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February 3, 2016

Sent via email to: amachado@portlandmaine.gov
City of Portland, Zoning Board of Appeals
c/o Ann Machado, Zoning Specialist
City of Portland
Portland City Hall, Room 315
389 Congress Street
Portland, ME 04101

RE: **Conditional Use Application, Verizon Wireless, 1877 Congress Street**
Jurisdiction of the Portland Zoning Board of Appeals

Dear Board Members and Attorney Lee:

On Monday, February 1, 2016, Attorney Kelly Boden submitted a letter outlining Verizon Wireless' position regarding the authority of the Portland Zoning Board of Appeals (the "Board") to make a conditional use determination on Verizon Wireless' proposed "Head End" facility.[1] That letter contains a number of misstatements that require correction in advance of the February 4, 2016 hearing.

To start, in the opening paragraph of her letter, Attorney Boden states that the abutters "object[] to the City's prior determination, made in October of 2015, that Verizon Wireless' proposed development constitutes a 'utility substation.'" That is not true. The abutters are not objecting to a *prior determination* because there has been no prior determination that the proposed head end facility is a utility substation. Instead the abutting landowners have argued simply that the "Board should deny Verizon Wireless' permit application." *See* Letter dated January 14, 2016 from David Silk at 6. As set forth in more detail below, the grant or denial of a conditional use permit *is* the initial determination on conditional use and such a determination is

[1] Section 27 of the City Code is titled "Broadband Telecommunications Network." It allows for the City to grant cable franchises pursuant to a franchise agreement. Section 27-2 includes a definition section. In that section "Head End" is defined as "the land, electronic processing equipment, antenna, tower, building and other appurtenances normally associated with and located at the starting point of a broadband telecommunications network." "Network facilities" are defined to include the head end.

within the sole province of the Board. No prior determination has been made as to whether or not the proposed head end facility is a utility substation that qualifies for a conditional use.

Attorney Boden's remaining misstatements concerning the procedural history of this case and her misunderstanding of the authority and procedures set forth in Portland's Land Use Code are addressed in more detail below.

1. The Land Use Code Gives The Board Of Appeals Primary And Exclusive Jurisdiction Over Conditional Use Determinations

Verizon Wireless cites Maine case law for the proposition that "[t]he authority to make a zoning determination must be expressly granted by statute or ordinance." *Ray v. Town of Camden*, 533 A.2d 912, 914 (Me. 1987). That much is true. What Verizon Wireless neglects to note, however, is that Portland's Land Use Code expressly grants that authority to the Board.[2] Section 14-471 states:

> The board of appeals shall have the following jurisdiction and authority:
> . . .
> (c) Subject to the provisions of section 14-474, to hear and grant or deny applications for conditional uses, as specified in this article.

Pursuant to the plain language of the Land Use Code, the Board has primary jurisdiction and authority to hear and decide conditional use applications. Therefore, the Board has the authority to decide, in the first instance, whether to grant or deny Verizon Wireless' conditional use permit application. *See Desfosses v. City of Saco*, 2015 ME 151, ¶ 8 ("If the meaning of the statute or ordinance is clear, we need not look beyond the words themselves to interpret the provision according to that plain meaning.").

Verizon Wireless confuses the Board's primary authority over conditional use applications with the Board's appellate authority over other matters. Verizon Wireless misleadingly quotes only subsection 14-471(a), pursuant to which the Board has appellate jurisdiction to "decide appeals from, and review orders, decisions, determinations or interpretations made by the building authority." That subsection is plainly inapplicable here because, by subsection 14-471(c) quoted above, only the Board has authority to decide conditional use applications.

Despite the express language of Section 14-471(c) to the contrary, Verizon Wireless suggests that the Board does not have "both appellate jurisdiction to hear appeals of zoning determinations and the authority to make a threshold determination within the context of a

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2 Relevant sections of the Land Use Code are reproduced and attached as Exhibit A.

conditional use application."[3] The Board clearly does. In fact, the Maine Supreme Judicial Court has explicitly recognized that a zoning board of appeals acts within its original jurisdiction when it considers an application for a special permit, such as a conditional use permit. In *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985), the Law Court considered whether the zoning board of appeals "was acting in an appellate or original jurisdiction capacity in considering [an] application for a special exception." *Id.* at 1294. It first explained that "[z]oning enabling acts and zoning ordinances usually do not characterize the jurisdiction of a board of adjustment as original or appellate, and such acts and ordinances must be inspected to determine the nature of the board's jurisdiction with regard to the various types of relief." *Id.* The Law Court reasoned that "[w]here the zoning ordinance provides that certain uses may be maintained only upon issuance of a special permit by the board, the board has original jurisdiction with regard to the issuance or denial of the permit." *Id.* It concluded that the board had authority to consider an application for a special exception without a written appeal because "the Board was acting in its original jurisdiction, and not in its appellate role acting upon a decision of the building inspector." *Id.* at 1295. *See also Cushing v. Smith*, 457 A.2d 816, 819 (Me. 1983) (recognizing that under what is now codified at 30-A M.R.S. § 4253(2)(B), the statute permits a municipality to authorize a zoning board of appeals to grant conditional use permits "in strict compliance with the ordinance").

Here, the plain language of Section 14-471(c) gives the Board primary jurisdiction and the authority to hear and decide conditional use applications. Therefore, the only way that Verizon Wireless would be permitted to install its head end telecommunications facility in the proposed residential area is if the Board determines that the facility qualifies for a conditional use permit. Neither the Zoning Administration staff nor any other City building authority has the power to make that determination.

Other sections of the Land Use Code support the conclusion that the authority to grant or deny conditional use permits rests with the Board. Section 14-474 governs the procedure for issuance of conditional use permits. Like Section 14-471(c), Section 14-474 (a) again grants the Board – and only the Board – the authority to grant or deny conditional use permits. Subsection (a) provides:

> "*Authority*. The board of appeals may, subject to the procedures, standards and limitations set out in this section, approve the issuance of a conditional use permit authorizing development of conditional uses."

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[3] The case Verizon Wireless cites in support of its position, *Ciccomancini v. City of Portland*, 2009 WL 1106417 (Me. Super. Mar. 2, 2009), is inapposite as that case does not involve a conditional use application. For an example of a case in which the Law Court upheld a threshold determination on conditional use made by a zoning board of appeals, see *Wells v. Portland Yacht Club*, 2001 ME 20 (holding that the board of zoning appeals did not err as a matter of law in determining in the first instance that the proposed use constituted a "private club," a permitted conditional use under the town ordinance).

Subsection (b) of Section 14-474 then outlines the procedure to be followed when applying for a conditional use permit. The application and application fee are to be submitted to the building authority, 14-474(b)(1), but then "[a] public hearing shall be set, advertised and conducted *by the board of appeals*." 14-474(b)(2) (*emphasis added*). The building authority's power over conditional use permits thus begins and ends with the collection of the application. By contrast, subsection 14-474(b)(3) provides the actions that may be taken by the Board:

> *Action by the board of appeals.* Within thirty (30) days following the close of the public hearing, the board of appeals shall render its decision, in a manner and form specified by article VI of this chapter, granting the application for a conditional use permit, granting it subject to conditions as specified in subsection (d), or denying it. The failure of the board to act within thirty (30) days shall be deemed an approval of the conditional use permit, unless such time period is mutually extended in writing by the applicant and the board. Within five (5) days of such decision or the expiration of such period, the secretary shall mail notice of such decision or failure to act to the applicant and, if a permit is authorized, shall issue such permit, listing therein any and all conditions imposed by the board of appeals.

