

Appeals Board Application # _____

Ref: _____

APPLICATION FOR VARIANCE

APPEAL TO BOARD OF ZONING APPEALS

Name of Appellant: Geoffrey and Carolyn Stiff, represented by Chris Neagle Esq. (see attached)

Mailing Address: 1151 Marney Court

City or Town: Henrico, VA. 23229 ~~Maine~~

Telephone: 757-775-1173

Name of Owner: Jody C. Jones and Stephen C. Jones

The undersigned requests that the Board of Appeals consider one of the following:

1. An Administrative Appeal. Relief from the decision, or lack of decision, of the Code Enforcement Officer or Planning Board in regard to an application for a permit. The undersigned believes that (check one):

 an error was made in the denial of the permit

 the denial of the permit was based on a misinterpretation of the ordinance

 there has been a failure to approve or deny the permit within a reasonable period of time

 x other Jones Planning Board Permit 08-06-2020

a. Explain in more detail the facts surrounding this appeal (please attach a separate piece of paper). You should be as specific as possible so that the Board of Appeals can give full consideration to your case.

b. A sketch plan of the property must accompany this application showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings or alterations, and any natural or topographic peculiarities of the lot in question.

2. A Variance.

Nature of Variance: Describe generally the nature of the variance. _____

- a. A sketch plan of the property must accompany this application showing dimensions and shape of the lot, the size and locations of existing buildings, the locations and dimensions of proposed buildings or alterations, and any natural or topographic peculiarities of the lot in question.
- b. *Justification of Variance.* In order for a variance to be granted, the appellant must demonstrate to the Board of Appeals that the strict application of the terms of the zoning ordinance would cause undue hardship. There are four criteria which must be met before the BOA can find that a hardship exists.

Please explain how your situation meets each of these criteria listed below:

- 1.) The land in question cannot yield a reasonable return unless the variance is granted.

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

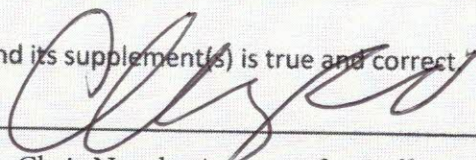
- 3.) The granting of a variance will not alter the essential character of the locality.

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

I certify that the information contained in this application and its supplement(s) is true and correct.

Date: Sept 3 2020

Appellant Signature: _____



Appellant's Printed Name: Chris Neagle, Attorney for Stiffs

Note to the appellant: This form should be returned to the Chairman of the Board of Appeals. You will be notified of the date of the hearing on your appeal.

LAW OFFICES OF THADDEUS V. DAY, P.L.L.C.

Telephone: 207-829-9300 • Facsimile: 207-221-5813

Thaddeus V. Day, Esq.
thaddeus@mainelegalservices.net

Official correspondence:
filings@mainelegalservices.net

Chris Neagle, Esq.
chris@mainelegalservices.net

TO: Town of Belgrade Zoning Board of Appeals
990 Augusta Road
Belgrade, Maine 04917
Email and UPS Overnight Mail

FROM: Chris Neagle, attorney for Geoffrey and Carolyn Stiff



DATE: September 3, 2020

RE: Jody C. Jones and Stephen C. Jones Planning Board Permit 8-6-20

Summary

The Town of Belgrade Planning Board issued an August 6, 2020 Shoreland Zoning Permit to the Jones (“Jones Permit”) after holding four public meetings. See Exhibit A.

The Stiffs only received the Jones Permit on Monday, August 31, 2020, and according to section 16(H)(4)(a)(1) of the Belgrade Shoreland Zoning Ordinance (BSZO”), an appeal of the Jones Permit needs to be filed within 30 days of the “date of the official, written decision”. If the Jones Permit is the “official written decision”, then it is dated August 6, 2020 and this appeal needs to be filed by September 5, 2020. The Stiffs only had three days to prepare this appeal, which seems unfair.

The Jones Permit was never sent to the Joneses, but the Stiffs sent it to their attorneys on August 31, 2020.

The Planning Board Written Decision is Not Complete

Exhibit B are relevant pages from the Maine Municipal Association’s Planning Board Manual.

Note that page 39 states that the Planning Board “must prepare a written statement of ‘findings of fact’ which appear in the written record” and a “written explanation of ‘conclusions of law’ which it has made as to whether the facts show the project is in compliance with the applicable ordinance/statute”. The Jones Permit has no written findings of fact or conclusions of law.

