official or board whose decision is being appealed and decide whether that record supports the original decision and whether the original decision is consistent with the ordinance. The role of the board of appeals is like that of an appeals court. The board is not conducting a hearing to solicit new evidence in order to create its own record. It is not starting from scratch and is not making its own independent decision. Its decision would not be in the form of “findings of fact” and “conclusions of law.” That format is used only when the board conducted a de novo review or was the original decision-maker, according to the court in *Yates*, supra. The board may hear presentations by each of the parties, but only for the purpose of summarizing the case or trying to clarify certain points; new evidence or arguments may not be introduced.

To determine whether the ordinance under which a decision is being appealed creates an appellate review role or a de novo review role for the board of appeals, the board should seek advice from the municipality’s private attorney or from the Maine Municipal Association’s Legal Services Department.

At least one Superior Court case has suggested that there may be times when a board of appeals must entertain testimony during its review of an appeal if the person seeking to offer evidence is entitled to due process, even though the board is conducting appellate review. The example given by the court involved a permit decision by a code enforcement officer where there was no hearing process at which an abutter could testify. The court suggested that an abutter who wanted to challenge the granting of a permit by the code enforcement officer would be deprived of due process if the board of appeals could not hear testimony from the abutter and was required to make its decision based solely on the record created by the code enforcement officer. *Salisbury v. Town of Bar Harbor*, AP-99-35 (Me. Super. Ct., Han. Cty., January 23, 2001).

Authority of Appeals Board Regarding Decision Appealed. As a general rule, in deciding an appeal, whether de novo or in an appellate review capacity, the board of appeals does not have the power to issue a permit. If the board of appeals decides that a permit or approval should be granted, then part of its decision would include an instruction to issue the permit or approval directed to the code enforcement officer, planning board, or whoever had initial jurisdiction over the permit application. However, a different approach may be authorized or required by local ordinance.

Consolidation of Pending Appeals. It is possible that a decision made by the CEO or planning board will be appealed to the board of appeals by different parties at different times within the appeal period citing the same or different grounds for appeal. Absent language in an applicable statute or ordinance to the contrary, the board of appeals probably could either hear the appeals separately or consolidate them. If the board wants to consolidate them in order to minimize the time and expense and confusion of dealing with each one separately, it would be advisable to get the written consent of the parties before doing so. If written consent is refused, then the board should handle each appeal independently to avoid any risk of jeopardizing an appellant's appeal deadlines or other rights.

Court Review of Appeals Board Decision. If the board of appeals conducted a "de novo" review of an appeal and the board of appeals' decision is appealed to Superior Court, the Superior Court will review the board of appeals decision and board of appeals record in determining whether to uphold or reverse the decision. If the board of appeals acted in an "appellate review" capacity, then the Superior Court will review the original decision made by the planning board or code enforcement officer and the related record, and not that of the board of appeals'. *Stewart, supra*. The court must decide whether the decision-maker "abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record." *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102, 104 (Me. 1984); *Juliano v. Town of Poland*, 1999 ME 42; 725 A.2d 545 (Me. 1999); *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013; *Hannum v. Board of Environmental Protection*, 2003 ME 123. It will uphold the decision being appealed unless it was "unlawful, arbitrary, capricious, or unreasonable." *Senders v. Town of Columbia Falls*, 647 A.2d 93 (Me. 1994); *Kelly & Picerne v. Wal-Mart Stores*, 658 A.2d 1077 (Me. 1995); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me. 1998). The court will uphold the board's decision even if conflicting evidence in the record would support a contrary decision, as long as the record does not compel a contrary conclusion. *Herrick v. Town of Mechanic Falls*, 673 A.2d 1348 (Me. 1996); *Two Lights Lobster Shack, supra*; *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989). If the official or board whose decision is reviewed by the court failed to make required findings and conclusions, the court generally will "remand" the case to that decision-maker with instructions to make written findings sufficient to allow the parties and the court to know whether or not the applicant satisfied each relevant ordinance standard and why. E.g., *Carroll v. Town of Rockport*, 2003 ME 135, 837 A.2d 148; *Chapel Road Associates v. Town of Wells*, 2001 ME 178, 787 A.2d 137; *Widewaters Stillwater v. BAACORD*, 2002 ME 27, 790 A.2d 597; and *Ram's Head Partners LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916.

Compare those cases with *Bragdon v. Town of Vassalboro*, 2001 ME 137, 780 A.2d 299, and *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371.

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

Status of Original Permit or Approval During Appeal Period or During Period When Appeal Being Reviewed. In the absence of a statute or ordinance provision or a court order to the contrary, the right of the person who received the initial permit or approval to proceed with the approved project is not “stayed” (prohibited temporarily). That person is free to proceed with the project, but does so at his/her peril; if an appeal is filed and decided in favor of the person challenging the permit/approval, the permit holder will have to comply with any final order by a court or appeals board to discontinue the work, remove what was done and restore the area. To avoid this additional expense, it would be in the permit holder’s best interest to wait and see if an appeal is filed and its outcome before proceeding with approved work.

Board of Appeals Members Attending Planning Board Meetings. Whether a board of appeals hears an appeal “de novo” or in an “appellate capacity” (see discussion earlier in this chapter), it probably is not good practice for board members to attend planning board meetings on applications which are likely to be appealed to the board of appeals. The board of appeals should be making its decisions based on evidence presented to it as part of its own proceedings. By not attending the planning board’s meetings, the appeals board will minimize bias and due process problems with its own proceedings by ensuring that the only information which will affect its decision on an appeal is what is presented directly to it and of which all participants will be aware. Board members who do learn information outside the board of appeals meetings have an obligation to note that information for the record.

Authority of Municipal Officers

The municipal officers do not have the inherent authority to hear appeals and override a decision of the planning board (or board of appeals). As a general rule, appeals are heard by the board of appeals and the courts.

Role of Planning Board at Board of Appeals Hearing. If a decision made by the planning board is appealed to the board of appeals, the planning board should attend the BOA meetings at which the appeal is heard and decided, either as a whole board or by designating one or two board members to speak on the board’s behalf. The planning

board should be prepared to defend its decision, answer questions about its decision, and provide other information as required by the board of appeals to help ensure that the board of appeals does not overturn the planning board's decision without substantial justification. Members of the two boards should not discuss the case outside of the appeals board meeting in order to ensure that the applicant's due process rights are not violated.

Second Appeal of Same Decision/Reconsideration by the Board of Appeals

Second Appeal. Unless an ordinance provides otherwise, the Maine Supreme Court has held that an applicant whose appeal or request for a variance was denied has no legal right to request another hearing on the same appeal or variance unless he or she can show a substantial change in the circumstances which provided the basis for the first appeal or variance. *Driscoll v. Gheewalla*, 441 A.2d 1023 (Me. 1982). *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985).

Reconsideration. Title 30-A M.R.S.A. § 2691 authorizes a board of appeals to reconsider a decision 'within 30 days of its prior decision.' This statute further provides that '(a) vote to reconsider and the action taken on that reconsideration must occur and be completed within 30 days of the date of the vote on the original decision.' The entire process of voting whether to reconsider and taking action on the reconsideration itself must be completed within that time frame. In *Carmel v. City of Old Town*, AP-00-9 (Me. Super. Ct., Pen. Cty., Feb. 19, 2001), a Superior Court justice interpreted this language as 'adding 30 days to any time limit that may be imposed locally on the issuance of the 'prior decision' (i.e., the local time limit for issuing a written decision); the *Carmel* decision was affirmed by the Maine Supreme Court in *Carmel v. City of Old Town*, Decis. No. Mem. 01-82 (Oct. 3, 2001), a non-precedential Memorandum of Decision. When reconsidering a decision, the board is authorized to hold additional hearings and receive additional evidence. Before beginning a reconsideration process, the board must give direct notice to the original appellant and/or applicant, *Doggett v. Town of Gouldsboro*, 2002 ME 175, 812 A.2d 256, and to any one else required by the ordinance or State law to receive special notice of the original proceedings. Notice also must be given to the public in the manner required for the original proceedings. If specific individuals actively participated in the original hearing, the board should also notify them directly of the reconsideration hearing. *Anderson v. New England Herald Development Group*, 525 A.2d 1045 (Me. 1987). (For other cases involving reconsideration issues, see *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987), *Cardinali v. Town of Berwick*, 550 A.2d 921 (Me. 1988), and *Gagnon v. Lewiston Crushed Stone*, 367 A.2d 613 (Me. 1976).) If someone has already filed a Rule 80B appeal from the board's original decision, the board should not attempt to reconsider its original decision on its own initiative or at the request of someone else without consulting the attorney who will handle the case for the municipality in court. If a request for a reconsideration is received, the board must vote at a meeting preceded by public notice as to whether it will entertain the request or deny it. Even if the chair knows that the board always rejects requests filed too close to the end of the 30-day deadline, the chair must schedule it for action at a board meeting if the person will not withdraw the request. In the Maine Supreme Court case of *Forbes v. Town of Southwest Harbor*, 2001 ME 9, 763 A.2d 1183, the board

voted to reconsider its decision but postponed making a final reconsideration decision on the substantive issues to a meeting date which was more than 30 days from the date of its original decision. In the meantime, the property owner had filed a Rule 80B appeal in Superior Court in order not to jeopardize his appeal rights. The Superior Court remanded the case to the board of appeals, ordering it to make a reconsideration decision. The Maine Supreme Court found that the board had a statutory duty to complete the process within 30 days of the original decision and that the landowner should not be penalized by this failure of the board because it was not within his control to prevent it. The normal 45-day deadline for filing a Rule 80B appeal in Superior Court arguably is extended in the case of a reconsideration proceeding. The Carmel case cited above, citing *Cardinali v. Town of Berwick*, 550 A.2d 921, 922 (Me. 1988), held that “the period of limitations is tolled while a motion for reconsideration is pending,” despite the express language of § 2691 (3)(F) and the legislative history of that section. Until another court adopts the holding in Carmel, a municipality may want to cite the Forbes case in support of the argument that the deadline is 45 days from the date of the original decision.

Authority of the Board to Modify/Revise an Appeal Application. If a person submits an application to the planning board or code enforcement officer for a permit and is denied, there may be several bases on which that person can or should appeal to the board of appeals (where a local appeal is authorized). The person may file an administrative appeal seeking to challenge the way the ordinance was administered, the way an ordinance provision was interpreted, or the way the evidence was analyzed in deciding whether the application met the ordinance requirements. Sometimes, as the board is reviewing the appeal which has been filed, it may conclude that the applicant hasn't requested exactly what he/she needs in order to get the approval that he/she wants for the proposed activity. For example, a person's application may have been denied because the planning board thought his structure needed to satisfy a setback requirement, so he appealed to the board of appeals for a variance. In reviewing the appeal, the board may conclude that the planning board misinterpreted the ordinance and that no variance is needed because the ordinance allows the proposed construction under a nonconforming structure provision. The Maine Supreme Court has held that in a case such as this, it is not necessary for the board of appeals to deny the appeal and make the person submit a new administrative appeal application seeking an interpretation of the ordinance. *Cushing v. Smith*, 457 A.2d 816,823 (Me. 1983). According to the court, the board of appeals has the authority to "address all issues raised and to correct plain error." It is not as clear from *Cushing* how the board should handle a situation where the person has filed an administrative appeal but really needs a variance. Since a variance has a totally different set of criteria which the person must satisfy and since abutters may be more interested in an appeal if a variance is being sought, it probably is safest for the board of appeals to require that the applicant fill out a separate variance appeal application and then advertise a new hearing on the variance request.

Relevance of Deed Restrictions; Title Disputes; Constitutional Issues; Other Code Violations and Related Lawsuits. The board cannot deny an application because the proposed use would violate a private deed restriction if the use otherwise would be in compliance with the applicable ordinance/statute. *Whiting v. Seavey*, 188 A.2d 276 (Me. 1963). Cf., *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995). The board has no legal authority to resolve boundary or title disputes as part of its decision on an application. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises*, 531 A.2d 1272 (Me. 1987). (See sample language in Appendix 5 which the board can insert into its decision in a case where a title or boundary issue has been raised to make clear that the board's granting of approval in no way resolves the title problem.) If the board is presented with credible written expert evidence by both the applicant and an opponent which is in direct conflict and which involves a title/boundary issue, the board probably has the option of either tabling action pending the resolution of the title or boundary dispute by the parties (either voluntarily or by court order) or denying approval on the basis that the board is unable to find that the applicant has met the required burden of proof. The board also cannot resolve constitutional problems with an ordinance in deciding an application. Cf., *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). The fact that the property involved is already the subject of other code violations also would not constitute a basis for denial, absent language in the ordinance to that effect. *Bauer v. Town of Gorham*, CV-89-278 (Me. Super. Ct., Cum. Cty., Nov. 21,

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

Chapter 4

Planning Board Manual Variances and Waivers

[Supplements # 1 & 2 are incorporated into the text of this chapter.]

Variations and Waivers

Authority to Grant Variations or Waivers

Zoning Variations. A zoning ordinance provision which attempts to give the planning board, code enforcement officer, or municipal officers the authority to grant variations violates 30-A M.R.S.A. § 4353, since the statute gives the board of appeals the sole authority to grant a zoning variance. *Perkins v. Town of Ogunquit*, 709 A.2d 106 (Me. 1998). A municipality's home rule authority under 30-A M.R.S.A. § 3001 has been preempted by 30A M.R.S.A. § 4353 regarding delegation of authority to grant zoning variations.

Non-Zoning Variations. Often a subdivision or site plan review ordinance or other non-zoning ordinance gives the planning board the authority to "waive" certain requirements of the ordinance if they would cause "hardship" to the applicant. The definition of "hardship" in that context is not necessarily the same as the definition of "undue hardship" in section 4353, unless the ordinance expressly refers to the statutory definition. Although the municipality may give the authority to grant these waivers to the board of appeals, there is no conflict with § 4353 if the ordinance empowers the planning board to grant waivers. In any case, a non-zoning ordinance which authorizes the planning board or the municipal officers to waive certain requirements should set out standards for the board to use in determining whether an applicant will suffer a hardship without a waiver. However, if the waiver authority granted to the planning board or municipal officers under a non-zoning ordinance attempts to authorize the board to waive dimensional requirements established under a zoning ordinance, such a waiver provision is probably beyond the municipality's home rule authority and is probably illegal. *Perkins v. Town of Ogunquit*, 709 A.2d 106 (Me. 1998) *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172.