There is nothing in Section 14-474 (or elsewhere in the Land Use Code) that allows the building authority to make any initial determination pertaining to conditional use. Indeed, all that the building authority is expressly authorized to do is accept the conditional use permit applications, which are then turned over to the Board to act upon. The Land Use Code thus vests the original authority to make conditional use determinations in the Board and no other entity.[4]

Verizon Wireless' own actions up until now comport with this. Verizon Wireless applied for a conditional use permit on October 21, 2015 by submitting an application *to the Board* and asking that *the Board* "consider this request at its next regularly scheduled meeting." *See* Verizon Wireless' Conditional Use Application dated October 21, 2015. The application form itself includes the standards set forth in 14-474(c)(2) that *the Board* applies in making its conditional use determination. *Id.* ("Upon a showing that a proposed use is a conditional use under this article, a conditional use permit shall be granted unless the Board determines . . . .") That standard places the burden of proof on Verizon Wireless to show that its proposed use qualifies as a conditional use. With its application to the Board, Verizon Wireless makes no

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[4] This primary authority of the Board over conditional uses is reinforced in other sections of the Land Use Code. For example, Section 14-78 provides that a temporary wind anemometer is permitted as a conditional use provided that certain standards are met, including constructing the tower according to a licensed engineer's plans, "which shall be provided to the Board of Appeals with the application" and providing an engineer's safety report, "to the Board of Appeals with their application for conditional use." Section 14-78(c)(4)(b)-(d). *See also* Section 14-88(a)(1); 14-118(a)(2); 14-128(a)(1); 14-137(a)(2) ("The board of appeals may impose conditions upon a conditional use permit . . . ."). These provisions further support the conclusion that the Board is tasked with evaluating initial applications for conditional use, not solely appeals as Verizon Wireless maintains.

mention of the "zoning determination" that it now claims had been made by the building authority on January 13, 2015.

2. The Proposed Head End Facility Is Not A Utility Substation

In order to issue a conditional use permit, the Board must determine if the proposed use is permitted in the zone where it is proposed to be located. Section 14-474(c) contains the conditions that must be met for a conditional use: "A conditional use permit may be issued for any use denominated as a conditional use in the regulations applicable to the zone in which it is proposed to be located." 14-474(c). In this case, that means that the Board must first determine whether the proposed use, Verizon Wireless' "Head End" building, is "denominated as a conditional use in the regulations applicable to the [R-2] zone in which it is proposed to be located." Put another way, Verizon Wireless has the burden to show that the proposed head end building, also called a "telecommunications facility" by Verizon Wireless, is a "utility substation" in the R-2 zone. If Verizon Wireless cannot meet its burden, then the Board must deny Verizon Wireless' application.[5]

As set forth in my January 14, 2016 letter, because it is undisputed that Verizon Wireless is not a public utility, its proposed telecommunications facility is *not* a utility substation but a telecommunications facility. Telecommunications facilities are not listed as conditional uses in the R-2 zone. Verizon Wireless has not suggested otherwise.

Even though it concedes it is not a public utility, Verizon Wireless argues that its proposed telecommunications facility is a "utility substation" and therefore does fall within permitted conditional uses for an R-2 zone. Verizon Wireless argues that it satisfies the definition of a utility substation because it meets "the commonly accepted meaning of public utility." *See* Letter dated January 20, 2016 from Attorney Boden at 4. But in its January 20, 2016 letter, Verizon Wireless conspicuously omits the portion of the *Black's Law* definition that supports the conclusion that it is not a public utility:

> 1. A company that provides necessary services to the public, such as telephone lines and service, electricity, and water. *Most utilities operate as monopolies, but are subject to governmental regulation.* 2. A person, corporation, or other association that carries on an enterprise for the accommodation of the public, the members of which are entitled as a matter of right to use its facilities.

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[5] If the Board does conclude that the proposed facility qualifies as a utility substation, which it should not, then the Board goes on to consider the standards listed in subsection (c) that the facility must meet before issuance of the conditional use permit. The abutting landowners continue to reserve the right to later address whether Verizon Wireless' proposal complies with these standards.

Black's Law Dictionary 1582 (8th ed. 2004) (*emphasis added*). Further, other definitions of "public utility" support the abutters' interpretation. For example, *The American Heritage Dictionary* defines public utility as "[a] private business organization, subject to governmental regulation, that provides an essential commodity or service to the public." *The American Heritage College Dictionary* 1106 (3d ed. 1997).

The treatise *American Law of Zoning* provides a more robust definition. It states that a "public utility" means "a private business, often a monopoly, which provides services so essential to the public interest as to enjoy certain privileges such as eminent domain and be subject to such governmental regulation as fixing of rates, and standards of service." 2 Anderson, *American Law of Zoning* § 12.32, at 568-569 (3d ed.). According to this treatise, characteristics of a public utility include:

> (1) the essential nature of the services offered which must be taken into account when regulations seek to limit expansion of facilities which provide the services,
>
> (2) "operat[ion] under a franchise, subject to some measure of public regulation," and
>
> (3) logistical problems, such as the fact that "[t]he product of the utility must be piped, wired, or otherwise served to each user . . .[,] the supply must be maintained at a constant level to meet minute-by-minute need[, and] [t]he user has no alternative source [and] the supplier commonly has no alternative means of delivery."

Id. at 569.

Verizon Wireless, as a mobile telecommunications company, does not meet these definitions of "public utility." It does not operate as a monopoly. Indeed, it has multiple direct competitors for its business in Portland such as AT&T, T-Mobile, Sprint and US Cellular. Nor does Verizon Wireless provide "an essential commodity or service to the public" or "enjoy certain privileges such as eminent domain." It is one of many companies in Maine that offers, at unregulated prices, mobile devices and mobile telecommunications services, neither of which is essential to the public interest. Applying any of the above definitions, Verizon Wireless is not a public utility.

3. The City's Ordinance Does Not Violate The Federal Telecommunications Act

Contrary to Verizon Wireless' assertion, a finding that the proposed telecommunications facility is not a utility substation under the Land Use Code will not violate the Federal Telecommunications Act of 1996 (the "Telecom Act"). The Telecom Act expressly preserves local zoning authority. 47 U.S.C. § 332(c)(7)(A) ("Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.") A zoning ordinance may violate the Telecom Act if it

prohibits or has "the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). Courts have held that to prove this violation of the Telecom Act, the wireless carrier must demonstrate that (1) preventing the construction of the proposed facility results in a significant gap in service and (2) that the carrier's proposal is the least intrusive means of filling that gap. *See Omnipoint Commc'ns Enters., L.P. v. Newtown Twp.*, 219 F.3d 240, 244 (3d Cir.), *cert. denied*, 531 U.S. 985 (2000). Verizon Wireless has failed to demonstrate that it meets this standard. Indeed, it cannot make such a showing because, with at least four other wireless carriers operating in southern Maine, there is no evidence of any significant gap in wireless coverage in Portland.[6]

Further, while Verizon Wireless acknowledges that telecommunications facilities are permitted uses in the B-6 and B-7 zones, it overlooks that such facilities are very likely permitted in the I-L zone as a low-impact industrial use and in the I-M zone under the performance-based uses. Section 14-248.