Note that page 45 states that the written decision should be sent to the Jones (and interested parties like the Stiffs and Jack Sutton) promptly after the decision is made. The Town has never sent the Jones Permit to the Joneses as far as the Stiffs know.

Merits of Planning Board Decision

The Stiffs have expressed many serious concerns about the Joneses' Planning Board application and project. Most significantly, the Stiffs do not believe that the building approved by the Planning Board is an accessory use.

Exhibit C are the first pages of four memoranda given by the Stiffs to the Planning Board. The Stiffs reserve the right to appeal the issues raised by the complete versions of those memoranda and the testimony presented to the Planning Board at its meetings. However, until the Planning Board adopts a proper written decision, it is premature to discuss those issues now. When the Zoning Board of Appeals considers any appeal of a proper written decision, the Stiffs will provide complete copies of their memoranda.

Request for Relief

The Stiffs respectfully request that the Zoning Board of Appeals remand this dispute back to the Planning Board, so that a complete written decision can be made by the Planning Board.

Otherwise, lots of time and money will be spent bringing the dispute to the Superior Court, which will almost certainly send the case back to the Planning Board as requested by the Stiffs.

We look forward to your hearing on this appeal.

TOWN OF BELGRADE BUILDING PERMIT

ANY DEVIATION FROM PERMIT
REQUIRES APPROVAL BY

PB / CEO

Number 78-19

Map # 20 Lot # 10

Application # 78-19

Issued to: Jody C. Jones, Stephen C. Jones

Mailing Address For Permit: 918 Terrill Farms Rd. St. Louis MD 63124

For Following Uses: See Application

Location Of Property: 326 Sandy Caves Rd

The following conditions and safeguards are prescribed as authorized in Section 12 B.7 of the Ordinance.
Any Violation of these conditions shall be a violation of the ordinance.

1. See Attachment
2. _____
3. _____
4. _____
5. _____

Issue Date: 8/6/2020 Expiration Date: 8/6/2021

PLEASE NOTE:

CONTACT CODE ENFORCEMENT OFFICER
WHEN PROJECT HAS BEEN COMPLETED
FOR FINAL INSPECTION.

CALL: HM: 495-3868 OR OFFICE: 495-2258

Fee: _____

paid

CEO: _____

DocuSigned by:
Planning Board: Robert E. Rushton
DocuSigned by: B370F9845BF4478...

George Seel
DocuSigned by: EBB43055D76242E...

Craig Alexander
DocuSigned by: 588142C903D643B...

Rich Baker
DocuSigned by: 00A30D5880C1480...

EXHIBIT A
STIFF ZBA
APPEAL

Shoreland
 Certified Contractor
 Number # _____
 Non Shoreland

Town of Belgrade, Maine
APPLICATION FOR PERMIT
AS BUILT

990 Augusta Road Belgrade Me 04917
 207-495-2258
 Application # _____
 Map# 20 Lot# 10
 Permit# _____

Date Logged _____ Date Rec'd by PB/CEO _____ \$ _____ Fee Paid _____ Receipt# _____

1. Applicant: Name <u>Jody C. Jones, Stephen C. Jones</u> Mailing Addr <u>918 Tirrill Farms Rd.</u> State/Zip <u>St. Louis MO 63124</u> Phone# <u>314-780-1850</u>	2. Owner (if other than applicant): Name _____ Mailing Addr _____ State/Zip _____ Phone# _____
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3. Specific location of property 326 Sandy Cove Rd Map# 20 Lot# 10
 Name of Lake/Pond/Stream (if applicable) Long Pond

4. Current use of property (check all that apply)
 Residential/Recreational; _____ Individual Private Campsite; _____ Commercial; _____ Industrial; _____ Other

5. Proposed construction or change in use: 2 story structure with garage, laundry room and play room on 1st floor with one bathroom, and 3 bedrooms on 2nd floor with one bathroom

6. Existing sewage disposal system type and capacity: Concrete 1,000 gallons
 Present number of bedrooms 3; Bedrooms to be added under this application 3
 When did you purchase the property within Shoreland Zone? 09/1995 (month/year) If after 11/6/18, attach copy of septic system inspection report documenting it is not malfunctioning.

