

Chapter 3

Supplement #2, January 2004 is included.

The Decision-Making Process

The discussion which follows should be used by the appeals board as a general guide in dealing with applications in which it is the original decision-maker (e.g. variance applications) or appeal applications in which the ordinance requires the board to conduct a “de novo” review. There may be provisions in a local ordinance which conflict with these general rules and which may control the board’s decision. If the board is faced with such a conflict, it should consult with the board’s attorney to resolve it. For additional discussion regarding variances, the board also should refer to the discussions in Chapters 4 and 5 of this manual. (*from Supplement #2, January 2004*)

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 3. Others may be available from the regional planning agency 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 forms.

Appeals Board Bylaws

In the absence of a local ordinance or charter provision to the contrary, any administrative board, like an appeals board, can (and should) adopt written bylaws to govern nonsubstantive "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 board 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; 30-A M.R.S.A. § 2691. A sample set of bylaws and hearing procedures is included in Appendix 2. In adopting bylaws, the board should be careful to stick to procedural kinds of provisions and avoid conflicts with a local ordinance or charter or a State or federal law, such as the Maine Freedom of Access Act (Right to Know Law) (1 M.R.S.A. § 401 et seq.) (see Appendix 1). A board created prior to 1971 also should avoid conflicts in its bylaws with 30 M.R.S.A. § 4954. 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 procedure and the courts will defer to the board’s

procedure so long as that procedure is fair and does not conflict with State, federal or local law. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). (from Supplement #2, January 2004)

Standing to Apply for a Permit

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 in question (i.e., "standing") to apply for approval to conduct a 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). 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.) 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*, 130 A. 537 (NJ 1925). 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 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. This "standing" test governs people who are seeking approval of an application for a permit, conditional use, or variance from the board or official who has the initial authority to grant such a request. The courts have established a different "standing" test for people who want to *appeal* such a decision. That test is discussed in Chapter 4 of this manual.

Freedom of Access Act ("Right to Know Law")

General. Under the Freedom of Access Act ("Right to Know Law") (1 M.R.S.A. § 410 et seq.), the public has a right to be present any time the board or a subcommittee of the board 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). This law also gives the public the right to tape, film and take notes of the meeting, 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 guaranteed only where a meeting has been advertised as a public hearing, absent a local ordinance or bylaw to the contrary. (A copy of the Freedom of Access Act is included in Appendix 2.)

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

The Decision-Making Process

make plans to attend. In some communities, this may mean newspaper notice of some sort and in others posting notice around town may be enough. Giving notice about a week before the meeting is advisable for both regular and special meetings. 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. *(from Supplement #2, January 2004)*

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. *(from Supplement #2, January 2004)*

Executive Sessions. One exception to the rule that meetings are open to the public is where the board wants to consult with its lawyer "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 conference telephone call. The Freedom of Access Act only allows the board to conduct a **discussion** with its attorney in an "executive session" if the board (1) takes the vote to go into executive session in a public meeting, (2) follows the procedures in § 405, 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 Law) 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 (Freedom of Access Law's) open meeting requirement - *(from Supplement #2, January 2004)*. Section 405 authorizes other subject matter to be discussed in an executive session, but those other subjects generally are not relevant to boards of appeal.

Common Violations. Practices which violate the Freedom of Access Act include the following:

The Decision-Making Process

- a. polling board members by telephone to vote on an application or to discuss it;
- b. 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;
- c. 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;
- d. making decisions in a "closed door" meeting or excluding the public when not authorized by law;
- e. conducting discussions or making decisions by e-mail.

Site Visits. If a majority of the board is going to visit the site of a proposed project or appeal, 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). (from Supplement #2, January 2004)

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 anyone 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 any further public comment. *Adams, supra*. It is also 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 Freedom of Access Act.** 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.

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. (from

Supplement #2, January 2004)

Board Records

Title 30-A, § 2961(3)(B) requires the secretary of the board to maintain a permanent record of all board meetings and all correspondence of the board. All records maintained or prepared by the secretary must be filed in the municipal clerk's office.

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); 30-A M.R.S.A. § 2961(3)(B). 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](#). 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. *(from Supplement #2, January 2004)*

Conflict of Interest

Definition. This section discusses what is legally called a "conflict of interest." It is a different type of "conflict" from the "incompatibility of office" rule discussed earlier 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 § 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 category 1 as discussed in the preceding paragraph), then 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 an appeal 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

The Decision-Making Process

application and his or her commission on the sale hinged on whether the board granted approval of the appeal. 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 board's 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 in order to avoid the appearance of impropriety and 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, a board of appeals has authority under 30-A M.R.S.A. § 2691 to decide whether one of its members has a legal conflict of interest based on the facts presented. 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 conflict 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. (*from Supplement #2, January 2004*)