4. Verizon Wireless' Incorrect Reading Of The Land Use Code Is Unconstitutional

Although the plain language of the Land Use Code clearly authorizes the Board – and only the Board – to hear applications for conditional use, Verizon urges the Board to find that a utility substation determination was made on January 13, 2015 and that the abutters' time to appeal that decision has expired. Such a conclusion is not only contrary to the express provisions of the Land Use Code as explained above, but would result in depriving the abutting landowners of their due process rights to notice and a fair hearing.

Courts strive to "interpret all provisions in a manner that avoids any danger of unconstitutionality." *Desfosses v. City of Saco*, 2015 ME 151, ¶ 8. The Law Court recently noted that an abutting landowner to a proposed project has a protected property interest and "a right to the notice and opportunity to be heard in all proceedings related to that interest that are the hallmarks of due process." *Id.* ¶ 20 n.12 (*citing Duffy v. Town of Berwick*, 2013 ME 105, ¶ 15 ("Both an applicant and members of the public who oppose a project are entitled under the Due Process Clause of the United States and Maine Constitutions to a fair and unbiased hearing.").)[7]

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[6] Even if there were a significant gap, of which Verizon Wireless has made no such showing, Verizon Wireless must also prove that its proposal is the least intrusive means of remedying the gap. Verizon Wireless has failed to show why situating its proposed facility in this residential zone, rather than a commercially zoned area, is the least intrusive method.

[7] In *Desfosses*, a car dealership requested and obtained approval from the city planner for a "minor change" to its site plan, that would allow the dealership to install a twelve-foot retaining wall and fence along its and abutter Desfosses's common boundary. Desfosses was given no notice of the proposed amendment to the approved site plan or the city planner's approval of that amendment. The Law Court held that Desfosses was entitled to notice.

If Verizon Wireless' version of events and interpretation of the Land Use Code were followed, the abutters here would be impermissibly deprived of notice and the opportunity to be heard on the proposed Verizon Wireless head end facility:

- The abutters had no notice in January 2015 that a "utility substation" determination had been made via an email exchanged between Verizon Wireless and City staff.
- The abutters had no opportunity to be heard prior to the January 2015 determination being made.
- There was no notice in the application for a conditional use permit that Verizon Wireless filed that suggested that a determination already had been made.
- The postcard sent to the abutters after Verizon Wireless filed its application for a conditional use permit did not contain any notice that a determination already had been made.
- The abutters had no opportunity to be heard prior to the December 3, 2015 meeting.
- There was no mention at the December 3, 2015 meeting that a determination already had been made on the "utility substation" issue.

My clients and others, such as direct abutters, have a constitutional right to notice and the opportunity to be heard in all proceedings concerning the proposed facility adjacent to their properties. Moreover, conditional use permits can only be issued "in strict compliance with the ordinance." 30-A M.R.S. § 4353 (2)(B). Nowhere in the Land Use Code does Verizon Wireless cite to any provision that describes any procedure by which (1) via email and without notice to abutters and area property owners the Zoning Administrator can make a legal determination on whether a proposed use qualifies as a conditional use and (2) any such determination is deemed binding on abutters, area property owners, and this Board if the determination is not appealed within thirty days. While such a process would greatly aid Verizon Wireless in its pursuit of locating commercial telecommunications facilities in residential zones where they are prohibited, it would make a mockery of landowners' rights to due process and notice.[8]

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[8] Verizon Wireless concedes it never filed for a zoning determination in the manner provided for in Section 14-465. Even if it had, absent notice, for the reasons discussed above, any determination made through that process would not be binding on impacted property owners. Compare Section 14-391 which sets forth the process for the Zoning Administrator to make a determination as to the number of nonconforming legal dwelling units in a structure. On receipt of a completed application, the Zoning Administrator is required to give notice to abutters as well as property owners located within 300 feet of the structure. Section 14-391(d). If after notice any objection is made, then the Zoning Administrator lacks any authority to make any determination and the applicant must proceed to this Board for conditional use approval. Section 14-391(d).

For the foregoing reasons and for the reasons set forth in my January 14, 2016 letter, the Board has the authority to grant or deny Verizon Wireless' application for a conditional use permit. The Board should deny the application because Verizon Wireless is not a public utility and its proposed head end telecommunications facility is prohibited in the R-2 residential zone.

Thank you for your consideration.

Sincerely,

David P. Silk

DPS/ml
Enclosures
cc: Kelly B. Boden, Esq. (w/encl.)

Exhibit A

Sec. 14-471. Jurisdiction and authority.

The board of appeals shall have the following jurisdiction and authority:

(a) Subject to the provisions of section 14-472, to hear and decide appeals from, and review orders, decisions, determinations or interpretations made by the building authority;

(b) Subject to the provisions of section 14-473, to hear and grant or deny applications for variances from the terms of this article;

(c) Subject to the provisions of section 14-474, to hear and grant or deny applications for conditional uses, as specified in this article;

(d) To initiate changes and amendments to this article.

(Code 1968, § 602.24.A; Ord. No. 437-74, 7-1-74; Ord. No. 354-85, § 5, 1-7-85)

Sec. 14-472. Appeals.

(a) *Authority.* The board of appeals shall hear and decide appeals from and review orders, decisions, determinations or interpretations or the failure to act of the building authority.

(b) *Procedure:*

1. *Notice of appeal.* An appeal may be taken to the board of appeals by any person affected by a decision of the building authority. Such appeal shall be taken within thirty (30) days of the action complained of by filing with the building authority a notice of appeal specifying the grounds thereof. A payment of a nonrefundable filing fee, as established from time to time by the city council to cover administrative costs and costs of hearing, shall accompany notice of appeal. The building authority shall forthwith transmit to the board of appeals all of the papers constituting the record upon which the action appealed from was taken.

2. *Public hearing.* A public hearing shall be set, advertised and conducted by the board of appeals in accordance with article VI of this chapter.

3. *Action by the board of appeals.* Within thirty (30) days

***Editor's note**—Ord. No. 93-88, adopted July 19, 1988, amended § 14-473 by adding subsection (f) to read as herein set out. See also the editor's note to Art. III of this chapter for additional provisions relative to Ord. No. 93-88.

Sec. 14-474. Conditional uses.

(a) *Authority.* The board of appeals may, subject to the procedures, standards and limitations set out in this section, approve the issuance of a conditional use permit authorizing development of conditional uses listed in this article.

(b) *Procedure:*

1. *Application.* Applications for conditional use permits shall be submitted to the building authority. A nonrefundable application fee, as established from time to time by the city council to cover administrative costs and costs of a hearing, shall accompany each application. The application shall be in such form and shall contain such information and documentation as shall be prescribed from time to time by the building authority but shall in all instances contain at least the following information and documentation:

   a. The applicant's name and address and his or her interest in the subject property;

   b. The owner's name and address if different than the applicant;

   c. The address, or chart, block and lot number as shown in the records of the office of the assessor of the subject property;

   d. The zoning classification and present use of the subject property;

   e. The particular provision of this article authorizing the proposed conditional use;

   f. A general description of the proposed conditional use;

   g. Where site plan approval is required by article V of this chapter, a preliminary or final site plan

as defined by article V of this chapter.

