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LEGAL UPDATE 2024

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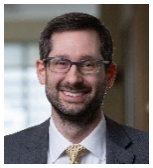

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MAINE BUILDING OFFICIALS MBOIA FOUNDED IN 1972 INSPECTORS ASSOCIATION

15th Annual Maine Code Conference

Sugarloaf Mountain Resort
May 21, 2024

LEGISLATIVE UPDATE[1]

1 This legislative update relies heavily on the 2024 LD List - 131st Legislature (Second Session) prepared by the Maine Municipal Association.

SHORELAND ZONING/ ENVIRONMENTAL PROTECTION

LD 2253 - An Act to Authorize a Stop-Work Order Regarding an Activity That is Creating an Immediate and Substantial Adverse Impact to a Protected Natural Resource (Signed by the Governor April 12, 2024)

- Authorizes the DEP Commissioner to issue a stop-work order whenever the Commissioner finds that:

1) an activity is being performed in a manner that violates either:

   - (1) state environmental protection laws or rules or the terms or conditions of a license; or

   - (2) a permit or order issued by the Board of Environmental Protection or the department;

and

LD 2253 - An Act to Authorize a Stop-Work Order Regarding an Activity That is Creating an Immediate and Substantial Adverse Impact to a Protected Natural Resource (Signed by the Governor April 12, 2024) (Cont'd)

2) the activity is creating "an immediate and substantial adverse impact to a protected natural resource."

- The stop-work order must provide various details (the violation, the natural resource that is being affected, the duration the activity must cease, the conditions under which the activity may resume (i.e., identifying the corrective measures that must be taken), the process by which the alleged violator may respond to the order and request that it be modified or rescinded).
- The stop-work order may be appealed to Superior Court (but it remains in effect during the pendency of the appeal, except as otherwise provided by the Commissioner or the Court).
- Violation of the stop-work order is subject to $5,000 per day, per violation penalty.
- Gives similar authority to the Director of Maine Land Use Planning Commission (LUPC).

AFFORDABLE HOUSING

LD 337 - An Act to Amend the Law Governing the Regulation of Manufactured Housing to Increase Affordable Housing (Signed by Governor March 19, 2024)

- Provides that a municipality must allow manufactured housing wherever single-family dwellings are allowed, subject to the same design criteria as the municipality may establish for single-family dwellings.

ROADS

LD 2264 - An Act to Clarify the Use of Public Equipment on Public Easements (Became law without Governor's signature April 21, 2024)

- While the original version of the bill sought to change to the statutory term "Private Way" to "Public Easement," this change did not make it into the final version.
- Clarifies that municipalities may plow, maintain and repair a public easement to the extent directed by the legislative body when the municipal officers consider it advisable in the best interest of the municipality for fire or police protection.
- Directs the Maine Abandoned and Discontinued Roads Commission to consider:
  - The scope of public use allowed on a public easement over an abandoned or discontinued road, the impact of the public use on abutting property owners and ways to reduce the negative impacts on abutting property owners;
  - Property owner liability, including personal injury, property damage and environmental damage liability resulting from public use of an abandoned or discontinued road;
  - Options for creating a road inventory of abandoned and discontinued roads; and
  - The creation of a right-of-way template for property owners to use when municipality considers discontinuing the road abutting a property owner's property.

LOCAL PLUMBING INSPECTORS

LD 2201 - An Act Regarding the Placement of Portable Toilets (Became law without Governor's signature April 10, 2024)

- Exempts a temporary portable toilet from the requirement to obtain a permit from a local plumbing inspector for placement. A temporary portable toilet is defined as one that is placed for less than seven days and is regulated by the Maine Centers for Disease Control under the Subsurface Wastewater Disposal Rule (Chapter 241) Section 5(I)(6): Temporary Portable Toilets.

- Authorizes a person not subject to statutes regulating the operations of eating establishments, lodging places, campgrounds, sporting and youth camps, and public pools and spas (Title 22, chapter 562), to place and use a temporary portable toilet provided the facility is maintained and serviced in a reasonable manner to protect public health, safety, and the environment.

MUBEC

LD 2053 - An Act to Exempt Buildings Used to Cultivate Crops from the Maine Uniform Building and Energy Code (Signed by the Governor March 6, 2024)

- Exempts buildings used to cultivate crops from the Maine Uniform Building and Energy Code, except that it does not exempt buildings used to cultivate cannabis.