The Maine Supreme Court in the case of *Jarrett v. Town of Limington*, 571 A.2d 814 (Me. 1990), overturned a number of waivers granted by the planning board from various requirements of the town's subdivision ordinance. The court found that the board had exceeded the authority granted to it under the language of the ordinance.

Procedure for Obtaining a Variance

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

Recording Variations/Abandonment of an Approved Variance

Recording Requirement. State law (30-A M.R.S.A. § 4353 and 4406) requires the

board of appeals and the planning board to prepare a certificate which can be recorded in the Registry of Deeds and provide it to the applicant for recording whenever they grant a zoning variance or a subdivision variance or waiver. (A sample form and copy of the law related to subdivisions is included in Appendix 3.) To be valid, zoning variance certificates must be recorded within 90 days of the decision. Subdivision variances or waivers must be recorded within 90 days of final approval of the plan. If these certificates are not recorded within the stated deadlines, they become void. The only way to “reactivate” the variance or waiver in that case is for the person wishing to rely on the variance or waiver to submit a new application on which the board may act. The board’s review would be governed by the ordinance in effect at the time of the new application. The board is not obligated to grant the variance automatically the second time around; if it determines that it made a mistake the first time, it should deny this new request. *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930. If the board of appeals’ jurisdiction to hear a variance request is triggered by the denial of a permit application (or similar application) and an appeal from that decision, then the person whose variance has become void would need to reapply for the permit/approval and be denied again in order for the board of appeals to have jurisdiction over the new variance request, absent language in the ordinance to the contrary.

Abandonment. If a person has recorded a variance certificate but later decides that he wants to abandon the variance and give up his legal rights in relation to it, he probably may do so, but there is no process spelled out in State law. Absent a procedure provided by ordinance, the person should make a written request to the board of appeals. The board should take a formal vote acknowledging that the owner wants to abandon the variance and issue a “certificate of abandonment” which can be recorded at the Registry. Such a written request and certificate could be patterned after similar documents developed by Portland attorney William Dale for abandonment of subdivision approval, which appear in Appendix 3 of this manual. Before approving and issuing a certificate, the board of appeals should require proof that neither the applicant, the landowner (if a different person), nor any third party had taken action in reliance on the original granting of the variance which might be jeopardized by its abandonment.

Variance/Waiver vs. Special Exception/Conditional Use

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

Special exception and conditional use provisions in a zoning ordinance deal with uses which the legislative body generally has decided to permit in a particular area of town. The purpose of the special exception or conditional use review procedure is to allow the planning board or board of appeals (whichever one is authorized by the ordinance) to

determine whether conditions should be imposed on the way the use is conducted or constructed, in order to ensure that the use is consistent with and has no adverse impact upon the surrounding neighborhood. This decision must be guided by specific ordinance standards.

Effect of Variance Decision

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

Once granted, a variance “runs with the land,” meaning that the variance is transferred automatically to a new owner if the property subsequently changes hands. Young, *Anderson’s American Law of Zoning* (4th ed.), § 20.02; *Inland Golf Properties v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000). 3 Anderson, *American Law of Zoning* 3d, § 20.02. After a variance is granted and a building is constructed or activity conducted based on that variance, the building or activity thereafter should be treated as a legally conforming structure or use for the purposes of deciding which ordinance provisions govern it in the future. *Sawyer Environmental Recovery Facilities Inc. v. Town of Hampden*, 2000 ME 179, 760 A.2d 257. This is probably true even if the variance is granted illegally, if it is not appealed. *Wescott Medical Center v. City of South Portland*, CV-94-198 (Me. Super. Ct., Cum. Cty., July 15, 1994).

Shoreland Zoning Variances

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

Appeal of Board of Appeals Decision by Other Municipal Officials

If the municipal officers or the planning board believe that the board of appeals has wrongfully granted a zoning variance where the applicant has not met all of the criteria for ‘undue hardship’ set out in § 4353, or if they believe that the board has otherwise made an incorrect decision on an appeal, as a board they have ‘standing’ to challenge the board of appeals’ decision in Superior Court pursuant to 30-A M.R.S.A. § 4353(4). *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989). However, in the case of an appeal by the planning board, the municipal officers may not necessarily vote to pay for such an appeal, so the planning board should consult with the municipal officers before retaining a lawyer to avoid having to pay from their own pockets.

Chapter 5

Planning Board Manual

Vested Rights, Equitable Estoppel, Pending Applications, and Permit Revocation

[Supplement # 1 & #2 have been incorporated into this chapter.]

Vested Rights, Equitable Estoppel, Pending Applications, and Permit Revocation

Revocation of Permit or Approval

Situations may arise in which a property owner obtained municipal approval before doing work, but the official/board who issued the approval believes that it should be revoked. Generally, the issuing official or board should not attempt to revoke the permit or approval on the ground that the property owner is violating certain conditions of the approval, unless authorized by a court order. However, the issuing authority may have authority to revoke its approval after providing notice and an opportunity for a hearing, without being authorized to do so by a court order or by ordinance, upon discovering that it granted the approval without authority or that the applicant made false statements on the application which were material to the decision. 83 *Am. Jur.*2d, “Zoning and Planning,” § 645; 13 *Am. Jur.*2d, “Buildings,” §§ 16, 18; *McQuillin, Municipal Corporations* (3rd ed. rev.), §§ 26.212a, 26.213, 26.214. The Maine Supreme Court in *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545, held that a new code enforcement officer’s attempt to revoke a permit which was improperly granted by the prior code enforcement officer constituted an untimely appeal of the former code enforcement officer’s decision and allowed the permit to stand; the court didn’t comment about whether the code enforcement officer who had issued the illegal permit could have revoked it himself at that point if he were still in office. In a concurring opinion in the Maine Supreme Court’s decision in *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422, one of the justices observed that a permit approved and issued by the wrong local official is totally invalid and cannot serve as a basis for a claim of vested rights. Before attempting to revoke any permit or approval, the board or official should consult with its municipal attorney.

A person aggrieved by the issuance of a permit or an approval cannot bypass an applicable appeal deadline simply by requesting that the official or board in question revoke it and then appealing a decision not to revoke. *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162. However, a court may waive an appeal deadline to prevent a “flagrant miscarriage of justice.” *Brackett v. Town of Rangeley, supra*.

The Maine Supreme Court has suggested that a person who begins substantial work (more than site preparation) in good faith reliance on a validly issued permit may obtain vested rights in that permit. *Thomas v. Bangor Zoning Board of Appeals*, 381 A.2d 643 (Me. 1978). (The test for analyzing whether a permit holder has acquired “vested rights” is discussed later in this chapter.) The issue of whether someone has established vested rights is generally one for the courts to decide, not municipal boards. Parties may raise these issues as part of a municipal board proceeding in order to preserve them for argument before a court later on, however.

Applicability of New Ordinances to ‘Pending’ Applications or Approved Projects; Expiration and Retroactivity Clauses

“Pending” Applications. Sometimes a municipality amends an applicable ordinance provision either while an application is being reviewed by the board or after the board has granted its approval but before the landowner has begun any of the work authorized by the board. If an application is “pending” when the ordinance is amended, 1 M.R.S.A. § 302 requires the board to complete its review under the original ordinance, unless the new ordinance contains a retroactivity clause. (Such clauses have been upheld by the Maine Supreme Court. *City of Portland v. Fisherman’s Wharf Associates II*, 541 A.2d 160 (Me. 1988).) The courts have found that an application is “pending” if the board has conducted at least one substantive review of the application, absent a contrary provision regarding what is “pending” in the ordinance. *Littlefield v. Inhabitants of Town of Lyman*, 447 A.2d 1231 (Me. 1982); *Maine Isle Corp., Inc. v. Town of St. George*, 499 A.2d 149 (Me. 1985); *Brown v. Town of Kennebunkport*, 565 A.2d 324 (Me. 1989); *Walsh v. Town of Orono*, 585 A.2d 829 (Me. 1991). Section 302 defines “substantive review” as a “review of that application to determine whether it complies with the review criteria and other applicable requirements of law.” Preliminary review of an application for completeness generally does not constitute a substantive review. *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779 (Me. 1989). The fact that an application was delivered to the town office or received and receipted by the town office staff does not make an application “pending,” absent a local ordinance to the contrary. *P.W. Associates v. Town of Kennebunkport*, CV-88-716 and CV-89-29 (Me. Super. Ct., York Cty., November 20, 1989).

Where a project is governed by more than one ordinance, the fact that an application is “pending” under one ordinance does not mean that it is “pending” for all purposes. Changes enacted in other relevant ordinances would apply. *Larrivee v. Timmons*, 549 A.2d 744 (Me. 1988); *Perrin v. Town of Kittery*, 591 A.2d 861 (Me. 1991).

Approved Projects; Expiration Clause. Generally, once the board has granted project approval, a property owner has an unlimited amount of time within which to complete the work covered by the approval. However, the board should check the applicable ordinance to be sure. Some ordinances provide that a decision granting project approval expires if work is not begun or completed to a certain degree within a certain period of time. This type of provision has been upheld by the court in Maine. *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993); *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

Even in the absence of such an expiration clause, it may be possible to apply new ordinances to previously approved projects in certain cases, depending on the facts. For example, where a subdivision plan has been recorded for a number of years and the landowner has not sold the lots or made any substantial expenditures to develop the plan,

it may be possible to require the owner to merge some of the lots shown on the plan to bring them into compliance with new lot size and frontage requirements which were adopted after the approval of the plan. This is an issue which has not been directly addressed by the Maine courts, so it is advisable for the board to consult with an attorney before deciding what to do in such situations. See, *Thomas, supra*; *Fisherman's Wharf, supra*; *Larrivee, supra*; and *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992). Compare those cases with *Littlefield v. Town of Lyman, supra*; *Cardinali v. Planning Board of Town of Lebanon*, 373 A.2d 251 (Me. 1978); and *Henry and Murphy Inc. v. Town of Allenstown*, 424 A.2d 1132 (NH 1980).

Retroactivity Clause. It is arguable that a new ordinance can be made applicable to an approved but uncompleted project by incorporating appropriate language in a retroactivity clause. *Fisherman's Wharf, supra*. However, it is questionable whether 1 M.R.S.A. § 302 permits a municipality to make an ordinance retroactive to a date before the date on which the public first had notice of the proposed ordinance.

Equitable Estoppel

Based on the facts of a particular situation, a municipality may be equitably estopped (prevented) from revoking a permit because a person has changed his or her position in reasonable and detrimental reliance upon the issuance of a permit or other approval. *City of Auburn v. Desgrossilliers*, 578 A.2d 712 (Me. 1990); *F. S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1992); *H. E. Sargent v. Town of Wells*, 676 A.2d 920 (Me. 1996); *Turbat Creek Preservation LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489. A finding of estoppel against a municipality is rare, however. The courts have not found a municipality estopped by oral representations of a code enforcement officer where the ordinance clearly required any official decision or ruling made by the CEO to be in writing. *Shackford and Gooch v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984); *Courbron v. Town of Greene*, AP-01-019 (Me. Super. Ct., Andro. Cty., November 19, 2002). In deciding whether a municipality should be estopped, a court will consider the “totality of the circumstances, including the nature of the particular governmental function being discharged, and any considerations of public policy arising from the application of estoppel to the governmental function.” *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). See also, *Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598.

Vested Rights

Vested Rights to Proceed with Approved Construction Under Existing Ordinance. The Maine Supreme Court in *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266, stated that “in order for a right to proceed with construction under the existing ordinance to vest, three requirements must be met: (1) there must be the actual physical commencement of some significant and visible construction; (2) the commencement must be undertaken in good faith ...with the intention to continue with the construction and to carry it through to completion; and (3) the commencement of construction must be pursuant to a validly issued permit” (citing a number of cases from Maine and other

states). The court went on to note that “rights may not vest solely because a property owner: (1) filed an application for a building permit; (2) was issued a building permit; (3) relied on the language of the existing ordinance; or (4) incurred preliminary expenses in preparing and submitting the application for a permit” (citing a number of Maine cases). In *Sahl* the court found that the landowner had acquired vested rights based on the facts and also found that an expiration clause applicable on its face to permits approved before a certain date did not apply to the project in question.

Vested Rights in Erroneously Approved Permit. In a concurring opinion in the Maine Supreme Court’s decision in *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422, one of the justices observed that a permit approved and issued in error is totally invalid and cannot serve as a basis for a claim of vested rights; however, that position has not been clearly adopted by a majority of the court. A vested rights test adopted by the Pennsylvania court in relation to an erroneously approved permit in *Department of Environmental Resources v. Flynn*, 344 A.2d 720 (PA Cmwlth 1975) is as follows:

- Did the applicant exercise due diligence in attempting to comply with the law?
- Did the applicant demonstrate good faith throughout the proceedings?
- Did the applicant expend substantial unrecoverable funds in reliance on the board’s approval?
- Has the period during which an appeal could have been taken from the approval of the application expired?
- Is there insufficient evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the project as approved?

If a person receives approval for a project, but the board later determines that it has granted the approval in error (such as for a use which is prohibited by the pertinent ordinance or which requires the approval of another board or official), before attempting to treat the approval as invalid or revoke it, the board should seek legal advice regarding whether the person has acquired vested rights in the approval under the facts of that particular situation. If the error is not detected by the board or official who granted the original permit or approval, and if the time for appealing the original decision has expired, the permit or approval probably cannot be revoked. *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545; *Wright v. Town of Kennebunk*, 1998 ME 184, 715 A.2d 162. Compare with *Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422.