7. Total lot area 53,641 sq. ft.; Lot area within the Shoreland Zone 53,641 sq. ft.

8. Square footage of unvegetated surface within shoreland zone including all structures, driveways, parking, walkways and patios. 9,312 sq. ft.

9. What is the total area of cleared openings of woody vegetation (Sqft) 9,500

10. Total number of structures on the lots 3 (with new) A site plan to-scale MUST accompany this application and be prepared in accordance with the requirements on the attached Instruction Sheet (Item #10 on the Instruction Sheet). All required attachments must accompany this application.

Present Structure Square Footage 2087
 Proposed Structure Square Footage 1028

*Required only for structures within Shoreland Zone
 I/We have obtained and understand the requirements of all Town of Belgrade Ordinance which apply to the proposed construction or change of use. The undersigned applies for a permit to build, alter or improve existing structure(s) or grounds as stated above on this application and portrayed on the attachments. The information provided is true and correct.
 Signature: Munro, atty for Jody C. Jones & Stephen C. Jones signature: _____

There may be additional Federal, State or local permits required depending on the nature of the project.

TOWN USE ONLY
 DECISION: _____ APPROVE _____ DISAPPROVED
 Conditions _____

Date: _____ PB _____ CEO _____
 Signed by: Rebecca E. [Signature]
 B370F9845BF4478...
 DocuSigned by: Craig Alexander
 5B8142C903D643B...
 Signed by: George Seal
 EBB43055D76242E...
 DocuSigned by: Rich [Signature]
 00A30D5880C1480...

Jones SLZ Permit Application
8/6/20 Planning Board Meeting
George Seel, Member, Belgrade Planning Board

Conditions of Approval Needed to Meet Required Belgrade SLZ Ordinance Findings in Section 16(D):

1. Installation of kitchen appliances and the preparation of meals is prohibited in the proposed structure.

Rationale: Needed to clarify not approving a second residential dwelling unit and to find application meets Finding #8 and the Land Use Standards in Section 15A.

2. Storm water runoff from the expanded driveway and proposed structure's roof is to be managed in accordance with the Maine Department of Environmental Protection (DEP) stormwater management practices as outlined in DEP publication Conservation Practices for Homeowners. Such measures shall be in place no later than June 1, 2021.

Rationale: Necessary to make positive findings under # 2 and 8, and to ensure proposed project will not result in pollution of surface water in the form of phosphorous being transported by unmitigated stormwater runoff to Long Pond. Also needed to ensure meets Sections 15 I and V of the Land Use Standards.

3. Use of the proposed structure for human occupancy, including use of the bathroom and laundry, is prohibited until such time as the approved new subsurface sewage disposal system is operating and the building is connected to and using this system.

Rationale: Needed to find application meets Findings #2, 3 and 8 – proposal will adequately provide for wastewater disposal, and to meet Sections 15 J and V of the Land Use Standards regarding septage disposal and water quality. Testimony before the Board indicated that the current septage disposal system alone is inadequate to serve both the existing principle structure and the accessory structure proposed in this application and its associated increase in wastewater volume.

4. The applicant shall submit to the Planning Board for review and approval a written soil erosion and sedimentation control plan by September 15, 2020, meeting the applicable requirements of Section 15(S) of the Belgrade Shoreland Zoning Ordinance and addressing any existing or potential soil erosion related to the construction of the proposed structure and the expanded driveway.

Rationale: Needed to find application meets Findings #2 and 8 – proposal will prevent soil erosion and protect water quality, as well as meet the requirements in Section 15(S) of the Land Use standards.

Maine
Municipal
Association

Manual for Local Planning Boards:
A Legal Perspective

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CHAPTER 2 – The Decision-Making Process

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

Forms

An important first step in establishing good decision-making procedures is the development of good application forms. The forms should let the applicant know what information the board wants and should require the applicant to sign the form once completed. Sample forms are included in Appendix 2. Others may be available from the regional planning commission or council of governments serving the area or from neighboring communities who have developed good systems of their own. Before using sample or borrowed forms, however, the board must review them carefully to be sure that they will fit the board's needs and be consistent with the town or city ordinance which governs the application. Application forms must be consistent with the requirements of the ordinance which governs the project. Application forms do not normally require the approval of the legislative body. The board generally has implicit authority to develop and use forms.

