2021 AVCOG MUNICIPAL LAW UPDATE

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Summary of Relevant Cases

1. Expansions or changes to nonconforming uses. *Grant v. Town of Belgrade*, 2019 ME 160, 221 A.3d 112.

In 2008 Shawn Grant, the owner of two addresses spanning three nonconforming lots in Belgrade, obtained a home occupation permit from the Belgrade Planning Board for a home occupation permit to conduct boat cleaning, painting and varnishing for one of the properties. Over the next decade Grant installed docks extending from the other property and expanded the business beyond boat restoration to rent out boat slips, kayaks, and paddle boards and customers used the property to park, access the docks, and launch small watercraft. In 2018 Grant applied for a seasonal dock and boat rental business at his property under the Commercial Development Review Ordinance and the Shoreland Zoning Ordinance ("SZO") – and the Planning Board denied both applications concluding that the property failed to meet the minimum lot standards in the SZO. The Board of Appeals ("BOA") upheld the Planning Board's determination, and the Superior Court affirmed the BOA's decision.

Grant appealed to the Law Court and argued: 1) that the BOA erred when it determined that waterfront activities constituted a new commercial use requiring permits; and 2) the BOA misinterpreted the SZO when it concluded the property was subject to the SZO's dimensional requirements. The Law Court affirmed the judgment of the Superior Court.

After first determining that 2008 home occupation permit did not extend to include the present activities on the property, the Law Court disposed of the first argument and held that although the SZO does not include the model shoreland zoning section regulating docks it maintained the definition of a marina and the BOA reasonably determined that the current activity should be regulated as a commercial use.

The Court also agreed with the BOA's interpretation of the SZO that a change of use from residential to commercial would render the lots less conforming. While one provision of the SZO exempts nonconforming lots from area, shore frontage, and lot width requirements – another provision provided that a non-conforming condition shall not be permitted to become more non-conforming. Because the lot was legally nonconforming with an existing residential use and commercial uses require a greater minimum lot area and shore frontage standards, the lots would be less conforming with the proposed commercial use. In arriving at this interpretation, the Law Court referenced zoning principles and objectives to generally abolish nonconforming uses and structures – thus zoning provisions that restrict nonconformities are liberally constructed and zoning provisions that allow nonconformities are strictly construed.

2. Municipal permitting procedures; review of municipal decisions. *Friends of Lamoine v. Town of Lamoine*, 2020 ME 70, 234 A.3d 214.

The Lamoine Planning Board denied two separate applications filed by Harold MacQuinn for the expansion of an existing gravel extraction operation under the Town's Gravel Ordinance and the Site Plan Review Ordinance. The Board of Appeals conducted a de novo review of the Gravel Ordinance application and an appellate review of the Site Plan Review Ordinance application, overturned the Planning Boards decisions on both permit applications and remanded to the Planning Board to issue both permits and the Planning Board did so. The Friends of Lamoine filed an 80B appeal only on the BOA's decision to reverse the Planning Board's denial of the Site Plan Review Ordinance permit and the Superior Court vacated the BOA's decision.

The Law Court upheld the Superior Courts decision after first determining that the Friends' 80B complaint was timely under the provisions in 30-A M.R.S. § 4482-A in that the Planning Board's decision to issue the permits after the BOA remand was the last and final step in the permitting process and thus the final decision for purposes of applying the 30-day appeal period, and not the BOA's decision remanding to the Planning Board.

Further, the Law Court found that the Superior Court correctly reviewed the Planning Board's decision since the BOA properly applied an appellate review standard under the Site Plan Review Ordinance when that ordinance language provided for BOA review that was limited to "when errors of interpretation are found" and when the BOA "may not alter the conditions attached" to the PB's decision. The Law Court held that an ordinance need not use particular language such as the word "appellate" in establishing appellate review – but instead "what is important is the function that the ordinance's language prescribes." Finally, the Law Court held that there was sufficient evidence in the record to support the PB's denial of the application.

3. Issue: Requirements for reviewable decision of municipal officer. *Kimberly LaMarre et al. v. Town of China et al,* 2021 ME 45, ____ A.3d_____.

The Town of China Code Enforcement Officer ("CEO") issued an after-the-fact permit to a property owner to allow the placement of a trailer on his lot. The plaintiff abutters appealed to the Town Board of Appeals, arguing that the trailer was not a "recreational vehicle" (RV) within the meaning of the Town's Land Use Ordinance allowing such placement. After an appellate review, the Board of Appeals affirmed. The Superior Court then reversed, after which the Town and property owner appealed to the Law Court.

The Law Court directly reviewed the CEO's after-the-fact permit as the operative permit. The Court held that the permit alone was insufficient to permit judicial review because it did not contain "reviewable findings of fact based on record evidence." *Id*. ¶ 6.

The Court remanded to the CEO for further findings. It also commented on the difficulty of directly reviewing decisions from code enforcement officers and the absence of the opportunity

for parties in such proceedings to present evidence and create a sufficient record. "If objectors cannot submit their opposing evidence to the Board—a material distinction between de novo and appellate review—then they are deprived of a critical component of administrative due process." *Id*. ¶ 13. It also acknowledged that municipal officials such as CEOs are often not well-suited to engage in adjudicatory decision making. "Unsurprisingly, when an objection by an interested person comes to the attention of a CEO during the permitting process, the CEO is unfamiliar with the minimum requirements of due process and the prerequisites for preparing a record and a decision sufficient for meaningful appellate review." *Id*. ¶ 14. Finally, in the hopes of avoiding costly appeals and remands, the Court strongly urged "municipalities to provide for de novo review of CEO decisions by boards of appeals." *Id*. ¶ 15. In a footnote, the Court also "strongly encourage" municipalities to use clear language such as "de novo" and "appellate" when drafting ordinances regarding standard of review for appeals.