Chapter 6

Planning Board Manual Ordinance Interpretation

[Supplement #1 & # 2 have been incorporated into this chapter.]

Ordinance Interpretation

General Ordinance Interpretation Rules

If the board is confronted with an ambiguous provision in a zoning ordinance and is unsure about how to apply the provision to a particular project, it should keep the following rules of ordinance interpretation in mind. The board may find it necessary to seek advice from an attorney in many instances in order to determine how these general rules apply to the ordinance involved.

Consistency. To determine the purpose of the ordinance provision, interpret each section to be in harmony with the overall scheme envisioned by the municipality when it enacted the ordinance. The assumption is that the drafter would not have included a provision that clearly was inconsistent with the rest of the ordinance. *Natale v. Kennebunkport Board of Zoning Appeals*, 363 A.2d 1372 (Me. 1976); *Cumberland Farms, Inc. v. Town of Scarborough*, 688 A.2d 914 (Me. 1997).

Object; Context. A zoning ordinance must be construed reasonably with regard to the objects sought to be attained and to the general structure of the ordinance as a whole. All parts of the ordinance must be taken into consideration to determine legislative intent. *Moyer v. Board of Zoning Appeals*, 233 A.2d 311 (Me. 1967); *George D. Ballard ,Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Nyczepir v. Town of Naples*, 586A.2d 1254 (Me. 1991); *Dyer v. Town of Cumberland*, 632 A.2d 145 (Me. 1993); *C. N. Brown, Inc. v. Town of Kennebunk*, 644 A.2d 1050 (Me. 1994); *Buker v. Town of Sweden*, 644 A.2d 1042 (Me. 1994); *Christy's Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me.1995); *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998); *Oliver v. City of Rockland*, 710 A.2d 905 (Me. 1998); *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996); *Springborn v. Town of Falmouth*, 2001 ME 57, 769 A.2d 852; *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768; *Priestly v. Town of Hermon*, 2003 ME 9, 814 A.2d 995; *Isis Development, LLC v. Town of Wells*, 2003 ME 149..

Ambiguity Construed in Favor of Landowner. The restrictions of a zoning ordinance run counter to the common law, which allowed a person to do virtually whatever he or she wanted with his or her land. The ordinance must be strictly interpreted. Where exemptions appear to be in favor of a property owner, the board should interpret them in the owner's favor. *Forest City, Inc. v. Payson*, 239 A.2d 167 (Me. 1968).

Natural Meaning of Undefined Terms. Zoning laws must be given a strict interpretation and the provisions of those laws may not be extended by implication. However, undefined terms must be given their common and generally accepted meaning unless the context indicates otherwise or there is express legislative intent to the contrary. *Hrouda v. Town of Hollis*, 568 A.2d 824, 825 (Me. 1990); *Moyer v. Board of Zoning Appeals, supra.*; *George D. Ballard, Builder, Inc. v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Putnam v. Town of Hampden*, 495 A.2d 785 (Me. 1985); *Camplin v. Town of*

York, 471 A.2d 1035 (Me. 1984); *Lewis v. Town of Rockport*, 712 A.2d 1047 (Me. 1998); *Underwood v. City of Presque Isle*, 715 A.2d 148 (Me. 1998); *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996); *Town of Freeport v. Brickyard Cove Associates*, 594 A.2d 556 (Me. 1991); *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). Compare with *C. N. Brown and Buker, supra*. Ordinances must be interpreted reasonably to avoid an absurd result. *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842; *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768.

Board of Appeals Authority/Similar Uses. The board of appeals has the ultimate authority to interpret the provisions of a zoning ordinance under 30-A M.R.S.A. § 4353. Even in the absence of a provision in a zoning ordinance authorizing “uses similar to permitted uses” or words to that effect, the court has held that a zoning appeals board has the inherent authority under 30-A M.R.S.A. § 4353 to interpret whether a proposed use which is not expressly authorized is “similar to” a use which is expressly addressed in the ordinance. In doing so, the board must act reasonably and base its decision on the facts in the record and the provisions of the ordinance. *Your Home, Inc. v. City of Portland*, 432A.2d 1250 (Me. 1981).

Legal Nonconforming (“Grandfathered”) Uses, Structures, and Lots

Provisions dealing with nonconforming lots, structures, and uses legally must be included in a zoning ordinance to avoid constitutional problems with the ordinance. Such provisions commonly are called “grandfather clauses.” They typically define a “nonconforming use or structure” as a use or structure which was legally in existence when the ordinance took effect but which does not conform to one or more requirements of the new ordinance. The mere issuance of a permit under a prior ordinance does not confer “grandfathered” status by itself. Cf., *Thomas v. Board of Zoning Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978). The use or structure must be in actual existence (or at least substantially completed) when the new ordinance takes effect in order to be “grandfathered.” *Town of Orono v. LaPointe*, 698 A.2d 1059 (Me. 1997). Cf., *Nyczepir v. Town of Naples*, 586 A.2d 1254, 1256 (Me. 1991); *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489. Where a permit is issued before a new ordinance takes effect and a deadline stated in the existing ordinance for beginning construction or substantially completing construction has not expired, then the approved use or structure can legally be completed under the existing ordinance if done within the stated deadline. To be “grandfathered,” a use must “reflect the nature and purpose of the use prevailing when (the ordinance) took effect and not be different in quality or character, as well as in degree, from the original use, or different in kind in its effect on the neighborhood. *Turbat, supra*. Revise the sixth sentence in the existing text as follows: “Nonconforming uses and structures generally are allowed to continue and be maintained, repaired and improved. Such uses and structures generally are allowed to continue and be maintained, repaired and improved. However, the ordinance usually contains language limiting expansion or replacement. “Nonconforming lots” generally are defined in an ordinance to mean lots which do not conform to the ordinance but which were legal when the ordinance took effect and for which a deed or plan was on record in the Registry of Deeds. Such lots generally don’t meet the lot size or frontage

requirements or both of the new ordinance. However, the new ordinance generally allows them to be used for certain purposes as long as other requirements can be met.

The court in Maine has established the following rules relating to nonconforming uses, structures, and lots. These court-made rules must be read in light of the specific language of the nonconforming use, structure, and lot provision of a given ordinance in order to determine whether the court decisions cited below have any bearing on a nonconforming use, structure, or lot in the municipality.

Gradual Elimination. “The spirit of zoning ordinance is to restrict rather than to increase any nonconforming uses and to secure their gradual elimination. Accordingly, provisions of a zoning regulation for the continuation of such uses should be strictly construed and provisions limiting nonconforming uses should be liberally construed. The right to continue a nonconforming use is not a perpetual easement to make a use of one’s property detrimental to his neighbors and forbidden to them, and nonconforming uses will not be permitted to multiply when they are harmful or improper.” *Lovely v. Zoning Board of Appeals of City of Presque Isle*, 259 A.2d 666 (Me. 1969); *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984); *Total Quality, Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *Chase v. Town of Wells*, 574 A.2d 893 (Me.1990); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me. 1998).

Phased Out Within Legislative Standards. “Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. Nevertheless, the rights of the parties necessitate that this policy be carried out within legislative standards and municipal regulations.” *Lovely, supra.*; *Frost v. Lucey*, 231 A.2d 441 (Me. 1967); *Oliver v. City of Rockland*, 710 A.2d 905 (Me. 1998).

Expansion. “Where the original nature and purpose of an existing nonconforming use remain the same, and the nonconforming use is not changed in character, mere increase in the amount or intensity of the nonconforming use within the same area does not constitute an improper expansion or enlargement of a nonconforming use,” where the language of the ordinance prohibits the extension or enlargement of a nonconforming use or the change of that use to a dissimilar use.” *Frost, supra.*; *Boivin v. Town of Sanford*, 588 A.2d 1197 (Me.1991); *W.L.H. Management Corp. v. Town of Kittery*, 639 A.2d 108 (Me. 1994); *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489. “Any significant alteration of a nonconforming structure is an extension or expansion. When an ordinance prohibits enlargement of a nonconforming building, a landowner cannot as a matter of right alter the structure, even if the alteration does not increase the nonconformity.” *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102 (Me.1984). Where a portion of a structure is nonconforming as to setback or height, expanding another portion of the structure to “line it up” or “square it off” constitutes an expansion which increases the nonconformity, absent language in the ordinance to the contrary. *Lewis v. Town of Rockport*, 712 A.2d 1047 (Me. 1998); *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644. (See Appendix 4 for a related Legal Note and other articles relating to expansion issues.)

There is a special rule related to the expansion of existing nonconforming structures in the shoreland zone which are too close to the normal high watermark, known as the “30% rule.” The rule permits expansions which are 30% or less of the existing floor area and of the volume over the lifetime of the structure without having to comply with current ordinance requirements. A common question is whether the landowner is entitled to expand both 30% of floor area and 30% of volume or whether it is a combined total. The position of the Maine Department of Environmental Protection’s Shoreland Zoning Unit is that the owner is allowed to expand both floor area and volume by 30% or less. For example, the owner could build an attached deck (not closer to the water, though, without a variance) that expanded the floor area of the existing nonconforming structure by 30% and later expand the volume by 30% by enclosing the deck or raising the pitch of the roof. See *Armstrong v. Town of Cape Elizabeth*, AP-00-023, (Me. Super. Ct., Cum. Cty., December 21, 2000) and *Fielder v. Town of Raymond*, AP-01-16 (Me. Super. Ct., Cum. Cty., October 4, 2001). Based on the Fielder case, the DEP also takes the position that the construction of fixed walls to enclose a deck would count toward the 30% volume limitation but would not constitute additional floor area. The Department’s opinion regarding the placement of a roof and screen walls over a legally existing deck is that this creates neither volume or floor area; the floor is already present and there are no fixed walls to create volume, as screens don’t constitute fixed walls. For a Maine Supreme Court case reciting the evidence on which a planning board relied to establish the size of an existing nonconforming deck for the purposes of making calculations under the 30% expansion rule, see *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368.

Ordinances generally prohibit the expansion toward the water of a legal nonconforming structure which is nonconforming as to the required water setback. The court has held that this doesn’t prevent a board of appeals from granting a water setback variance if the applicant proves “undue hardship.” *Peterson v. Town of Rangeley*, 1998 ME 192, 715 A.2d 930.

Constitutionality. Nonconforming use provisions are included in zoning ordinances “because of hardship and the doubtful constitutionality of compelling immediate cessation” of a nonconforming use. *Inhabitants of the Town of Windham v. Sprague*, 219 A.2d 548 (Me. 1966).

Merger of Lots. Where two or more unimproved, recorded legally nonconforming lots are adjacent and owned by the same person, the State Minimum Lot Size Law (12 M.R.S.A. § 4807-D) and many zoning ordinances require that those lots be merged and considered as one for the purposes of development to the extent necessary to eliminate the nonconformity. In order to require the merger of a developed and undeveloped lot of record or two developed lots of record which are contiguous and in the same ownership, the Maine courts have said that the ordinance must expressly require such a merger. *Moody v. Town of Wells*, 490 A.2d 1196 (Me. 1985); *Powers v. Town of Shapleigh*, 606 A.2d 1048 (Me. 1992) (where the court interpreted the phrase “not contiguous to any other lot in the same ownership” to mean either built or vacant in the context of the rest of the nonconforming lot section, where that section used the words “vacant” and “built” where it wanted to make that distinction). For other nonconforming lot cases, see *Farley*

v. Town of Lyman, 557 A.2d 197 (Me. 1989) and *Robertson v. Town of York*, 553 A.2d 1259 (Me. 1989). If a local ordinance establishes a local minimum lot size which is different from and more restrictive than the State's, then the question of merger will be controlled by the ordinance. Where an ordinance requires the merger of lots in the same ownership which have "contiguous frontage" with each other, the court in Maine has held that such a provision does not apply to corner lots. *Lapointe v. City of Saco*, 419 A.2d 1013 (Me. 1980). The court also has held that a merger clause which refers to lots with "continuous frontage" does not require the merger of a back lot which is landlocked with an adjoining lot or the merger of adjoining lots which "front" on different streets. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391. See also, *John B. DiSanto and Sons, Inc. v. City of Portland*, AP-03-13 (Me. Super. Ct., Cum. Cty., September 25, 2003), where the court upheld the board of appeals' interpretation of the phrase "separate and distinct ownership" as meaning continuously held under separate and distinct ownership from the adjacent lots.

As a general rule, in order for a nonconforming lot to be conveyed and retain its "grandfathered" status, it must be conveyed with the same boundaries as it had when the ordinance took effect; otherwise, it must be treated as a newly created illegal lot. If additional acreage is added to a nonconforming lot which increases its size, but not enough to make it conforming, such an increase won't necessarily cause the lot to lose its grandfathered status, although the legal status of an adjoining lot from which the acreage was transferred may be affected by doing this. For a discussion of the meaning of "lot of record," see *Camplin v. Town of York*, 471 A.2d 1035 (Me. 1984).

Where a single parcel of land had been developed with a number of buildings prior to the effective date of the ordinance and the buildings had all been used for distinct and separate uses prior to that date, the Maine court has held that the buildings could be sold separately on nonconforming lots, finding that the land had already been functionally divided. *Keith v. Saco River Corridor Commission*, 464 A.2d 150 (Me. 1983). The Keith case might be decided differently today, since shoreland zoning ordinances now contain much more detail and expressly address a variety of scenarios with regard to the merger, division, and separate conveyance of developed or vacant contiguous or isolated nonconforming lots of record. Whether the functional division theory applied in Keith will control a nonconforming lot situation in a particular town will depend on exactly what the town's ordinance does and doesn't address and what intent can be inferred from the ordinance's regulatory scheme. It may be advisable for the board to seek legal advice regarding the interpretation of the specific ordinance language adopted by the town before deciding to apply Keith to the division of a developed nonconforming lot.

The fact that a single deed describes multiple contiguous lots by their external perimeter does not automatically destroy their independent status. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391; *Logan v. City of Biddeford*, 2001 ME 84, 772 A.2d 1183.