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 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,

The Decision-Making Process

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 2) If a board of appeals member is hearing an appeal from a decision by the planning board under a zoning ordinance and the appeals board member is related to a planning board member within the 6th degree, he or she should abstain. This is because under 30-A M.R.S.A. § 4353, the planning board is a "party" to zoning appeals. See also *Inhabitants of the Town of West Bath v. Zoning Board of the Town of West Bath*, CV-91-19 (Me. Super. Ct., Sag. Cty., May 7, 1991). The same would not necessarily be true if the board member were related to the code enforcement officer (CEO) and the decision being appealed was the CEO's, because the CEO is not a statutory party to board of appeals proceedings. However, it would be advisable for a board of appeals member related to the CEO within the 6th degree to abstain when a zoning appeal involves the CEO's decision in order to avoid the appearance of bias and a challenge on due process grounds.

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 that 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, Inc. v. Town of Kittery*, 554 A.2d 799, 801, ftn. 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 an ample record to support the board's decision to deny approval. 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.) (from Supplement #2, January 2004)

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 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 the applicable ordinance or statute. Cf., *New England Telephone and Telegraph Co. v. P.U.C.*, 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 furthermore that there was no way that he (the board member) would ever vote to approve any project of that type, or (3) that prior to becoming a board member, the member in question had testified against the application in earlier board proceedings, a court probably would view the board member as biased. *Pelkey, supra*.

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 or other members of the public to respond. 18 A.L.R.2d 562.

The Maine Supreme Court has held that it is legally permissible and not evidence of bias for a board

The Decision-Making Process

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. (from Supplement #2, January 2004)

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 arguably has the authority to decide.

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 member should follow that. If none, the member should make full disclosure for the record of his/her financial interest in the matter or any bias which might prevent him/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.

If a board member does not believe that he/she has a conflict or bias but the majority of the board believes that a conflict or bias does exist, the majority of the board may vote on that issue. 30-A M.R.S.A. § 2691; *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. If a board member thinks that he/she may have a conflict or bias which would legally disqualify him/her but is not sure, that board member may ask the rest of the board to consider the facts and vote on the matter.

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 any appeal or application.

Conducting the 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 application, 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. The board also should give reasonable notice to the public and press, as required by the Freedom of Access Act, or other relevant ordinance or State law. For zoning appeals and variance applications, 30-A M.R.S.A. § 4353 requires the board to give notice of the appeal to the municipal officers, the planning board, and the person filing the appeal. There is no statutory requirement of notice to abutters for zoning appeals. Nor is there a 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 (30-A 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 3 of this manual. Although the statutes do not expressly mention appeals involving those projects, it would be wise for the board of appeals to give notice of the appeal to be safe, especially where the board will be conducting a “de novo” review of the appeal (see discussion of “de novo” review in Chapter 4). (*from Supplement #2, January 2004*)

Even if the chairperson believes that the board has no jurisdiction to hear the requested appeal or that the appeal was not filed within the required deadline, the chairperson still must schedule an initial board meeting on the appeal in order for the board to make that decision by majority vote. The chair cannot simply refuse to call the meeting or require the applicant to withdraw the appeal. (*from Supplement #2, January 2004*)

Attendance by Applicant/Appellant. As long as the applicant/appellant has received reasonable notice of the meeting at which his or her application will be discussed, it is not legally required that the applicant/appellant or his/her authorized representative be present. A board which does not believe that it can make a decision without asking questions of the applicant or his/her agent should table further action until a future meeting and request that the applicant or a representative either attend the meeting or provide written answers to specific questions. If the applicant fails to do this or does not provide satisfactory answers, the board then 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/appellant to attend its meeting or to be represented by someone else. (*from Supplement #2, January 2004*)

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 local ordinance establishes a different quorum requirement. 1 M.R.S.A. § 71(3). A member who must abstain due to a legal conflict of interest in a particular case may not be counted in determining whether a quorum is present for that issue, absent ordinance language to the contrary. *Fitandides v. City of Saco*, 684 A.2d 421 (Me. 1996). *Corpus Juris Secundum, "Parliamentary Law"*, § 6. 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 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). (*from Supplement #2, January 2004*)
- **Use of Alternate Members.** If alternate board member positions were created by the legislative body when it established the board of appeals, 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. *(from Supplement #2, January 2004)*

- . • **Timeliness of Appeal; Required Notices Given.** If a quorum exists and the application involves an appeal, the chairperson then should indicate whether the appellant has filed a complete appeal application within the required deadline. The chairperson also should indicate whether required notices of the meeting have been given. (See Chapter 4)
- . • **Summarize Appeal.** If so, 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 appear to give the board jurisdiction over the permit application or appeal.
- . • **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 or to appeal (depending on the type of application). (See related discussion in this chapter and in Chapter 4.)
- . • **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. *(from Supplement #2, January 2004)*