MORATORIA

LD 772 - An Act to Limit Retroactive Application of Land Use Ordinances to Pending Permit Applications That Propose Housing (Signed by the Governor April 9, 2024)

- Prevents a municipality or local planning board from retroactively applying a land use ordinance on a development that includes one or more units of residential housing, provided the ordinance was proposed after: (1) the permit application is filed; and (2) deemed complete for processing.
- Defines the term “deemed complete for processing” as when the application is filed with the municipality or planning board and at the time of submission, the applicant demonstrates legal title or right to or interest in all of the property proposed for development.

LD 772 - An Act to Limit Retroactive Application of Land Use Ordinances to Pending Permit Applications That Propose Housing (Signed by the Governor April 9, 2024) (Cont'd)

- Specifically states that the legislation applies notwithstanding 1 M.R.S. § 302 if the proposal date of the ordinance occurred after the application was submitted. This is a significant departure from existing law, which only considers a land use application to be "pending" (and thus safe from subsequent enactments) when the reviewing authority has conducted at least one substantive review of the application and not before. A "substantive review" means of a review of the application to determine whether it complies with the relevant review criteria.
- While the Law Court has held a number of times that ordinance amendments can apply retroactively, this bill changes the law significantly when the retroactive ordinance involves housing.

PROPERTY TAX ISSUES

LD 2262 - An Act to Amend the Process for the Sale of Foreclosed Properties Due to Nonpayment of Taxes (Signed by Governor April 16, 2024)

- Amends the process following the foreclosure on a property by a municipality for failure to pay property taxes and the return of excess fund by:

  1) Requiring a municipality to make 3 attempts to contract with a real estate broker for the sale of the subject property;

  2) Requiring a real estate broker to attempt to sell the property for 6 months before the municipality can sell the property in a manner authorized by the municipality's legislative body;

  3) Eliminating the requirement that the former owner submit a written demand for the return of excess funds from the sale;

  4) Allowing a municipality to deduct from the proceeds of the sale additional costs authorized under the current law, fees incurred for advertising, mailing, and recording the property in addition to any expenses incurred in improving the property;

LD 2262 - An Act to Amend the Process for the Sale of Foreclosed Properties Due to Nonpayment of Taxes (Signed by Governor April 16, 2024) (Cont'd)

5) Requiring a municipality to provide notice of intent to disburse any excess funds to the former owner to each record holder of an interest in the property by certified mail return receipt request at least 30 days prior to that disbursement;

6) Requiring that if the municipality is unable to locate the former owner, they publish a notice in newspaper of general circulation in the county in which the property is located, specifying the former owner, a description of the property sold, the amount of the excess proceeds and the date by which the proceeds must be claimed; and

7) Requiring the municipality to record in the registry of deeds a notice within 10 days of paying the excess proceeds to the former owner, their name, date of the payment and to whom it was made, a description of the property and a statement that by accepting the excess proceeds the former owner has waived the right to commence an action to dispute the taking of the property.

LD 2102 - An Act to Support Municipalities by Repealing the Law Limiting the Municipal Property Tax Levy (Signed by the Governor April 9, 2024)

- This emergency bill repeals the law limiting municipal property tax levy, also known as LD 1.

MISCELLANEOUS

LD 2035 - An Act Regarding Disclosure of Flood Risk by Sellers of Real Estate (Became Law without Governor's signature April 2, 2024)

- Requires sellers of residential and nonresidential real property to notify and inform prospective buyers in writing of whether: (1) the property is in a special flood hazard area mapped on a Federal Emergency Management Agency flood insurance rate map; (2) the property has been impacted by flood events or flood-related damages; or (3) if flood insurance claims were filed or disaster-related aid was provided.

BILLS THAT HAVE, OR LIKELY WILL, DIE ON THE VINE….

GROWTH MANAGEMENT/PLANNING

LD 1976 - An Act to Update the Growth Management Program Laws (Passed to be enacted May 10, 2024)

- This bill would have made extensive changes to the Growth Management Act

SUBDIVISION LAW

LD 1787 - Resolve, Directing the Department of Agriculture, Conservation and Forestry to Convene a Stakeholder Group Tasked with a Comprehensive Overhaul and Modernization of the State Subdivision Statutes (Finally Passed in Concurrence Enacted May 10, 2024)

- Directs the Department of Agriculture, Conservation and Forestry to convene a stakeholder group, including commissioners of various state agencies and representatives of: a municipal government with experience in subdivision law; a registry of deeds; a code enforcement officer who assists planning boards with development of subdivision ordinances; an organization that advocates for land and natural resources conservation; a landowner with significant holdings in the unorganized territories; and a representative of the real estate development industry.