2. *Public hearing.* A public hearing shall be set, advertised and conducted by the board of appeals in accordance with article VI of this chapter.

3. *Action by the board of appeals.* Within thirty (30) days following the close of the public hearing, the board of appeals shall render its decision, in a manner and form specified by article VI of this chapter, granting the application for a conditional use permit, granting it subject to conditions as specified in subsection (d), or denying it. The failure of the board to act within thirty (30) days shall be deemed an approval of the conditional use permit, unless such time period is mutually extended in writing by the applicant and the board. Within five (5) days of such decision or the expiration of such period, the secretary shall mail notice of such decision or failure to act to the applicant and, if a permit is authorized, shall issue such permit, listing therein any and all conditions imposed by the board of appeals.

(c) *Conditions for conditional uses:*

1. *Authorized uses.* A conditional use permit may be issued for any use denominated as a conditional use in the regulations applicable to the zone in which it is proposed to be located.

2. *Standards.* The Board shall, after review of required materials, authorize issuance of a conditional use permit, upon a showing that the proposed use, at the size and intensity contemplated at the proposed location, will not have substantially greater negative impacts than would normally occur from surrounding uses or other allowable uses in the same zoning district. The Board shall find that this standard is satisfied if it finds that:

   a. The volume and type of vehicle traffic to be generated, hours of operation, expanse of pavement, and the number of parking spaces required are not substantially greater than would normally occur at surrounding uses or other allowable uses in the same zone; and

   b. The proposed use will not create unsanitary or

harmful conditions by reason of noise, glare, dust, sewage disposal, emissions to the air, odor, lighting, or litter; and

c. The design and operation of the proposed use, including but not limited to landscaping, screening, signs, loading, deliveries, trash or waste generation, arrangement of structures, and materials storage will not have a substantially greater effect/impact on surrounding properties than those associated with surrounding uses or other allowable uses in the zone.

(d) *Conditions on conditional use permits.* The board of appeals may impose such reasonable conditions upon the premises benefited by a conditional use as may be necessary to prevent or minimize adverse effects therefrom upon other property in the neighborhood. Such conditions shall be expressly set forth in the resolution authorizing the conditional use permit and in the permit. Violation of such conditions shall be a violation of this article.

(e) *Effect of issuance of a conditional use permit.* The issuance of a conditional use permit shall not authorize the establishment or extension of any use nor the development, construction, reconstruction, alteration or moving of any building or structure, but shall merely authorize the preparation, filing and processing of applications for any permits or approvals which may be required by the codes and ordinances of the city, including but not limited to a building permit, a certificate of occupancy, subdivision approval and site plan approval.

(f) *Limitations on conditional use permits.* No conditional use permit shall be valid for a period longer than six (6) months from the date of issue, or such other time as may be fixed at the time granted not to exceed two (2) years, unless the conditional use has been commenced or is issued and construction is actually begun within that period and is thereafter diligently pursued to completion; provided, however, that one (1) or more extensions of said time may be granted if the facts constituting the basis of the decision have not materially changed, and the two-year period is not exceeded thereby. A conditional use permit shall be deemed to authorize only the particular use for which it was issued and such permit shall automatically expire and cease to be of any force or effect if such use shall for any reason be discontinued for a period of twelve (12) consecutive months or more.

(g) *Appeals from board decisions.* Appeals from any decision of the board of appeals or, where applicable, the Planning Board respecting a conditional use permit shall be to superior court.
(Code 1968, § 602.24.D; Ord. No. 437-74, 7-1-74; Ord. No. 407-83, 2-2-83; Ord. No. 467-83, § 2, 4-20-83; Ord. No. 237-83, 10-17-83; Ord. No. 222-13/14, 5-5-2014)

Sec. 14-475. Reserved.

***Editor's note**—Section 7 of Ord. No. 354-85, adopted Jan. 7, 1985, repealed § 14-475, relative to nonconforming uses, which derived from Code 1968, § 602.24.E, and Ord. No. 437-74, adopted July 1, 1974.

Sec. 14-476. Successive applications.

Whenever any application, appeal or other request filed pursuant to this article has been finally denied on its merits, a second application, appeal or other request seeking essentially the same relief, whether or not in the same form or on the same theory, shall not be brought within one (1) year of such denial unless, in the opinion of the officer or board before which it is brought, substantial new evidence is available or a mistake of law or fact significantly affected the prior denial.
(Code 1968, § 602.24.F; Ord. No. 437-74, 7-1-74)

Sec. 14-477. Violations.

In addition to any other remedies available, the board of appeals after notice and hearing may revoke any variance or other relief granted under this article when the provisions of this article or the conditions under which the relief was granted have not been complied with.
(Code 1968, § 602.24.G; Ord. No. 437-74, 7-1-74)

Sec. 14-478. - 14-482. Reserved.

***Editor's Note**—Pursuant to Council Order 280-09/10 passed on 7/19/10 Division 29 (Preservation and Replacement of Housing Units) was repealed in its entirety and replaced with a new Division 29 (Housing Preservation and Replacement).

DIVISION 29. HOUSING PRESERVATION AND REPLACEMENT

Exhibit B

771 A.2d 371
Supreme Judicial Court of Maine.

Lloyd WELLS et al.
v.
PORTLAND YACHT CLUB et al.

Docket No. Cum-00-381.
|
Submitted on Briefs: Dec. 20, 2000.
|
Decided: Jan. 30, 2001.

Landowners sought review of zoning board of appeals' approval of yacht club's conditional use request for construction of building for boat storage and use by junior sailing program. The Superior Court, Cumberland County, Warren, J., affirmed. Landowners appealed. The Supreme Judicial Court, Dana, J., held that: (1) landowners had standing to appeal; (2) landowners waived their claim that sufficiently similar request had been rejected within previous year; (3) club and its junior sailing program were permitted conditional uses; and (4) record supported approval of conditional use request.

Affirmed.

West Headnotes (10)

[1] **Zoning and Planning**
Permits, certificates, and approvals

Landowners had standing to appeal zoning board of appeals' approval of yacht club's conditional use request for construction of building for boat storage and use by junior sailing program; minutes of board meeting indicated that landowners, described as abutters or residents of road on which building was to be constructed, voiced their concerns for traffic, noise and aesthetics.

5 Cases that cite this headnote

[2] **Zoning and Planning**
Right of Review; Standing

To appeal a decision of the zoning board of appeals, a party must (1) have appeared before the board of appeals; and (2) be able to demonstrate a particularized injury as a result of the board's action.

4 Cases that cite this headnote

[3] **Zoning and Planning**
Preservation before board or officer of grounds of review

Landowners who opposed conditional use request for construction of building waived their claim that zoning board of appeals' approval of conditional use request violated zoning ordinance that prohibited board from considering second appeal of similar nature within one year from date of denial of first appeal; that issue was not sufficiently "raised" to board, despite letters and comments that generally stated that concerns raised by landowners at hearing for applicant's first conditional use request continued to exist.

3 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Preservation of Questions Before Administrative Agency

Generally, a party in an administrative proceeding must raise any objections it has before the agency for the issue to be preserved for appeal.

Cases that cite this headnote

[5] **Administrative Law and Procedure**
Preservation of Questions Before Administrative Agency

A party in an administrative proceeding must raise any objection to the agency to ensure that the agency, and not the court, has the first opportunity to pass upon the claims of the parties.