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, 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. Unless the board's rules say otherwise, the chairperson's right to vote is not limited to breaking ties. The Maine Supreme Court has recognized that boards generally have the inherent authority to adopt their own rules of procedure e.g., *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 cross-examination and rebuttal in order to satisfy due process requirements. *Fichter v. Board of Environmental Protection*, 604 A.2d 433 (Me. 1992). Sample procedures and introductory remarks by the chairperson are included in Appendix 2, as well as a copy of 30-A M.R.S.A. § 2691(3). (See Appendix 1.) One issue, which the board should be sure to address in its rules of procedure, is the effect of a tie vote. The rules also should address participation by the chairperson in votes taken by the board; unless the rules provide otherwise, the chairperson may participate in all votes of the board, not just when necessary to break a tie.

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 board may have bylaws which require that the public be given at least a limited opportunity to speak at any 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. Applications involving an appeal or variance must be the subject of a public hearing before a decision is made on the substance of an appeal, either because of an express requirement in a local ordinance or by inference from the language of 30-A M.R.S.A. § 2691. Where an application involves a request for a conditional use or special exception, many ordinances leave it to the board to decide whether to call a public hearing. Where a zoning appeal or variance is involved, 30-A M.R.S.A. § 4353 requires the board to give direct notice of the hearing date to the appellant, municipal officers, and planning board. Local ordinances often require special notice to abutters and sometimes indicate how notice to the general public must be given. Several State laws may require notice to public drinking water suppliers. (See the earlier discussion in this chapter.)
- **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/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 (e.g., 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 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 continue 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 for the record verbally or in writing. (See discussion of site visits earlier in this chapter.) The board members should consider seeking technical advice from its regional planning commission or from a State agency or from other experts which the board is authorized to consult 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, 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 of its own 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 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).

Municipal 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 is the subject of the 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. (from Supplement #2, January 2004)

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 by whom, what votes were taken, and any agreements made regarding procedures or other issues at a board meeting. 30-A M.R.S.A. § 2691. The minutes, any documents submitted by the applicant or others (such as the application, a report from a professional engineer, a letter from an abutter, plans, maps, photographs, or diagrams), and the board's findings of fact and

The Decision-Making Process

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. Judges also find it easier to determine the nature and order of documents entered into the board's record when the board has marked those documents (for example, Applicant's Exhibit #1). 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. 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. (from Supplement #2, January 2004)

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 that evidence substantial? Is it credible? Is it outweighed by conflicting evidence?
- f. To what extent does the ordinance/statute authorize the board to impose conditions on its approval?

Basis for the Board's Decision in the Context of an Original Application or De Novo Appeal

- **General Rule.** Once the board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute. The board should not base its decision on the amount of public opposition or support displayed for the project. Nor should its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met his or her burden of proof and complied with the provisions of the statute/ordinance. *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*, 554 A.2d 799 (Me. 1989). Where a proposed project complies with all of the relevant ordinance requirements, the board must approve the application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994). At least one court has expressly warned board members that they must not "abdicate (their) responsibility, ignore the ordinance and approve an application regardless of whether it meets the conditions of the ordinance or not" and that board members who are philosophically hostile to zoning should address their concerns to the local and

State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance. *Fraser v. Town of Stockton Springs*, CV-88-97 (Me. Super. Ct., Waldo Cty., Aug. 10, 1989). (from Supplement #2, January 2004)

- **"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." (from Supplement #2, January 2004)
- **"Substantial Evidence" Test.** "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, supra*. (See additional discussion of the standard of review on appeal in Chapter 4 of this manual.)
- **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 3 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 a 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). (See Chapter 4 of this manual for additional discussion of constitutional issues.) 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 a court appeal. (from Supplement #2, January 2004)

- **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 1202, 1208 (Me. 1982). In the absence of expert testimony, the board may rely on the testimony of any one personally familiar with the site and conditions surrounding the application. *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 as well, 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 or due process violations. 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.) 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. (from Supplement #2, January 2004)

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 Re Villeneuve*, 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 2 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. (from Supplement #2, January 2004)

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. (from Supplement #2, January 2004)

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. (from Supplement #2, January 2004)

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 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. (from Supplement #2, January 2004)

Tie Votes. If a motion results in a tie vote, the board has failed to act and another vote should be taken to try to get a definitive decision. *Quinney v. Lambert*, CV-84-435 (Me. Super. Ct., Yor. Cty., July 8, 1985). If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). See generally, *Marchi v.*