Replacement. There is no inherent right on the part of a landowner to replace an existing nonconforming structure with a newer one of the same or larger dimensions. That right hinges on whether the ordinance expressly allows it. This is true even where

the original building was destroyed by fire or natural disaster. *Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548 (Me. 1966). The court also has held that when a unit is moved from an existing mobile home park, the park owner doesn't automatically have a right to bring in a replacement unit without a permit, absent clear language in the ordinance to the contrary. *LaBay v. Town of Paris*, 659 A.2d 263 (Me. 1995).

Discontinuance/Abandonment. Zoning ordinances generally attempt to prohibit a person from reactivating a nonconforming use if it has been "abandoned" or "discontinued" for a certain period of time. Absent language in an ordinance to the contrary, the word "abandonment" generally is interpreted by the courts on the basis of whether the intent of the landowner was to give up his or her legal right to continue the existing nonconforming use. The owner's intent is generally judged on the basis of "some overt act, or some failure to act, which carries the implication that (the) owner neither claims nor retains any interest in the subject matter of the abandonment." Young, *Anderson's American Law of Zoning* (4th ed.), § 6.65. Although "discontinuance" or cessation of the use for the period stated in the ordinance does not automatically constitute abandonment, it may be evidence of an intent to abandon if accompanied by other circumstances relating to the use or non-use of the property, such as the removal of advertising signs or allowing the building formerly occupied by the use to become dilapidated.

If the ordinance regulates the reactivation of a "discontinued" nonconforming use rather than an "abandonment" of such a use, an analysis of the owner's intent is not necessary. Cessation of the use for the period of time stated in the ordinance is enough. *Mayberry v. Town of Old Orchard Beach*, 599 A.2d 1153 (Me. 1991). *Cf.*, *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.

Where the voluntary removal of a nonconforming structure has the effect of returning the use of the property to a permitted use, some ordinances will not allow a replacement structure because the nonconforming use has been superseded by a permitted use. See *Chase v. Town of Wells*, 574 A.2d 893 (Me. 1990).

Approval of a second permit for essentially the same project doesn't automatically constitute an abandonment of the first permit obtained for the project, absent language in the ordinance or permit conditions to the contrary. *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644.

Where a house burned and no livable structure thereafter existed on the property and the property had not been used since the fire (for 6 years), the existence of a foundation and septic system were not enough to defeat a legal conclusion that the nonconforming use of the property for a residence had been discontinued. *Lessard v. City of Gardiner Board of Appeals*, AP-02-27 (Me. Super. Ct., Kenn. Cty., January 14, 2003).

Change of Use. The test to be applied in determining whether a proposed use fits within the scope of an existing nonconforming use or whether it constitutes a change of use is: "(1) whether the use reflects the "nature and purpose" of the use prevailing when

the zoning ordinance took effect; (2) whether there is created a use different in quality or character, as well as in degree, from the original use; or (3) whether the current use is different in kind in its effect on the neighborhood.” *Total Quality, Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *Boivin v. Town of Sanford*, 588 A.2d 1197 (Me. 1991); *Keith v. Saco River Corridor Commission, supra*; *Turbat Creek, supra*.

Illegality of Use; Effect on “Grandfathered” Status. “As a general rule, . . . the illegality of a prior use will result in a denial of protected status for that use under a nonconforming use exception to a zoning plan. but violations of ordinances unrelated to land use planning do not render the type of use unlawful.” *Town of Gorham v. Bauer*, CV-89-278 (Me. Super. Ct., Cum. Cty., November 21, 1989). In *Bauer* the court held that the failure of a landowner to obtain a State day care license did not deprive an existing day care of nonconforming use status, but the fact that the owner had not obtained the necessary local site plan approval and certificate of occupancy did prevent his use from becoming a legal nonconforming use.

Split Lots

In some cases, one lot is divided between two or more zones. Absent a provision in a zoning ordinance to the contrary, the requirements of the ordinance for a particular zone apply only to that part of the lot which is located in that zone. *Town of Kittery v. White*, 435 A.2d 405 (Me. 1981). For a Maine Supreme Court decision interpreting an ordinance which extended the provisions relating to one zoning district into an adjoining district in the case of a split lot, see *Marton v. Town of Ogunquit*, 2000 ME 166, 759 A.2d 704. See *Gagne v. Inhabitants of City of Lewiston*, 281 A.2d 579 (Me. 1971) for a case involving a structure divided by a zone boundary.

Definition of Dwelling Unit

The conversion of seasonal cabins rented on a nightly basis, each with separate heating and electrical systems, bathroom, and kitchen, to condominium ownership has been held by the court as constituting the creation of individual dwelling units which must satisfy the applicable minimum lot size. *Oman v. Town of Lincolnville*, 567 A.2d 1347 (Me. 1990). The court also has upheld a determination by a local code enforcement officer and board of appeals that a detached garage with its own water, heat, septic system, full bathroom, kitchen sink, and refrigerator constituted a “dwelling unit” for the purposes of the town’s lot size requirement. *Goldman v. Town of Lovell*, 592 A.2d 165 (Me. 1991) See also *Wickenden v. Luboshutz*, 401 A.2d 995 (Me. 1979), and *Moyer v. Board of Zoning Appeals*, 233 A.2d 311 (Me. 1967), and *Hopkinson v. Town of China*, 615 A.2d 1166 (Me. 1992). For a case analyzing whether a guest house addition to a garage constituted a dwelling unit or an accessory structure, see *Adler v. Town of Cumberland*, 623 A.2d 178 (Me. 1993). Whether a living arrangement legally constitutes a “dwelling unit” ultimately depends on the specific definition of that term in the applicable ordinance.

Definition of Lot

In the absence of an ordinance definition of “lot” to the contrary, a parcel which is divided by a public road or a private road serving multiple properties is effectively two lots even though described as a single parcel in the deed. *Fogg v. Town of Eddington*, AP-02-9 (Me. Super. Ct., Pen. Cty., January 3, 2003); *Bankers Trust Co. v. Zoning Board of Appeals*, 345 A.2d 544, 548-549 (Ct. 1974). Absent language to the contrary in an ordinance, the land area underlying such a road or easement is not included in calculating whether a lot meets the minimum lot area requirements (e.g., *Sommers v. Mayor and City Council of Baltimore*, 135 A.2d 625 (Md. 1957); *Loveladies Property Owners Assoc. v. Barnegat City Service Co.*, 159 A.2d 417 (NJ Super. 1960).

Camper Trailers

In the case of *State v. Town of Damariscotta*, CV-98-84 (Me. Super. Ct., Kenn. Cty., June 12, 2001), the court found that a wood frame structure placed on skids to allow it to be moved to various sites within a campground did not qualify as a “camper trailer” and was not within the scope of the grandfathered campground use.

Conflict With Zoning Map and Ordinance

The courts in Maine have held on several occasions that, absent a rule of construction in the ordinance to the contrary, where a depiction of a zoning district boundary on a map conflicts with the ordinance text description of the type of land which should be included in a particular district, the map depiction is controlling until amended by the legislative body. *Veerman v. Town of China*, CV-93-353 (Me. Super. Ct., Kenn. Cty., April 13, 1994); *Coastal Property Associates, Inc. v. Town of St. George*, 601 A.2d 89 (Me. 1992). See generally *Lippman v. Town of Lincolnville*, 1999 ME 149, 739 A.2d 842. See also *Nardi v. Town of Kennebunkport*, AP-00-001 (Me. Super. Ct., York Cty., Feb. 12, 2001).

Conflict Between Ordinances

Where a town wide zoning ordinance prohibited a particular expansion of a nonconforming use but a separate shoreland zoning ordinance permitted it, the court applied the section of the ordinance which governed conflicts between ordinances and ruled that the expansion was prohibited. *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me.1998). Where a town-approved shoreland zoning ordinance contained a side line setback requirement and a shoreland zoning ordinance imposed on the town by the Maine Board of Environmental Protection (BEP) did not, the Maine Supreme Court held that the State-imposed ordinance served as a supplement to the town ordinance and did not effectively repeal it. *Bartlett v. Town of Stonington*, 1998 ME 50, 707 A.2d 389.

Road Frontage

Where a town ordinance defined “frontage” as the horizontal distance between the side lot lines as measured along the front lot line, the court held that an interior road which passes through the center of the lot cannot be used to satisfy “road frontage” requirements. *Morton v. Schneider*, 612 A.2d 1285 (Me. 1992). See also *Morse v. City of Biddeford*, AP-01-061 (Me. Super. Ct., York Cty., May 10, 2002) (case involving disputed right to use the road in question).

Water Setback Measurement

“The general objectives of the shoreland zoning ordinance, the specific objectives of shoreland setbacks, and the customary methods of surveying boundaries all counsel in favor of the use of the horizontal methodology” to measure setback, rather than an “over-the-ground” method of measurement. *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). For cases interpreting the location of the normal high watermark, see *Armstrong v. Town of Cape Elizabeth*, AP-00-023 (Me. Super. Ct., Cum. Cty., Dec. 21, 2000) and *Nardi v. Town of Kennebunkport*, AP-00-001 (Me. Super. Ct., York Cty., Feb. 12, 2001).” See also, *Griffin v. Town of Dedham*, 2002 ME 105, 799 A.2d 1239, and *Mack v. Town of Cape Elizabeth*, 463 A.2d 717 (Me. 1983).

Decks

A deck which is attached to a home becomes “an extension and integral part of the principal structure” and therefore must comply with any setback requirements applicable to principal structures. *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996). The court also has held that a detached deck constitutes a structure which is subject to applicable setback requirements. *Inhabitants of Town of Boothbay Harbor v. Russell*, 410 A.2d 554 (Me. 1980). In the case of *Town of Poland v. Brown*, CV-97-227 (Me. Super. Ct., Andro. Cty., Feb. 11, 1999), a landowner attempted to claim that an illegal deck was not a structure by putting wheels under it and registering it as a trailer while it was still in place on the ground with lattice skirting and outdoor furniture. The court found that ‘a deck by any other name is still a deck’.

Essential Services; Communication Towers; Satellite Dishes

Neither a communications tower nor a radio station qualifies as an “essential service” as typically defined in a local zoning ordinance, absent language to the contrary in the applicable ordinance. *Priestly v. Town of Hermon*, 2003 ME 9, 814 A.2d 995. In *Brophy v. Town of Castine*, 534 A.2d 663 (Me. 1987), the Maine Supreme Court held that a satellite dish was a “structure” for the purposes of the shoreland zoning setback requirements. A Maine Superior Court judge found that a cellular telecommunications tower constituted a “public utility” for the purposes of a particular town’s zoning ordinance. *Means v. Town of Standish*, CV-92-1365 (Me. Super. Ct., Cum. Cty., Oct. 8, 1993).

Accessory Use or Structure

“The essence of an accessory use or structure by definition admits to a use or structure which is dependent on or pertains to a principal use or main structure, having a reasonable relationship with the primary use or structure and by custom being commonly, habitually and by long practice established as reasonably associated with the primary use or structure.... (F)actors which will determine whether a use or structure is accessory within the terms of a zoning ordinance will include the size of the land area involved, the nature of the primary use, the use made of the adjacent lots by neighbors, the economic structure of the area and whether similar uses or structures exist in the neighborhood on an accessory basis.” *Town of Shapleigh v. Shikles*, 427 A.2d 460, 465 (Me. 1981). As is always true with ordinance interpretation, the court’s test must be read in light of the exact language of the applicable ordinance and the facts in a particular case. See *Flint v. Town of York*, CV-95-675 (Me. Super. Ct., York Cty., Sept. 4, 1996) for a case where the court found that the addition of a redemption center to an existing fruit and vegetable stand did not qualify as an accessory use.

Home Occupations

A number of Maine court decisions have interpreted local ordinance definitions of “home occupation.” In *Town of Kittery v. Hoyt*, 291 A.2d 512, 514 (Me. 1972), the Maine Supreme Court concluded that a commercial lobster storage and sales business was not a home occupation under a local ordinance which defined the term as a “business customarily conducted from the home.” Similarly, the court held that an auto body shop and used car rental and sales business wasn’t a home occupation under an ordinance requiring such businesses to be “operated from the home.” *Baker v. Town of Woolwich*, 517 A.2d 64, 68 (Me. 1987). In *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063, the court found that a commercial dog kennel with 11 indoor-outdoor runs and boarding capacity for 15 dogs qualified as a home occupation under an ordinance permitting home occupations if “customarily conducted on or in residential property.” The court found this definition broader and more lenient than the ones in *Hoyt* and *Baker*. A Maine Superior Court judge found that a mail order pharmacy business did not qualify as a home occupation, based on language in the town’s ordinance which referred to “stock-in-trade.” *Simonds v. Town of Sanford*, CV-91-710 (Me. Super. Ct., York Cty., July 14, 1992).

Measurements for Slope of Land, Calculation of Building Expansion, Percentage of Lot Coverage, and Building Height

For a case involving measurement of the slope of the land within the shoreland zone, see *Griffin v. Town of Dedham*, 2002 ME 105, 799 A.2d 1239. *Rockland Plaza Realty v. City of Rockland*, 2001 ME 81, 772 A.2d 256, is a case in which the Maine Supreme Court analyzed ordinance provisions related to building height and percentage of lot covered by structures. *Lewis v. Maine Coast Artists*, 2001 ME 75, 770 A.2d 644, provides some guidance regarding taking measurements in connection with the expansion of a nonconforming structure. Regarding expansions toward the water and the point at which the measurement of ‘toward the water’ begins, see *Fielder v. Town of Raymond*, AP-01-

16 (Me. Super. Ct., Cum. Cty., October 4, 2001), where the court found that it starts from ‘the linear setback boundary, not from the structure itself’

Commercial, Retail Use

For several Maine Supreme Court cases analyzing whether a use or structure was “commercial,” see *Beckley v. Town of Windham*, 683 A.2d 774 (Me. 1996) (holding that an office/maintenance building which was proposed as part of a boat rental facility was a commercial structure) and *Bushey v. Town of China*, 645 A.2d 615 (Me. 1994) (dog kennel as commercial use). See *C.N. Brown Co., Inc. v. Town of Kennebunk*, 644 A.2d 1050 (Me. 1994), for a case interpreting whether a gasoline filling station constituted a retail store as defined in the ordinance.

