TOWN OF GRAY

ZONING BOARD OF APPEALS

AGENDA • MARCH 27, 2024

Zoning Board of Appeals Regular Meeting	**Henry Pennell Municipal Complex 24 Main Street Gray, Maine**	**6:00 PM**

I. MEETING COMMENCES

Roll Call

II. MINUTES APPROVAL

a. Zoning Board of Appeals - Regular Meeting - 2/28/24 7:00 PM

III. NEW BUSINESS

a. Zoning Board Training

IV. ADJOURNMENT

** The Town of Gray is an equal opportunity employer and complies with all applicable equal access to public accommodations law. If you are planning to attend a Town Council or Town committee or board meeting and need assistance with a physical disability, please contact the Town Manager's office at least 48 hours in advance of the meeting to have the Town assist you. 657-3339. TTY 657-3931.*

TOWN of GRAY

ZONING BOARD OF APPEALS

MINUTES • FEBRUARY 28, 2024

Henry Pennell Municipal Complex **7:00 PM**
24 Main Street Gray, ME, 04039

I) MEETING COMMENCES

ROLL CALL

Attendee Name	Status
Brad Fogg	Present
Georgia Woodbury	Present
Derek Shirley	Present
Tammy Munson	Present
Martin Meaney	Present

II) MINUTES APPROVAL

II.a) Zoning Board of Appeals - Regular Meeting - 1/31/24 7:00 PM

Motion to table II.a) Zoning Board of Appeals - Regular Meeting - 1/31/24 7:00 PM

RESULT	**PASSED [UNANIMOUS]**
MOVER	Brad Fogg
SECONDER	0
AYES	None

III) NEW BUSINESS: PUBLIC HEARINGS

III.a) Robert and Joanna Ritchie are requesting a reconsideration of the Notice of Decision dated December 27, 2023 regarding the reduction of a 50-foot required front setback down to 33-feet in order to install a 50-foot right of way accessing the rear of their parcel for the purpose of building up to one additional housing unit located on their property at 134 Long Hill Road, Gray Tax Map 064-042-004-000, in a Rural Residential & Agricultural Zoning District.

Motion to table III.a) Robert and Joanna Ritchie are requesting a reconsideration of the Notice of Decision dated December 27, 2023 regarding the reduction of a 50-foot required front setback down to 33-feet in order to install a 50-foot right of way accessing the rear of their parcel for the purpose of building up to one additional housing unit located on their property at 134 Long Hill Road, Gray Tax Map 064-042-004-000, in a Rural Residential & Agricultural Zoning District.

RESULT	**PASSED [UNANIMOUS]**
MOVER	Derek Shirley
SECONDER	Georgia Woodbury
AYES	Brad Fogg, Georgia Woodbury, Derek Shirley

III.b) Mark and Mary Bourgeois are requesting a variance appeal to increase 20' of allowed structure height to 28' located at 32 North Raymond Road, Gray Maine Tax Map 013, 107-019-000, located in a Limited Residential and Shoreland Zone.

Motion to approve a. That the land in question cannot yield a reasonable return unless a variance is granted;

RESULT	**PASSED [UNANIMOUS]**
MOVER	Brad Fogg
SECONDER	Georgia Woodbury
AYES	Brad Fogg, Georgia Woodbury, Derek Shirley

Motion to approve b. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

RESULT	**PASSED [UNANIMOUS]**
MOVER	Brad Fogg
SECONDER	Derek Shirley
AYES	Brad Fogg, Georgia Woodbury, Derek Shirley

Motion to approve c. That the granting of a variance will not alter the essential character of the locality;

RESULT	**PASSED [UNANIMOUS]**
MOVER	Derek Shirley
SECONDER	Georgia Woodbury
AYES	Brad Fogg, Georgia Woodbury, Derek Shirley

Motion to approve d. That the hardship is not the result of action taken by the applicant or a prior owner.

RESULT	**PASSED [UNANIMOUS]**
MOVER	Georgia Woodbury
SECONDER	Derek Shirley
AYES	Brad Fogg, Georgia Woodbury, Derek Shirley

IV) ADJOURNMENT

TOWN OF GRAY
ZONING BOARD OF APPEALS TRAINING

March 27, 2024

Benjamin T. McCall, Esq.

10 Free Street
PO Box 4510
Portland, ME 04112-4510

Toll Free: 1-800-756-1166
www.jensenbaird.com

TOWN OF GRAY
ZONING BOARD OF APPEALS WORKSHOP
March 27, 2024

BENJAMIN T. MCCALL, ESQ.

I. ADMINISTRATIVE BOARD DECISION MAKING

A. Governing Law

1. **Constitution – federal and state**

   Due Process Clause

2. **Statutes – federal and State**

   30-A M.R.S. § 2691 **(see page 12)**

   30-A M.R.S. § 4353 **(see page 15)**

3. **Town of Gray Zoning Ordinance, § 402.9.2 (see page 1)**

4. **Town of Gray Shoreland Zoning Ordinance, § 16.H.1 (see page 6)**

5. **Robert's Rules of Order – gap filler**

B. "Quasi-Judicial" versus "Legislative" Roles (see page 25)

1. Quasi-judicial – variance appeals, administrative appeals, interpretation appeals.

2. Legislative – not applicable to Zoning Board of Appeals.

3. Keep in mind 2 different roles and duties that apply to each role.
   - Board of Appeals' job is to apply the law, not to make it.

C. **Freedom of Access Act, or "FOAA" (1 M.R.S. §§ 401-411)**
(see pages 31-44 for FAQ)

1. **Notice of meetings**

- Any meeting of majority of the Board at which members will discuss official business or vote must be noticed to the public.
- Statute is not specific about time frames.
- "This notice shall be given in ample time to allow public attendance and shall be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency concerned." 1 M.R.S. § 406.
- Rule of thumb – about a week is adequate notice.
- Emergency meetings may be held if absolutely necessary. Then, notice should be given to the press and posted as quickly and widely as possible.

2. **Public meeting (or "public proceeding") vs. public hearing**

- Public proceeding must be open to the public so that any person may attend and observe.
- No right to speak or participate at public proceeding under FOAA.
- However, at a public hearing, which is designed to allow for participation of the public, the right to speak is guaranteed, subject to rules governing appropriate decorum maintained by the Board Chair. For example, a time-limit for all speakers may be set, so long as it is applied and enforced evenly and fairly.
- FOAA allows for tape recording or videotaping of public proceedings as long as it is not disruptive.
- Most Zoning Board of Appeals proceedings will be public hearings that require a chance for the general public to comment.

3. **Board member discussions/e-mail**

- Any discussions or e-mail communications among board members can be deemed a "public proceeding" for purposes of FOAA.
- Not allowed to conduct business by e-mail because it is not in public.

- Note: E-mails **<u>are</u>** public records under FOAA, good idea to keep them in a separate folder in your email account if there is ever a request, or for the Town to issue separate email addresses to all board members.

- Best practice is to keep e-mail communication to absolute minimum.

- All e-mails (whether on personal or town email) that relate to participation are subject to disclosure under FOAA.

4. **"Ex parte" communications**

- When one party to proceeding communicates to the decision-maker without other party being present.

- Not fair if someone lobbies you off-site, the other side can't hear it and respond to it.

- Board decisions must be based on evidence <u>in the record</u>. Ex parte communications, by definition, are not in the record.

- Try to avoid, but if this happens…

- Board member should report to the full board at the next meeting and disclose any communications; provide opportunity to respond.

- Goal is full disclosure and to avoid the "appearance of impropriety."

5. **Site visits**

- Also are "public proceedings" under FOAA subject to notice requirement.

- Minutes are not required but are good practice.

- The public is allowed to attend, but may not speak or otherwise participate.

- Do not discuss substantive issues about the site or application with other board members or the applicant.

- Applicant or members of public should not be "lobbying" the board – these are ex parte communications.

- At next meeting, note for the record that a site visit occurred.

6. **Executive sessions**

- Board may go into executive session by vote of 3/5 of members present and voting.
- Only may go into executive session for purpose specified in FOAA (not many are applicable to Board of Appeals).
    - Executive sessions between the Board and its attorney concerning its legal rights and responsibilities or pending litigation is the most frequently used.
- Attorney must be present in person or by conference call/Zoom.
- Board may not take any official action or vote while in executive session.

7. **Public records**

- All Board records are public records under FOAA (paper records, audio/video, computer files, emails).
- Includes emails between Board members (save in separate folder).

D. **<u>Impartial Decision Maker: Conflicts of Interest</u>**

Overall goal: The Board's fact-finding must always be fair and impartial.

1. **Definition of Conflict**

- Statutory test (30-A M.R.S. § 2605) **(see pages 23-24)**
    - Conflict when member is direct or indirect owner of 10% of stock or owns 10% interest in business entity.
    - Member must make notice of the conflict and abstain from voting.
- Case law test (*Tuscan v. Smith*, 130 Me. 36 (1931)):
    - By reason of the Board member's interest, is the Board member placed "in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act" as a Town official?

- Examples: abutting property owner, real estate agent if sale contingent upon variance, employee of company that is applicant (and member is not disqualified under statutory test).

2. **Appearance of impropriety**

- Statutory provision 30-A M.R.S. § 2605(6) **(see page 24)**
- Even if statutory test or case law test not met, board member should abstain to avoid appearance of a conflict of interest.
- Purpose: maintain public confidence in the Board's work.

3. **How to handle conflicts of interest**

- Make a full disclosure of the interest at the start of the agenda item.
- State on the record whether you can be fair and impartial.
- If conflict is clear, abstain.
- If conflict is unclear and you state you can be fair and impartial, remaining members vote whether to allow you to participate.
- If you are not participating, sit in the audience (not with Board).

4. **Effect of failure to abstain**

- Entire board's decision could be voidable.
- Court may decide that decision is tainted and require a new hearing.
- Indirectly implicates the trust in the Board's impartiality.

E. **<u>Impartial Decision Maker: Bias</u>**

1. **Bias based on blood/marital relation to applicant or other party**

- 1 M.R.S. § 71(6) (relation to the 6th degree, or second cousins)
- "When a person is required to be disinterested or indifferent in a matter in which others are interested, a relationship by consanguinity or affinity within the 6th degree according to the civil law, or within the degree of 2nd cousins inclusive, except by written consent of the parties, will disqualify."

2. **Bias against a party based on state of mind**

- If board member is so biased against the applicant or project that he/she could not make an impartial decision.
- Purpose is to protect applicant's due process rights.
- Examples: personal grudge, public comments that board member is generally opposed to certain types of projects, previously testified against application in earlier board hearings (perhaps before joining the board).

3. **Investigations conducted by Board members**

- When board members go out and investigate matters beyond reviewing materials presented by applicant and other parties.
- Generally not a good idea, because parties involved in the proceeding do not have opportunity to comment on the information obtained.
- Again, due process concern.
- However, it is OK to review materials beforehand and prepare outline of issues and potential findings to anticipate matters that might arise at hearing.

4. **How to handle allegations of conflict or bias**

- At the start of the agenda item, make a full disclosure of the alleged bias.
- State on the record whether you can be fair and impartial.
- If bias is clear, abstain.
- If bias is unclear and you state you can be fair and impartial, remaining members vote whether to allow you to participate.
- If you are not participating, sit in the audience (not with Board).

5. **Burden of proof in court**

Burden of proof is on the applicant to show bias.

F. **Meeting Conduct**

1. **Standard Procedures for Speaking; Order of Presentations**

2. **Fairness to speakers at hearings**

3. **Public input other than hearings**

4. **Time of meetings; length of meetings; time limits**

5. **Participation of board members who miss meetings**

6. **Take adequate time to make a decision**

7. **Expert vs. non-expert testimony/personal knowledge**

8. **Majority vote/tie vote**

9. **Conditions of approval**

10. **Reconsideration**

- Follow procedure in statute (30-A M.R.S. § 2691(3)(F)), which is paralleled by Zoning Ordinance § 402.9.2.C.17.

- Must occur within 45 days of original decision under Section 2691. However, no reconsideration if case has already been appealed to court pursuant to Rule 80B.