- The stakeholder group is tasked to review and recommend a comprehensive overhaul and modernization of the subdivision laws and submit a report to the joint standing committees of the Legislature having jurisdiction over subdivision review matters under those laws by December 6, 2025

AFFORDABLE HOUSING

LD 1867- An Act to Establish the Community Housing Production Program (Carried Over to any special session of the 131st Legislature)

- Establishes the Community Housing Production Program and directs MaineHousing to administer grants to nonprofit developers, corporations and public entities to produce mixed income rental housing. The bill also allocates in a one-time $75 million appropriation for the production program and a one-time $25 million appropriation for existing homeownership assistance programs.

LD 1752 - Resolve, to Prepare Pre-approved Building Types (Carried Over to any special session of the 131st Legislature)

- Directs the Department of Agriculture, Conservation and Forestry, Bureau of Resource Information and Land Use Planning to enter into a contract with a consultant to establish a set of preapproved building types that municipalities may adopt to reduce the cost and time associated with processing building permit applications.
- Requires the consultant to: (1) ensure that each preapproved building type can be developed to ensure that rent for affordable units does not exceed 30% of the median income in the county where the building will be located; and (2) seek input from a postsecondary institution in the State with a program that uses new technologies to produce materials and develop building methods designed to make housing more efficient and affordable.
- No later than December 3, 2025, the bureau is further directed to submit a report to the joint standing or select committee of the Legislature having jurisdiction over housing matters.

LD 1493 - An Act to Increase Affordable Housing by Expanding Tax Increment Financing (Carried Over to any special session of the 131st Legislature)

- Authorizes the creation of Evergreen Housing Zones to allow tax increment financing revenue to be used to finance qualified housing projects located within the municipality.
- Qualified housing projects include developments: (1) where at least 50% of the units are restricted for affordable or workforce housing; (2) are subject to a restrictive covenants preserving affordable or workforce housing units for a period of 10 years for single-family, owner-occupied units and 30 years for rental units; (3) located in an Evergreen Housing Zone; and (4) meet all other qualifications adopted in Department of Economic and Community Development rules.

LD 2146 - An Act to Prohibit Certain Municipalities from Adopting Moratoria on Emergency Shelters (Carried Over to any special session of the 131st Legislature)

- Prohibits municipalities with populations exceeding 30,000 people from adopting moratoria on the establishment of emergency shelters that provide temporary shelter for persons experiencing homelessness.

LD 1929 - An Act to Protect Consumers by Licensing Home Building Contractors (Carried Over to any special session of the 131st Legislature)

- Establishes licensing requirements for contractors that perform work on residential construction and establishes a board to administer the licensing requirements, which includes two municipal code enforcement officers.

CASE LAW UPDATE

Tominsky v. Town of Ogunquit, 2023 ME 30, 294 A. 3d 142

Issues:

- Standing
- Good cause exception (judicial vs. administrative)
- Timeliness of appeal
- If/when a party can appeal an occupancy permit
- Failure to exhaust administrative remedies
- Questions of fact (deferential review) vs. issues of law (de novo review - no deference)

Tominsky v. Town of Ogunquit, 2023 ME 30, 294 A. 3d 142 (Cont'd)

Procedural Posture:

- Abutting property owner appealed CEO's issuance of various building permits to ZBA.
- Appeal was untimely but ZBA granted "good cause exception" to hear appeal. ZBA ultimately denied appeal on the merits.
- Abutter filed Rule 80B appeal of ZBA decision to Superior Court (Tominsky I) and LLC property owner cross appealed ZBA's granting the good cause exception.
- While Tominsky I was pending, CEO issued occupancy permit for one of the building permits, which Tominsky appealed to ZBA. ZBA denied the appeal, which denial Tominsky appealed to Superior Court (Tominsky II).
- Superior Court denied Tominisky I (regarding the building permits) and dismissed Tominsky II (as unlawful attempt to bootstrap an untimely appeal of the building permits). Superior Court also denied LLC's appeal of the ZBA's granting the good cause exception.
- Law Court held that because the ZBA had erred in concluding that good cause existed for the untimely appeal, its decision on the merits must be vacated.

Tominsky v. Town of Ogunquit, 2023 ME 30, 294 A. 3d 142 (Cont'd)

Background Facts:

- CEO issued 6 building permits to LLC property owner.
- Abutter (Tominsky) was living in Florida at time permits were issued. Months later upon his return, Tominsky discovers buildings and his attorney contacts the CEO requesting information but received no response.
- A few weeks later, Tominsky files action in court seeking an injunction and various other remedies, which the court dismissed given Tominsky's failure to exhaust his administrative remedies before the ZBA.
- Tominsky then files appeal to ZBA (7 months after issuance of final building permit and 3 months after Tominsky learns of it).
- Ordinance prescribes a 30 day appeal period but allows ZBA to grant exceptions "only where, in its sole and exclusive judgment, extraordinary circumstances have been shown which would result in flagrant miscarriage of justice unless the 30 day period is extended."
- ZBA grants exception based in large part on CEO's lack of response to request for information, but ultimately denies appeal on merits.