Chapter 7

Planning Board Manual

Laws Affecting Municipal Ordinance Authority and Planning Board Jurisdiction

[Supplements # 1 & # 2 have been incorporated into this chapter]

Laws Affecting Municipal Ordinance Authority and Planning Board Jurisdiction

An ordinance is a local law that usually is adopted by the municipality's legislative body (the town meeting or town or city council, depending on the form of government in that municipality). If properly adopted in conformance with applicable procedures and if carefully drafted to avoid legal problems, an ordinance generally has the same legal weight as a State statute enacted by the Maine Legislature. Some communities have adopted local ordinances that impose additional requirements on a project which is also regulated by a State law. Other municipalities may have no ordinance governing a particular activity, preferring to enforce a State law where empowered to do so (e.g., junkyards and dangerous buildings) or deferring completely to whatever authority a State agency may have to control an activity.

It is absolutely crucial to the successful administration and enforcement of municipal ordinances that they be properly adopted and drafted to avoid conflicts with case law, State statutes or the Maine and United States Constitution, as well as to avoid internal conflicts or conflicts with other ordinances. The discussions that follow outline some of the legal requirements that ordinances must satisfy.” Revise the existing opening paragraph on page 65 by inserting the following in the fourth line after the word “expected”: “(and is sometimes required by State law)”.

Planning boards, especially in smaller towns, are often asked by the voters or by the municipal officers to “take the lead” in the preparation of various types of land use ordinances to address particular problems. After drafting a proposed ordinance, the planning board is often expected to shepherd it through the public hearing and adoption process as well. The following discussion provides an overview of the process for adopting ordinances and the legal limits on municipal ordinance authority.

Ordinances Generally

Ordinance Enactment Procedures. As a general rule, whether a municipality operates under a charter or only under the State statutes, its legislative body must adopt in ordinance form any requirement which the municipality wants to enforce against the general public. The basic procedure for adopting an ordinance at open town meeting is found in 30-AM.R.S.A. § 3002, a detailed discussion of which is included in Maine Municipal Association's ‘Ordinance Enactment Information Packet.’ (See Appendix 2 for information about how to obtain a copy.) If the municipality is governed by a charter (usually this means a town or city which has a council-manager form of government), ordinance enactment procedures would be spelled out there. In addition to the statutory or charter procedures, there also may be local requirements which the municipality has adopted, such as a requirement that a zoning ordinance be enacted by a 2/3 majority vote of the legislative body.

Special rules governing public hearing requirements for adoption or amendment of zoning ordinances and maps are found in 30-A M.R.S.A. § 4352. See Appendix 6 for a Legal Note discussing these rules.

Amendments. The rules governing ordinance enactment normally will govern amendments to an ordinance. Some ordinances also will contain their own special requirements for adopting amendments. An example of an ordinance amendment format is included in MMA's Ordinance Enactment Information Packet (see Appendix 2).

Form of the Ordinance. Although a "one-liner" (for example, "No building may be constructed without a permit.") may seem like an effective, simple-to-understand kind of ordinance, it would not contain enough detail to make it easy to administer or legally enforceable. In preparing an ordinance, the planning board should use the following checklist to ensure that the ordinance has all the basic provisions:

- Statement of statutory authority
- Statement of purpose
- Definitions section
- Basic requirements/prohibitions
- Designation of person or board to make decision on applications
- Application fees, if any required; clear statement regarding the nature of the appeals board review (de novo vs. appellate).
- Standards to guide the person or board in deciding whether to issue or deny a permit or other necessary approval; standards to guide imposition of conditions of approval
- Right to appeal, to whom and within what time frame; standards to guide the appeals board in reviewing the appeal and reaching a decision
- Designation of who enforces the ordinance and procedures to follow
- Period after which a permit expires if substantial work has not been completed
- Penalty section
- Severability clause explaining what happens to the rest of the ordinance if part is held invalid by a court
- Section dealing with effect of inconsistent ordinance provisions
- Effective date

Scope of the Ordinance. When developing the basic requirements of the ordinance, the board should try to keep in mind all the possible types of activities which the municipality would want to regulate through the ordinance and all of the problems which might be associated with a particular activity. As difficult a job as this will be, it is very important that an ordinance "cover all the bases" since the municipality will not be able to control an activity through a given ordinance if it is not covered by the provisions of that ordinance. The board should contact other municipalities, the regional planning commission or council of governments serving the area, Maine Municipal Association, and the State Planning Office for examples of the kind of ordinance it wants the municipality to adopt.

Availability. According to 30-A M.R.S.A. § 3002, copies of any ordinance adopted by the legislative body must be on file with the municipal clerk and must be accessible to any member of the general public. Copies also must be made available for a reasonable fee to any member of the public requesting them. The clerk must post a notice regarding the availability of ordinances.

Constitutional Issues

Standards; Delegation of Legislative Authority. It is very important for an ordinance to contain fairly specific standards of review if it is an ordinance which requires the issuance of a permit or the approval of a plan. The standards must be something more than “as the Board deems to be in the best interest of the public” or “as the Board deems necessary to protect the public health, safety and welfare.” *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It also is very important to have language in the ordinance instructing the board reviewing an application filed under the ordinance as to the action which the board must take. It is not enough merely to say that the board must “consider” or “evaluate” certain information. *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). If an ordinance gives the board basically unlimited discretion in approving or denying an application, it creates two constitutional problems. It violates the applicant’s constitutional rights of equal protection and due process because (1) it does not give the applicant sufficient notice of what requirements he or she will have to meet and (2) it does not guarantee that every applicant will be subject to the same requirements. It amounts to substituting the board’s determination of what is desirable land use regulations for that of the legislative body (town meeting or town or city council), where it legally belongs. The courts call this an “improper delegation of legislative authority.” Legally, only the legislative body can adopt ordinances, unless a statute gives that authority to some other official or board.

It is not legally permissible to include a review standard in the ordinance which requires a board to find that a project will be “compatible with the neighborhood” or “harmonious with the surrounding environment.” Compare, *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987) with *American Legion, Field Allen Post #148 v. Town of Windham*, 502 A.2d 484 (Me. 1985), *In Re: Spring Valley Development*, 300 A.2d 736, 751-752 (Me. 1973), and *Secure Environments, Inc. v. Town of Norridgewock*, 544 A.2d 319 (Me. 1988). A standard that requires a board or official to determine whether a development “will conserve natural beauty” has also been declared unconstitutional. *Kosalka v. Town of Georgetown*, 2000 ME 106, 752 A.2d 183. Compare, *Conservation Law Foundation, Inc. v. Town of Lincolnville*, 2001 ME 175, 786 A.2d 616. The court has upheld an ordinance review standard that requires a determination that “the proposed use will not adversely affect the value of adjacent properties.” *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1992). A shoreland zoning ordinance provision requiring a board to find that a proposed pier, dock or wharf would be “no larger than necessary to carry on the activity” has also been upheld, *Stewart v. Town of Sedgwick*, 2002 ME 81, 797 A.2d 27, as has ordinance language requiring a finding that a pier, dock or wharf would not “interfere with developed areas.” *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996).

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

Reasonableness; Takings Issue. Another constitutional limitation to keep in mind when drafting an ordinance is that the ordinance must be a reasonable means to protect the public health, safety and welfare. *Warren v. Municipal Officers of the Town of Gorham*, 431 A.2d 624 (Me. 1981); *Crosby v. Inhabitants of Town of Ogunquit*, 468 A.2d 996 (Me. 1983). An ordinance generally cannot totally prohibit a land use unless the use is “ultra-hazardous” (i.e., cannot be safely regulated). See generally, Young, *Anderson’s American Law of Zoning* (4th ed.) § 9.16. If it is a land use regulation, it cannot be so restrictive that a landowner is deprived of all reasonable use of the property being regulated. Otherwise, the ordinance cannot be enforced unless the municipality compensates the landowner. Determining whether an ordinance has “crossed the line” and effected a “taking” is not an easy task; this issue is for a court to decide, not the planning board. Existing case law gives little guidance. See generally, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Just v. Marinette County*, 56 Wis.2d 7, 201 N.W.2d 761 (1972); Maine Constitution, Art. 1, section 6-A and § 21; *Seven Islands Land Co. v. Maine Land Use Regulation Commission*, 450 A.2d 475 (Me. 1982); *Inhabitants of Town of Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Nolan v. California Coastal Commission*, 107 S.Ct. 3141 (1987); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, ___ S. Ct. ___ (526 U.S. 687 (1999)). *Curtis v. Town of South Thomaston*, 1998 ME 63, 708 A.2d 657; *M. C. Associates v. Town of Cape Elizabeth*, 2001 ME 89, 773 A.2d 439; *Wyer v. Board of Environmental Protection*, 2000 ME 45, 747 A.2d 192; *Drake v. Inhabitants of the Town of Sanford*, 643 A.2d 367 (Me. 1994) [see also the Superior Court decision in a related case regarding the ‘reasonable return’ standard in a variance appeal, *Drake v. Inhabitants of the Town of Sanford*, CV-88-679 (Me. Super. Ct., York Cty., November 15, 1990, amended January 9, 1991)]; *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Van Horn v. Town of Castine*, 167 F. Supp.2d 424 (D. Me. 2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002).

The Maine Legislature established a program in 1996 for the mediation of “takings” claims arising from the application of State and local land use laws. The process is outlined in 5M.R.S.A. § 3341.

Statutes Which Affect Municipal Ordinance Authority

As was noted in the first chapter of this manual, the powers and duties of planning boards are governed generally either by State statute or local ordinance provisions. There is no single list of duties which will apply to all boards. The following brief summary of State land use statutes and local ordinances which a municipality may adopt is intended to give board members an idea of the possible range of their authority and of the range of municipal authority to adopt ordinances regulating land use. A planning board will not have authority to administer and enforce these laws unless there is a specific grant of authority to the board contained in the statute or ordinance in question.

Home Rule. In 1969 the Maine Legislature adopted a statute (30 M.R.S.A. § 1917) which delegated broad “home rule” ordinance powers to towns and cities. This statute was revised and renumbered in 1989 (30-A M.R.S.A. § 3001) to make it clear that the Legislature intended “home rule” to be a very broad grant of authority. In its present form, the “home rule” statute reads as follows:

A municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law, or charter . . . The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section, unless the municipal ordinance in question would frustrate the purpose of any State law.

This statute provides a basis for the adoption of local land use ordinances which are not expressly authorized or expressly or impliedly prohibited by other statutes. Several Maine Supreme Court decisions have addressed the issue of whether an ordinance has been implicitly prohibited by the Legislature. In *Central Maine Power v. Town of Lebanon*, 69571 A.2d 1189 (Me. 1990), the court found that a local ordinance relating to herbicide spraying was within the town’s home rule authority because it did not frustrate the State’s regulatory program. The court found no home rule authority to prohibit the disposal of out-of-town waste within the boundaries of the town in *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149 (Me. 1988), holding that the authority to regulate solid waste disposal did not include the authority to totally prohibit certain activities. In contrast, the court upheld an ordinance which totally prohibited land spreading of septage, finding that other legal options were still available for the disposal and utilization of septage, even though more costly and difficult. *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200. See *School Committee of Town of York*, 626 A.2d 935 (Me. 1993), *International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995), and *Perkins v. Town of Ogunquit*, 709 A.2d 106 (Me.1998); *Sawyer Environmental Recovery Facilities v. Town of Hampden*, 2000 ME 179, 760 A.2d 257 for a more recent analysis of home rule ordinance authority by the Maine Supreme Court.

One type of ordinance commonly adopted under the authority of home rule is a “Site Plan Review Ordinance,” which is an ordinance used to regulate developments which normally cannot be reviewed as subdivisions. Usually the planning board is authorized by the ordinance to review the projects which the ordinance regulates. The State Planning Office has published a model site plan review ordinance with accompanying commentary.

Adoption of Codes by Reference. Title 30-A, § 3003 establishes certain legal requirements with which a municipality must comply if it wants to adopt a code such as the BOCA building code by reference or incorporate certain standards by reference into an existing or new ordinance. In order for such a code or standards to be enforceable, it is very important to comply with the provisions of this law.

Subdivisions. Title 30-A § 4401 et seq. (the Municipal Subdivision Law) requires the planning board to review subdivisions using the criteria set out in the statute. (If the municipality has not established a planning board, then the municipal officers must perform the review in the absence of some other locally-designated review authority.) It also authorizes the board to adopt additional reasonable regulations which are related to and supplement the statutory guidelines. Some municipalities have gone a step further and adopted a subdivision ordinance approved by the legislative body using home rule authority; in those municipalities, the planning board would not have the legal authority to adopt subdivision regulations. The State Planning Office has published a detailed model subdivision ordinance with commentary prepared by Southern Maine Regional Planning Commission. In 2002 the Legislature enacted 30-A M.R.S.A. § 4401(4)(H-1), which prohibits municipalities from adopting new definitions of “subdivision” which are in conflict with the statutory definition, except as expressly authorized by § 4401(4)(H-1); municipalities are authorized to include multi-unit commercial and industrial structures in a local definition and to exempt 40 acre lots divided from a larger parcel that is entirely outside the shoreland zone. Municipalities which had adopted a definition of “subdivision” prior to June 1, 2001 which was in conflict with the statute were allowed to continue enforcing those definitions, provided the definition was recorded in the registry of deeds by June 30, 2003.” See Appendix 3 also for a copy of the statute and a number of other materials relating to the definition of “subdivision” and other subdivision issues.