- A request to the board to reconsider must be filed within 10 days of the decision.

- Board may hold additional hearings and receive additional evidence.

- Must give notice to original applicant, and should give direct notice to anyone who participated in original hearing, and notice to general public.

- If reconsidering, the Board has to re-do all findings and adopt everything again.

II. ADMINISTRATIVE APPEALS

A. **Appeals from CEO decisions (*de novo* review means no deference)**

1. **Zoning Ordinance § 402.9.2.C; Shoreland Zoning Ordinance § 16.H.3.**

- Applicant will argue that the CEO has misinterpreted the code provision, rather than looking for a variance (which will be discussed later).
- Appeals can either be by landowner (denials and some enforcement actions) or by an abutter (approvals).

2. **Standing** – must show "direct and personal injury" as a result of decision; that actual use or enjoyment of property will be adversely affected by the application, or some other personal interest different from general public.
    - *Raposa v. Town of York*, 2019 ME 29 – clarifies that board of appeals has jurisdiction over appeal of CEO's finding of no violation, as long as ordinance does not expressly preclude an appeal (i.e., it's not an advisory opinion)

B. **Appeals from Planning Board Decisions**

1. Zoning Ordinance – no review at all; appeals are directly to Superior Court.

2. Shoreland Zoning Ordinance § 16.H.3 – appellate review
- This means: (1) the Board is **not** taking new evidence; (2) the Board is **only** reviewing the Planning Board's decisions for errors of law, abuses of discretion, or decisions made without there being "substantial evidence" in the record.

III. VARIANCES

A. **Types of Variances**

1. **Undue hardship variance (see 30-A M.R.S. § 4353(4), page 15; Zoning Ordinance § 402.9.2.B.2; Shoreland Zoning Ordinance § 16.H.2)** for reduction in dimensional requirements related to lot frontage, structure height, lot coverage, and setback requirements).

- Criteria:
    - The land in question cannot yield a reasonable return unless a variance is granted.
    - The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.

- The granting of a variance will not alter the essential condition of the locality.

- The hardship is not the result of action taken by the applicant or a prior owner.

2. **Variance from Dimensional Requirements (Practical Difficulty) (see 30-A M.R.S. § 4353(4-C); Zoning Ordinance § 402.9.2.B.3)**

- Criteria:

  - The need for the variance is due to the unique circumstances of the property and not the general conditions of the neighborhood.

  - The granting of the variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties.

  - The practical difficulty is not the result of action taken by the applicant or a prior owner.

  - No other feasible alternative to a variance is available to the applicant.

  - The granting of the variance will not unreasonably adversely affect the natural environment.

  - The property is not located in whole or in part within the shoreland area as described in 38 M.R.S. § 435.

  - Note: the term "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the applicant to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the applicant.

3. **Additional variance standards (see Zoning Ordinance § 402.9.2.B.4)**

- What effect will the proposed variance have on the prevailing character of the area?
- Does the proposed variance require special screening or fencing to separate or protect the property of abutting owners?
- Will the proposed variance create drainage, erosion, or flooding problems?

- Will the proposed variance increase water pollution?
- Will the proposed variance generate vehicular traffic, access circulation or parking conditions which create hazardous situations?
- Will granting of the variance violate any of the performance standards of this Ordinance apart from the specific relief authorized by this Section?
- Will the granting of the variance violate any of the performance standards of this Ordinance apart from the specific relief authorized by this Section?
- Will the proposed variance create any dangerous nuisances to abutting property owners?
- Is the variance request the least modification of the Zoning Regulations necessary to afford relief?

4. **Disability variance (see 30-A M.R.S. § 4353(4-A))**

State statute permits municipalities to delegate these responsibilities to Code Enforcement Officers, which is the standard in Gray (Zoning Ordinance § 402.6.5.H.3.)

B. **Recording of Variance** – applicant's responsibility to record within 90 days; if not recorded, variance is void. (see 30-A M.R.S. § 4353(5))

C. **Prior Mistakes by Board**

- Just because a prior board mistakenly granted a variance in the past does not require you to issue one again involving similar circumstances.

D. **Variances vs. Waivers**

- Variances may only be granted for **general zoning** requirements and NOT for performance standards imposed for specific uses.

- For example: the Board has jurisdiction to hear a request for a variance from the maximum lot coverage in the RRA (Zoning Ordinance Table 402.5.4.B); but the Board does not have jurisdiction to hear a request for a reduction of the minimum number of off-street parking spaces (Zoning Ordinance § 402.10.11.B.8). This is something that only the Planning Board has the authority to consider.

York v. Town of Ogunquit, 2001 ME 53, 769 A.2d 172.

IV. WRITTEN DECISION REQUIREMENTS

A. Reasons for Preparing a Written Decision

1. **The law requires it**:
   - FOAA (1 M.R.S. § 407(1)) (written decision required for denials or conditional approvals)

2. **Practical reasons**:
   - It ensures that the Board considered all of the review criteria and that evidence supports the Board's findings.
   - Allows interested parties to determine whether to appeal the Board's decision and on what basis.
   - Provides a clear statement of rationale for decision to court if appealed. Judge must need to be able to tell what basis for decision is.
   - If Board does not do it carefully enough, the court will make you do it better—remand for further findings.
   - Always assume every decision (especially denials) will go to court.

B. Elements of a Written Decision

1. **Findings of fact**: statements by the Board summarizing all the basic facts involved in a particular application.

   The more detailed the better.

   Example:

   - name of applicant and interest in the project
   - key elements of the proposal or application
   - evidence submitted by applicant beyond that contained in application
   - evidence submitted by people other than applicant either for or against application

2. **Conclusions of law**: statements by the Board linking the specific facts covered in the findings of fact to the specific review standards in the ordinance or statute that the applicant must meet in order to receive the Board's approval.

   Example: "With regard to 30-A M.R.S. § 4353(4-A)(A), the installation of equipment or the construction of structures proposed

under this application is necessary for access to or egress from the dwelling by the person with the disability because the applicant's wife needs a dry surface, handrails and low riser stairs in order to access the dwelling."

3. Be sure to address <u>each</u> review standard (<u>NOT</u> "all applicable review standards have been met.")

4. Be sure to include any conditions of approval, which should be expressly stated and explained. Note: conditions of approval must be reasonably related to standards that applicant is required to meet.

5. It must be the Board's decision – affirmatively voted on a majority of the members of the Board.

C. **<u>Procedures for Adoption of a Written Decision</u>**

1. **Three different methods of adoption of a written decision**:

(a) Use a fill-in-the blank form; Board can handwrite on the spot

(b) Discuss written decision, draft the language on the spot and authorize Chair to sign it as agreed once it is typed up.

(c) Vote on merits but postpone adoption of written decision and come back within a week to review draft prepared by staff or someone else.

NOTE: 30-A M.R.S. § 2691(3)(E) requires: "Notice of any decision must be mailed or hand delivered to the petitioner, the petitioner's representative or agent, the planning board, agency or office and the municipal officers within 7 days of the board's decision."

2. **The following methods do not work**:

(1) Reference to the meeting minutes as the findings of fact/conclusions of law

(2) Delegation of the task to a staff member or Board member without any Board vote to approve the written decision.

V. QUESTION AND ANSWER SESSION (not about pending applications)

CHAPTER 402
ZONING ORDINANCE
TOWN OF GRAY MAINE

Adopted November 10, 2008 / Effective December 10, 2008
Amended January 19, 2010 / Effective February 18, 2010
Amended June 21, 2011 / Effective July 21, 2011
Amended September 6, 2011 / Effective October 6, 2011 (Medical Marijuana)
Amended November 15, 2011 / Effective December 15, 2011 (Contract Zoning)
Amended December 6, 2011 / Effective January 5, 2012 (Agritourism Center)
Amended June 5, 2012 / Effective July 5, 2012 (Gravel Pits / Art. 11)
Amended February 5, 2013 / Effective March 7, 2013 (Gravel Pits / Art. 11)
Amended October 20, 2015 / Effective November 19, 2015
Amended March 15, 2016 / Effective April 14, 2016
Amended September 6, 2016 / Effective October 5, 2016
Amended January 3, 2017 / Effective February 2, 2017
Amended March 21, 2017 / Effective April 20, 2017
Amended May 16, 2017 / Effective June 15, 2017
Amended September 19, 2017 / Effective October 19, 2017
Amended October 17, 2017 / Effective November 16, 2017
Amended January 2, 2018 / Effective February 1, 2018
Amended January 22, 2019, Effective March 1, 2019
Amended June 18, 2019 / Effective date is July 18, 2019
Amended January 19,2021/ Effective Date February 18,2021

of construction is prohibited unless all the applicable provisions of the Basic Code are complied with. A change from one prohibited use, for which a permit has been granted, to another prohibited use shall be deemed a violation of the Zoning Ordinance

G. Plumbing Permit: Must be obtained prior to issuance of a building permit. The State of Maine Plumbing Code standards will be used. The application shall also furnish the Code Enforcement Officer with reliable information relating to soils tests conducted in the sewage disposal area, in accordance with any applicable state or Local law, code, or regulation and must demonstrate that soil conditions are suitable for the absorption of waste materials from septic tanks. The results of the soil tests shall be submitted on the HHE 200 form or Maine Department of Environmental Protection, whichever is applicable.

402.9.2 Duties and Authority of the Board of Zoning Appeals

A. Appointment and Composition:

1. The Zoning Board of Appeals shall be appointed by the Town Council of the Town of Gray, and shall consist of five (5) members and two (2) associates, all of whom shall be legal residents of the Town of Gray. Terms of members shall be for three (3) years except that initial appointments shall be such that the terms of office of no more than two (2) members shall expire in any single year. The board shall elect annually a chair and vice-chair from its membership. A recorder shall keep the minutes of the proceedings of the Board of Appeals, which shall show the vote of each member upon each question. All minutes of the Board shall be public record. A quorum shall consist of three (3) members.
2. Town Council members and/or their spouses may not serve as members or associate members of the Board.
3. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting thereon shall be decided by a majority vote of the members, except the member who is being challenged.
4. A member of the Board may be dismissed for cause by the Town Council upon written charges and after public hearing.

B. Powers and Duties:

Appeals shall lie from the decision of the Code Enforcement Officer to the Board of Appeals and from the Board of Appeals to the Superior Court according to the provision of Maine Revised Statues. The Board of Appeals shall have the following powers and duties:

1. Administrative Appeals: To hear and decide where it is alleged there is an error in any order, required, decision, or determination by the Code Enforcement Officer in the enforcement of this Ordinance. The actions of the Code Enforcement Officer may be modified or reversed by the Board of Appeals, by concurring vote of at least three (3) members of the Board. Decisions of the Code Enforcement Officer may be reversed only upon a finding that the decision is clearly contrary to specific provisions of this Ordinance.
2. Variance Appeals: To hear and decide, upon appeal, in specific cases where a relaxation of the terms of this Ordinance would not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant, a literal enforcement of this Ordinance would result in unnecessary or undue hardship. A variance may be granted by the Board only where strict application of the Ordinance, or a provision thereof,

to the petitioner and his/her property would cause undue hardship. The words "undue hardship" mean:

a. That the land in question cannot yield a reasonable return unless a variance is granted;

b. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

c. That the granting of a variance will not alter the essential character of the locality; and

d. That the hardship is not the result of action taken by the applicant or a prior owner.

Establishment or expansion of a use or structure otherwise prohibited shall not be allowed by variance, not shall a variance be granted because of the presence of nonconformities in the Zoning District or uses in adjoining Zoning Districts. The Board of Appeals shall grant a variance only by concurring vote of at least three (3) members and in so doing may prescribe conditions and safeguards as are appropriate under this Ordinance.

3. Practical Difficulty Variance: The Board may grant a variance from the dimensional standards of the Zoning Ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

   a. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;

   b. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;

   c. The practical difficulty is not the result of action taken by the petitioner or a prior owner;

   d. No other feasible alternative to a variance is available to the petitioner;

   e. The granting of a variance will not unreasonably adversely affect the natural environment; and

   f. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.