Cases that cite this headnote

[6] **Administrative Law and Procedure**

Preservation of Questions Before Administrative Agency

An issue is considered raised and preserved for appeal in an administrative proceeding if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue.

5 Cases that cite this headnote

[7] **Zoning and Planning**

Clubs, fraternities, and sororities

Zoning ordinance providing that private clubs were permitted conditional use in residential district allowed private yacht club to operate junior sailing program that charged tuition and allowed public to participate; language of ordinance did not limit use of "private club" to those who paid fees or dues, and junior sailing program taught boating skills to children, which was integral part of predominant goal of club, which was to promote and facilitate boating.

Cases that cite this headnote

[8] **Zoning and Planning**

Water-related uses and regulations

Record supported zoning board of appeals' approval of yacht club's conditional use request for construction of building for boat storage and use by junior sailing program; communications in meeting between board, club, and landowners who opposed conditional use request, and conditions that board placed on approval, supported board's implicit finding that club satisfied requirements for receiving conditional use approval.

Cases that cite this headnote

[9] **Zoning and Planning**

Evidence and fact questions

The applicant for a conditional use permit is responsible for demonstrating to the zoning board of appeals that each of the prerequisites is satisfied.

Cases that cite this headnote

[10] **Administrative Law and Procedure**

Further or corrected findings, remand for

If an agency's findings of fact are insufficient to apprise the Supreme Judicial Court of the basis of the agency's decision and whether it is supported by substantial evidence, the Court will usually remand to the agency for further findings of fact; in some cases, however, the subsidiary facts may be obvious or easily inferred from the record and the general factual findings, and a remand would be unnecessary.

5 Cases that cite this headnote

Attorneys and Law Firms

*372 S. James Levis Jr., Esq., Levis & Hull, P.A., Biddeford, for plaintiffs.

Gary D. Vogel, Esq., Aaron P. Burns, Esq., Lambert, Coffin, Rudman & Hochman, Portland, (for PYC), Amy K. Tchao, Esq., Drummond Woodsum & MacMahon, Portland, (for Town of Falmouth), for defendants.

Panel: WATHEN, C.J., and CLIFFORD, RUDMAN, DANA, SAUFLEY, ALEXANDER, and CALKINS, JJ.

Opinion

DANA, J.

[¶ 1] Lloyd Wells, Ellen Wells, Zbignew J. Kurlanski, Dee Kurlanski, Joseph Kilbride, Kathleen Kilbride, Roswell Y. Furman and Jennifer Furman (hereinafter Wells) appeal from a judgment entered in the Superior Court (Cumberland County, *Warren, J.*) affirming the Falmouth Zoning Board of Appeals' approval of the Portland Yacht Club's conditional use request for the construction of a building for boat storage and use by the junior sailing program. Wells contends that the Board erred in approving the conditional use request because a sufficiently similar request had been rejected within one year; the junior sailing program is an impermissible conditional use; the grant enlarged a nonconforming use; the request was not supported by substantial evidence; and the grant violated shoreland zoning. We affirm the judgment.

I. FACTS AND PROCEDURE

[¶ 2] The Club property is located in a residential district at the end of Old Powerhouse Road, and the Club operates the junior sailing program to teach children of both members and nonmembers to sail. On April 29, 1998, the Board denied the Club's request for conditional use approval "to construct a new building to house the junior program and store small boats at Old Powerhouse Rd." On March 1, 1999, the Club filed a conditional use request for the "construction of a building as part of the existing Portland Yacht Club, that measures $_{30'}$ x $_{40'}$ to store small boats nine months a year and use as classrooms during the summer for the Junior Sailing ***373** Program." The Club's conditional use request was discussed at a Board meeting, and the public participated through oral and written comments. On March 30, 1999, the Board approved the Club's conditional use request with conditions. [1]

[¶ 3] Wells filed an appeal pursuant to M.R. Civ. P. 80B in the Superior Court. The court upheld the Board's conditional use approval, finding that: the ordinance banning resubmission of a conditional use request within one year was not violated; [2] the Club's use is a permitted conditional use; and the remaining arguments could not be sustained on the record. This appeal followed.

II. STANDING

[1] **[2]** [¶ 4] The Club contends that Wells does not have standing. To appeal a decision of the Board, "a party must (1) have appeared before the board of appeals; and (2) be able to demonstrate a particularized injury as a result of the board's action." *Sproul v. Town of Boothbay Harbor,* 2000 ME 30, ¶ 6, 746 A.2d 368, 371 (quotations and citation omitted). The minutes of the Board meeting indicate that the appellants, described as abutters or residents of Old Powerhouse Road, voiced their concerns for traffic, noise and aesthetics. Thus, the appellants have standing to bring this appeal. *See id.* ¶¶ 6-7, 746 A.2d at 371 (finding "[t]he threshold requirement for an abutter to have standing is minimal" because a party appealing as an abutter "need only allege a potential for particularized injury to satisfy the standing requirement") (quotations and citation omitted).

III. TIMING REQUIREMENT

[3] **[4]** **[5]** **[6]** [¶ 5] Wells contends that the approval of the conditional use request violates section 8.8(*l*), which prohibits the Board from considering a second appeal of a similar nature within one year from the date of the denial of the first appeal. FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 8.8(*l*). "Generally, a party in an administrative proceeding must raise any objections it has before the agency for the issue to be preserved for appeal." *Berry v. Bd. of Trustees, Me. State Ret. Sys.,* 663 A.2d 14, 18 (Me.1995). A party must raise any objection to the agency "to ensure that the agency, and not the court, has the first opportunity to pass upon the claims of the parties." *Oliver v. City of Rockland,* 1998 ME 88, ¶ 7, 710 A.2d 905, 907. An issue is considered raised and preserved for appeal "if there is sufficient basis in the record to alert the court and any opposing party to the existence of that issue." *Farley v. Town of Washburn,* 1997 ME 218, ¶ 5, 704 A.2d 347, 349.

[¶ 6] Wells contends that the issue was raised to the Board through letters and comments that generally state that the concerns raised by Wells at the hearing for the Club's first conditional use request continue to exist. These letters and comments were not sufficient to alert the Board and the Club to the existence of the issue that the Club's conditional use request violated the timing requirement; therefore, the issue cannot be raised here.

***374** IV. CONDITIONAL USE

[7] [¶ 7] Wells contends that the Board erred in allowing an impermissible conditional use in a residential district because, while the Club is a "private club," a permitted conditional use, the junior sailing program is not. A "private club" is defined in the ordinance as: "A group of people organized for a common purpose to pursue common goals, interests or activities, such as social or recreational, and usually characterized by certain membership qualifications, payment of fees or dues, and a constitution and bylaws." FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 2.116. "[A]ny use not specifically allowed as either a permitted use or a conditional use is specifically prohibited." *Id.* § 1.5.

[¶ 8] "Whether a proposed use falls within the terms of a zoning ordinance is a question of law." *Underwood v. City of Presque Isle,* 1998 ME 166, ¶ 9, 715 A.2d 148, 151.

"The language at issue must be construed reasonably and with regard to both the ordinance's specific object and its general structure." *Lewis v. Town of Rockport,* 1998 ME 144, ¶ 11, 712 A.2d 1047, 1049 (quotations and citation omitted). "Moreover, we construe a statute to avoid absurd, illogical, or inconsistent results." *Wright v. Town of Kennebunkport,* 1998 ME 184, ¶ 5, 715 A.2d 162, 164.