Tominsky v. Town of Ogunquit, 2023 ME 30, 294 A. 3d 142 (Cont'd)

Holdings:

- If ZBA grants a good cause exception but rejects appeal on the merits, the party who obtained the approval should not file its own separate appeal. Rather, it should just make its arguments in the context of its responsive Rule 80B brief.
  - Note: This is because a party lacks standing to appeal a decision that grants them the relief sought if the basis for the appeal is that they preferred the decision to be based on different grounds. (Here, because the LLC prevailed on the merits, with the result that its permits were upheld, it lacks standing to appeal the good cause determination because it is not an aggrieved party.)
- There are two kinds of "good cause" exceptions to ZBA appeal deadlines.
  - The first is a judicially created exemption which only courts can grant when they find that "special circumstances which would result in a flagrant miscarriage of justice." This only applies when a local ordinance does not contain its own good cause exception. Judicially created good cause exceptions granted by the Superior Court are reviewed by the Law Court based on an abuse of discretion standard.
  - The second is administrative, i.e., when the exception is contained in a local ordinance. The court will review a ZBA's findings of fact regarding why the appeal was filed late deferentially. However, whether those facts present the kind of "extraordinary circumstances" that would result in a "flagrant miscarriage of justice" unless the 30 day deadline is extended is a question of law which the court will review de novo (no deference).

Tominsky v. Town of Ogunquit, 2023 ME 30, 294 A. 3d 142 (Cont'd)

Holdings Cont'd:

- While lack of notice of the issuance of a permit is one factor that will be examined when determining whether a good cause exception exists, it isn't the only factor. Another is how long appellant waited after become aware of the permit to file an appeal. While Tominsky lacked notice of the permit, the court found no viable excuse for the almost 3 month delay after he become aware of it. While he filed a case in court (rather than to the ZBA as he should have), his attorney's mistake of the law was not an "extraordinary circumstance" that would justify the delay.
- Tominsky II was denied because an appeal of a certificate of occupancy cannot be used as a substitute for an appeal of the underlying permit. The only circumstances in which an appeal of an occupancy permit will be allowed is when the permit holder exceeded the scope of the permit. Because Tominsky sought to use the appeal of the occupancy permit as a back door way to challenge the underlying building permit, the Law Court denied it.

Tominsky v. Town of Ogunquit, 2023 ME 30, 294 A. 3d 142 (Cont'd)

Takeaways:

- Just because a party would have preferred to have won on different grounds does not mean they are an "aggrieved party" withstanding to appeal a decision in which they were the prevailing party.
- When the issue presented involves a good cause exception in a local ordinance, it is a question of law that will be reviewed de novo. While the board's factual determinations about why the appeal was filed after the deadline will be reviewed deferentially, whether those facts will support a conclusion that the good cause exception is met is a question of law to which courts will pay no deference.
- A certificate of occupancy is not appealable when it is being used as a way to bootstrap an untimely appeal of the underlying building permit.

Upstream Watch v. City of Belfast, 2023 ME 43, 299 A.3d 25

Issues:

- "Administrative" Standing
- Ordinance Interpretation
- Who is an "abutter"?

Upstream Watch v. City of Belfast, 2023 ME 43, 299 A.3d 25 (Cont'd)

Procedural Posture:

- Upstream Watch ("Upstream") is an environmental organization that appealed to the ZBA the Planning Board's approval of Nordic Aquafarms' ("Nordic") application for a land-based salmon aquaculture project.
- ZBA dismissed Upstream's appeal on basis that Upstream lacked standing.
- On Rule 80B appeal, the Superior Court affirmed the ZBA's decision to dismiss based on lack of standing.
- Law Court reversed, finding that Upstream did have standing under the ordinance.

Upstream Watch v. City of Belfast, 2023 ME 43, 299 A.3d 25 (Cont'd)

Factual Background:

- Planning Board issued order requiring anyone wanting to participate to file a statement demonstrating: (a) that they owned land affected by the project; and (b) would suffer a "particularized injury" distinct from the general public as a result of the project.
- Upstream filed a statement with the Planning Board outlining its purpose and its members with property who would be affected by the project. Planning Board granted Upstream party-in-interest status.
- Planning Board held 22 public hearings and 39 public meetings in which Upstream participated and expressed opposition to the project.
- Planning Board approved project and Upstream timely appealed to the ZBA.
- ZBA determined that Upstream lacked standing because it could not show a "particularized injury" (despite affidavits stating that two of its members owned property within 600' of the project).