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

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

4. Variance Review Criteria: In hearing variance appeals under this section, the Board of Appeals shall determine that the applicant has demonstrated that all of the undue hardship or practical difficulty criteria in sub-Sections 2 and 3 above have been met. Additionally, the Board shall consider the following criteria in its decision to grant any variances or impose conditions:

   a. What effect will be proposed variance have on the prevailing character of the area?

   b. Does the proposed variance require special screening or fencing to separate or protect the property of abutting owners?

c. Will the proposed variance create drainage, erosion or flooding problems?

d. Will the proposed variance increase water pollution?

e. Will the proposed variance generate vehicular traffic, access circulation or parking conditions which create hazardous situations?

f. Will granting of the variance violate any of the performance standards of this Ordinance apart from the specific relief authorized by this Section?

g. Will the proposed variance create to any degree nuisances to abutting property owners?

h. Is the variance request the least modification of the Zoning Regulations necessary to afford relief?

i. In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this Ordinance.

C. Appeal Procedure:

1. In all cases, persons aggrieved by decision of the Code Enforcement Officer shall commence their appeal within thirty (30) days after a decision is made by the Code Enforcement Officer. The appeal shall be filed with the Board of Appeals on forms approved by the Board and aggrieved person shall specifically set forth on the form the grounds for the appeal
2. In appeals involving variances, the applicant shall include as part of the appeal application, information demonstrating that the criteria listed in Section 402.9.2 B above are met for the applicant's situation.
3. The fee to cover the administrative costs of an appeal shall be set by the Council annually.
4. Following the filing of an appeal, and before taking action on any appeal, the Board of Appeals shall hold a public hearing on the appeal within thirty (30) days. The Board of Appeals shall notify the Code Enforcement Officer and the Planning Board, at least twenty (20) days in advance, of the time and place of the hearing, and shall publish notice of the hearing at least ten (10) days in advance in a newspaper of general circulation in the area.
5. In the case of administrative or variance appeals, the Board of Appeals shall notify by mail the appellant and only the owners of property abutting that property for which an appeal is taken at least ten (10) days in advance of the hearing, of the nature of the appeal and of the time and place of the public hearing thereon. For the purpose of this section, abutting properties shall include property directly across the street from the property for which the variance is requested.
6. The owners of property shall be considered to be those against whom taxes are assessed. Failure of any property owner to receive a notice of public hearing shall not necessitate another hearing nor invalidate any action by the Board of Appeals.
7. At any hearing, a party may be represented by agent or attorney. Hearing shall not be continued to other times except for good cause.
8. The Code Enforcement Officer or his/her designated assistant shall attend all hearings and may present to the Board of Appeals all plans, photographs, or other material he or she deems appropriate for an understanding of the appeal.
9. The Board may receive any oral or documentary evidence but shall provide as a matter of policy for the exclusion of irrelevant, immaterial or unduly repetitious evidence. All parties shall have

the right to present their case of defense by oral or documentary evidence, to submit rebuttal evidence and to conduct cross-examination as may be required for a full and true disclosure of the fact.

10. The transcript of testimony, if any, and exhibits, together with all papers, and requests filed in the proceedings, shall constitute the record. All decisions shall become a part of the record and shall include a statement of findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law or discretion presented and the appropriate order, relief or denial thereof. Notice of any decision shall be mailed to the petitioner or his/her representative or agent within seven (7) days of their decision.
11. In reviewing appeals involving variances the Board of Appeals shall follow the criteria outlined under "Variance Review Criteria" of this section before reaching a decision. In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this Ordinance.
12. If the Board grants a variance under this Section, a certificate indicating the name of the current property owner, identifying the property by reference to the last recorded deed in its chain of title and indicating the fact that a variance, including any conditions on the variance, has been granted and the date of the granting, shall be prepared in recordable form. This certificate must be recorded in the Cumberland County Registry of Deeds within ninety (90) days of the date of the final written approval of the variance or the variance is void. The variance is not valid until recorded as provided in this subsection. For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.
13. Upon submission of a recorded certificate of variance approval, the Code Enforcement Officer may issue a Building Permit in accordance with the conditions of the approval.
14. A right of appeal under the provisions of this Ordinance secured by vote of the Board of Appeals shall expire if the work or change involved is not commenced within six (6) months of the date of which the appeal is granted and if the work or change is not substantially completed within one (1) year of the date on which such appeal is granted.
15. If the Board of Appeals shall deny an appeal, a second appeal of a similar nature shall not be brought before the Board within one (1) year from the date of the denial by the Board of the first appeal, unless in the opinion of a majority of the Board, substantial new evidence shall be put forward or unless the Board finds, in its sole and exclusive judgment, that an error or mistake of law of misunderstanding of fact shall have been made.
16. Any party may take an appeal within forty five (45) days of the vote on the original decision, to Superior Court from any order, relief or denial in accordance with Maine Rules of Civil Procedure, Article 80B. This time period may be extended by the court upon motion for good cause shown. The hearing before the Superior Court must be without a jury.
17. The Board of Appeals may reconsider any decision reached under this section within forty-five (45) days of its prior decision. A request to the board to reconsider a decision must be filed within 10 days of the decision that is to be reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of its prior decision. The Board may conduct additional hearings and receive additional evidence and testimony as provided in this subsection.

CHAPTER 403 SHORELAND ZONING ORDINANCE
TOWN OF GRAY MAINE

Adopted Dec. 3, 1991
Effective Jan. 3, 1992
Amended Apr. 17, 1992
Amended Jan. 20, 1994
Amended July 4, 1996
Amended Oct. 31, 1996
Amended August 7, 1998
Amended Sept 17, 1998
Amended Nov 10, 1998
Amended August 31, 2000
Amended September 5, 2000
Amended July 7, 2009
Amended January 19, 2010
Amended February 15, 2016 / Effective April 14, 2016
Amended March 20, 2018 / Effective January 16, 2018

CONTENTS

b. Located outside the floodway of the 100-year flood-plain along rivers and artificially formed great ponds along rivers, based on detailed flood insurance studies and as delineated on the Federal Emergency Management Agency's Flood Boundary and Floodway Maps and Flood Insurance Rate Maps; all buildings, including basements, are elevated at least one foot above the 100-year flood-plain elevation; and the development is otherwise in compliance with any applicable municipal flood-plain ordinance.

   If the floodway is not shown on the Federal Emergency Management Agency Maps, it is deemed to be 1/2 the width of the 100-year flood-plain.

4. The total ground-floor area, including cantilevered or similar overhanging extensions, of all principal and accessory structures is limited to a maximum of 1,500 square feet. This limitation shall not be altered by variance.

5. All structures, except functionally water-dependent structures, are set back from the normal high-water line of a water body, tributary stream or upland edge of a wetland to the greatest practical extent, but not less than 75 feet, horizontal distance. In determining the greatest practical extent, the Planning Board shall consider the depth of the lot, the slope of the land, the potential for soil erosion, the type and amount of vegetation to be removed, the proposed building site's elevation in regard to the flood-plain, and its proximity to moderate-value and high-value wetlands.

F. EXPIRATION OF PERMIT

Following the issuance of a permit, if no substantial start is made in construction or in the use of the property within one year of the date of the permit, the permit shall lapse and become void.

G. INSTALLATION OF PUBLIC UTILITY SERVICE

No public utility, water district, sanitary district or any utility company of any kind may install services to any new structure located in the shoreland zone unless written authorization attesting to the validity and currency of all local permits required under this or any previous Ordinance, has been issued by the appropriate municipal officials. Following installation of service, the company or district shall forward the written authorization to the municipal officials, indicating that installation has been completed.

H. APPEALS

1. Powers and Duties of the Board of Appeals - The Board of Appeals shall have the following powers:

   a. Administrative Appeals: To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by, or failure to act by, the Code Enforcement Officer or Planning Board in the enforcement or administration of this Ordinance; and to hear and decide administrative appeals on a de novo basis where it is alleged by an aggrieved party that there is an error in any order, requirement, decision or determination made by, or failure to act by, the Code Enforcement Officer in his or her review of and action on a permit application or potential ordinance violation under this Ordinance.

   b. Variance Appeals: To authorize variances upon appeal, within the limitations set forth in this Ordinance.

2. Variance Appeals
Except as provided in subsection 2-A, Variances may be permitted only under the following conditions:

a. Variances may be granted only from dimensional requirements including but not limited to, lot width, structure height, percent of lot coverage, and setback requirements.

b. Variances shall not be granted for establishment of any uses otherwise prohibited by this Ordinance.

c. The Board shall not grant a variance unless it finds that:

(i) The proposed structure or use would meet the provisions of Section 15 except for the specific provision which has created the non-conformity and from which relief is sought; and

(ii) The strict application of the terms of this Ordinance would result in undue hardship.

The term "undue hardship" shall mean:

(01) That the land in question cannot yield a reasonable return unless a variance is granted;

(02) That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood

(03) That the granting of a variance will not alter the essential character of the locality; and

(04) That the hardship is not the result of action taken by the applicant or a prior owner.

d. Set-back variance for single family dwelling:
The Board may grant a variance from a set-back requirement for a single family dwelling under this section only when the strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

(i) The need for the variance is due to the unique circumstances of the property and not the general conditions of the neighborhood;

(ii) The granting of the variance will not alter the essential character of the locality;

(iii) The hardship is not the result of action taken by the applicant or prior owner;

(iv) The granting of the variance will not substantially reduce or impair the use of abutting property; and

(v) That the granting of the variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

This ordinance provision is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. For lots lawfully existing non-conforming lots of record recorded at the Registry of Deeds prior to January 1, 1989, a variance under this subsection may exceed 20% of the setback requirement, except for minimum setbacks from a wetland or

water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner meets all of the above standards and the relief requested is the least necessary to relieve the hardship.

e. The Board of Appeals shall limit any variances granted as strictly as possible in order to insure conformance with the purposes and provisions of this Ordinance to the greatest extent possible, and in doing so may impose such conditions to a variance as it deems necessary. The party receiving the variance shall comply with any conditions imposed.

f. A copy of each variance request, including the application and all supporting information supplied by the applicant, shall be forwarded by the municipal officials to the Commissioner of the Department of Environmental Protection at least twenty (20) days prior to action by the Board of Appeals. Any comments received from the Commissioner prior to the action by the Board of Appeals shall be made part of the record and shall be taken into consideration by the Board of Appeals.

3. Administrative Appeals
When the Board of Appeals reviews a decision of the Code Enforcement Officer the Board of Appeals shall hold a "de novo" hearing. At this time the Board may receive and consider new evidence and testimony, be it oral or written. When acting in a "de novo" capacity the Board of Appeals shall hear and decide the matter afresh, undertaking its own independent analysis of evidence and the law, and reaching its own decision.

When the Board of Appeals hears a decision of the Planning Board, it shall hold an appellate hearing, and may reverse the decision of the Planning Board only upon finding that the decision was contrary to specific provisions of the Ordinance or contrary to the facts presented to the Planning Board. The Board of Appeals may only review the record of the proceedings before the Planning Board. The Board Appeals shall not receive or consider any evidence which was not presented to the Planning Board, but the Board of Appeals may receive and consider written or oral arguments. If the Board of Appeals determines that the record of the Planning Board proceedings is inadequate, the Board of Appeals may remand the matter to the Planning Board for additional fact finding.

4. Disability Variance Appeals

a. Dwelling Accessibility
The Board of Appeals may grant a variance to an owner of a residential dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. The term "structures necessary for access to or egress from the dwelling" shall include railing, wall or roof systems necessary for the safety or effectiveness of the structure.

b. Vehicle Storage

(i) The Board may grant a variance to an owner-occupant who is a person with a permanent disability for the construction of a place of storage and parking for a noncommercial

vehicle owned by that person and for no other purpose. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle. The owner shall submit proposed plans for the structure with the request for the variance pursuant to this paragraph to the Board.

(ii) The person with the permanent disability shall prove such status.

(iii) For purposes of this paragraph, "noncommercial vehicle" means a motor vehicle as defined in Title 29-A, Maine Revised Statutes, section 101, subsection 42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate (or placard) issued pursuant to Title 29-A, section 521 and owned by the person with the disability.