Bylaws/Rules of Procedure

In the absence of a local ordinance or charter provision to the contrary, any administrative board, like a planning board, can (and should) adopt written bylaws to govern non-substantive "housekeeping" matters. Such bylaws generally do not need to be approved by the legislative body. *In Re Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973); *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). This is because bylaws of this type are not the same as an ordinance. Examples of the kinds of things covered in bylaws are the election of officers, the time and place of meetings, how meetings are called and advertised, agenda items, and the rules of procedure that the board will use to run its regular meetings and public hearings, where not otherwise addressed in a State law, local ordinance or charter. Issues such as the number of members needed to constitute a quorum, the number of votes needed to approve a motion, the number of absences allowed before a position can be declared vacant, and the deadline for filing an appeal generally must be part of an ordinance or charter adopted by the legislative body rather than merely in bylaws approved by the board, unless the board's bylaws are simply stating a rule that already exists by virtue of a local or State law. 1 M.R.S.A. § 71. Sample bylaws and hearing procedures are included in Appendix 2. In adopting bylaws, the board should be careful to avoid conflicts with a local ordinance, charter, or State statute, such as the Maine Freedom of Access Act (1 M.R.S.A.

Reopening the Hearing Process

In at least one case, the court has upheld a board's right to reopen its hearing process to allow an applicant to submit new evidence to clarify a technical issue and modify its plan without allowing additional public comment. The court found that there had been prior extensive hearings that were more than adequate to afford due process. *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202.

Preserving Objections for Appeal

If a party to the proceedings has any objections to procedures or proposed findings by the board, he or she should raise them at the meeting so that the board has a chance to consider them and address them in its decision. Failure to raise objections before the board will prevent that person or any other party from making those objections in an appeal to the Superior Court. *Pearson v. Town of Kennebunk*, 590 A.2d 535, 537 (Me. 1991); *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371; *Oliver v. City of Rockland*, 1998 ME 88, 710 A.2d 905; *Rioux v. Blagojevic*, 2002-24 (Me. Super. Ct., Pen. Cty., June 24, 2003).

Approval and Form of Decision

- **Majority Vote Rule.** It is the opinion of the attorneys on the MMA Legal Services staff that, in determining whether a motion has been approved by a majority vote of the board, State law requires that calculation to be based on the total number of regular voting members on the board (not including the number of alternate or associate members), whether or not there are vacancies on the board. However, an ordinance provision authorizing "a majority of those present and voting" to approve a motion would be legal and would supersede the statutory rule. 1 M.R.S.A. § 71 (3). *Warren v. Waterville Urban Renewal Authority*, 161 Me. 160 (1965). While many private municipal attorneys agree with this opinion, there are some who do not. To avoid controversy over what rule legally applies, it is advisable to spell it out in the local ordinance which governs a particular decision.
- **Abstention.** In the absence of a State law, local ordinance, or local rules of procedure to the contrary, an abstention is not counted as either a vote in favor of a motion or against it. *Gerrity v. Ballich*, CV-84-646 (Me. Super. Ct., Yor. Cty., June 27, 1985).
- **Tie Votes.** If a motion results in a tie vote, the board has failed to act and another vote should be taken to try to get a definitive decision. *Quinney v. Lambert*, CV-84-435 (Me. Super. Ct., Yor. Cty., July 8, 1985); see also concurring opinion in *Stevenson v. Town of Kennebunk*, 2007 ME 55, 930 A.2d 1046. If the tie cannot be broken, it probably should be treated as having the same effect as a vote to defeat the motion. *Jackson v. Town of Kennebunk*, 530 A.2d 717 (Me. 1987). See generally, *Marchi v. Town of Scarborough*, 411 A.2d 1071 (Me. 1986). See, *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1292 (Me. 1985). As previously noted, the effect of a tie vote should be spelled out in the board's rules of procedure or applicable local ordinance to avoid confusion.

- **Findings and Conclusions.** When taking a final vote, the board must prepare a written statement of the “findings of fact” which appear in the written record and a written explanation of the “conclusions of law” which it has made as to whether the facts show that the project is in compliance with the applicable ordinance/statute. The Maine Supreme Court has held that it is not enough simply to prepare detailed minutes. *Comeau v. Town of Kittery*, 2007 ME 76, 926 A.2d 189.