General Zoning Ordinance and Comprehensive Plan. In 1988 the Maine Legislature enacted a comprehensive Growth Management Act. 30-A M.R.S.A. § 4301 et seq. This law required every municipality to prepare and adopt a comprehensive plan and a town-wide zoning ordinance. Deadlines and substantive requirements for the plan and related ordinances, including public hearing requirements, were outlined in the law. In 1991 the Legislature made adoption of a plan and ordinances discretionary. However, 30-A M.R.S.A. § 4314 establishes deadlines by which existing zoning, impact fee, and rate of growth ordinances must be made consistent with a comprehensive plan adopted in accordance with the Growth Management Act; otherwise, the ordinances become invalid to the extent they are inconsistent with a plan. See Appendix 6 for an article discussing these deadlines.

Title 30-A, § 4352 requires all zoning ordinances to be pursuant to and consistent with a comprehensive plan adopted by the legislative body. “Zoning” is defined as a regulation which applies different requirements to different areas of a municipality. *Benjamin v. Houle*, 431 A.2d 48, 49 (Me. 1981); *LaBay v. Town of Paris*, 659 A.2d 263 (Me. 1995); *Bragdon v. Town of Vassalboro*, 2001 ME 137. Under this definition, ordinances and maps that regulate only aquifers or floodplains would constitute a type of “zoning” and therefore would need to be consistent with a comprehensive plan.

With regard to shoreland zoning ordinances, the Maine Supreme Court has held that a town may still enforce its shoreland zoning ordinance even if it has no comprehensive plan. However, if the ordinance regulates areas not required by the State minimum shoreland zoning statute and guidelines, or if the town already had an adopted comprehensive plan in effect at the time of the adoption of its shoreland zoning ordinance, then the ordinance must be consistent with an adopted comprehensive plan to be enforceable. *Enos v. Town of Stetson*, 665 A.2d 678 (Me. 1995); *F. S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856 (Me. 1987).

Title 30-A, § 4352 (9) and (10) establish special public hearing and notice requirements for the adoption and amendment of zoning and shoreland zoning ordinances. See Appendix 6 for a Legal Note discussing these requirements.

There is little case law in Maine regarding comprehensive plans and the amount of detail required in order to provide a sufficient legal basis for a zoning ordinance. Most of the cases have upheld the zoning provisions against a challenge of inconsistency with the plan. *Baker v. Town of Woolwich*, 517 A.2d 64, 68 (Me. 1987); *LaBonta v. City of Waterville*, 528 A.2d 1261, 1265 (Me. 1987); *Salvatore Vella and Trician Marine Corp. v. Town of Camden*, 677 A.2d 1051 (Me. 1996); *Adelman v. Town of Baldwin*, 2000 ME 91. Compare the preceding cases with *Hackett v. City of Auburn*, CV-85-336 (Me. Super. Ct., Andr. Cty., October 29, 1985). See also *Gilliam v. Town of Freeport*, ___ A.2d ___, Decis. No. 7077 (Me. 1994). [For a detailed discussion of the facts in *Gilliam*, see the Superior Court decision, CV-92-287 (Me. Super. Ct., Cum. Cty., February 4, 1994)]. (Note: *Gilliam* is a “Memorandum of Decision” and cannot be used as legal precedent, but it may be helpful in understanding how to determine when an ordinance is not consistent with a plan.) See also *City of Old Town v. Dimoulas*, CV-98-124 (Me. Super. Ct. Pen. Cty., March 28, 2000), in which the court outlined information which it would need to determine whether the plan and ordinance were consistent.” (This case was appealed and decided by the Maine Supreme Court. *City of Old Town v. Dimoulas*, 2002 ME 133, 803 A.2d 1018.)

Another important issue related to the adoption and enforcement of a zoning ordinance is the statutory requirement that a map be prepared and adopted as part of the ordinance. 30-AM.R.S.A. § 4352. Failure to adopt a map will render the zoning ordinance unenforceable. *Inhabitants of Town of Camden v. Miller*, CV-89-LU-1 (Me. Dist. Ct. 6, Knox, November 20, 1989). Where a map and the ordinance description of zone boundaries are inconsistent, the depiction on the map will control, absent language in the ordinance establishing a different rule for resolving conflicts. *Coastal Property*

Associates, Inc. v. Town of St. George, 601 A.2d 89 (Me. 1992); *Veerman v. Town of China*, CV-93-353 (Me. Super. Ct., Kenn. Cty, April 13, 1994). See generally, *Lippman v. Town of Lincolnville*, 1999 ME 149 (October 26, 1999). Any revisions to an adopted zoning map must be approved by a vote of the legislative body to be effective.

Spot Zoning

According to Young, *Anderson's American Law of Zoning* (4th ed.), § 5.12 – 5.22, “spot zoning” has been defined by the courts in other states as “the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and the detriment of other owners.” It has been called “the very antithesis of planned zoning.” In the words of an Oregon court which declared a “spot” zoning amendment to be invalid, “arbitrary, or ‘spot,’ zoning to accommodate the desires of a particular landowner is not only contrary to good zoning practice, but violates the rights of neighboring landowners and is contrary to the intent of the enabling legislation which contemplates planned zoning based upon the welfare of an entire neighborhood.”

In Maine, State law requires that a zoning ordinance, “must be pursuant to and consistent with a comprehensive plan adopted by the municipality’s legislative body.” 30-A M.R.S.A. §4352. Any provision in a zoning ordinance must be supported by data contained in the municipality’s comprehensive plan demonstrating why a particular use should be allowed or prohibited in a particular area. The type of information which should be included in a comprehensive plan is outlined in Title 30-A § M.R.S.A. 4326 of the Maine Statutes.

To determine whether a particular zoning amendment constitutes an act of “spot zoning,” a court must consider a number of factors: “the size of the area to be rezoned, the classification and the development of adjacent land, the relation of the amendment to existing zoning patterns and objectives, the planning history of the amendment, and the benefits or detriments which may accrue to the owner of the land, his neighbors, and the community” i.e., is it for the “exclusive and preferential benefit (of the landowner making the request), with no relation to the community as a whole?” An example of where one court found spot zoning was a zoning amendment which reclassified land to create a small commercial area entirely surrounded by residential use, where the court found the amendment to be of benefit to the landowner without any relation to the welfare of the neighborhood or the community at large.

“Spot” zoning also may occur where a small parcel is reclassified to the detriment of the landowner for the purpose of preventing a use which would otherwise be permitted and to which the abutters are objecting.

The reclassification of a small parcel has been upheld where the proposed use is perceived as having a public benefit which outweighs the advantage to the landowner or the potential injury to the immediate neighborhood. For example, a reclassification was upheld where a small parcel was to be used for an apartment building in a medium

density residential area where the court found that there was a need for that type of housing in the area. Another example is where a small parcel was rezoned for a small shopping center which the court found necessary to meet the needs of the residents of the surrounding neighborhood, because it was a rapidly developing residential suburban area.

In deciding whether a particular rezoning request constitutes “spot zoning,” the board must apply the rules outlined above to the facts of that specific situation and review the provisions of the municipality’s comprehensive plan to determine whether the proposed change would be supported by the policies and data contained in the plan. The Maine courts have upheld zoning amendments against challenges based on “spot zoning” in at least two cases. *Salvatore Vella and Trician Marine Corp. v. Town of Camden*, 677 A.2d 1051 (Me. 1996); *Gilliam v. Town of Freeport*, ___ A.2d ___ (Me. 1994) (Decis. No. 7077)[for a detailed discussion of the facts, see the Superior Court decision, CV-92-287 (Me. Super. Ct., Cum. Cty., February 4, 1994)]. (Note: *Gilliam* is a ‘Memorandum of Decision’ which is not printed in the Atlantic Court Reporter and should not be cited as precedent. However, the facts and holding may be helpful in understanding spot zoning.)

Shoreland Zoning. During the early 1970s, most towns and cities in Maine either voluntarily adopted shoreland zoning ordinances or had an ordinance imposed on them by the State Legislature through the Shoreland Zoning Task Force under Title 12 § 4811 et seq. (now 38 M.R.S.A. § 435 et seq.). Shoreland zoning ordinances must regulate lands within 250 feet of normal high water of certain water bodies and wetlands, but they may also regulate land use activities below the normal high water mark if the municipality adopts appropriate amendments. As a general rule, the planning board has authority to review and act upon at least some of the projects covered by shoreland zoning. The shoreland zoning statute states that the planning board may also be designated to enforce the shoreland zoning ordinance.

Local shoreland zoning ordinances must be at least as restrictive as the State’s minimum shoreland zoning guidelines (sometimes called “the model ordinance”). They also must be consistent with the State shoreland zoning statute. As a general rule, it is the town’s existing ordinance which the planning board must follow in reviewing applications, even if it does not conform to the State guidelines or statute. However, where the shoreland zoning statute states that “notwithstanding a local ordinance to the contrary” a certain provision of the statute applies, then it is the statutory provision that the planning board must apply. Examples include the statutory provisions pertaining to expansion of a nonconforming structure (“30% rule”), timber harvesting, and clearing of vegetation.

If a shoreland zoning ordinance and town wide zoning ordinance are in conflict, the ‘conflicts’ section of the ordinance usually dictates that the more restrictive provision controls the proposed use. *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 1998 ME 153, 712 A.2d 1061. Where a town-approved shoreland zoning ordinance contained a side line setback requirement and a shoreland zoning ordinance imposed upon the town by the Board of Environmental Protection did not, the Maine Supreme Court held that the State-imposed ordinance served as a supplement to the town ordinance and did not effectively repeal it. *Bartlett v. Town of Stonington*, 1998 ME 50, 707 A.2d 389.

Title 38, section 438-A(2) requires shoreland zoning ordinances to be pursuant to a comprehensive plan. However, the Maine Supreme Court has held that an adopted comprehensive plan is not a prerequisite to a valid shoreland zoning ordinance. The court interpreted Maine's Mandatory Shoreland Zoning Law (38 M.R.S.A. § § 435-449) in *Enos v. Town of Stetson*, 665 A.2d 678 (Me. 1995) and concluded that the Legislature intended municipalities to immediately adopt a shoreland zoning ordinance conforming to the State minimum guidelines regardless of whether a comprehensive plan had already been enacted. The language in 38 M.R.S.A. § 438-A(2) directing that municipalities prepare shoreland zoning ordinances "in accordance with a local comprehensive plan" is "mandatory only if a comprehensive plan is already in existence," in the court's opinion. The court noted, however, that if a town already has a comprehensive plan in effect and enacts a new shoreland zoning ordinance which is inconsistent with that plan, the shoreland zoning ordinance is invalid [citing *F. S. Plummer Co. v. Town of Cape Elizabeth*, 612 A.2d 856,860 (Me. 1992) and *LaBonta v. City of Waterville*, 528 A.2d 1262 (Me. 1987)].

Any new shoreland zoning ordinance, an amendment to a new or existing ordinance, or the repeal of any shoreland zoning provision must be submitted to the Department of Environmental Protection for approval before it becomes effective. The DEP has 45 days within which to act; if it fails to act, the ordinance/amendment is deemed approved. Any application for a shoreland zoning permit submitted to the municipality during the 45-day period is governed by the new ordinance, if approved by the DEP.

DEP periodically publishes "Shoreland Zoning News," a newsletter devoted to shoreland zoning issues such as expansions of nonconforming structures, changes in the State Shoreland Zoning laws, and other shoreland zoning matters. To receive back issues as well as future issues, contact DEP's Shoreland Zoning unit in the Bureau of Land and Water Quality in Augusta.

Flood Plain Development. In addition to the regulation of flood plains under a minimum shoreland zoning ordinance, Title 38, section 440 of the Shoreland Zoning Act authorizes municipalities to extend their shoreland zoning ordinances and maps to areas beyond 250 feet of the normal high water mark in order to control problems associated with flood plain development. These ordinances also must be based on a comprehensive plan, but they do not have to be part of a general zoning ordinance. The board may have some role to play in the permit system, if authorized by the ordinance. Some municipalities also have adopted flood hazard building ordinances and federal flood hazard maps under the federal Flood Disaster Protection Act of 1973 in order to enable local residents to participate in the Federal Flood Insurance Program. Again, planning boards may be authorized to administer the ordinances and generally are involved in reviewing the maps to determine their accuracy.

Typically, shoreland zoning ordinances zone the 100-year flood plain as a resource protection district, although these ordinances may exclude developed areas from the district. The shoreland zoning performance standards governing structures in the flood

plain generally require them to be elevated a certain number of feet above flood level. Generally, new principal structures are not allowed at all. Flood hazard building permit ordinances also tend to impose severe restrictions or prohibitions on new and replacement construction in designated flood areas.

Manufactured Housing and Mobile Homes. A number of Maine statutes authorize municipal ordinances regulating mobile homes, mobile home parks, manufactured housing, and modular housing, but place certain restrictions on the nature and extent of those local regulations, including 30-A M.R.S.A. § 3001 (home rule), 30-A M.R.S.A. § 4401 et seq (subdivision law), 30-A M.R.S.A. § 4358 (manufactured housing), and 10 M.R.S.A. §§ 9006 (2) and 9042 (3) (Manufactured Housing Act).

Section 9006 (2) reads: “Manufactured housing which is manufactured, sold, installed or serviced in compliance with this chapter (10 M.R.S.A. chapter 951) shall be exempt from all state or other political subdivision codes, standards or regulations which regulate the same matters.” For the purposes of § 9006, “manufactured housing” includes both newer and older mobile homes and modular homes. In contrast to § 9006, § 9042 (3) of Title 10 imposes the following limitations on local ordinances governing State-certified modular homes: “Notwithstanding the provisions of Title 25, § 2357 and Title 30-A § 4358, new manufactured housing that is manufactured, sold, installed or serviced in compliance with this chapter is exempt from all state and other political subdivision codes, standards, rules or regulations that regulate the same matters. A building permit or certificate of occupancy may not be delayed, denied or withheld on account of any alleged failure of new manufactured housing to comply with any code, standard, rule or regulation from which the new manufactured housing is exempt under this subsection.” (“New manufactured housing” is defined to include only State-certified modular housing for the purposes of § 9042.) To determine whether a particular State law or local ordinance or code is preempted by § 9006 (2) or § 9042 (3), it is necessary to compare the law, ordinance, or code with Title 10, chapter 951 and the provisions of the rules adopted by the Manufactured Housing Board to see if they “regulate the same matters.