(iv) The Board may impose conditions on the variance granted pursuant to this subsection.

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

5. Appeal Procedure

a. Making an Appeal

(i) An administrative or variance appeal may be taken to the Board of Appeals by an aggrieved party from any decision of the Code Enforcement Officer or the Planning Board. Such appeal shall be taken within thirty (30) days of the date of the decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement.

(ii) Such appeal shall be made by filing with the Board of Appeals a written notice of appeal which includes:

(01) A concise written statement indicating what relief is requested and why it should be granted.

(02) A sketch drawn to scale showing lot lines, location of existing buildings and structures and other physical features of the lot pertinent to the relief sought.

(iii) Upon being notified of an appeal, the Code Enforcement Officer or Planning Board, as appropriate, shall transmit to the Board of Appeals all of the papers constituting the record of the decision appealed from.

(iv) The Board of Appeals shall hold a public hearing on the appeal within thirty-five (35) days of its receipt of an appeal request.

b. Decision by Board of Appeals

(i) A majority of the board shall constitute a quorum for the purpose of deciding an appeal. A member who abstains shall not be counted in determining whether a quorum exists.

(ii) The concurring vote of a majority of the members of the Board of Appeals present and voting shall be necessary to reverse an order, requirement, decision, or determination of the Code Enforcement Officer or Planning Board, or to decide in favor of the applicant on any matter on which it is required to decide under this Ordinance, or to affect any variation in the application of this Ordinance from its stated terms. The board may reverse the decision, or failure to act, of the Code Enforcement Officer or Planning Board

only upon a finding that the decision, or failure to act, was clearly contrary to specific provisions of this Ordinance.

(iii) The person filing the appeal shall have the burden of proof.

(iv) The Board shall decide all appeals within thirty five (35) days after the close of the hearing, and shall issue a written decision on all appeals.

(v) All decisions shall become a part of the record and shall include a statement of findings and conclusions as well as the reasons or basis therefor, and the appropriate order, relief or denial thereof. The Board shall cause written notice of its decision to be mailed or hand-delivered to the applicant and to the Department of Environmental Protection within seven (7) days of the Board's decision. Copies of written decisions of the Board of Appeals shall be given to the Planning Board, Code Enforcement Officer, and the municipal officers.

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

7. Reconsideration
In accordance with 30-A M.R.S.A. section 2691(3)(F), the Board of Appeals may reconsider any decision within forty-five (45) days of its prior decision. A request to the Board to reconsider a decision must be filed within ten (10) days of the decision that is being reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision. Reconsideration of a decision shall require a positive vote of the majority of the Board members originally voting on the decision, and proper notification to the landowner, petitioner, planning board, code enforcement officer, and other parties of interest, including abutters and those who testified at the original hearing(s). The Board may conduct additional hearings and receive additional evidence and testimony.

I. ENFORCEMENT

1. Nuisances
Any violation of this Ordinance shall be deemed to be a nuisance.

2. Code Enforcement Officer

a. It shall be the duty of the Code Enforcement Officer to enforce the provisions of this Ordinance. If the Code Enforcement Officer shall find that any provision of this Ordinance is being violated, he or she shall notify in writing the person responsible for such violation, indicating the nature of the violation and ordering the action necessary to correct it, including discontinuance of illegal use of land, buildings or structures, or work being done, removal of illegal buildings or structures, and abatement of nuisance conditions. A copy of such notices shall be submitted to the municipal officers and be maintained as a permanent record.

b. The Code Enforcement Officer shall conduct onsite inspections to insure compliance with all applicable laws and conditions attached to permit approvals. The Code Enforcement Officer shall also investigate all complaints of alleged violations of this Ordinance.

§2691. Board of appeals

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

1. Establishment. A municipality may establish a board of appeals under its home rule authority. Unless provided otherwise by charter or ordinance, the municipal officers shall appoint the members of the board and determine their compensation.
[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

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

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

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

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

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

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

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

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

B. The secretary shall maintain a permanent record of all board meetings and all correspondence of the board. The secretary is responsible for maintaining those records which are required as part of the various proceedings which may be brought before the board. All records to be maintained

or prepared by the secretary are public records. They shall be filed in the municipal clerk's office and may be inspected at reasonable times. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

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

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

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

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

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

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

H. For purposes of this section, a decision of the board is a final decision when the project for which the approval of the board is requested has received all required municipal administrative approvals by the board, the planning board or municipal reviewing authority, a site plan or design review board, a historic preservation review board and any other review board created by municipal charter or ordinance. If the final municipal administrative review of the project is by a municipal administrative review board other than a board of appeals, the time for appeal is governed by section 4482-A. Any denial of the request for approval by the board of appeals is considered a final decision even if other municipal administrative approvals are required for the project and

remain pending. A denial of the request for approval by the board of appeals must be appealed within 45 days of the date of the board's vote to deny or within 15 days of final action by the board on a reconsideration that results in a denial of the request. [PL 2017, c. 241, §3 (NEW).]

[PL 2017, c. 241, §§1-3 (AMD).]

4. Jurisdiction. Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required. No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board. Absent an express provision in a charter or ordinance that certain decisions of its code enforcement officer or board of appeals are only advisory or may not be appealed, a notice of violation or an enforcement order by a code enforcement officer under a land use ordinance is reviewable on appeal by the board of appeals and in turn by the Superior Court under the Maine Rules of Civil Procedure, Rule 80B. Any such decision that is not timely appealed is subject to the same preclusive effect as otherwise provided by law. Any board of appeals shall hear any appeal submitted to the board in accordance with Title 28-A, section 1054. [PL 2013, c. 144, §1 (AMD).]

SECTION HISTORY

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

§4353. Zoning adjustment

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

1. Jurisdiction; procedure. The board of appeals shall hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance. The board of appeals is governed by section 2691, except that section 2691, subsection 2, does not apply to boards existing on September 23, 1971.
[PL 1989, c. 104, Pt. A, §45 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]

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

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

B. Approve the issuance of a special exception permit or conditional use permit in strict compliance with the ordinance except that, if the municipality has authorized the planning board, agency or department to issue these permits, an appeal from the granting or denial of such a permit may be taken directly to Superior Court if required by local ordinance; and [PL 2011, c. 655, Pt. JJ, §24 (AMD); PL 2011, c. 655, Pt. JJ, §41 (AFF).]

C. Grant a variance in strict compliance with subsection 4. [PL 1989, c. 104, Pt. A, §45 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]
[PL 2011, c. 655, Pt. JJ, §24 (AMD); PL 2011, c. 655, Pt. JJ, §41 (AFF).]

3. Parties. The board shall reasonably notify the petitioner, the planning board, agency or department and the municipal officers of any hearing. These persons must be made parties to the action. All interested persons must be given a reasonable opportunity to have their views expressed at any hearing.
[PL 2011, c. 655, Pt. JJ, §25 (AMD); PL 2011, c. 655, Pt. JJ, §41 (AFF).]

4. Variance. Except as provided in subsections 4-A, 4-B and 4-C and section 4353-A, the board may grant a variance only when strict application of the ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The land in question can not yield a reasonable return unless a variance is granted; [PL 1991, c. 47, §1 (AMD).]

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

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

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

Under its home rule authority, a municipality may, in a zoning ordinance, adopt additional limitations on the granting of a variance, including, but not limited to, a provision that a variance may be granted only for a use permitted in a particular zone.
[PL 2013, c. 186, §1 (AMD).]

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

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

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

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

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

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

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

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

For purposes of this subsection, "disability" has the same meaning as a physical or mental disability under Title 5, section 4553-A.
[PL 2015, c. 152, §1 (AMD).]

4-B. Set-back variance for single-family dwellings. A municipality may adopt an ordinance that permits the board to grant a set-back variance for a single-family dwelling. An ordinance adopted under this subsection may permit a variance from a set-back requirement only when strict application of the zoning ordinance to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means:

A. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; [PL 1991, c. 659, §3 (NEW).]

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

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

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

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

An ordinance adopted under this subsection is strictly limited to permitting a variance from a set-back requirement for a single-family dwelling that is the primary year-round residence of the petitioner. A

variance under this subsection may not exceed 20% of a set-back requirement and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage. An ordinance may allow for a variance under this subsection to exceed 20% of a set-back requirement, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to Title 38, chapter 3, subchapter I, article 2-B, if the petitioner has obtained the written consent of an affected abutting landowner.
[PL 1993, c. 627, §1 (AMD).]

4-C. Variance from dimensional standards. A municipality may adopt an ordinance that permits the board to grant a variance from the dimensional standards of a zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

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

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

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

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

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

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

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

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

Under its home rule authority, a municipality may, in an ordinance adopted pursuant to this subsection, adopt additional limitations on the granting of a variance from the dimensional standards of a zoning ordinance. A zoning ordinance also may explicitly delegate to the municipal reviewing authority the ability to approve development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster development, to accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by municipal zoning. As long as the development falls within the parameters of such an ordinance, the approval is not considered the granting of a variance. This delegation of authority does not authorize the reduction of dimensional standards required under the mandatory shoreland zoning laws, Title 38, chapter 3, subchapter 1, article 2-B.
[PL 2005, c. 244, §2 (AMD).]

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

For the purpose of this subsection, the date of the final written approval shall be the date stated on the written approval.
[PL 1989, c. 642 (AMD).]

SECTION HISTORY

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

§438-A. Municipal authority; state oversight

With respect to all shoreland areas described in section 435, municipalities shall adopt zoning and land use control ordinances pursuant to existing enabling legislation, under home rule authority and in accordance with the following requirements. The deadline for municipalities to adopt a shoreland zoning ordinance meeting the minimum guidelines adopted by the Board of Environmental Protection is extended to July 1, 1992. [PL 1991, c. 622, Pt. X, §12 (AMD).]

Notwithstanding other provisions of this article, the regulation of timber harvesting and timber harvesting activities in shoreland areas must be in accordance with section 438-B and rules adopted by the Commissioner of Agriculture, Conservation and Forestry pursuant to Title 12, section 8867-B. [PL 2005, c. 226, §2 (AMD); PL 2011, c. 657, Pt. W, §6 (REV).]

1. Land use guidelines. In accordance with Title 5, chapter 375, subchapter II, the Board of Environmental Protection shall adopt, and from time to time shall update and amend, minimum guidelines for municipal zoning and land use controls that are designed to carry out the legislative purposes described in section 435 and the provisions of this article. These minimum guidelines must include provisions governing building and structure size, setback and location and establishment of resource protection, general development, limited residential, commercial fisheries and maritime activity zones and other zones. Within each zone, the board shall prescribe uses that may be allowed with or without conditions and shall establish criteria for the issuance of permits and nonconforming uses, land use standards and administrative and enforcement procedures. These guidelines must also include a requirement for a person issued a permit pursuant to this article in a great pond watershed to have a copy of the permit on site while work authorized by the permit is being conducted. The board shall comprehensively review and update its guidelines and shall reevaluate and update the guidelines at least once every 4 years.

A. Minimum guidelines adopted by the board under this subsection may not require the issuance of a municipal permit for the repair and maintenance of an existing road culvert or for the replacement of an existing road culvert, as long as the replacement culvert is:

(2) Not more than 25% longer than the culvert being replaced; and

(3) Not longer than 75 feet.

Ancillary culverting activities, including excavation and filling, are included in this exemption. A person repairing, replacing or maintaining an existing culvert under this paragraph shall ensure that erosion control measures are taken to prevent sedimentation of the water and that the crossing does not block fish passage in the water course. [PL 1993, c. 315, §1 (AMD).]

[PL 1993, c. 315, §1 (AMD).]

1-A. Minimum guidelines; limitations. The minimum guidelines adopted under subsection 1 may not require a municipality, in adopting an ordinance, to:

A. Treat an increase in hours or days of operation of a nonconforming use as an expansion of a nonconforming use; or [PL 1991, c. 419 (NEW).]