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

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

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

The practical purpose behind preparing findings and conclusions is that it helps the board ensure that it has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another purpose is to provide a written statement of the reason for the board’s decision which is detailed enough to enable the

applicant or anyone else who is interested (1) to judge whether they agree or disagree with the board and (2) to decide whether there are sufficient grounds on which to appeal the decision. Probably the most important purpose is to provide a clear statement for the Superior Court of the facts which were submitted for the board's consideration and the facts on which the board relied in concluding that the review standards were/were not met by the applicant. This is particularly important where the board must choose between conflicting evidence which has been introduced to prove that a particular standard has/has not been met. If the board fails to make written findings of fact and conclusions, it appears now that the court will remand the case to the board for the preparation of findings and conclusions before reaching a decision, rather than reading through the board's minutes and other records to determine the basis for the decision. [E.g., *Peaker v. City of Biddeford*, 2007 ME 105, 927 A.2d 1169; *Carroll v. Town of Rockport*, 2003 ME 135, 837 A.2d 148; *Ram's Head Partners, LLC v. Town of Cape Elizabeth*, 2003 ME 131, 834 A.2d 916; *McGhie v. Town of Cutler*, 2002 ME 62, 793 A.2d 504; *Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834; *Widewaters Stillwater Co., LLC v. Bangor Area Citizens Organized for Responsible Development*, 2002 ME 27, 790 A.2d 597; *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me.1983); *Rocheleau v. Town of Greene*, 1998 ME 59, 708 A.2d 660; compare, *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1991)]. (See Appendix 3 for excerpts from some of these cases.) The standard of review which governs the Superior Court in deciding whether to uphold the board's decision is the "substantial evidence in the record" test, i.e., is there sufficient credible evidence in the record of the case created by the board to support the board's decision? The court also will determine whether the board applied the proper law and whether the board applied that law correctly or acted arbitrarily or capriciously. *Thacker v. Konover Development Corp.*, 2003 ME 30, 818 A.2d 1013. If the planning board's decision is appealed directly to the court, then the court will review the planning board's decision. If the planning board's decision is appealed to the board of appeals and the board of appeals conducts a *de novo* review of the planning board decision rather than an appellate review, the court will review the board of appeals decision.

- ***Address Each Review Standard.*** It is important for the board to address each standard of review in reaching its decision in case the decision is appealed and the board of appeals or court disagrees with some of the board's conclusions. See generally, *Grant's Farm Associates, Inc. v. Town of Kittery*, 554 A.2d 799 (Me. 1989), *Tompkins v. City of Presque Isle*, 571 A.2d 235 (Me. 1990), and *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988).
- ***Recommended Procedure for Preparing Findings and Conclusions.*** There are a number of ways to handle the process of making findings and voting on an application. Probably the method used by most boards and recommended by most municipal attorneys is as follows: The board should use the ordinance or statute which governs the review of the

proposal and the application form as a checklist. The board's chairperson should focus the board's attention on each performance standard/review criteria in the ordinance, ask the board to vote whether it is applicable, and if they find that it is, ask whether it has been satisfied by the evidence in the record. The board must cite evidence which supports a finding either in favor of the applicant or against the applicant.

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

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

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

The chairperson should explain during the course of discussing and approving findings and conclusions that, if any board member thinks the applicant has not met his or her burden of proof and that some information is missing or not convincing, that board

member should state those concerns during the findings and conclusion phase. The final vote on whether to approve/reject the application is really a formality; the important, binding decisions are those regarding the individual findings and conclusions. If the board members do not cite problems with the evidence at that stage, the board will have no legal basis for denying the application, unless it revisits and modifies its earlier votes on the individual standards.