Municipal authority to adopt design and safety standards for manufactured housing has been the subject of much debate because of the seemingly inconsistent treatment of ordinance authority in the Title 10 provisions noted above and 30-A M.R.S.A. § 4358. Section 4358 (2)(A) prohibits municipal ordinances which require manufactured housing on individual lots to be greater than 14 feet wide, but it allows ordinances which establish “design criteria, including, but not limited to, a pitched shingled roof, a permanent foundation and exterior siding that is residential in appearance,” as long as the requirements do not have the effect of circumventing the purpose of § 4358. Section 4358 (1) (D) (1) defines “permanent foundation” for HUD-certified mobile homes constructed after June 15, 1976 (i.e., “newer” mobile homes) to mean “a foundation that conforms to the installation standards established by the Manufactured Housing Board.” Subsection (1) (D) (2) defines “permanent foundation” for modular homes as one that “conforms to the” 1990 edition of the BOCA National Building Code. Subsection 4358 (2)(D) allows municipalities to apply reasonable safety standards to any manufactured home built before June 15, 1976 (i.e., “older” mobile homes) or not built in accordance with certain

national standards (i.e., not HUD-certified). It also authorizes municipalities to apply the design standards permitted by § 4358 (2)(A) to all manufactured housing, regardless of its date of manufacture. However, 30-A M.R.S.A. § 4358 (2)(A)(2) prohibits municipalities from applying design standards to a manufactured home on an individual lot that was legally sited in the municipality as of August 4, 1988 if the design standards would prevent the relocation of that manufactured home, regardless of its date of manufacture.

Title 10, § 9042 (3) now makes it clear that a municipality's authority to impose design criteria on modular homes pursuant to § 4358 is preempted to the extent that the State Manufactured Housing Act and agency rules regulate the same design issues. However, it is still arguable that a municipality's authority to impose design criteria on newer and older mobile homes pursuant to 30-A M.R.S.A. § 4358(2) is not preempted by 10 M.R.S.A. § 9006 (2). Section 4358 was adopted after § 9006 (2) and is not expressly referenced in the § 9006 (2) preemption, in contrast to the language of § 9042 (3) regarding modular homes. Until § 9006 (2) is amended to expressly preempt municipal authority related to newer and older mobile homes under § 4358, it is arguable that a municipality may adopt design standards applicable to mobile homes to the extent authorized by § 4358. Specifically as to installation of a newer mobile home, a local design standard arguably may require that all newer mobile homes be installed on a permanent foundation which conforms to the installation standards of the Manufactured Housing Board's rules, even in situations where none is required by the State, except where such a requirement would effectively prevent the relocation of a home already legally sited in the municipality as of August 4, 1988. It is not clear from the definition of "permanent foundation" applicable to newer mobile homes whether a local ordinance may require that the foundation must meet only one particular type of foundation standard in Chapter 900 of the Manufactured Housing Board's rules or whether the ordinance must treat the foundation as legal if it conforms to any one of the options available under the Board's rules. With regard to older mobile homes, the statutory definition of "permanent foundation" doesn't apply, so arguably ordinance provisions establishing installation standards for older units wouldn't be governed by the Manufactured Housing Board's rules, since § 4358 doesn't require it.

Subsection 4358 (2)(E) provides that any "modular home" as defined in § 4358 which meets construction standards for State-certified manufactured homes adopted pursuant to 10 M.R.S.A. § 9042 must be allowed in all zones where other single-family homes are allowed. This is an exception to the general rule stated in the opening paragraph of § 4358 (2), which requires only that a municipality allow manufactured housing to be located in a number of locations on undeveloped lots where single-family dwellings are allowed.

Section 4358 also establishes limitations on regulations which a municipality may adopt governing mobile home parks. Restrictions on ordinance authority include lot size requirements, buffer strips, setback requirements, and road construction standards, among others. For an interpretation of § 4358 by the Maine Supreme Court regarding a municipality's obligation to allow existing mobile home parks to expand in their current

location, see *Bangs v. Town of Wells*, 2000 ME 186, 760 A.2d 632. The court found that the right to expand included both density and physical area.

Condominium Projects. Generally, condominium projects must be reviewed as subdivisions under the Municipal Subdivision Law (30-A M.R.S.A. § 4401). Any local ordinance regulating condominiums must not conflict with the Maine Condominium Act (Title 33, Chapter 31). (That statute deals primarily with how condominiums are created and managed, provides certain protections for purchasers, and establishes rules for the conversion of existing buildings to condominiums.) Local ordinances may not prohibit the condominium form of ownership.

Farmland. Title 7, section 56 generally prohibits a municipal official from issuing a building or use permit which would allow “inconsistent development” on land of more than one acre if the development will be within 100 feet of “farmland” which is registered with the municipality. The law defines “inconsistent development” and “farmland” and describes the registration process.

Another statute, 17 M.R.S.A. § 2805, protects a farm operation from being prosecuted by a municipality as a public nuisance or for an ordinance violation if it is a permitted use and is operated in conformity with “best management practices,” as defined by the Maine Department of Agriculture, Food, and Rural Resources. It also cannot be considered a violation of a local ordinance if it is located in an area where agricultural activities are permitted, as long as the method of operation constitutes a “best management practice,” as defined by the Department.

Any municipal ordinance proposed after October 9, 1999 which would impact farm operations must be submitted to the Department of Agriculture by the municipal clerk or his or her designee at least 90 days before the meeting of the legislative body or the public hearing at which adoption will be considered. 17 M.R.S.A. § 2805. The commissioner of Agriculture must review the ordinance and advise the municipality if the ordinance would restrict or prohibit the use of “best management practices” as defined by the Department.

Junkyards/Automobile Graveyards /Automobile Recycling Business. Title 30-A, sections 3751-3760 impose an obligation on municipalities (through the municipal officers) to license “junkyards,” “automobile graveyards,” and “automobile recycling businesses” as defined in the statute each year and to enforce the law against people who are in violation. These activities also are regulated by the DEP under the Site Location of Development Act (38 M.R.S.A. § 481 et seq.) and to a lesser extent by the Secretary of State (29-A M.R.S.A. §§ 1101-1112). (MMA’s Legal Services Department has prepared an information packet discussing this law.) This law was revised extensively during the 2003 legislative session.

Title 30-A, section 3754-A authorizes municipal ordinances which impose additional standards with which proposed “junkyards,” “automobile graveyards,” and “automobile recycling businesses” must comply in order to receive a license from the municipal

officers. Without such an ordinance, the municipal officers can consider only the statutory requirements. *Spain v. City of Brewer*, 474 A.2d 496 (Me. 1984); *Polk v. Town of Lubec*, 2000 ME 152, 756 A.2d 510. The municipality may restrict the location of these businesses through properly enacted zoning ordinances, which often require planning board review and approval for new or expanded activities. Planning board review and approval would be independent of the approval required under State law from the municipal officers.

Minimum Lot Size. Title 12, § 4807 et seq. establishes a statewide minimum lot size for land use activities which will dispose of waste by means of a subsurface disposal system. The minimum lot size for new single family residential units (including mobile homes and seasonal homes) is 20,000 square feet. For multi-unit housing and other land use activities, a proportionately greater lot size is required based on a statutory formula. Municipalities may establish larger minimum lot sizes by ordinance under home rule (30-A M.R.S.A. §3001). This law is administered and enforced by the Maine Department of Human Services. An article discussing this law appears in Appendix 6.

Signs. Municipalities which want to regulate off-premise signs must comply with minimum guidelines administered by the Department of Transportation under 23 M.R.S.A. § 1901 et.seq.

Noise. Title 38, § 484 (3)(C) authorizes municipalities to adopt noise regulations which are stricter than those adopted by DEP under the Site Location Act. See also 30-A M.R.S.A. § 3011 regarding local regulation of shooting ranges.

Solid Waste, Septage, and Sludge. Solid waste, septage, and sludge disposal and storage are, generally regulated by DEP pursuant to Title 38 of the Maine statutes and rules adopted by DEP. Municipalities are prohibited from enacting stricter standards than those contained in Title 38 and in the DEP solid waste management rules “governing the hydrogeological criteria for siting or designing solid waste disposal facilities or governing the engineering criteria related to waste handling and disposal areas of a solid waste disposal facility.” Local ordinances regulating solid waste facilities may include reasonable standards regarding other issues such as: “conformance with state and federal rules; fire safety; traffic safety; levels of noise that can be heard outside the facility; distance from existing residential, commercial or institutional uses; ground water protection; and compatibility of the facility with local zoning and land use controls, provided the standards are not more strict than those contained in [Title 38, chapter 13 (solid waste law) and Title 38, chapter 3, subchapter I, articles 5-A and 6 (Natural Resources Protection Act and Site Location Act)]and the rules adopted there under.” Local ordinances must use definitions consistent with those adopted by DEP. Municipal authority to regulate State-and regionally-owned solid waste facilities is also restricted. Any ordinance adopted by a municipality regulating solid waste facilities must be filed with the DEP within 30 days. 38 M.R.S.A. § 1310-U. As noted earlier, a municipal ordinance may not totally prohibit privately-operated solid waste facilities or the disposal of out-of-town waste. *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149 (Me. 1988). Nor may a local ordinance totally ban new or expanded solid waste facilities.

Sawyer Environmental Recovery Facilities v. Town of Hampden, 2000 ME 179, 760 A.2d 257. The Maine Supreme Court reached a different conclusion regarding home rule authority to ban septage spreading. In *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200, the court found that under 38 M.R.S.A. § 1305 (6), an ordinance banning septage spreading did not frustrate the purpose of the State law, because other methods for disposing of septage were still available, even though more costly and difficult. The court noted, without deciding, that a total ban on all methods of septage disposal might have exceeded the town's home rule authority. The Maine DEP has prepared a guidance document to assist municipalities in drafting these types of ordinances.

Prior to approving an application for land application or storage of sludge, the DEP is required by 38 M.R.S.A. § 1305(9) to consult with the municipal officers of the municipality in which the sludge will be stored or spread. If DEP doesn't impose conditions on a permit that have been suggested in writing by the municipal officers, DEP must provide a written explanation to the municipal officers. If a generator requests a change in the terms or conditions of a permit, the DEP is also required to consult with the municipal officers. The municipality may ask for a review of the generating facility's testing protocol for sludge and if the Commissioner agrees, he or she may order the applicant to conduct an additional test at the applicant's expense. A copy of the test results must be provided to the municipal officers. Title 38, § 1310-N(2-G) establishes setback requirements for sludge land application sites and sludge storage sites and facilities which are near certain kinds of water bodies and also a setback from abutting property boundaries.

Title 38, § 1305(6) of the Maine statutes requires an applicant for a septage disposal permit to obtain approval from both DEP and the municipality in which the site will be located, unless the site is in a Resource Protection District under the jurisdiction of the Maine Land Use Regulation Commission (LURC). The municipality (presumably through the municipal officers) may decide whether the applicant must seek DEP or local approval first. The municipal officers hold a hearing and then conduct a review of the application. If they find that the site complies with local ordinances, they must approve it. If the municipality lacks applicable ordinances, then the municipal officers' approval must be based on a finding of compliance with the siting and design standards in the DEP septage management rules. For a discussion of which DEP standards the municipal officers may apply, see *Hutchinson v. Cary Plantation*, 2000 ME 129, 755 A.2d 494.

Hazardous Waste. Title 38, § 1319-P authorizes municipal ordinances regulating hazardous waste disposal, storage and generation as long as those ordinances are not less stringent than the statutes and agency rules administered and enforced by DEP. However, provisions governing "commercial hazardous waste facilities" cannot be more restrictive than or duplicative of State law; the DEP is required to incorporate all applicable local requirements to the fullest extent possible in conducting an application review. Municipalities are authorized to enact an ordinance levying a fee on a commercial hazardous waste facility. 38 M.R.S.A. § 1319-R. "Commercial" facilities are defined as "a waste facility for hazardous waste which handles wastes generated off the site of the facility; or a facility which in the handling of a waste generated off the site, generates

hazardous waste.” See also 38 M.R.S.A. § § 1497 and 1464 relating to radioactive waste disposal.

Coastal Management Policies. According to 38 M.R.S.A. § 1801, all coastal municipalities on tidal waters, in regulating, planning, developing, or managing coastal resources, are required to “conduct their activities affecting the coastal area consistent with the following policies to:

- **Port and harbor development.** Promote the maintenance, development and revitalization of the State’s ports and harbors for fishing, transportation and recreation;
- **Marine resource management.** Manage the marine environment and its related resources to preserve and improve the ecological integrity and diversity of marine communities and habitats, to expand our understanding of the productivity of the Gulf of Maine and coastal waters and to enhance the economic value of the State’s renewable marine resources;
- **Shoreline management and access.** Support shoreline management that gives preference to water-dependent uses over other uses, that promotes public access to the shoreline and that considers the cumulative effects of development on coastal resources;
- **Hazard area development.** Discourage growth and new development in coastal areas where, because of coastal storms, flooding, landslides or sea-level rise, it is hazardous to human health and safety;
- **State and local cooperative management.** Encourage and support cooperative state and municipal management of coastal resources;
- **Scenic and natural areas protection.** Protect and manage critical habitat and natural areas of state and national significance and maintain the scenic beauty and character of the coast even in areas where development occurs;
- **Recreation and tourism.** Expand the opportunities for outdoor recreation and encourage appropriate coastal tourist activities and development;
- **Water quality.** Restore and maintain the quality of our fresh, marine and estuarine waters to allow for the broadest possible diversity of public and private uses; and
- **Air quality.** Restore and maintain coastal air quality to protect the health of citizens and visitors and to protect enjoyment of the natural beauty and maritime characteristics of the Maine coast.

This means that local ordinances affecting land use in coastal areas must contain review standards which will promote these coastal policies.