[¶ 9] The language of the ordinance is not so narrow that it excludes a private club from operating a program that charges tuition and allows the public to participate. *See* FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 2.116. The definition of "private club" does not include any limitation regarding public access or participation; instead, the definition characterizes a "private club" as a "group of people." *See id.* The ordinance also states that a "private club" is "usually characterized by certain membership qualifications, payment of fees or dues." *Id.* This language does not limit the use of a "private club" to those who pay fees or dues, and it does not prevent a private club from charging other fees, such as tuition. *See id.* Furthermore, the junior sailing program teaches boating skills to children, an integral part of the predominant goal of the Club, which is to promote and facilitate boating. *See Underwood,* 1998 ME 166, ¶ 11, 715 A.2d at 151-52. Therefore, the Board did not err as a matter of law in approving the conditional use request. Because we agree that the Club and its junior sailing program are permitted conditional uses, we need not consider Wells's contention that the conditional use approval enlarged a nonconforming use.

V. SUFFICIENCY OF THE EVIDENCE

[8] **[9]** **[10]** [¶ 10] Wells contends that the Club failed to satisfy the requirements of section 8.3(c), (d), (e) and (h).[3] "The applicant ***375** is responsible for demonstrating to the board that each of the statutory prerequisites is satisfied." *Forester v. City of Westbrook,* 604 A.2d 31, 32 (Me.1992). Recently we stated that if an agency's findings of fact are insufficient to apprise us of the basis of the agency's decision and whether it is supported by substantial evidence, we should usually remand to the agency for further findings of fact. *Christian Fellowship and Renewal Ctr. v. Town of Limington,* 2001 ME 16, ¶¶ 10, 14, 769 A.2d 834. In some cases, however, "the subsidiary facts may be obvious or easily inferred from the record and the general factual findings, and a remand would be unnecessary." *Id.* ¶ 19, 769 A.2d at 840.

[¶ 11] The record reflects that the Board questioned the Club about the requirements in section 8.3, and the minutes of the meeting state that a Board member "reviewed the conditional use standards[,] finding that the applicant satisfied those standards if conditions were placed on an approval." We find that the communications in the meeting between the Board, the Club, and the appellants and the conditions the Board placed on approval support the Board's implicit finding that the Club satisfied the requirements for receiving conditional use approval. *See id.; see also Forester,* 604 A.2d at 33 (stating that "[i]f there is sufficient evidence on the record, the Board's decision will be deemed supported by implicit findings").

VI. SHORELAND ZONING

[¶ 12] Wells also contends that by granting the conditional use request, the Board violated various shoreland zoning provisions. We find that Wells failed to preserve this issue for appeal.

The entry is:

Judgment affirmed.

All Citations

771 A.2d 371, 2001 ME 20

Footnotes

1 The conditions specified in the approval are:
1. No landscaping within [a specified nonappealing abutter's] property right of way.
2. The number of students in the sailing program shall be limited to 60 per session.
3. Activities at the proposed building are to cease by 8:00 PM.

2 The Superior Court also determined that this issue was arguably waived "by the plaintiffs below, but given the record here the court does not need to rely upon waiver ...."

3 The Club was denied the initial conditional use request for failure "to satisfy section 8.3 c, d & e." Section 8.3 states in pertinent part:

> Conditional uses may be granted by the Board of Appeals after considering the characteristics and location of the proposed use and of other properties in the surrounding neighborhood, provided that the petitioner shall submit to the Board statements in writing, which may be accompanied by diagrams or photographs which shall become part of the record of the such petitions, demonstrating that the proposed use:
>
> ....
>
> c. will not have a significant detrimental effect on the use and peaceful enjoyment of abutting property as a result of noise, vibrations, fumes, odor, dust, light or glare;
>
> d. will not have a significant adverse effect on adjacent or nearby property values;
>
> e. will not result in significant hazards to pedestrian or vehicular traffic or significant traffic congestion;
>
> ....
>
> h. will be served adequately by, but will not overburden, existing public services and facilities, including fire protection services, sanitary sewers, roads, water and storm drainage systems.
>
> FALMOUTH, ME., FALMOUTH ZONING ORDINANCE § 8.3.

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Exhibit C

501 A.2d 1290
Supreme Judicial Court of Maine.

Myrle C. SILSBY, et al.
v.
ALLEN'S BLUEBERRY FREEZER, INC., et al.

Argued May 8, 1985.
|
Decided Dec. 9, 1985.

Action was filed challenging a decision of a zoning board of appeals to grant a special exception that would allow a corporation to build an expansion to its blueberry processing plant. The Superior Court, Hancock County, affirmed. Appeal was taken. The Supreme Judicial Court, Violette, J., held that: (1) the board was acting within its original jurisdiction in granting the special exception and, therefore, the corporation was not required to take an appeal from the building inspector's denial of the application; (2) the board did not abuse its discretion in determining that a substantial change in circumstances had occurred after a prior denial of the corporation's application; and (3) the evidence sustained the granting of the special exception.

Judgment affirmed.

West Headnotes (3)

[1] Zoning and Planning
Proceedings for Variances and Exceptions

Zoning board of appeals was acting in its original jurisdiction, and not in its appellate role acting upon decision of building inspector, when board considered corporation's application for special exception that would allow corporation to expand its blueberry processing plant and, therefore, board had authority to consider application without requisite of written appeal from building inspector's decision. 30 M.R.S.A. § 4963, subd. 2, par. B.

Cases that cite this headnote

[2] Zoning and Planning
Successive applications

Zoning board of appeals did not abuse its discretion in determining that there was substantial change in circumstances after prior denial of special exception that would allow corporation to expand its blueberry processing plant where there was substantial change in application with respect to off-street parking and loading requirement of special exception, even if there was no finding as to any substantial changes on objectionable odors.

7 Cases that cite this headnote

[3] Zoning and Planning
Business, commercial, and industrial uses in general

Substantial evidence supported decision of zoning board of appeals to grant special exception that would allow corporation to expand its blueberry processing plant, even if there was conflicting evidence on whether proposed expansion would emit additional objectionable odors.

Cases that cite this headnote

Attorneys and Law Firms

***1291** James A. Silsby (orally), Ellsworth, for plaintiffs.

Bernard Staples (orally), Bar Harbor, for City of Ellsworth.

Peter Roy, Ellsworth, Paul L. Rudman, Dawn M. Pelletier (orally), George F. Terry, IV, Bangor, for Allen's Blueberry Freezer, Inc.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, VIOLETTE, WATHEN, and SCOLNIK, JJ.

Opinion

VIOLETTE, Justice.

Plaintiffs Myrle C. Silsby and William S. Silsby, Sr. (Silsbys) appeal from a judgment of the Superior Court, Hancock County, affirming the grant of a special exception by the Ellsworth Zoning Board of Appeals (Board) to Allen's Blueberry Freezer, Inc. (Allen's) that would allow Allen's to build an expansion to its blueberry processing plant.

Silsby contends, inter alia, that (1) the Board was without jurisdiction to consider the application for a special exception, (2) the grant of the special exception was erroneous because Allen's had failed to prove changed circumstances since denial of the previous application, and (3) the Board's findings were not supported by substantial evidence. We affirm the judgment of the Superior Court.