If the board wants time to think about the evidence submitted in connection with a particular application and wants to wait until another meeting to go through the formal process for voting on each criterion as outlined above, it may do so as long as the members bear in mind any deadline for making a final decision which must be met under the relevant ordinance. This may necessitate calling a special meeting to take a final vote in time to meet the deadline. In the meantime, the individual board members can be thinking about what findings of fact and conclusions of law the board should vote to approve. Board members must not discuss these issues outside the board meeting, however, in order to avoid problems under the Freedom of Access Act. Once the board has reconvened and has discussed each review standard, it can then either take time at that meeting to prepare formal written findings and conclusions and approve a final decision at that meeting or it can conduct a general discussion of each ordinance criterion and the evidence presented and then delegate to one person (i.e., one member of the board, a paid secretary, the board's attorney or similar person) the task of sorting through the individual statements and preparing a set of draft findings and conclusions for the board to discuss in detail and approve at a subsequent meeting held within any required deadline. It is crucial that the board carefully discuss the draft decision in detail in order to make that decision its own before voting whether to approve it. Another approach used by some boards is to invite the parties to submit proposed findings and conclusions for review, discussion and possible adoption by the board. (See *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489, where the court found that it was legal for a board member to bring a list of issues and draft findings to the meeting for the board's consideration.). If the board takes what it considers a "preliminary vote" to be finalized at a subsequent meeting following the preparation and review of a final draft of its findings, then the board should make this clear for the record. See generally, *Beckford v. Town of Clifton*, 2014 ME 156, 107 A. 3d 1124. Several sample written decisions and a number of excerpts from Maine Supreme Court cases indicating the kind of detail that a court expects in a board decision appear in Appendix 3.

Several problems can result if the board delegates the responsibility for developing a tentative draft of findings and conclusions before it has gone through the list of criteria and developed its own. The board runs the risk of "rubber-stamping" a decision that could have been formulated by less than a majority of the board or by a non-board member. *Brown v. Inhabitants of the Town of Bar Harbor*, CV-83-56 (Me. Super. Ct.,

Han. Cty., Jan. 19, 1984). Another risk is that if a subcommittee of the board comprised of three or more members is asked to develop tentative findings and conclusions, the subcommittee members may not realize that they must comply with the notice requirements of the Maine Freedom of Access Act (1 M.R.S.A. § 406). *Lewiston Daily Sun v. City of Auburn*, 455 A.2d 335 (Me. 1988). They also run the risk that someone may try to introduce new information which was not presented at the full board meeting and to which the applicant and other parties may not have had an opportunity to respond, thereby depriving the applicant and those parties of their right to due process under the Constitution. *Mutton Hill Estates, Inc. v. Inhabitants of the Town of Oakland*, 468 A.2d 989 (Me. 1983). Whatever procedure is used by the board to prepare and approve findings and conclusions, it is crucial to their validity that the board carefully review them to make sure that each review standard and subpart of each standard is addressed and that the board clearly adopts all of the findings and conclusions as part of its own decision. *Chapel Road Associates, supra*.

- **Conditions of Approval.** A planning board has inherent authority to attach conditions to its approval of an application. See generally, *In Re: Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977). Any conditions imposed by the board on its approval must be reasonable and must be directly related to the standards of review governing the proposal. *Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985); *Boutet v. Planning Board of the City of Saco*, 253 A.2d 53 (Me. 1969). There must be a “nexus” and “rough proportionality” between a condition of approval and the impact of the proposed development. *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). A conditional approval “which has the practical effect of a denial...must be treated as a denial.” *Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty, Jan. 12, 1990). Any conditions which the board wants to impose on the applicant’s project must be clearly stated in its decision and on the face of any plan to be recorded to ensure their enforceability. *City of Portland v. Grace Baptist Church*, 552 A.2d 533 (Me. 1988); *Hamilton v. Town of Cumberland*, 590 A.2d 532 (Me. 1991); *McBreairty v. Town of Greenville*, AP-99-8 (Me. Super. Ct., Piscat. Cty., June 14, 2000). (See Appendix 3 for sample language.) If it is the municipality’s intention to render a permit void if the permit holder fails to comply with conditions of approval within a certain time frame, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Me. Super. Ct., Knox Cty., July 1, 1994).

If the board finds that the application could be approved if certain conditions were met, then it must determine what kinds of conditions are needed based on the evidence presented in the record and what kinds the ordinance/statute allows the board to impose. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Before granting approval with certain conditions attached, as a practical matter, the board should be certain that the applicant has the financial and technical ability to meet those conditions. Otherwise, the board may find

itself later on with a situation where the applicant has not met the conditions, forcing the municipality to go to court to convince a judge to enforce the conditions of approval. Unless the board and applicant can reach an agreement on reasonable conditions to impose which are both technically and financially feasible for the applicant and adequate to satisfy the ordinance requirements, the board should not approve the application. *Cf., Warwick Development Co., Inc. v. City of Portland*, CV-89-206 (Me. Super. Ct., Cum. Cty., January 12, 1990).