4. Variances; "essential character of the locality" standard. *Kevin J. Hill v. Town of Wells et al.*, 2021 ME 38, ____ A.3d_____.

Kevin Hill purchased a property in the shoreland overlay zone in the Town of Wells that borders on and intrudes into wetlands. He sought two variances – from the front setback and the freshwater wetland rear setback – to build a residence with a footprint of 680 square feet on the lot. The Town's Zoning Board of Appeals (ZBA) denied the variances, finding that Hill did not meet his burden of showing that the variance would not alter the essential character of the locality. Hill appealed and the Superior Court vacated the ZBA's denial. An abutting landowner appealed to the Law Court.

The Law Court began its analysis with a review of the various environmental laws protecting and conserving sensitive environmental resources governing the use of the geographic area and Hill's property specifically, as well as noting that the property lies within the drakes Island Game Sanctuary and borders the Rachel Carson National Wildlife Refuge. While the relevant statutes and protected areas do not prevent the ZBA from granting the variances, the Court found that it does indicate that this locality is of "particular environmental sensitivity" – and those laws and protected areas identify public health and welfare interests relevant to assessing developing in the area, including habitat protection, avoiding flooding and wetland degradation, and preserving open space and natural beauty.

The Law Court then reviewed the "essential characteristics" variance criteria and held that the discretion of a board in the application of that criteria is limited not only "by the specific provisions in an ordinance defining the characteristics of a zoning district, but, also, by the guiding perspective that a variance should not be granted unless the party seeking the variance can prove that there is something unique about his property that makes adherence to the uses, structures, and dimensions permitted within the district inconsistent with the purposes of the zoning for that district." Id. at ¶22. The Court also determined that the size of the "locality" for purposes of the criteria is context depended and not limited to developed uses and values – and impact is measured not only in economic terms but also in terms of the effect on

environmental values. Finally, the Court held that a variance must be compatible with the district as zoned, not just surrounding nonconforming uses and dimensions.

Turning to the ZBA's decision, the Court held that Hill only presented evidence of surrounding grandfathered nonconforming and did not overcome its burden of proof showing that the variances will not alter the essential characteristics of the locality, and that granting the variance based on that information alone would erode setback required for any further development in the area. The record as to the environmental impact granting the variances would have also did not compel a conclusion that the environmental purpose of the Shoreland Overlay District would be met by allowing a variance from the wetland setback.

The Law Court vacated the judgment of the Superior Court and affirmed the decision of the Town of Wells ZBA denying the variance requests.

5. Standing before Town zoning boards where applicant has an easement to the property at issue. *Tomasino v. Town of Casco*, 2020 ME 96, ___A.3d ___.

The Tomasinos obtained a building permit from the Town of Casco to remove the existing home from their property and construct a new home in its place, as well as a shoreland permit to remove three trees from the abutting property owned by the Lake Shore Realty Trust over which the Tomasinos claimed a deeded easement in order to establish a gravel road to the new home. The Trust appealed and the Board of Appeals vacated the CEO's decision to issue the shoreland permit, having developed findings on remand that "the easement is unclear as to the rights of the parties to cut trees without the other party's permission" and that no other evidence was presented to the Board to definitively resolve the issue. The Superior Court affirmed the Board's decision.

The Law Court, citing Casco's ordinance, noted that applications for permits must be signed by someone who can show evidence of right, title or interest in the property – and as an evidentiary matter the language of the deeds did not disclose whether and to what extent the easement includes the right to remove trees. Determining property rights under a deed are "well outside the Board's jurisdiction, authority, or expertise, which is instead limited to the interpretation and application of ordinance provisions" – and that "a municipal zoning case is not the proper forum for a private property dispute between neighbors."

The Court, however, upheld the Board of Appeals decision to overturn the permit and held that administrative standing is not conferred merely by possessing any kind of easement on the property at issue. In this case Tomasinos failed to demonstrate that they have the kind of interest in the easement that would allow them to cut the trees if they were granted a permit to do so, i.e., the kind of relationship to the site that gives them "a legally cognizable expectation of having the power to use that site in the ways that would be authorized by the permit or license he seeks." In conclusion, the Court held that "in the face of a dispute between private property owners" the minimum right, title or interest requirement in the

Casco ordinance "is not met by an easement whose parameters have not been factually determined by a court with jurisdiction to do so."

In a dissent, Justice Connors agreed with the majority that "a municipal zoning case is not the property forum for a private property dispute between neighbors" and questions of property law are outside of a municipal board's jurisdiction – but disagreed with the holding and would have held that the Tomasinos had sufficient right, title and interest to seek a permit. Further, Justice Connors worried that the Court's holding "invites, rather than discourages, municipal boards to wade into private property disputes and will result in needlessly protracted proceedings involving squabbling neighbors" and create unnecessary conflict by forcing easement holders to actively litigate the scope of easements before seeking what might have otherwise been unchallenged permits.