Upstream Watch v. City of Belfast, 2023 ME 43, 299 A.3d 25 (Cont'd)

Factual Background Cont'd:

- Under the ordinance, only "aggrieved parties" may bring appeals to the ZBA, which term was defined in the ordinance as "a person whose land is directly or indirectly affected by the granting or denial of a permit…or a person whose land abuts land for which the permit has been granted."
- The ordinance does not define "abutter," but prior case law holds that in absence of a specific definition, "abutter" means a person who owns property in "close proximity" (i.e., not limited to direct abutters but in the same neighborhood).
- The Law Court has previously granted standing to organizations as long as at least one member can demonstrate standing in the member's own right.
- Ordinance interpretation is a question of law that courts review "de novo." Courts will give no deference to local boards' legal interpretation, whereas factual determinations will be given deference as long as they are supported by substantial record evidence.

Upstream Watch v. City of Belfast, 2023 ME 43, 299 A.3d 25 (Cont'd)

Holding:

- While courts will review factual determinations with deference, the Law Court held that the record evidence clearly supported a determination that Upstream had standing because:
- Two of its members owned property "next to or near enough" to the subject property.
- They were "aggrieved" because Nordic's project would draw large amounts of water from the same aquifer on which their wells are located.
- Because determinations of standing involve ordinance interpretation, they are therefore questions of law that will be afforded no deference.
- While a "particularized injury" must be shown to demonstrate judicial standing (to seek redress under Rule 80B in court), a municipality can set a more liberal standard for administrative standing under its local ordinance. While most local ordinances do impose a requirement of particularized injury, not all do.
- Here, the "aggrieved party" definition in Belfast's ordinance did not include such a requirement.

Upstream Watch v. City of Belfast, 2023 ME 43, 299 A.3d 25 (Cont'd)

Takeaways:

- Determinations of standing must be made based on the particular requirements of the local ordinance if there is one. Otherwise, the criteria for judicial standing (i.e., particularized injury) must be demonstrated.
- Determinations of whether an organization has "administrative standing" will be tied to the standing of its constituent members.

Murray v. City of Portland, 2023 ME 57, 301 A.3d 777

Issues:

- Importance of Detailed Findings of Fact/Conclusions of Law
- Remands

Murray v. City of Portland, 2023 ME 57, 301 A.3d 777 Cont'd

Procedural Posture:

- Planning Board unanimously approved the multi-unit residential building.
- Neighbors appealed to Superior Court, which upheld Planning Board's decision.
- Law Court overturned Superior Court's finding that because the Planning Board failed to make appropriate findings and conclusions, the matter must be remanded matter back to the Planning Board.

Murray v. City of Portland, 2023 ME 57, 301 A.3d 777 Cont'd

Background Facts:

- Neighbors appealed Planning Board's unanimous approval of twelve-unit residential building based on purported failure to meet various ordinance standards.
- While the findings stated that its decision was "based on the application, documents and plans as submitted and reports that planning staff prepared." The decision did not make any specific findings related to the challenges that the neighbors raised (such as height, setbacks, and compliance with design requirements).

Murray v. City of Portland, 2023 ME 57, 301 A.3d 777 Cont'd

Holdings:

- This was not a situation where "the facts are obvious from the record," in which case the Law Court has previously been somewhat forgiving of deficiencies in findings (it no longer is).
- The Law Court will not treat comments of individual members made during the proceedings as factual findings for the whole board.
- In absence of findings and conclusions, a reviewing court cannot effectively determine the basis for its decision; a remand back to the board is the appropriate remedy in such cases.

Murray v. City of Portland, 2023 ME 57, 301 A.3d 777 Cont'd

Takeaways:

- Municipal boards must make adequate findings and conclusions to apprise the applicant, public and courts of the basis for their decisions. Otherwise, they will be remanded back to board.
- While courts in the past were somewhat forgiving of voluntary municipal boards, the Law Court has increasingly demonstrated an unwillingness to do so and will not "imply findings" from the available record.
- Courts will not infer that any particular comment from a board member represents the decision of the full board and such statements will not be considered findings.
- The remedy for the failure of an agency to make appropriate findings and conclusions is a remand. See also *LaMarre v. Town of China*, 2021 ME 45; 29 *McKown, LLC v. Town of Boothbay Harbor*, 2022 ME 38 (involving CEO's duty to draft findings for stop work orders where there is an appellate standard of review before the ZBA).