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

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

The Maine Supreme Court has upheld a condition of approval imposed by a planning board that authorized the City planner to approve minor changes to an approved project plan. *Fitanides v. City of Saco*, 2015 ME 32, 113 A. 3d 1088. The court found that the condition did not constitute an improper delegation of legislative authority in violation of the Constitution. The court also found that the condition did not violate any express or implied prohibition against a delegation of administrative authority in the City's zoning ordinance. (For a discussion of the appeal of plan revisions approved by the City planner, see *Desfosses v. City of Saco*, 2015 ME 151, 128 A. 3d 648.)

Reviewing Conditional Use/Special Exception Permit Applications

If a general or shoreland zoning ordinance authorizes the planning board to decide whether to approve conditional use or special exception applications, the board should be guided by the standards of review that the ordinance provides. (Shoreland zoning ordinances usually refer to these as "planning board permits.") In passing the ordinance and designating certain

uses as “conditional uses” or “special exceptions,” the legislative body has made a decision that those uses are ordinarily not injurious to the public health, safety, and welfare or detrimental to the neighborhood, but that they may be detrimental under certain circumstances if restrictions are not placed on how those uses are conducted. *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It is the board’s job to review the application, decide whether the ordinance allows the proposed use on a conditional basis in that zone, determine whether the application complies with each of the standards of review, and whether to approve or deny the application.

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

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

After Making the Decision; Notice of Decision

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

Reconsideration

There is no statute governing the planning board’s authority to reconsider a decision, as there is for the board of appeals in 30-A M.R.S.A. § 2691. The planning board has the inherent authority to reconsider a decision. *Jackson v. Town of Kennebunk*, 530 A. 2d 717 (Me. 1987); *Cardinali v. Town of Berwick*, 550 A. 2d 921 (Me. 1988). However, it is

advisable either for the board to adopt rules of procedure governing the reconsideration process or for the municipality to adopt an ordinance provision. An ordinance may be legally required in order to impose a deadline by which a person with standing must request a reconsideration.

Effect of Decision; Transfer of Ownership After Approval

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

Second Request for Approval of Same Project

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

Vague Ordinance Standards; Improper Delegation of Legislative Authority

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

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



MEMORANDUM

TO: Belgrade Planning Board

FROM: Chris Neagle, attorney for Geof and Carolyn Stiff

CON

DATE: November 21, 2019

RE: Stephen and Jody Jones Application for As-Built Shoreland Zoning Approval
326 Sandy Cove Road, Map 20, Lot 10.

Summary

The Stiffs own the lot adjacent to the Jones lot near the “garage” constructed by the Jones in 2017. The Stiffs request that the Planning Board determine that the Jones application is incomplete and table the Jones application until a complete application is filed.

The Jones Lot

The front of the Jones lot is most of Lot 69 on a 1963 subdivision plan of lots on Long Pond called “Sandy Cove Point – East Shore” recorded in Plan Book 35, Page 45 of the Registry of Deeds, which is attached as Exhibit 1.

The developed portion of the Jones lot is in the Limited Residential District of the Belgrade Shoreland Zoning Ordinance (“BSZO”). It is a *non-conforming lot* because: (a) BSZO section 15(A)(1)(a) requires 200 feet of shore frontage and the Jones lot has about 120 feet of frontage and (b) BSZO section 15(A)(4) requires 200 feet of lot width and the Jones lot is only about 120 feet at the shore and gets narrower as it gets further away from the shore.

It should also be noted that the existing Jones residence is a *non-conforming structure* as it is almost entirely within the 100-foot setback from Long Pond required by BSZO section 15(A)(4). The Jones’ site plan shows that an “Open Deck” was added to the residence, which the Stiffs believe happened around 2010. The Stiffs are not aware of any Planning Board approval for this apparent expansion as required by BSZO section 12(C)(1). Note that BSZO section 12(D)(1) prohibits any expansions of non-confirming structures toward Long Pond.