B. Treat as a single lot, 2 or more contiguous lots, at least one of which is nonconforming, owned by the same person or persons on the effective date of the municipal ordinance and recorded in the registry of deeds if the lot is served by a public sewer or can accommodate a subsurface sewage disposal system in conformance with state subsurface wastewater disposal rules, and:

(1) Each lot contains at least 100 feet of shore frontage and at least 20,000 square feet of lot area; or

(2) Any lots that do not meet the frontage and lot size requirements of subparagraph (1) are reconfigured or combined so that each new lot contains at least 100 feet of shore frontage and 20,000 square feet of lot area.

For purposes of this paragraph the term "nonconforming" means that a lot does not meet the minimum standards for lot area and shore frontage required by municipal ordinances adopted pursuant to this article. [PL 1991, c. 419 (NEW).]

[PL 1991, c. 419 (NEW).]

1-B. Notification to landowners. This subsection governs notice to landowners whose property is being considered for placement in a resource protection zone.

A. In addition to the notice required by Title 30-A, section 4352, subsection 9, a municipality shall provide written notification to landowners whose property is being considered by the municipality for placement in a resource protection zone. Notification to landowners must be made by first-class mail to the last known addresses of the persons against whom property tax on each parcel is assessed. The municipal officers shall prepare and file with the municipal clerk a sworn, notarized certificate indicating those persons to whom notice was mailed and at what addresses, and when, by whom and from what location notice was mailed. This certificate constitutes prima facie evidence that notice was sent to those persons named in the certificate. The municipality must send notice not later than 14 days before it holds a public hearing on adoption or amendment of a zoning ordinance or map that places the landowners' property in the resource protection zone. Once a landowner's property has been placed in a resource protection zone, individual notice is not required to be sent to the landowner when the zoning ordinance or map is later amended in a way that does not affect the inclusion of the landowner's property in the resource protection zone. [PL 2013, c. 320, §7 (AMD).]

B. In addition to the notice required by this Title or by rules adopted pursuant to this Title, the board shall provide written notification to landowners whose property is being considered by the board for placement in a resource protection zone. Notification to landowners must be made by first-class mail to the last known addresses of the persons against whom property tax on each parcel is assessed. The board shall prepare and file with the commissioner a sworn, notarized certificate indicating those persons to whom notice was mailed and at what addresses, and when, by whom and from what location notice was mailed. This certificate constitutes prima facie evidence that notice was sent to those persons named in the certificate. The board must send notice not later than 30 days before the close of the public comment period prior to formal consideration of placement of the property in a resource protection zone by the board. Upon request of the board, the municipality for which the ordinance is being adopted shall provide the board with the names and addresses of persons entitled to notice under this subsection. Notification and filing of a certificate by the department are deemed to be notification and filing by the board for purposes of this section. [PL 1995, c. 542, §1 (NEW).]

C. Any action challenging the validity of an ordinance based on failure by the board or municipality to comply with this subsection must be brought in Superior Court within 30 days after adoption or amendment of the ordinance or map. The Superior Court may invalidate an amended ordinance or map if the appellant demonstrates that the appellant was entitled to receive notice under this subsection, that the municipality or board failed to send notice as required, that the appellant had no knowledge of the proposed adoption or amendment of the ordinance or map and that the appellant was materially prejudiced by that lack of knowledge. This paragraph does not alter the right of a person to challenge the validity of any ordinance or map based on the failure of a municipality to provide notice as required by Title 30-A, section 4352, subsection 9 or the failure of the board to provide notice as required by this Title. [PL 1995, c. 542, §1 (NEW).]

[PL 2013, c. 320, §7 (AMD).]

2. Municipal ordinances. In accordance with a schedule adopted by the board and acting in accordance with a local comprehensive plan, municipalities shall prepare and submit to the commissioner zoning and land use ordinances that are consistent with or are no less stringent than the minimum guidelines adopted by the board and, for coastal communities, that address the coastal

management policies cited in section 1801. When a municipality determines that special local conditions within portions of the shoreland zone require a different set of standards from those in the minimum guidelines, the municipality shall document the special conditions and submit them, together with its proposed ordinance provisions, to the commissioner for review and approval.

Notwithstanding section 435, a municipality may limit to 75 feet the shoreland zone around a freshwater wetland that has not been rated by the Department of Inland Fisheries and Wildlife as having moderate or high value provided that the municipality applies the requirements of this article regarding streams as defined under section 436-A to any outlet stream from any freshwater wetland.
[PL 1993, c. 196, §3 (AMD).]

3. Commissioner approval. Municipal ordinances, amendments and any repeals of ordinances are not effective unless approved by the commissioner. In determining whether to approve municipal ordinances or amendments, the commissioner shall consider the legislative purposes described in section 435, the minimum guidelines and any special local conditions which, in the judgment of the commissioner, justify a departure from the requirements of the minimum guidelines in a manner not inconsistent with the legislative purposes described in section 435. Recognizing that the guidelines are intended as minimum standards, the commissioner shall approve a municipal ordinance that imposes more restrictive standards than those in the guidelines. If an ordinance or an amendment adopted by a municipality contains standards inconsistent with or less stringent than the minimum guidelines, the commissioner, after notice to the municipality, may approve the proposed ordinances or amendment with conditions imposing the minimum guidelines in place of the inconsistent or less stringent standard or standards. Those conditions are effective and binding within the municipality and must be administered and enforced by the municipality. If the commissioner fails to act on any proposed municipal ordinance or amendment within 45 days of the commissioner's receipt of the proposed ordinance or amendment, the ordinance or amendment is automatically approved. Any application for a shoreland zoning permit submitted to a municipality within the 45-day period is governed by the terms of the proposed ordinance or amendment if the ordinance or amendment is approved under this subsection. A municipality may appeal to the board a decision of the commissioner under this subsection.
[PL 1991, c. 346, §4 (AMD).]

4. Failure to adopt ordinances. If the commissioner determines, after notice to a municipality, that the municipality has failed to adopt ordinances as required under this article or that an ordinance that the municipality has adopted does not satisfy the requirements and purposes under this article, and that the commissioner is unable to make the ordinance consistent with the minimum guidelines by the imposition of conditions, as set forth in subsection 3, then the commissioner shall request and the board may adopt, acting in accordance with Title 5, chapter 375, subchapter II, suitable ordinances, or suitable provisions of ordinances, on behalf of the municipality. Notwithstanding subsections 2 and 3, if the board determines that special water quality considerations on a great pond warrant more restrictive standards than those contained in the minimum guidelines, the board may adopt the additional standards for all municipalities outside the jurisdiction of the Maine Land Use Planning Commission, which abut those waters. Following adoption by the board, these ordinances or provisions are effective and binding within the municipality and must be administered and enforced by that municipality. The board may adopt modifications to ordinances adopted pursuant to this subsection. Preparation and notice of proposed modifications, prior to consideration by the board, may be initiated by the commissioner.
[PL 1995, c. 493, §3 (AMD); PL 2011, c. 682, §38 (REV).]

5. Exemptions. Any areas within a municipality that are subject to nonmunicipal zoning and land use controls may be exempted from the operation of this section upon a finding by the commissioner that the purposes of this chapter have been accomplished by nonmunicipal measures.
[PL 1989, c. 890, Pt. A, §40 (AFF); PL 1989, c. 890, Pt. B, §46 (AMD).]

6. Variances.

[PL 1991, c. 346, §6 (RP).]

6-A. Variances. A copy of a request for a variance under an ordinance approved or imposed by the commissioner or board under this article must be forwarded by the municipality to the commissioner at least 20 days prior to action by the municipality. The material submitted must include the application and all supporting information provided by the applicant. The commissioner may comment when the commissioner determines that the municipal issuance of the variance would not be in compliance with the requirements of state law for a zoning variance or that the variance would undermine the purposes stated in section 435. These comments, if submitted by the commissioner prior to the action by the municipality, must be made part of the record and must be considered by the municipality prior to taking action on the variance request.
[PL 2005, c. 440, §1 (NEW).]

7. Exclusion of recreational boat storage buildings. Notwithstanding subsection 3, the exclusion of recreational boat storage buildings from the definition of "functionally water-dependent uses" is deemed to be incorporated into each municipal shoreland zoning ordinance on the effective date of this subsection, regardless of any prior approval of the ordinance by the commissioner.
[PL 1997, c. 726, §2 (NEW).]

SECTION HISTORY

PL 1987, c. 815, §§5,11 (NEW). PL 1989, c. 143 (AMD). PL 1989, c. 403, §7 (AMD). PL 1989, c. 890, §§A40,B44-46 (AMD). RR 1991, c. 2, §143 (COR). PL 1991, c. 46, §2 (AMD). PL 1991, c. 346, §§4-6 (AMD). PL 1991, c. 419 (AMD). PL 1991, c. 622, §X12 (AMD). PL 1991, c. 838, §23 (AMD). PL 1993, c. 196, §3 (AMD). PL 1993, c. 315, §1 (AMD). PL 1995, c. 493, §3 (AMD). PL 1995, c. 542, §1 (AMD). PL 1997, c. 726, §2 (AMD). PL 2003, c. 335, §4 (AMD). PL 2005, c. 226, §2 (AMD). PL 2005, c. 440, §1 (AMD). PL 2011, c. 657, Pt. W, §6 (REV). PL 2011, c. 682, §38 (REV). PL 2013, c. 320, §7 (AMD).

§2605. Conflicts of interest

Certain proceedings of municipalities, counties and quasi-municipal corporations and their officials are voidable and actionable according to the following provisions. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

1. Voting. The vote of a body is voidable when any official in an official position votes on any question in which that official has a direct or an indirect pecuniary interest.
[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

2. Contracts. A contract, other than a contract obtained through properly advertised bid procedures, made by a municipality, county or quasi-municipal corporation during the term of an official of a body of the municipality, county or quasi-municipal corporation involved in the negotiation or award of the contract who has a direct or an indirect pecuniary interest in it is voidable, except as provided in subsection 4.
[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

3. Restrain proceedings. The Superior Court may restrain proceedings in violation of this section on the application of at least 10 residents of the municipality, county or area served by the quasi-municipal corporation.
[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

4. Direct or indirect pecuniary interest. In the absence of actual fraud, an official of a body of the municipality, county government or a quasi-municipal corporation involved in a question or in the negotiation or award of a contract is deemed to have a direct or indirect pecuniary interest in a question or in a contract where the official is an officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity to which the question relates or with which the unit of municipal, county government or the quasi-municipal corporation contracts only where the official 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.

When an official is deemed to have a direct or indirect pecuniary interest, the vote on the question or the contract is not voidable and actionable if the official makes full disclosure of interest before any action is taken and if the official abstains from voting, from the negotiation or award of the contract and from otherwise attempting to influence a decision in which that official has an interest. The official's disclosure and a notice of abstention from taking part in a decision in which the official has an interest shall be recorded with the clerk or secretary of the municipal or county government or the quasi-municipal corporation.

A. This subsection does not prohibit a member of a city or town council or a member of a quasi-municipal corporation who is a teacher from making or renewing a teacher employment contract with the municipality or quasi-municipal corporation for which the member serves. [PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]
[PL 1987, c. 737, Pt. A, §2 (NEW); PL 1987, c. 737, Pt. C, §106 (NEW); PL 1989, c. 6 (AMD); PL 1989, c. 9, §2 (AMD); PL 1989, c. 104, Pt. C, §§8, 10 (AMD).]