Small Gravel Pits. Title 30-A § 3105 requires municipalities to incorporate certain minimum standards into any local ordinance regulating borrow pits that do not fall within the jurisdiction of DEP. Both § 1305 and 38 M.R.S.A. § 490-I (1) expressly acknowledge municipal home rule authority relating to pits that do fall within DEP’s scope of review.

Pesticide Use. Title 22, § 1471-U requires a municipality to give notice and a copy of the proposed ordinance to the State Board of Pesticide Control at least 7 days prior to the date of the meeting at which the adoption of an ordinance regulating pesticide storage, use or distribution will be considered. Once adopted, the clerk has 30 days to notify the Board of that fact. Ordinances already in existence also must be filed with the Board. Failure to file and/or comply with the notice requirements makes the ordinance invalid to the extent that it regulates the storage, distribution and use of pesticides.

Timber Harvesting. Any municipality attempting to regulate timber harvesting activities must use definitions of forestry terms in their ordinances which are consistent with those found in 12 M.R.S.A. § 8868 and those adopted by the Commissioner of the Department of Conservation. A municipal timber harvesting ordinance adopted before September 1, 1990 had to meet this requirement by January 1, 2001. Municipal ordinances may not be less stringent than the minimum standards established by the statute and agency rules. A municipality may not adopt a new timber harvesting ordinance or amend an existing one unless it follows the procedures outlined in 12 M.R.S.A. §§ 8869 and 8867-B for the development and review of the ordinance. This includes:

- a. A licensed professional forester must participate in the development of the ordinance;
- b. A meeting must take place in the municipality during the development of the ordinance between representatives of the Department and municipal officials involved in developing the ordinance. Discussion at the meeting must include, but is not limited to, the forest practices goals of the municipality;
- c. The municipality shall hold a public hearing to review a proposed ordinance or amendment at least 45 days before a vote is held on the ordinance. The municipality shall post and publish public notice of the hearing in accordance with 30-A M.R.S.A. § 4352(9) (zoning ordinance hearing notices); and
- d. It also must mail notices to all landowners at least 14 days before the hearing unless the ordinance will only apply to certain areas, in which case only the landowners in or immediately abutting those areas receive mailed notice. Mailed notice isn't required where the purpose of the amendment is to conform an existing ordinance to the minimum guidelines required by 38 M.R.S.A. § 439-A or the definitions in 12 M.R.S.A. § 8868.

See § 8869 for additional requirements regarding mailed notices to and comments by the Department, and a procedure for reimbursement of municipal costs of providing notice to landowners. After the legislative body has adopted the ordinance, the municipal clerk must file a copy of the ordinance with the Department within 30 days.

Regarding timber harvesting within the shoreland zone generally and within the Resource Protection District specifically, 38 M.R.S.A. § 439-A requires municipalities to regulate timber harvesting in the shoreland zone and prohibits local standards which are less restrictive than those outlined in § 439-A (5). For rules governing shoreland zoning ordinance timber harvesting provisions as of January 1, 2006, see 38 M.R.S.A. § 438-B.

Housing for Individuals With Disabilities. Title 42, sections 3600-3620 of the United States Code preempt local land use regulations which illegally discriminate on the basis of handicap or family status. Local ordinances which attempt to regulate group homes for people with physical or other disabilities in a manner different from comparable housing for non-disabled people may be in violation of this federal law. Consult with an attorney to determine whether an ordinance violates the Federal Fair Housing Act Amendments in order to avoid potential federal civil rights liability. Title 30-A, § 4357-A defines a “community living arrangement” as a State-approved housing facility for 8 or fewer persons with disabilities and states that such a facility is a single-family use for zoning purposes. For a copy of the State law, an article discussing the relationship between the Americans with Disabilities Act (ADA) and local ordinances, and a Legal Note discussing the legislative intent behind § 4357-A, see Appendix 6.

Ground Water Protection. Title 38, § 401 expressly acknowledges municipal home rule authority to “enact ordinances. . . to protect and conserve the quality and quantity of groundwater.” As was noted in the discussion of “zoning” ordinances earlier in this chapter, separate ground water protection or aquifer ordinances may constitute a type of zoning ordinance and must be supported by a comprehensive plan. In addition, the municipal officers have some limited authority to regulate surface uses of a public water supply and uses of the land overlying public water supply aquifers and their recharge areas. 22 M.R.S.A. § 2642.

Regulation of Water Levels. Title 30-A, § 4455 expressly authorizes municipal ordinances which regulate water levels or minimum flow on an impounded body of water. The ordinance must include certain provisions and be reviewed and approved by the Commissioner of DEP.

Airports. Title 6, § § 241-246 authorize municipalities to zone areas surrounding an airport in order to regulate uses, height of structures, and permissible vegetation. The statute expressly addresses nonconforming uses, variances, permit procedures, and appeals. See 30-A M.R.S.A. § 4402(4) regarding the applicability of the Municipal Subdivision Law to airport plans. (Copy of the Subdivision Law appears in Appendix 3.)

Antennas, Towers, and Satellite Dishes. Certain municipal ordinance provisions regulating satellite dishes, wireless communications towers, and amateur radio towers have been preempted by federal statute and agency rules adopted by the FCC. For a detailed discussion of this issue, see MMA’s “Telecommunications Information Packet,” which is available on MMA’s website at www.memun.org or in hard copy by contacting the Legal Services Department.

The Maine Supreme Court has held that a satellite dish is a “structure” for the purposes of shoreland zoning setback requirements. *Brophy v. Town of Castine*, 534 A.2d 663 (Me.1987). A Superior Court decision interpreting a specific municipal zoning ordinance upheld an appeals board finding that a 180-foot cellular telecommunications tower was a “public utility” which required approval as a special exception subject to certain conditions since it would exceed the general 35-foot height restriction for structures

under the town's ordinance. *Means v. Town of Standish*, CV-92-1365 (Me. Super. Ct., Cum. Cty., October 8, 1993). For other court cases involving local board decisions regarding tower applications, see *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577 and *Banks v. Maine RSA #1*, 1998 ME 272, 721 A.2d 655.

Title 30-A § 3012 prohibits the adoption or enforcement of an ordinance that is preempted by the FCC rule requiring reasonable accommodation of amateur radio communications.

Rental Housing. Title 14, section 6021(6) expressly authorizes municipal ordinances which establish standards for the habitability of rental dwelling units, as long as the local standards are more stringent than the specific standards for habitability included in § 6021. Section 6021 deals primarily with the temperature of the dwelling unit. (Note: Unless a municipality has an ordinance regulating rental housing, a municipality probably will be unable to help a tenant resolve a problem with a rented dwelling unit. The statutes and court-made rules governing the rights of tenants are enforceable in a civil lawsuit by the tenant against the landlord. Low income tenants may be able to obtain assistance from such legal aid groups as Pine Tree Legal Assistance or the Legal Aid Clinic at the University of Maine School of Law.)

Erosion and Sedimentation. Title 38, § 420-C expressly acknowledges municipal home rule authority to adopt ordinances which establish stricter standards relating to erosion and sedimentation control than those contained in § 420-C.

Storm Water Management. Title 38, section 420-D expressly provides that the storm water management standards contained in that section do not preempt local home rule ordinances which attempt to establish stricter standards.

Building Codes and Ordinances. Title 30-A, §§ 4101-4104 contain provisions which apply to local ordinances regulating various types of building construction activity, mobile homes and travel trailers and buildings used for public assembly. The provisions relate to administration and enforcement procedures and to appeals and variances. They are intended primarily to provide procedures where the local ordinance is silent. They probably were not intended to preempt a municipality's home rule authority to adopt different procedures and provisions.

Chimneys, Fireplaces, Vents, and Solid Fuel Burning Appliances. Title 25, section 2465(5) expressly acknowledges that a municipal ordinance regulating the materials, installation, and construction of chimneys, fireplaces, vents, and solid fuel burning appliances may exceed the requirements of rules adopted by the Commissioner of Public Safety.

Moratoria. Title 30-A, § 4356 establishes minimum requirements for a municipal ordinance which proposes a moratorium on certain types of land use activity while the municipality develops ordinances to regulate those activities. Contact MMA's Legal

Services Department or visit MMA's website (www.memun.org) for a copy of an information packet discussing moratoria and for sample ordinances adopted by other communities. The Maine Supreme Court has held that an ordinance that limits the number of building permits that may be issued each year for residential development does not constitute a "moratorium" for the purposes of § 4356. *Home Builders Association of Maine, Inc. v. Town of Eliot*, 2000 ME 82, 750 A.2d 566.

Impact Fees. Title 30-A, § 4354 establishes minimum guidelines which a municipal ordinance must meet if the municipality wants to establish development "impact fees." Impact fees are used by municipalities as a way to recover some of the infrastructure costs incurred to meet the needs of the new development (roads, sewers, schools, recreation, etc.). Contact MMA's Legal Services Department for more detailed information and sample ordinance provisions.

Religious Institutions and Activities. The federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq, prohibits any governmental entity from enacting or enforcing any land use regulation that imposes a "substantial burden" on the exercise of religion by any person, including religious assemblies and institutions, unless the government can show that the regulation furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest. For a copy of the law and information about court cases interpreting it, go to www.rluipa.com.

Underground Oil Storage Tanks. Title 38 § 563-C (5) expressly acknowledges the home rule authority of municipalities to adopt siting standards for underground oil storage tanks that are more stringent than State law.

Rate of Growth Ordinances. Title 30-A § 4360 requires a municipality that adopts a rate of growth ordinance to review and update it at least every three years. The ordinance may distinguish between rural and growth areas. Title 30-A § 4314 requires rate of growth ordinances to be supported by a comprehensive plan. For recent Maine court cases discussing this type of ordinance, see *Inland Golf Properties, Inc. v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000); *Home Builders Assoc. of Maine v. Town of Eliot*, 2000 ME 82, 750 A.2d 566; *Currier Builders v. Town of York*, 146 F. Supp.2d 71 (D. Me. 2001); and *York v. Town of Limington*, U.S. District Court Docket No. 03-99-P-H, decided October 7, 2003 and November 13, 2003.

Transfer of Development Rights Program. Title 30-A § 4328 authorizes the adoption of a transfer of development rights program within the municipality's boundaries and also between municipalities if they have entered an interlocal agreement.

Utilities in Historic District. Title 35-A § 2312 provides that, when a municipality has designated an historic district by ordinance, the "governing body" (i.e., the municipal officers) may demand that a utility connect its facilities at the rear of a structure, if access is reasonably available, or underground.

Chapter 8

Planning Board Manual

Overlap With State and Federal Laws

[Supplements # 1 & # 2 have been incorporated into this chapter.]

Overlap With State and Federal Laws

The planning board may be required by a local ordinance or State law to determine whether any State or federal laws apply to an applicant's project before the board may grant its approval. The board can draw on the expertise of the applicable State or federal agency to help it make this determination. Approval of a State or federal permit does not eliminate the need for the landowner to obtain local approval for his or her project, if required. Where a question exists about whether a project complies with State or federal law, one option for the board is to adopt a condition of approval that the applicant obtain approval from the State or federal agency or a nonjurisdictional letter from the agency before commencing work under the local permit/approval; the board's condition should require that proof of the State/federal approval or letter be filed with the municipality.

Some of the areas in which there may be overlap between ordinances and State or federal statutes are illustrated in the following examples:

- a. Mr. X proposes to build a house and seawall on $\frac{1}{4}$ acre of land which includes dunes and salt marsh and which is within 250 feet of a tidal river. The property is in a flood plain and is not serviced by a public sewer. This project would require permits pursuant to the following ordinances and statutes: local shoreland zoning ordinance, Natural Resources Protection Act, Minimum Lot Size Law, State Plumbing Code, and possibly a local flood hazard building permit ordinance and the federal wetlands program administered by the Corps of Engineers under section 404 of the Clean Water Act and the program administered by the U.S. Environmental Protection Agency.
- b. Company Y wants to build an industrial development 160,000 square feet in size, on land which it owns in a shoreland district adjacent to a stream. The general zoning ordinance permits industrial uses as a special exception in that part of town, with approval of the board of appeals. The company wants to discharge some of its waste into the stream and some into the air. It also wants to pile leftover bark on the bank of the stream. The following laws would probably apply to this project: local general zoning ordinance, local shoreland zoning ordinance, Protection of Waters Act, Site Location of Development Act, Protection and Improvement of Air Act, and Natural Resources Protection Act.
- c. Z Construction Company plans to develop a 80 acre parcel of land into a 40 lot subdivision. The local general zoning ordinance establishes a two-acre minimum lot size for that area of town. The developer proposes to relocate the course of a small stream which crosses the property and to fill a large freshwater bog area. Each lot will be served by an individual subsurface septic system. The laws which apply in this situation probably include: local zoning ordinance, State Plumbing

Code, Municipal Subdivision Law, Site Location of Development Act, Natural Resources Protection Act, the Clean Water Act, section 404 wetlands program administered by the Corps of Engineers, and the wetlands program administered by the U.S.Environmental Protection Agency.

Chapter 9

Planning Board Manual

Enforcement

Note: No changes (Supplement 2) were made to this chapter

Enforcement

If the planning board has been named as the board responsible for enforcing a particular ordinance or statute, the board members should obtain a copy of MMA's Manual for Municipal Code Enforcement Officers: A Legal Perspective, for a general discussion of code enforcement procedures, issues, and forms. To determine whether the board has authority to enforce a particular ordinance or statute, the members must look at that ordinance or statute to see who is authorized to send notices to people in violation of the law or take similar preliminary enforcement steps. If no one is specifically authorized to give notice of violation, the person authorized to approve projects or issue permits under the ordinance or statute probably has implicit preliminary enforcement power.

Planning boards should be aware that if they have been given the power to enforce an ordinance, State law (30-A M.R.S.A. § 4451) requires the board members to be certified by the State Planning Office in their area of enforcement responsibilities. Since this is something that most board members would not want to undertake, a board which has been given enforcement powers should talk to the municipal officers about having the ordinance amended to transfer that power to the local code enforcement officer.