Odiorne Lane Solar, LLC v. Town of Eliot, 2023 ME 67, 304 A.3d 253

Issues:

- What is the "operative decision" under review?
- What is governing standard of review for local decisions involving ordinance interpretation (deferential vs. de novo)?

Odiorne Lane Solar, LLC v. Town of Eliot, 2023 ME 67, 304 A.3d 253 (Cont'd)

Procedural Posture:

- Planning Board approved developer's application for large solar array in the rural district
- ZBA granted abutter's appeal and vacated Planning Board's approval
- Superior Court reversed ZBA and reinstated Planning Board's approval
- Law Court vacated Superior Court's decision and remanded with instructions to vacate Planning Board approval

Odiorne Lane Solar, LLC v. Town of Eliot, 2023 ME 67, 304 A.3d 253 (Cont'd)

Background Facts:

- At issue is the meaning of "public utility facility" under the local ordinance.
- The ordinance permits "public utility facilities" in all districts in town.
- Town attorney opined that "public utility facilities" include large scale solar arrays.
- While ordinance did not define "public utility facility" it defined "public utility" as "any person, firm, corporation…authorized to furnish … electricity to the public."
- While developer conceded that project was not a "public utility" under state statute, it argued that town's definition (not the state's) governed.
- In Maine, solar developers generate power that is ultimately distributed to the public. While many solar developers are registered with the PUC as allowed to engage in "net billing," only a few entities in Maine (like CMP and Versant) are authorized by the PUC to distribute electricity.
- During pendency of proceedings, ordinance amendments were proposed to allow large solar arrays in the Rural district.

Odiorne Lane Solar, LLC v. Town of Eliot, 2023 ME 67, 304 A.3d 253 (Cont'd)

Holdings:

- When boards of appeal act in an appellate capacity (vs. de novo), the court will review the Planning Board's (not the appeals board's) decision.
- The Law Court noted that when there is no ambiguity in an ordinance, the court will review a local board's characterization of a use as a finding of fact, giving deference to the board's ultimate conclusion. Interpretations of ordinances, however, are questions of law that courts will review de novo.
- While municipalities are free to define "public utilities" differently than the Legislature, because the developer is not "authorized to furnish" power directly to the consumer, it cannot be a public utility under the local ordinance.
- The Law Court would not consider the subsequent amendments to ordinance or whether they were intended to clarify or change the existing ordinance because the language was not in the record, and courts cannot take judicial notice of ordinances.

Odiorne Lane Solar, LLC v. Town of Eliot, 2023 ME 67, 304 A.3d 253 (Cont'd)

Takeaways:

- Case addresses somewhat conflicting case law regarding whether a particular use meets an ordinance's definition. On the one hand, cases state that local characterizations of whether an ordinance standard is met will be afforded deference. On the other, the court has stated that ordinance interpretation is a question of law that will be reviewed de novo (i.e., afforded no deference). Here, the court clarified that:
  - When the question involves the meaning of ordinance text, then it will be reviewed de novo (no deference).
  - When question involves "whether the bundle of factual characteristics of the project fit an unambiguous definition" then deference will be given.
  - When ordinance language is unambiguous, the court will look no further than its plain meaning.
  - Courts can't take "judicial notice" of ordinances or amendments, they must be part of the record.

Parker v. Department of Inland Fisheries and Wildlife, 2024 ME 22

Issues:

- Constitutionality of Maine's Sunday hunting ban in light of Maine's "right to food" constitutional amendment
- Ordinance interpretation

Parker v. Department of Inland Fisheries and Wildlife, 2024 ME 22 (Cont'd)

Background Facts:

- Parkers appealed Maine's longstanding hunting ban on basis that it is unconstitutional, alleging that it conflicts with Maine's "right to food" constitutional amendment.
- Since the mid-1800's there has been a statutory ban on Sunday hunting in Maine.
- Maine voters passed the right to food constitutional amendment in November 2021. It states that "all individuals have a natural, inherent and unalienable with to food, including….the right to grow, raise, harvest, produce and consume the food of their own choosing……as long as an individual does not commit….poaching…in the harvesting, production, or acquisition of food."
- Parkers have five children and feed their family partially through hunting. They work during the week so any hunting is limited to the weekends. Their attempt to obtain a hunting permit for Sundays was denied by IFW because of the Sunday hunting ban.
- Parkers argue that the ban violates their constitutional right to "harvest" food through hunting.
- IFW argues that ban does not conflict with the "right to food" amendment. The court addressed whether "harvesting" can include game as well as crops.