I.

Allen's is located in a Commercial and Institutional (C-I) Zone in the City of Ellsworth and is shown on the city's tax maps as Lot 101 of Map 35. This property is adjacent to the appellants' residential property that is located in an Urban Residential (R-1) Zone and shown as Lot 103 of Map 35. In December of 1982, Allen's acquired Lot 102 of Map 35 that also abuts the Silsby property. On December 19, 1983, Lot 102 was rezoned from R-1 to C-1.

On December 20, 1983, Allen's applied to the City of Ellsworth for a building permit to add an extension to its existing blueberry processing plant. This extension would expand the present size of the building onto Lot 102 to allow the installation of an additional blueberry processing and quick freezing line, including freezing units to provide freezing capacity for the new line. The application was denied by the building inspector as requiring a special exception. The Board scheduled a public hearing for January 26, 1984 to consider the request but remanded the application to the building inspector for further information. On January 27, 1984, Allen's filed a second application for a building permit, which was again denied by the building inspector for the same reason given in the first application; whereupon Allen's filed a written appeal to the Board.

The Board held a public hearing on the application on February 9, 1984, then the hearing was tabled to February 23. The ***1292** record before us does not include a transcript of the proceedings on February 9. While we can deduce from the record of the proceedings on February 23 and March 16 that both sides presented evidence on the subjects of objectionable odors and the adequacy of off-street parking and loading space, we cannot ascertain the exact nature of that evidence. The Board resumed the public hearing on February 23, 1984, with four of the five members present. After denying Silsbys' request to reopen the hearing for further evidence, the Board made no findings of fact but proceeded to vote on the application. The Board first voted two for, and two against, a motion to deny the application for a special exception on the ground that Allen's had failed to satisfy both the objectionable odors and adequate parking and loading space conditions of the zoning ordinance. A subsequent motion to grant the special exception on the basis that both conditions of the ordinance had been satisfied again resulted in the same two votes for and two votes against. The Board was thereupon informed by its counsel that, because the ordinance required the concurring vote of at least three members for approval of the application, the vote constituted a denial.

On February 28, 1984, Allen's filed another application with the building inspector for the same building permit, along with four documents identified as (1) Salsbury survey dated January 26, 1984; (2) Site Plan for Allen's Blueberry Freezer, dated January 24, 1984 and revised January 27, 1984; (3) Site Plan-Williams Lot, dated February 28, 1984; and (4) Site Plan-Giles Lot, dated February 28, 1984. Allen's proposed to use the Williams and Giles Lots for off-street employee parking. On March 1, 1984, the building inspector refused to grant the permit, noting the matter had to go to the board of appeals for a special exception. The building inspector then transferred the application and accompanying documents to the Board. On March 12, 1984, Allen's submitted an option for purchase of the Giles property. The Board scheduled and held a public hearing on the application on March 16, 1984. At the outset, Silsbys made several procedural objections to the holding of the hearing, two of which we consider. They argued the Board was without jurisdiction to hold the hearing because Allen's had not filed a written appeal from the building inspector's denial of the application, as required by the zoning ordinance. They also argued the application did not demonstrate that any substantial change of conditions materially affecting the merits of the application had occurred since the Board's denial of the prior application. The Board decided it had authority to hold the hearing, and, acknowledging that Allen's had to show a substantial change, deferred ruling on this objection until later on in the hearing. The hearing continued with the presentation of evidence on the special exception conditions of objectionable odors and adequacy of off-street parking and loading space.[1] The Board decided during the hearing that with the submission of the proposed acquisition and plan of the Giles property and the drawings of the Williams property, Allen's application demonstrated a significant change of conditions since the last application. Following the closing of evidence and argument the Board, by a three to two vote, conditionally approved Allen's application for a special exception to build an addition to its freezing plant, finding that the addition would not

emit objectionable odors, that adequate loading areas were provided, and that off-street parking would be satisfied with imposition of certain conditions, namely, acquisition of *1293 the Giles lot and removal of the buildings or obstructions on the lot, that parking be delineated and drawings so showing be presented to the building inspector for his approval, and that the lot be designated for Allen's employees only. On March 23, 1984, the Board gave Allen's written notice of its decision. Silsby thereupon filed an 80B complaint, M.R.Civ.P., in Superior Court, Hancock County, seeking review of the Board's decision.

II.

When, as here, the Superior Court acts as an intermediate appellate court reviewing the action of the Board of Appeals, we examine directly the record before the Board without deference to the decision of the Superior Court. *Kittery Water District v. Town of York,* 489 A.2d 1091, 1093 (Me.1985); *Lakes Environmental Ass'n. v. Town of Naples,* 486 A.2d 91, 94 (Me.1984). Our review is confined to ascertaining whether there was an abuse of discretion, error of law, or findings of fact not supported by substantial evidence in the record. *Id.*

[1] Appellant contends that the Board was without jurisdiction to hear the request for a special exception because Allen's had not filed a written appeal from the building inspector's refusal to grant the permit. When Silsby raised this objection, the chairman responded that it had been the general practice, when a request for a special exception was made, to have the building inspector refuse the request because a special exception was required and he would then pass the application on to the Board, which would act on the application. It appears the Board did not adhere to a uniform practice and heard such applications in the aforedescribed manner as well as upon written appeal. It was the Board counsel's opinion that, under the city's Zoning Ordinance, the Board had the authority to hear and grant an application for a special exception without the requirement of a formal notice of appeal because the Board was then not acting in an appellate role but, rather, was exercising its original jurisdiction as the only body authorized to consider a request for a special exception. He added that the building inspector had no authority over a use classified as a special exception other than to refer the matter to the Board. He distinguished this authority from that when the Board acted in its true appellate capacity.

While a literal reading of the pertinent enabling statutes, the zoning ordinance and the Board's rules and regulations appears to support appellants' position, our analysis of the issue leads us to agree with the Board's conclusion. 30 M.R.S.A. § 2411 (1978) permits a municipality to establish a board of appeals and provides for its organization, procedures and jurisdiction. Under 30 M.R.S.A. § 2151(4)(C)(5) (1978), a municipality may enact an ordinance regulating the construction of new buildings and additions and alterations of existing buildings and an appeal in writing may be taken from an order of the building inspector refusing to grant a permit therefor to a board of appeals established in accordance with section 2411. 30 M.R.S.A. § 4963 (1978 & Supp.1984-85) provides in pertinent part:

> **§ 4963. Zoning adjustment**
>
> **1. Establishment.** A board of appeals is established in any municipality which adopts a zoning ordinance. The board of appeals shall hear appeals from actions or failure to act of the official or board charged with the enforcement of the zoning ordinance, unless only a direct appeal to Superior Court has been provided by municipal ordinance. Such board of appeals shall be governed by section 2411, except that section 2411, subsection 2 shall not apply to boards existing on September 23, 1971.
>
> **2. Powers.** In deciding any appeal:
>
> **A.** The board may interpret the provisions of the ordinance which are called into question;
>
> **B.** The board may approve the issuance of a special permit or conditional *1294 use permit in strict compliance with the ordinance;
>
> **C.** The board may grant a variance in strict compliance with subsection 3.