Town of Scarborough, 411 A.2d 1071 (Me. 1986); *see, Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985). As previously noted, the effect of a tie vote should be spelled out in the board's rules of procedure 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/her relationship to the property, location of the property, basic description of the project, key elements of the proposal (lot size, setback, frontage, 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 the "undue hardship" test for a variance would be: "We conclude that the applicant will not be able to realize a reasonable return on his investment without a variance from the required side and front setbacks. Testimony from his appraiser and from a local realtor indicates that a house of only 10 feet x 20 feet could be built on the lot without a variance. Based on their experience, such a house would not sell in that neighborhood. The lot had been for sale for 10 years before the applicant purchased it. Only single-family residences are allowed in this district under § 105 of the Zoning Ordinance." Simply stating that "the applicant will not be able to obtain a reasonable return without a variance" is not enough, since this fails to explain why the board decided that the applicant met that standard.
(from Supplement #2, January 2004)

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). Title 30-A, § 2691(3)(E) requires board of appeals decisions to 'include a statement of findings and conclusions, upon all the material issues of fact, law, or discretion presented and the appropriate order, relief or denial of relief.' 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; *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131; *McGhie v. Town of Cutler*, 2002 ME 62, 793 A.2d 504; *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834; *Widewaters Stillwater Co., LLC v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597; *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me.1983); *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660; compare, *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991). (See Appendix 3 for excerpts from some of these cases.) In a case where the board of appeals heard an appeal application "de novo," 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 of appeals 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. *Curtis v. Main*, 482 A.2d 1253 (Me. 1984); *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013. (from Supplement #2, January 2004)

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 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 these conditions in the final vote so that there will be no confusion regarding what conditions are applicable; only those conditions which were adopted by a majority vote on an individual review criterion or which are adopted by the majority

The Decision-Making Process

of the board in the final vote would 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. (*from Supplement #2, January 2004*)

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. In the case of a board decision on an application for an appeal or variance, the board must keep in mind that 30-A M.R.S.A. § 2691(3) requires the board to issue a written decision to the applicant and others within seven days of taking a final vote to approve or deny the application; 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 appear in Appendix 3. (*from Supplement #2, January 2004*)

Several problems can result if the board delegates the responsibility of 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). The other 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 of appeals 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. (*from Supplement #2, January 2004*)

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 (and anyone else required by statute or ordinance) promptly after the decision is made. The board should check the applicable statute or ordinance to see if it states a deadline. For example, 30-A M.R.S.A. § 2691 requires the board to send or hand deliver a copy of its written decision to the applicant, the applicant's

The Decision-Making Process

representative, the municipal officers, and the planning board within seven days of making the decision in the case of an appeal. The date on which this is done 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 Right to Know Law and can be inspected and copied by any member of the general public, whether or not a resident of the municipality.

In the case of a variance decision, the board is required to provide a recordable certificate to the applicant. This is discussed more fully in Chapter 5 and Appendix 4 of this manual. (See Chapter 4 of this manual for a discussion of reconsideration of appeals decisions.)

Conditions of Approval. A board has inherent authority to attach conditions to its approval of an application. See generally, *In Re: Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). A conditional approval “which has the practical effect of a denial...must be treated as a denial.” *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., Jan. 12, 1990). Any conditions which the board wants to impose on the applicant’s project must be clearly stated in its decision and on the face of any plan to be recorded to ensure their enforceability. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). 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 protect the public, 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). (from Supplement #2, January 2004)

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). (from Supplement #2, January 2004)

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. (*from Supplement #2, January 2004*)

Reviewing Conditional Use/Special Exception Applications

General. If a general zoning or shoreland-zoning ordinance authorizes the appeals 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. 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 the 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 and adequate to protect the public, 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 "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 any other bases for denial. That way, if the denial is appealed, it is possible that a court could uphold it even if the court disagrees with some of the board's conclusions - (*from Supplement #2, January 2004*). *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).

Second Request for Approval of Same Project. Once an application for a conditional use or special exception permit 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 then govern the board's authority.

Transfer of Ownership after Approval. It is commonly assumed that a subsequent purchaser of land

for which a special exception 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 K. Young, *Anderson's American Law of Zoning*, §20.02, pgs. 416-417. 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. (Regarding variance approval and a new owner, see Chapter 5.) (from Supplement #2, January 2004)

Vague Ordinance Standards/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 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 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). (from Supplement #2, January 2004)

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. (from Supplement #2, January 2004)

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). (from Supplement #2, January 2004)

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,

The Decision-Making Process

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. (from Supplement #2, January 2004)

Prior Mistakes by the Board. The fact that a board of appeals or its predecessor made mistakes in the issuance of a permit or variance 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 the Use of the Permit. Generally, once the board has issued a permit, the holder of the permit has an unlimited amount of time within which to complete the work covered by the permit. However, the board should check the applicable ordinance or statute to be sure. (See discussion in Chapter 6 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. (from Supplement #2, January 2004)