Parker v. Department of Inland Fisheries and Wildlife, 2024 ME 22 (Cont'd)

Holdings:

- To determine whether the Maine Constitution and a statute conflict, courts look to the plain language of both.
- When a term is undefined, courts will look to dictionary definitions. Customary definitions of "harvest" include catching and killing animals; additionally various Maine statutes use the term "harvest" in the context of hunting.
- The Law Court held that while the constitutional amendment permits hunting as "harvesting," the amendment includes certain express limitations, such as "poaching" while "harvesting food."
- The court yet again looked to dictionaries for the meaning of the undefined term "poaching." Various dictionaries defined it as taking game or fish "by illegal methods." Because Sunday hunting is illegal, doing so would be considered "poaching," and therefore, an express exception to the constitutional "right to food."

Dahlem v. City of Saco, 2024 ME 32

Issues:

- Preemption
- Minimum Shoreland Zoning
- Interpretations of contract zoning agreements

Dahlem v. City of Saco, 2024 ME 32 (Cont'd)

Background Facts:

- Involves a decade long effort by property owners to build a single-family residence in a shoreland area and a complicated factual background and procedural history.
- The lot in question is 5,450 square feet and has 50 feet of frontage.
- After unsuccessfully pursuing various ways to develop the parcel, property owners applied to the City Council for a contract zone, which was granted.
- Both the Superior Court and Law Court held that the contract zone agreement was unlawful because: (1) it was enacted in violation of the City's contract zoning ordinance; and (2) it was preempted by Maine's Mandatory Shoreland Zoning guidelines.

Dahlem v. City of Saco, 2024 ME 32 (Cont'd)

Holdings:

- Contract zone agreements are like any other contracts and must be interpreted pursuant to contract principles. If a term is unambiguous, then it must be interpreted according to its plain language, which if undefined, is its customary dictionary definition.
- The contract allowing construction of the house violated the City's contract zoning ordinance because: (1) the required recommendation from the Planning Board was neither sought nor obtained: (2) certain requisite findings were not made by the Council; and (3) it allowed a single family dwelling in the RP zone, and the ordinance precluded contract zoning in the RP.
- The contract zone agreement was preempted by the state's Mandatory Shoreland Zoning provisions, which require residential lots adjacent to tidal areas (which the lot in question was) to be no less than 30,000 square feet per dwelling unit and have no less than 150 feet of shore frontage. The subject lot did not meet these requirements, therefore, the contract zone (which effectively, is akin to a zoning ordinance) was preempted by the mandatory guidelines.

Dahlem v. City of Saco, 2024 ME 32 (Cont'd)

Takeaways:

- While Maine is a home rule state and gives wide berth for municipalities to enact ordinances to govern themselves, state statues may preempt local ordinances either impliedly or expressly.
- Maine's mandatory shoreland zoning provisions expressly preempt any local zoning decisions in areas within 250 feet of the upland edge of a coastal wetland that do not adhere to the minimum guidelines.

City of Lewiston v. Verrinder, 2022 ME 29

Issues:

- Fines in land use enforcement proceedings
- Administrative res judicata
- Constitutional issues regarding excessive fines
- Can ZBA's waive appeal fees?

City of Lewiston v. Verrinder, 2022 ME 29

Background:

- At issue were two fairly minor violations: (1) trash and construction debris on the property; (2) damaged front stairs.
- CEO issues NOV. Verrinder does not appeal. City moves forward with 80K.
- The court never got to the merits of the actual violations because both parties moved for summary judgment.
- City argued that the doctrine of "administrative res judicata" barred having an actual hearing on the merits. The doctrine of res judicata, in essence, means that if a party does not exercise an existing right of appeal (i.e., appealing the NOV to the BOA or court, depending on the avenue of appeal provided for in the local ordinance), then the allegations in the NOV are deemed to be true and the party cannot dispute them in a later proceeding.

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Background Cont'd:

- The court granted the City's motion based on the doctrine. Accordingly, instead of holding an 80K trial to determine whether there were violations, the Court set a hearing limited to the issue of the amount of penalties and attorneys' fees to be awarded under 30-A M.R.S. § 4452.
- Note that the local ordinance made express provision for daily fines. Query whether the Court would have found it mandatory if the local ordinance had not specifically provided for daily fines, and simply referenced § 4452 (as many ordinances do), which simply states that the court "may" impose daily fines.
- City asks for the minimum daily fine ($100/day).
- Court finds that although it is disproportionate to the nature of the violations, it had no discretion to waive the minimum daily fine. Accordingly, it imposed the $100 minimum daily fine, multiplied by the number days the violation existed, which amounted to $24K for the trash/debris and $15K for the stairs.
- Appeals to the Law Court ensue on the issues of whether the court has discretion to lower the minimum fine and on the applicability of the doctrine of administrative res judicata.