Article VII, section 1, of the Ellsworth Zoning Ordinance establishes a Board of Appeals, and Section 7 of Article VII defines the powers and duties of the Board as follows in pertinent part:

> **A. Administrative Review**-To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by the Building Inspector in the enforcement of this ordinance.
>
> **B. Special Exceptions**-To hear and decide special exceptions upon which the Board is required to act under the terms of this ordinance. An exception may be granted

only for a use which is specifically listed in this ordinance as a permitted exception in the zone in which the exception is requested. In granting an exception, the Board may prescribe appropriate conditions or safeguards.

C. Variance-To authorize upon appeal in specific cases such variance from the terms of this ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of this ordinance would result in unnecessary hardship....

Section 3 of Article VII states that an appeal from any decision of the building inspector to the Board shall be taken by filing a written notice of appeal specifying the grounds thereof. Section II(A) & (B) of the Board's Rules and Regulations comport with Art VII, sec. 3 of the Ordinance.

Notwithstanding that the aforementioned pertinent enabling statutes, provisions of the zoning ordinances and of the Board's rules and regulations all speak of an appeal to the Board, we perceive the issue to be whether the Board was acting in an appellate or original jurisdiction capacity in considering the application for a special exception. Zoning enabling acts and zoning ordinances usually do not characterize the jurisdiction of a board of adjustment as original or appellate, and such acts and ordinances must be inspected to determine the nature of the board's jurisdiction with regard to the various types of relief. 82 Am.Jur.2d, *Zoning and Planning,* § 297 at 855 (1976).[2] The jurisdiction vested in a board of adjustment to hear and decide appeals from the orders, decision, or determination by an administrative official is clearly appellate, but the board's jurisdiction with regard to a special permit may be either appellate or original in nature. *Id.*[3] Where the zoning ordinance provides that certain uses may be maintained only upon the issuance of a special permit by the board, the board has original jurisdiction with regard to the issuance or denial of the permit. *Id.*

In *Cushing v. Smith,* 457 A.2d 816, 819 (Me.1983), this Court said that "30 M.R.S.A. § 4963(2)(B) permits a municipality to authorize either the zoning board of appeals or a planning board, agency or office to grant a special permit in the first instance." We further said that "[W]here, as in the instant case, the municipality has authorized the planning board to make the initial determination regarding a special exception permit, then the planning board is "the office charged with the enforcement of the zoning ordinance" as contemplated by 30 M.R.S.A. § 4963(1) with respect to the granting of special exceptions." *Id. See Thornton v. Lothridge,* 447 A.2d 473, 476 (Me.1982) (a town's zoning board of appeals had authority under section 4963(2)(B) to make initial determination whether applicant qualified for exception.) The Ellsworth Zoning Ordinance, Art. VII, sec. 7(B), which comports with 30 M.R.S.A. § 4963(2)(B), authorizes the Board to grant ***1295** special exception permits in the first instance. We are led to conclude that the Board was acting in its original jurisdiction, and not in its appellate role acting upon a decision of the building inspector, in its consideration of Allen's application for a special exception. It therefore had authority to consider the application without the requisite of a written appeal. A use by exception is a particular type of use, differing substantially from a use by variance, as we said in *Stucki v. Plavin,* 291 A.2d 508, 511 (Me.1972):

> A special exception use differs from a variance in that a variance is authority extended to a landowner to use his property in a manner prohibited by the ordinance (absent such variance) while a special exception allows him to put his property to a use which the ordinance expressly permits.

Our determination of this issue in no way excuses either the applicant nor the Board from compliance with every provision of the zoning ordinance. In this respect, proper public notice was given of the Board's special meeting on March 16, 1984, and the business to be taken at that meeting. Appellants were fully apprised of the relief sought in the application and were given full opportunity to present their case. We find no error of law by the Board in hearing this application.

III.

[2] Appellants also claim the Board committed error in holding the hearing and granting the special exception because Allen's had failed to show changed circumstances since denial of the previous application. We determine that the vote of the Board on February 23, 1984, was a denial of the pending application. It is clear that the Ordinance required the concurring vote of 3 members of the Board in favor of the application.[4] Because of the clear language of the Ordinance, we are not required to determine the consequences of a tie vote.

The Ellsworth Zoning Ordinance has no provision dealing with reapplication following the denial of a special exception by the Board. We have previously stated, in the case of a reapplication for a variance, that even in the absence of an express provision in a zoning ordinance, the general rule is that a board of zoning appeals or a board of adjustment may not entertain a second application concerning the same property after a previous application has been denied, unless a substantial change of conditions had occurred or other considerations materially affecting the merits of the subject matter had intervened between the first application and the subsequent application. *Driscoll v. Gheewalla,* 441 A.2d 1023, 1027 (Me.1982) (citations omitted). We can discern no reason why this rule should not apply also to special exceptions.

The Board found that inclusion of the Williams lot plan, the Giles lot plan and the option to acquire the Giles lot constituted a "significant change" in conditions between the February 28 application and the prior application. The Silsbys agree there was a substantial change in the application with respect to the off-street parking and loading requirement of the special exception, but argue that Allen's was also required to show a substantial change on the objectionable odor requirement. The Board made no finding as to any substantial changes on objectionable odors. While the Board denied the prior application, we have no specific findings by the Board whether Allen's failed to comply with either or both requirements of the special exception. In the absence of such findings, we are of the ***1296** opinion that the Board's finding that a substantial change in circumstances had occurred was within the Board's discretion. This determination by the Board will be disturbed only if its discretion is abused. *Driscoll,* 441 A.2d 1027.

III.

[3] Contrary to appellants' argument, we conclude that the Board's decision is supported by substantial evidence on the entire record. *Bruk v. Town of Georgetown,* 436 A.2d 894, 898. The Board found five loading spaces existed where four was required. With respect to off-street parking, it found the Williams lot inadequate but determined the Giles lot would provide more than the essential number of parking spaces and conditioned its approval of the application upon Allen's acquisition of that property for employee parking space. The Board found the proposed addition would not emit additional objectionable odors. While evidence on this requirement of the special exception was conflicting, we cannot say, upon examination of the record, the Board could not reasonably have found this requirement was met. *See Driscoll,* 441 A.2d 1026.

We do not consider it necessary to address other issues raised in the appeal.

The entry is:

Judgment affirmed.

All concurring.

All Citations

501 A.2d 1290

Footnotes

1 Art. X, Sec. (4)(B)(18) of the Ellsworth Zoning Ordinance, Commercial and Institutional "C-1" Zone provides:
Board of Appeal may permit as special exceptions:
(18) Food processing and freezing, but excluding slaughterhouses and chicken processing plants provided that:
a. Proposed activity will not emit objectionable odors
b. Adequate off-street parking and loading area is provided.

2 Am.Jur.2d uses the term "board of adjustment" as a generic one to indicate board of adjustment, board of review or board of appeal.

3 Am.Jur.2d uses the term "special permit" as a generic one to denote special permit, special exception, conditional use permit, or special use permit.

4 Art. VII, sec. 6 of the Zoning Ordinance provides:
The concurring vote of 3 members of the Board shall be necessary to reverse any order, requirement, decision, or determination of the Building Inspector, or to decide in favor of the applicant of any matter on which it is required to

pass under this ordinance, or to affect any variation in the application of this ordinance. The failure of the Board to issue a written notice of its decision, directed to the applicants, within thirty (30) days of filing of the appeal constitutes a denial of the appeal.

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