5. Former municipal and county officials. This subsection applies to former municipal and county officials.

A. No former municipal or county official may, for anyone other than the municipality or county, knowingly act as an agent or attorney, or participate in a proceeding before a municipal or county

government body for one year after termination of the official's employment or term of office with that government body in connection with any proceeding:

(1) In which the specific issue was pending before the municipal or county official and was directly within the responsibilities of that official; and

(2) Which was completed at least one year before the termination of that official's employment or term of office. [PL 1989, c. 104, Pt. A, §22 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]

B. No former municipal or county official may, for anyone other than the municipality or county, knowingly act as an agent or attorney, or participate in a proceeding before a municipal or county government body at any time after termination of the official's employment or term of office with that government body in connection with any proceeding:

(1) In which the specific issue was pending before the municipal or county official and was directly within the responsibilities of that official; and

(2) Which was pending within one year of the termination of the municipal or county official's employment or term of office. [PL 1989, c. 104, Pt. A, §22 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]

C. This subsection may not be construed to prohibit former municipal or county officials from doing personal business with the municipality or county. This subsection does not limit the application of Title 17-A, chapter 25. [PL 1989, c. 104, Pt. A, §22 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]

For the purpose of this subsection, a municipal or county government body includes an agency, board, commission, authority, committee, legislative body, department or other governmental entity of a municipality or county.
[PL 1989, c. 104, Pt. A, §22 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]

6. Avoidance of appearance of conflict of interest. Every municipal and county official shall attempt to avoid the appearance of a conflict of interest by disclosure or by abstention.
[PL 1989, c. 104, Pt. A, §22 (NEW); PL 1989, c. 104, Pt. C, §10 (NEW).]

7. Municipal officers adopt ethics policy. In their discretion, the municipal officers may adopt an ethics policy governing the conduct of elected and appointed municipal officials.
[PL 1989, c. 561, §19 (NEW).]

SECTION HISTORY

PL 1987, c. 737, §§A2,C106 (NEW). PL 1989, c. 6 (AMD). PL 1989, c. 9, §2 (AMD). PL 1989, c. 104, §§A22,C8,C10 (AMD). PL 1989, c. 561, §19 (AMD).

Quasi-Judicial Versus Legislative Roles… How Should You Be Acting?

When you are in Quasi-Judicial mode, you are on a case...judging a pending application.

- Don't talk or email about an application outside of the meetings-either to Board members or the public.
- Try to be impartial as possible, concentrating only on whether the application meets the written standards.
- Only discuss waivers that you have the authority to give.
- Consistency in interpretation is important, but if you discover that past practice has been wrong, don't keep doing it.
- Popularity of the project, who the applicant is, and whether you personally like the applicant or the project are almost always irrelevant.
- Your duty is to process the application as efficiently and as fairly as possible, sticking to the ordinance.
- The only relevant public comment is with respect to whether the application meets standards and whether procedures and submissions are in order.

When you are in Legislative mode, you are helping to create plans and ordinances that will be adopted by the Legislative Body.

- You may talk to as many people as you like outside of meetings, and you should study the adopted comprehensive plan (but don't talk to other board members).
- Use your feelings and instincts about what's right for the future of the community to decide how the ordinance should come out.
- Consider changing the way things have always been done.
- Popularity and what is politically possible needs to be realistically considered.
- You can be an advocate for a particular change.
- It is important to gather public input on how people feel about the rules and their vision of what should be allowed and encouraged in the future.

SMPDC
SOUTHERN MAINE PLANNING & DEVELOPMENT COMMISSION

ILLUSTRATION OF WHY ZONING BOARD OF APPEALS SHOULD VOTE SEPARATELY ON VARIANCE REVIEW CRITERIA

Practical Difficulty Dimensional Variance Standards (lot area, lot coverage, frontage and setback requirements)	**SCENARIO 1: No Separate Votes on Review Criteria**	**SCENARIO 2: Separate Votes on Review Criteria**
Strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located 30-A M.R.S.A. § 4353(4-C) last ¶	All Board Members think that this standard is met	All Board Members vote that this standard is met Vote: 5-0
Strict application of the ordinance results in significant economic injury to the petitioner 30-A M.R.S.A. § 4353(4-C) last ¶	Susan, Bill and John think "yes" Gordon and Shari think "no"	Susan, Bill and John vote "yes" Gordon and Shari vote "no" Vote: 3-2
The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood 30-A M.R.S.A. § 4353(4-C)(A)	Susan, Shari, Bill and Gordon think "yes" John thinks "no"	Susan, Shari, Bill and Gordon vote "yes" John votes "no" Vote: 4-1
The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties 30-A M.R.S.A. § 4353(4-C)(B)	All Board Members think that this standard is met	All Board Members vote that this standard is met Vote: 5-0
The practical difficulty is not the result of action taken by the petitioner or a prior owner 30-A M.R.S.A. § 4353(4-C)(C)	All Board Members think that this standard is met	All Board Members vote that this standard is met Vote: 5-0

Practical Difficulty Dimensional Variance Standards (lot area, lot coverage, frontage and setback requirements)	**SCENARIO 1:** **No Separate Votes on Review Criteria**	**SCENARIO 2:** **Separate Votes on Review Criteria**
No other feasible alternative to a variance is available to the petitioner 30-A M.R.S.A. § 4353(4-C)(D)	Bill, John and Shari think "yes" Susan and Gordon think "no"	Bill, John and Shari vote "yes" Susan and Gordon vote "no" Vote: 3-2
The granting of a variance will not unreasonably adversely affect the natural environment 30-A M.R.S.A. § 4353(4-C)(E)	All Board Members think that this standard is met	All Board Members vote that this standard is met Vote: 5-0
The property is not located in whole or in part within shoreland areas as described in Title 38, section 435 30-A M.R.S.A. § 4353(4-C)(F)	All Board Members think that this standard is met	All Board Members vote that this standard is met Vote: 5-0

RESULT OF BOARD ACTION:

Scenario 1: Board does NOT take individual votes on the 8 standards but simply conducts a single vote on a blanket motion to approve the variance request. **Result**: Variance request will be DENIED because four (4) Board Members (Gordon, Shari, John and Susan) think that the application does not meet ALL of the review criteria.

Scenario 2: Board takes individual votes on all 8 standards. **Result:** Variance request will be GRANTED because a majority of Board Members voted that the application meets EACH of the review criterion. No blanket motion to approve the variance request is necessary (and would only confuse everyone).

Applicable case: *Widewaters Stillwater Co., LLC v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597.

Zoning Variances – Which Ones Will Courts Uphold?

(from *Maine Townsman*, "Legal Notes," August/September 2004)

The traditional zoning variance requires a showing of "undue hardship," and this in turn requires proof that, among other things, "[t]he land in question can not yield a reasonable return unless the variance is granted" (see 30-A M.R.S.A. § 4353(4)).

The "no reasonable return" test has always been the most difficult one for appeals boards to interpret and for appellants to satisfy. We know from longstanding case law that a reasonable return does not mean the landowner is entitled to a maximum return (see, e.g., *Barnard v. Town of Yarmouth*, 313 A.2d 741 (Me. 1974)) and that undue hardship exists where strict application of the ordinance would result in the practical loss of all beneficial use of the property (see, e.g., *Thornton v. Lothridge*, 447 A.2d 473 (Me. 1982)). But in practical terms, what do these maxims really mean?

We recently reviewed most of the Maine Supreme Court's decisions in this area over the past two decades and identified what we believe are some guiding principles based on *real* cases. Although predicting what courts will do is inherently risky (courts can and sometimes do deviate from precedent, though usually not radically), here are our best guesses on how the courts would rule on certain variance scenarios, together with some of the cases we think confirm our views:

A variance will probably be upheld if the land is unimproved (unbuilt), is not abutted by any other land in the same ownership, is not practically buildable, and no other beneficial uses are permitted.

In *Marchi v. Town of Scarborough*, 511 A.2d 1071 (Me. 1986), the buildable portion of a vacant corner lot was limited by setback requirements to an area measuring 5 feet by 19 feet, and the appellants owned no abutting land. As the lot was strictly confined to residential use and was unbuildable without a variance, the Court found that there would be no other beneficial uses and upheld the variance. An offer from an abutter to purchase the lot at a discount did not, by itself, constitute a reasonable return because the appellants were entitled to *use* their property and were not required to sell it.

Similarly, in *Greenberg v. DiBiase*, 637 A.2d 1177 (Me. 1994), a vacant lot was confined to residential use only and was, by virtue of setback requirements, unbuildable. The Court again found that there would be no reasonable return and upheld the variance. The fact that the owner also owned nearby (but not contiguous or abutting) property was held irrelevant.

A variance will probably be overturned if the land is unimproved but has some value in relation to abutting land in the same ownership.

In *Sibley v. Inhabitants of Town of Wells*, 462 A.2d 27 (Me. 1983), the appellants bought a substandard lot adjacent to the one they occupied and sought a variance on the grounds that the second lot, without a variance, was worth substantially less than they paid for it as a building lot. The Court found no undue hardship and rejected the variance (and a "takings" claim), observing that "[the appellants'] land has substantial use and value in conjunction with the adjacent lot."

Likewise, in *Perrin v. Town of Kittery*, 591 A.2d 861 (Me. 1991), where the appellants divided their land and sought a setback variance in order to build on the second lot, the Court held that they had failed to prove that there would be no reasonable return from their use of the second lot as "an unimproved lot contiguous to [the first lot] on which [they] had constructed their residence."

A variance will probably be overturned if the land, with minor improvements, is suitable for some low-intensity use.

In *Twigg v. Town of Kennebunk*, 662 A.2d 914 (Me. 1995), the Court refused a variance for a new residence to replace an existing boathouse where the record showed that the appellant had used the property for docking his rowboat and storing gear. Noting that there was no proof this recreational use could not continue, the Court wrote, "Such use is relevant to the reasonable return analysis."

Twigg cited, among other precedents, *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). In *Hall*, the Court found a beneficial use (and thus rejected a "takings" claim) where the availability of water, sewer and electrical services made it feasible to park a seasonal camper on a sand dune.

A variance will probably be overturned if the land is improved (built), even if space is limited or the property is losing income or value.

In *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987), the Court rejected a variance for an addition to a 20-foot by 32-foot house, concluding that the house, though small, "offers adequate living space."

Likewise, in *Forester v. City of Westbrook*, 604 A.2d 31 (Me. 1992), the Court overruled a variance to expand a two-family dwelling, noting that "limitations on living space alone do not constitute an undue hardship."

In *Brooks v. Cumberland Farms, Inc.*, 703 A.2d 844 (Me. 1997), the Court overturned a variance needed to modernize a convenience store's gasoline sales area, even though, without it, the business would be unprofitable, where the evidence showed that there were numerous other lawful uses available without the need for a variance.

And in *Goldstein v. City of South Portland*, 728 A.2d 164 (Me. 1999), the Court refused a variance to enlarge a two-bedroom rental, even though it would continue to decrease in value in comparison to other rentals, where the property was in fact rented and generating income.

A variance will probably be overturned if the cost of compliance, even if substantial, is due not to the ordinance but to the owner's mistake.

In *Rowe v. City of South Portland*, 730 A.2d 673 (Me. 1999), a large oceanfront home was nearly completed when minor setback violations were discovered and the owner applied for and was granted an after-the-fact variance. Although the cost to correct the violations was tens of thousands of dollars, the Court overturned the variance because "[the owner] could still enjoy a beneficial use as a residence if she moves the house or rebuilds [it]." The cost of doing so was caused not by restrictions in the ordinance but by human error, so the expense involved was not relevant to reasonable return.

We should note that the traditional undue hardship variance also requires proof of three other elements in addition to no reasonable return and that variances are occasionally overturned for these or other reasons as well.

For more on zoning variances, see our "Information Packet" on variances, available free of charge to members on MMA's web site at www.memun.org. *(By R.P.F.)*

Maine Freedom of Access Act: Your Right to Know

Home → Frequently Asked Questions

Frequently Asked Questions (FAQ)

General Questions | Public Records | Public Proceedings

GENERAL QUESTIONS

What is the Freedom of Access Act?

The Freedom of Access Act (FOAA) is a state statute that is intended to open the government of Maine by guaranteeing access to the "public records" and "public proceedings" of state and local government bodies and agencies.

Are federal agencies covered by the Freedom of Access Act?

No. The FOAA does not apply to federal agencies operating in Maine or to federal government records. A similar but different federal statute called the Freedom of Information Act (FOIA) applies to the federal government. This federal statute does not apply to state or local government bodies, agencies or officials.

For more general information on the Freedom of Information Act go to:

FOIA.gov - Freedom of Information Act

Who enforces the Freedom of Access Act?