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Let's look at the two issues separately:

1) Administrative Res Judicata

- Decisions of municipal officials and boards are given the same finality as court judgments. The implication is that if a party does not appeal within the designated appeal period, then the official's or board's determination will be deemed to be final and not subject to future challenge.

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Takeaways:

- If there is a right to appeal an NOV (either to the BOA or the Superior Court) and the alleged violator does not appeal, then the violation will be deemed to be established in any subsequent 80K proceedings. The only issue for the court to determine will be the appropriate amount of fines and attorneys' fees.
- In order to get the benefit of administrative res judicata, you must include the following in your NOV's:
- Make sure to reference the specific ordinance provisions violated;
- Inform violator of any appeal rights; and
- Inform violator of consequences of failure to appeal. (I actually cite Verrinder in all NOV's now.)

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2) Issue of whether a BOA can waive an appeal fee.

- Verrinder asserts that he couldn't pay the $150 fee and that it was unconstitutional.
- Court rejected this argument because Verrinder never actually tried to appeal or request a waiver.
- Query whether BOA can waive a fee established in the ordinance (unless the ordinance specifically allows waiver). Maybe consider granting the BOA, in the ordinance, authority to waive filing fee (if circumstances warrant) in order to avoid constitutional arguments.

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3) Unconstitutionally Excessive Fines?

- Both the U.S. and Maine constitutions preclude excessive fines where the amount does not bear a reasonable relationship to the gravity of the offense (the standard is that it must be "grossly disproportionate" to be unconstitutional).
- The dissent held that $39K for some trash and a broken stair is unconstitutionally disproportionate, but the majority held that because the Legislature specifically contemplated $100/day, then it cannot be unreasonable (the majority viewed the issue through the lens of $100/day and not the total of $39K).
- The majority emphasized that purpose of fines is to incentive compliance and Verrinder could have complied at any time simply by fixing the stairs and cleaning up the trash. (The court also rejected Verrinder's argument that his trash was constitutionally protected freedom of expression).

Tomasino v. Town of Casco, 2020 ME 96

Issues:

- Right, title, and interest ("RTI")
- Standing

Tomasino v. Town of Casco, 2020 ME 96 (Cont'd)

Background:

- Tomasinos own property on Sebago Lake.
- Abutting property is owned by a trust (the "Trust"). The Trust owns title to the property beneath the right of way but the Tomasinos have an access easement over it.
- In order to access the new home they were building, the Tomasinos needed to remove three trees within the easement area.
- The CEO issued a shoreland zoning permit to remove the trees within the easement area to build a gravel driveway.
- Trust appeals permit to BOA, which overturns the CEO, finding that the Tomasinos lacked sufficient RTI to obtain the permit to remove the trees from the Trust's property.
- Tomasinos appeal, and Superior Court remands to BOA for better findings. BOA finds that CEO erred in issuing permit because it was unclear whether the Tomasinos had the right under the terms of the easement to remove the trees without the Trust's permission.
- Superior Court affirmed the BOA post-remand decision and Tomasinos appeal to Law Court.

Tomasino v. Town of Casco, 2020 ME 96 (Cont'd)

Context:

- The reason why this case is important is because until it was decided, municipal attorneys routinely advised CEOs and BOAs not to go behind instruments (i.e., deeds, easements, restrictive covenants, etc.). Rather, if those documents provided a straight-faced indication of RTI, then that was all that was required. The logic underlying this advice was that it is not up to CEOs and volunteer municipal boards to undertake a legal analysis of such instruments. Moreover, established case law provided that municipal zoning decisions were not the proper forum in which to determine private property disputes between neighbors.
- Ultimately, the majority of the Law Court held that standing to obtain a permit cannot be conferred merely by possessing an easement. Rather, the applicant must demonstrate that the easement allows what they are applying for. The majority held that even though the Tomasinos demonstrated that they had some interest in the property at issue, they failed to demonstrate the kind of interest that would allow them to cut trees. Accordingly, the Court found no error in the BOA's decision to reverse the CEO's decision to grant the permit.
- There was a strong dissent by Justice Connors. She emphasized the line of case law which states that zoning cases are not the proper forum to decide private property disputes and that complicated deed interpretation is not something local municipal officials should be undertaking.

Tomasino v. Town of Casco, 2020 ME 96 (Cont'd)

Takeaways:

- On the one hand, some argue that this flips previously existing case law regarding RTI on its head. Others argue that this case is limited to its facts (i.e., when the scope of an easement is in dispute, the Court will uphold a BOA's decision to deny an application based on lack of RTI).

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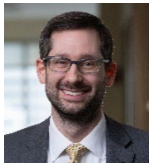

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