MEMORANDUM

TO: Belgrade Planning Board

FROM: Chris Neagle, attorney for Geof and Carolyn Stiff

DATE: February 19, 2019

RE: Stephen and Jody Jones Application for As-Built Shoreland Zoning Approval
326 Sandy Cove Road, Map 20, Lot 10.

Summary

The Stiffs expressed concerns about the completeness of the Jones application in their November 21, 2019 memo to the Planning Board. Important information on Belgrade Shoreland Zoning Ordinance (“BSZO”) environmental review standards was missing. After reviewing the documents recently submitted by the Jones, very few of these concerns have been addressed.

The Jones have the burden of establishing that their application meets all relevant BSZO review standards for their proposed new residential structure. The Planning Board cannot properly review the project until the Jones application is complete.

The Stiffs request that the Jones application be denied or tabled until it is complete.

The Jones Lot

It should be noted that the *entire portion of the Jones lot between Long Pond and the wetlands (labeled “bog area” on their site plan) is in the Shoreland Zone*, as these two water bodies are slightly more than 300 feet away from each other, and therefore, all relevant land is within 250 feet of these protected resources.

The site plan submitted with the 2019 application showed part of a “covered porch” and a hand drawn “open deck” attached to the existing main residence. Neither of these improvements was shown on the Jones’ 2018 Boundary Survey attached as Exhibit 6. The revised 2000 site plan now shows the “open deck” as a “covered porch”. Several questions are raised:

1. Why wasn’t any portion of the covered porch or open deck shown on the Jones 2018 Boundary Survey? Which plan is correct?



MEMORANDUM

TO: Belgrade Planning Board

FROM: Chris Neagle, attorney for Geof and Carolyn Stiff

DATE: June 11, 2020

RE: Stephen and Jody Jones Application for As-Built Shoreland Zoning Approval
326 Sandy Cove Road, Map 20, Lot 10.

Summary

We understand that the Jones application is being reviewed this month despite the fact that the Jones have not responded to the concerns raised by the Planning Board in February.

In addition to the points made in their November 21, 2019 and February 19, 2020 memos and testimony at prior meetings, the Stiffs would like to present new evidence on one of the review criteria and present two new arguments.

1. The plumbing in the new Jones structure will increase the number of gallons per day above the limit established by the Maine Minimum Lot Size Rules adopted under the Minimum Lot Size Law.
2. The new Jones structure is not a permitted use under BSZO Section 14 Table of Land Uses.

The Stiffs again request that the Jones application be denied because: (a) the proposed plumbing violates the Maine Minimum Lot Size Law; (b) the proposed building is not a permitted use; (c) the Jones have not met their burden to show that their project meets all relevant BSZO review standards. Contrary to their arguments at the last meeting, the Jones do have the burden of proving that the proposed activity conforms to the BSZO review standards. See Section 16(D) on page 65 of the attached BSZO sections.

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LAW OFFICES OF THADDEUS V. DAY, P.L.L.C.

Telephone: 207-829-9300 • Facsimile: 207-221-5813

Thaddeus V. Day, Esq.
thaddeus@mainelegalservices.net

Official correspondence:
filings@mainelegalservices.net

Chris Neagle, Esq.
chris@mainelegalservices.net

TO: Belgrade Planning Board

FROM: Chris Neagle, attorney for Geof and Carolyn Stiff

DATE: August 5, 2020

RE: Stephen and Jody Jones Application for As-Built Shoreland Zoning Approval
326 Sandy Cove Road, Map 20, Lot 10.

Summary

In addition to the points made in their November 21, 2019, February 19, 2020, and June 11, 2020 memos and testimony at prior meetings, the Stiffs would like the Planning Board to consider these points.

1. The Jones have given sworn statements to the Superior Court that their new structure ("Jones Structure") is part of the Joneses' residential dwelling unit which is not allowed by the Belfast Shoreland Zoning Ordinance ("BSZO").
2. The Jones still have not supplied some of the application information required by the BSZO. The Joneses' report on tree cutting limits is somewhat vague and not well documented.

The Stiffs again request that the Jones application be denied because: (a) the Jones Structure is not a permitted use because it is neither a residential dwelling unit nor an accessory structure; (b) the Jones have not met their burden to show that their project meets all relevant BSZO review standards. Contrary to their arguments to the Planning Board, the Jones do have the burden of proving that the construction of the Jones Structure conforms to the BSZO review standards. See Section 16(D).