Any aggrieved person may appeal to any Superior Court in the state to seek relief for an alleged violation of the FOAA. 1 M.R.S. § 409(1)

Relief can be in the form of an order issued by the court that directs the government body, agency or official to comply with the law, such as by providing access to a public proceeding or by making public records available for inspection or copying.

In addition, the Office of the Attorney General or the District Attorneys may bring an enforcement action seeking penalties if the alleged violation is willful. 1 M.R.S. § 410

What are the penalties for failure to comply with the Freedom of Access Act?

A state government agency or local government entity whose officer or employee commits a willful violation is subject to a fine of not more than $500 for the first violation; a fine of not more than $1,000 for a civil violation that was committed not more than 4 years after a previous adjudication of a violation by an officer or employee of the same state government agency or local government entity; or a fine of not more than $2,000 for a civil violation committed not

more than 4 years after 2 or more previous adjudications of a civil violation by an officer or employee of the same state government agency or local government entity. 1 M.R.S. § 410 Under the current law, there are no criminal penalties for failure to comply with a request for public records. It is a Class D crime to intentionally remove, alter, or destroy documents belonging to a state office. 1 M.R.S. § 452

What is the Public Access Ombudsman?

The Legislature created a public access ombudsman position to review complaints about compliance with the FOAA and attempt to mediate their resolution, as well as answer calls from the public, media, public agencies and officials about the requirements of the law. The ombudsman is also responsible for providing educational materials about the law and preparing advisory opinions. The ombudsman works closely with the Right to Know Advisory Committee in monitoring new developments and considering improvements to the law.

How do I contact the Public Access Ombudsman?

Call the Office of the Attorney General at (207) 626-8577 or get more information online at:

Your Right to Know: Maine's Freedom of Access Act

Who is required to take training on the Freedom of Access Act?

Public access officers and certain officials subject to this section must complete a course of training on the requirements of the FOAA. 1 M.R.S. § 412

Which officials are required to take Freedom of Access training?

Officials required to complete the training include:

- the Governor
- Attorney General, Secretary of State, Treasurer of State and State Auditor
- Legislators
- Commissioners, treasurers, district attorneys, sheriffs, registers of deeds, registers of probate and budget committee members of any county
- Municipal officers, clerks, treasurers, assessors and budget committee members of municipal governments
- Officials of school administrative units
- Officials of regional or other political subdivisions, including officials of water districts, sanitary districts, hospital districts, transit districts or regional transportation districts
- Public access officers.

As of October 18, 2021 the list of officials required to complete the training also includes:

- Municipal managers or administrators
- Municipal code enforcement officers

- Deputies for municipal clerks, treasurers, managers or administrators, assessors, and code enforcement officers
- Municipal planning board members
- Officials of school administrative units includes superintendents, assistant superintendents and school board members

What is a public access officer?

A public access officer must be designated to serve as the contact person for an agency, county, municipality, school administrative unit and regional or other political subdivision for public records requests. An existing employee is designated public access officer and is responsible for ensuring that public record requests are acknowledged within five working days of receiving the request and that a good faith estimate of when the response to the request will be complete is provided.

What does the training include?

At a minimum, the training must be designed to be completed in less than 2 hours and include instruction in:

- the general legal requirements regarding public records and public proceedings
- the procedures and requirements regarding complying with a request for a public record
- the penalties and other consequences for failure to comply with the law

Officials and public access officers can meet the training requirement by conducting a thorough review of the material in this FAQ section of the State's Freedom of Access website or by completing another training course that includes all off this information but may include additional information.

Do training courses need to by certified by the Right to Know Advisory Committee?

No. Training courses do not need the approval of the Right to Know Advisory Committee, or any other State agency.

When must the training be completed?

The training requirement must be completed not later than the 120th day after the date the official assumes the person's duties as an official or the person is designated as a public access officer.

How do officials and public access officers certify they have completed the training?

After completing the training, officials and public access officers are required to make a written or electronic record attesting that the training has been completed. The record, which will be available to the public, must be kept by the official or filed with the public entity to which the

official was elected or appointed. A public access officer must file the record with the agency or official that designated the public access officer. A sample training completion form is available (PDF) (This file requires the free Adobe Reader).

PUBLIC RECORDS

What is a public record?

The FOAA defines "public record" as "any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business". A number of exceptions are specified. (See the discussion of exemptions below.) 1 M.R.S. § 402(3)

Do I have to be a citizen of this state to submit a Freedom of Access Act request for a public record?

No. The FOAA provides that "a person" has the right to inspect and copy public records. 1 M.R.S. § 408-A

How do I make a Freedom of Access Act request for a public record?

See the How to Make a Request page on this site.

Is there a form that must be used to make a Freedom of Access Act request?

No. There are no required forms.

Does my Freedom of Access Act request have to be in writing?

No. The FOAA does not require that requests for public records be in writing. However, most governmental bodies and agencies ask individuals to submit requests in writing in order to maintain a record of when the request was received and what records were specifically requested.

What should I say in my request?

In order for the governmental body, agency or official to promptly respond to your request, you should be as specific as possible when describing the records you are seeking. If a particular document is required, it should be identified precisely-preferably by author, date and title. However, a request does not have to be that specific. If you cannot identify a specific record, you should clearly explain the type of records you are seeking, from what timeframe and what subject the records should contain. For example, assume you want to obtain a list of active landfills near your home. A request to the state Department of Environmental Protection asking for "all

records on landfills" is very broad and would likely produce volumes of records. The fees for such a request would be very high; the agency would likely find your request too vague and ask that you make it more specific. On the other hand, a request for "all records identifying landfills within 20 miles of 147 Main Street in Augusta" is very specific and the request might fail to produce the information you desire because the agency has no record containing data organized in that exact fashion. You might instead consider requesting any record that identifies "all active landfills in Augusta" or "all active landfills in Kennebec County." It is more likely that a record exists which contains this information. You might also want to explain to the agency exactly what information you hope to learn from the record. In other words, if you are really trying to determine whether any active landfills near your home in Augusta accept only wood waste, this additional explanation may help the agency narrow its search and find a record that meets the exact request.

Does an agency have to acknowledge receipt of my request?

Yes. An agency or official must acknowledge receipt of a request within 5 working days of receipt of the request. 1 M.R.S. § 408-A(3)

How does an agency determine the date a request for public records was received?

The date a request for public records was received is the date a sufficient description of the record is received by the agency or official at the office responsible for maintaining the record. 1 M.R.S. § 408-A(3)

Does an agency have to forward my request if I sent it to an office within the agency that does not maintain the record?

A request for records that are maintained by the agency but not by the office of the agency that received the request must be forwarded to the appropriate office or official within the agency without willful delay. 1 M.R.S. § 408-A(3)

Can an agency ask me for clarification concerning my request?

Yes. An agency or official may request clarification concerning which public record or public records are being requested. 1 M.R.S. § 408-A(3)

Does an agency have to estimate how long it will take to respond to my request?

Yes. An agency or official must provide a good faith, nonbinding estimate of how long it will take to comply with the request within a reasonable time of receiving the request. The agency or official shall make a good faith effort to fully respond within the estimated time. 1 M.R.S. § 408-A(3)

When does the agency or official have to make the records available?

The records must be made available "within a reasonable period of time" after the request was made. 1 M.R.S. § 408-A The agency or official can schedule the time for your inspection, conversion and copying of the records during the regular business hours of the agency or official, and at a time that will not delay or inconvenience the regular activities of the agency of official. 1 M.R.S. § 408-A(5)

Can an agency or official delay responding if my request was not directed to the agency public access officer?

No. An agency that receives a request to inspect or copy a public record must acknowledge and respond regardless of whether the request was directed to the public access officer. The unavailability of a public access officer may not be reason for a delay. 1 M.R.S. § 413(3)

What if the agency or official does not have regular office hours?

If the agency or official does not have regular office hours, the name and telephone number of a contact person authorized to provide access to the agency's or official's records must be posted in a conspicuous public place and at the office of the agency or official, if an office exists. 1 M.R.S. § 408-A(5)

Does an agency have to produce records within 5 days of my request?

No. The records that are responsive to a request must be made available "within a reasonable period of time" after the request was made. 1 M.R.S. § 408-A Agencies must acknowledge the request within 5 working days of receipt.

Do I have to go to the agency to inspect the records or can I ask the agency or official to mail me the records?

A person may inspect or copy any public record in the office of the agency or official during reasonable office hours. The agency or official shall mail the copy upon request. The agency may charge a reasonable fee to cover the cost of making the copies for you, as well as actual mailing costs. 1 M.R.S. § 408-A(1), (2), (8)(E)

When may a governmental body refuse to release the records I request?

The FOAA provides that certain categories of documents are not public records. Included among these are records that have been designated confidential by statute, documents subject to a recognized legal privilege such as the attorney-client privilege or the work-product privilege, records describing security plans or procedures designed to prevent acts of terrorism, medical records, juvenile records, and the personal contact information of public employees contained within records.

For a list of records or categories of records deemed by statute to be confidential or otherwise not a public record, see the Statutory Exceptions List. While this listing may not be totally complete, it contains the vast majority of exceptions to the FOAA.

What happens if a public record holds some information that is open to the public and some information that falls within an exception to the Freedom of Access Act?

Some public records contain a mixture of information that is public and information that is confidential or otherwise not subject to public inspection under the FOAA. If the record you requested contains any confidential or excepted information, the custodian will decide if the confidential or excepted information can be adequately redacted or blacked out so that public access can be provided or if public access to the document should be denied.

Must an agency have computer technology resources that allow for maximum accessibility to public records while protecting confidential information?

When purchasing and contracting for computer software and other information technology resources, an agency shall consider the extent to which it will maximize accessibility and exportability while protecting confidential information that may be contained in the public records. 1 M.R.S. §414

Does an agency have to explain why it denies access to a public record?

Yes. An agency has 5 working days after the receipt of a request to deny the request and state the reason for the denial or state that some or all of the responsive records may be denied once they are located and reviewed. 1 M.R.S. § 408-A(4)

What can I do if an agency fails to provide a written denial?

If an agency does not provide a written denial or a statement that the request may be denied in full or in part following a review within 5 working days of the receipt of the request, this is considered a failure to allow inspection or copying and is subject to appeal. 1 M.R.S. § 408-A(4)

What can I do if I believe an agency has unlawfully withheld a public record?

If you are not satisfied with an agency's decision to withhold access to certain records, you are entitled to appeal, within 30 calendar days of your receipt of the written notice of denial, to any Superior Court within the state. 1 M.R.S. § 409(1)

Can an agency deny a request because it is unduly burdensome?

An agency may seek protection from a request for inspection or copying that is unduly burdensome or oppressive by filing an action in the Superior Court for the county where the request was made within 30 days of receipt. The agency must document the terms of the request, the good faith estimate and efforts to clarify or modify the request. Notice must be provided to the requester at least 10 days before the agency files for an order of protection. Upon a showing of good cause, the court can establish the terms of production and limit or deny the request. 1 M.R.S. § 408-A(4-A) **As of October 18, 2021**, a reasonable fee to cover the cost of copying is

no more than 10 cents per page for a standard 8 ½ by 11 inch black and white copy. A per page fee may not be charged for records provided electronically.

May a governmental body ask me why I want a certain record?

The FOAA does not specifically prohibit agencies or officials from asking why an individual is requesting a public record. However, if asked, the individual is not required to provide a reason for seeking a record, and the agency cannot deny an individual's request based solely on either the individual's refusal to provide a reason or the reason itself. An agency or official may request clarification concerning which public record or public records are being requested. 1 M.R.S. § 408-A(3)

Can I ask that public reports or other documents be created, summarized or put in a particular format for me?

No. A public officer or agency is not required to prepare reports, summaries, or compilations not in existence on the date of your request. 1 M.R.S. § 408-A(6)

If the public record is electronically stored, the agency or official subject to a request must provide the public record either as a printed document or in the medium in which the record is stored, except that the agency or official is not required to provide access to an electronically stored public record as a computer file if the agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in or associated with that file. 1 M.R.S. § 408-A(7)

Must the agency or official provide me with access to a computer terminal to inspect electronically stored public records?

No. The agency or official is not required to provide access to a computer terminal. 1 M.R.S. § 408-A(7)(B)

I asked a public official a question about a record, but he/she didn't answer. Is the official required to answer my question?

No. A public officer or agency is not required to explain or answer questions about public records. The FOAA only requires officials and agencies to make public records available for inspection and copying.

Are an agency's or official's e-mails public records?

Any record, regardless of the form in which it is maintained by an agency or official, can be a public record. As with any record, if the e-mail is "in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or

governmental business" and is not deemed confidential or excepted from the FOAA, it constitutes a "public record". 1 M.R.S. § 402(3)

An agency or official must provide access to electronically stored public records, including e-mails, as a printed document or in the medium it is stored at the discretion of the requestor. If an agency or official does not have the ability to separate or prevent the disclosure of confidential information contained in an e-mail, the agency is not required to provide the records in an electronic format. 1 M.R.S. § 408-A(7)

Email messages are subject to the same retention schedules as other public records based on the content of the message. There are no retention schedules specific to email messages.

Is information contained in a communication between a constituent and an elected official a public record?

Information of a personal nature consisting of an individual's medical information, credit or financial information, character, misconduct or disciplinary action, social security number, or that would be confidential if it were in the possession of another public agency or official is not a public record. However, other parts of the communication are public. 1 M.R.S. § 402(3)(C-1)

Can an agency charge for public records?

There is no initial fee for submitting a FOAA request and agencies cannot charge an individual to inspect records unless the public record cannot be inspected without being compiled or converted. 1 M.R.S. § 408-A(8)(D) However, agencies can and normally do charge for copying records. Although the FOAA does not set standard copying rates, it permits agencies to charge "a reasonable fee to cover the cost of copying". 1 M.R.S. § 408-A(8)(A)

Agencies and officials may also charge fees for the time spent searching for, retrieving, compiling or redacting confidential information from the requested records. The FOAA authorizes agencies or officials to charge $15 per hour after the first hour of staff time per request. **As of October 18, 2021**, an agency or official may charge $25 per hour after the first two hours of staff time per request. 1 M.R.S. § 408-A(8)(B) Where conversion of a record is necessary, the agency or official may also charge a fee to cover the actual cost of conversion. 1 M.R.S. § 408-A(8)(C)

As of October 18, 2021, an agency may retain any fees or costs charged for responding to a FOAA request.

The agency or official must prepare an estimate of the time and cost required to complete a request within a reasonable amount of time of receipt of the request. If the estimate is greater than $30, the agency or official must notify the requester before proceeding. The agency may request payment of the costs in advance if the estimated cost exceeds $100 or if the requester has previously failed to pay a fee properly assessed under the FOAA. 1 M.R.S. § 408-A(9), (10)

I cannot afford to pay the fees charged by the agency or official to research my request or copy the records. Can I get a waiver?

The agency or official may, but is not required to, waive part or all of the total fee if the requester is indigent, or if the agency or official considers release of the public record to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. 1 M.R.S. § 408-A(11)

Is a public agency or official required under the Freedom of Access Act to honor a "standing request" for information, such as a request that certain reports be sent to me automatically each month?

No. A public agency or official is required to make available for inspection and copying, subject to any applicable exemptions, only those public records that exist on the date of the request. Persons seeking to inspect or obtain copies of public records on a continuing basis are required to make a new request for any additional records sought after the date of the original request.

PUBLIC PROCEEDINGS

What is a public proceeding?

The term "public proceeding" means "the transactions of any functions affecting any or all citizens of the State" by the Maine Legislature and its committees and subcommittees; any board or commission of a state agency or authority including the University of Maine and the Maine Community College System; any board, commission, agency or authority of any county, municipality, school district or any regional or other political or administrative subdivision; the full membership meetings of any association, the membership of which is comprised exclusively of counties, municipalities, school districts, other political or administrative subdivisions, or their boards, commissions, agencies or authorities; and any advisory organization established, authorized or organized by law, resolve or executive order.1 M.R.S. § 402 (2)

What does the law require with regard to public proceedings?

The FOAA requires all public proceedings to be open to the public and any person must be permitted to attend. 1 M.R.S. § 403

When does a meeting or gathering of members of a public body or agency require public notice?

Public notice is required of all public proceedings if the proceedings are a meeting of a body or agency consisting of 3 or more persons. 1 M.R.S. § 406

What kind of notice of public proceedings does the Freedom of Access Act require?

Public notice must be given in ample time to allow public attendance and must be disseminated in a manner reasonably calculated to notify the general public in the jurisdiction served by the body or agency. 1 M.R.S. § 406

Can a public body or agency hold an emergency meeting?

Yes. Public notice of an emergency meeting must be provided to local representatives of the media, whenever practicable. The notice must include the time and location of the meeting and be provided by the same or faster means used to notify the members of the public body or agency conducting the public proceeding. 1 M.R.S. § 406 The requirements that the meeting be open to the public, that any person be permitted to attend and that a record of the meeting be made and open for public inspection still apply. 1 M.R.S. § 403

Can public bodies or agencies hold a closed-door discussion?

Yes. Public bodies or agencies are permitted, subject to certain procedural conditions, to hold closed "executive sessions" on specified subjects after a public recorded vote of 3/5 of the members present and voting. 1 M.R.S. § 405(1)-(5)

Can the body or agency conduct all of its business during an executive session?

Generally, no. The content of deliberations during executive sessions is restricted to the matters listed in the FOAA, such as the following: discussions regarding the suspension or expulsion of a student; certain employment actions; the acquisition, use or disposition of public property; consultations between a body and its attorney concerning its legal rights and responsibilities or pending litigation; and discussion of documents that are confidential by statute. In addition, any governmental body or agency subject to the FOAA is prohibited from giving final approval to any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session. 1 M.R.S. § 405(2), (6)

What if I believe a public body or agency conducted improper business during an executive session?

Upon learning of any such action, any person may appeal to any Superior Court in the State. If the court determines the body or agency acted illegally, the action that was taken by the body or agency will be declared to be null and void and the officials responsible will be subject to the penalties provided in the Act. 1 M.R.S. § 409(2)

Can members of a body communicate with one another by e-mail outside of a public proceeding?

The law does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes of the FOAA. 1 M.R.S. § 401

E-mail or other communication among the members of a body that is used as a substitute for deliberations or decisions which should properly take place at a public meeting may likely be considered a "meeting" in violation of the statutory requirements for open meetings and public notice. "Public proceedings" are defined in part as "the transactions of any functions affecting any or all citizens of the State..." 1 M.R.S. § 402 The underlying purpose of the FOAA is that

public proceedings be conducted openly and that deliberations and actions be taken openly; clandestine meetings should not be used to defeat the purpose of the law. 1 M.R.S. § 401 Public proceedings must be conducted in public and any person must be permitted to attend and observe the body's proceeding although executive sessions are permitted under certain circumstances. 1 M.R.S. § 403 In addition, public notice must be given for a public proceeding if the proceeding is a meeting of a body or agency consisting of 3 or more persons. 1 M.R.S. § 406

Members of a body should refrain from the use of e-mail as a substitute for deliberating or deciding substantive matters properly confined to public proceedings. E-mail is permissible to communicate with other members about non-substantive matters such as scheduling meetings, developing agendas and disseminating information and reports.

Even when sent or received using a member's personal computer or e-mail account, e-mail may be considered a public record. 1 M.R.S. § 402(3) As a result, members of a body should be aware that all e-mails and e-mail attachments relating to the member's participation are likely public records subject to public inspection under the FOAA.

Can I record a public proceeding?

Yes. The FOAA allows individuals to make written, taped or filmed records of a public proceeding, or to broadcast the proceedings live, provided the action does not interfere with the orderly conduct of the proceedings. The body or agency holding the proceeding can make reasonable rules or regulations to govern these activities so long as the rules or regulations do not defeat the purpose of the FOAA. 1 M.R.S. § 404

Do members of the public have a right to speak at public meetings under the Freedom of Access Act?

The FOAA does not require that an opportunity for public participation be provided at open meetings. However, public participation may be permitted or required in certain circumstances for constitutional reasons or under various statutes, local ordinances or policies. An individual should determine the type of public meeting and consult sources of authority outside the FOAA for information about participation rights.

Is a public body or agency required to make a record of a public proceeding?

Unless otherwise provided by law, a record of each public proceeding for which notice is required must be made within a reasonable period of time. At a minimum, the record must include the date, time and place of the meeting; the presence or absence of each member of the body holding the meeting; and all motions or votes taken, by individual member if there is a roll call.

The FOAA also requires that public bodies and agencies make a written record of every decision that involves the conditional approval or denial of an application, license, certificate or permit, and every decision that involves the dismissal or refusal to renew the contract of any public official, employee or appointee. 1 M.R.S. § 407(1), (2)

If the public proceeding is an "adjudicatory proceeding" as defined in the Maine Administrative Procedure Act, the agency is required to compile a record that complies with statutory

specifications, including a recording in a form susceptible of transcription. 5 M.R.S. § 8002(1); 5 M.R.S. § 9059

Is the agency or body required to make the record or minutes of a public proceeding available to the public?

Yes. Any legally required record or minutes of a public proceeding must be made promptly and shall be open to public inspection. In addition, every agency is required to make a written record of any decision that involves conditional approval or denial of any application, license, certificate or other type of permit and to make those decisions publicly available, 1 M.R.S. § 403 , 407; 5 M.R.S. § 9059 (3)

Can a public body or agency meet remotely?

Yes, but only under the conditions set forth in 1 M.R.S. § 403-B. The body must adopt a written policy on remote participation after notice and public hearing. The body may then allow members to participate by remote means if the body complies with the other requirements of the law, including allowing for remote attendance by members of the public. The body may limit public attendance at a proceeding solely to remote methods if there is an emergency or urgent issue that requires the body to meet only by remote methods.

Can a public body hold a remote hearing on a proposed written policy?

Yes. If the chair of a body determines that an emergency or urgent issue exists that prevents an in-person public meeting, the chair may call for a remote meeting to adopt a proposed remote meeting policy. If 2/3 of the members of the body vote in support of the chair's determination that an emergency or urgent issue exists, after an opportunity for hearing, the members may then vote on whether to adopt a remote meeting policy.

Does the remote meeting policy apply to boards or committees within the jurisdiction of the public body?

Yes, unless the board or committee adopts its own policy.

What is the procedure for adopting the written remote meeting policy?

The law requires public notice and a hearing prior to adopting the written policy. The body should give notice to the public in the same way it would give notice of any other public proceeding under 1 M.R.S. § 406. The notice should include information about how the public can participate in the meeting and the proposed policy or instructions on how to obtain a copy of the proposed policy in advance of the meeting.

What notice is required for a meeting being conducted remotely?

Notice must be given in ample time to allow the public to attend remotely and given in a manner reasonably calculated to notify the public of the time, date, location and method to be used to conduct the meeting. If any members of the body participate remotely, the notice must include

the means by which members of the public may access the meeting. The notice must also provide the physical location where members of the public may participate in person, if applicable.

What methods of remote participation may be used?

Remote participation in a public proceeding is through either telephonic or video technology. Members of the public shall be provided with a meaningful opportunity to attend by remote means when any members of the body are participating remotely. Other means may be used when necessary to provide reasonable accommodation to a person with a disability. Public proceedings may not be conducted by text-only means of communication, such as email, text message or chat functions.

What if a member of the public wants to provide public comment?

The body must provide an effective means of communication between members of the body and members of the public when public comment is allowed.

Do members of a body who are participating remotely count toward a quorum?

Yes, a member who participates remotely pursuant to the adopted policy is considered present for purposes of determining a quorum.

Is a roll call vote required for action taken during remote meetings?

Yes, all votes must be taken by roll call in a manner that can be seen and heard if using video technology, and heard if using only audio technology, by all members of the body and the public.

Do members of the public who attend remotely have access to meeting documents and materials?

All documents and other materials must be made available to members of the public participating remotely to the same extent customarily available to the public attending in person, as long as additional costs are not incurred by the public body. A proposed policy regarding remote participation must be made available in advance of the meeting if meeting remotely.

Credits