



**Town of Gorham**  
**PLANNING BOARD WORKSHOP NOTES**  
**April 26, 2010**

A workshop meeting of the Gorham Planning Board was held on Monday, April 26, 2010, at 6:00 p.m. in the Municipal Center Council Chambers, 75 South Street, Gorham, Maine.

In attendance were Edward Zelmanow, acting Chairman, Lauren Carrier, Thomas Fickett, George Fox, Christopher Hickey, Thomas Hughes, and Andrew McCullough. Also present were Zoning Administrator Sandra Mowery, Town Planner Thomas Poirier and Planning Board Clerk Barbara Skinner.

The Clerk of the Board called the roll, noting that all members were present.

**APPROVAL OF THE FEBRUARY 1, 2010 WORKSHOP NOTES**

There were no comments or corrections noted by those members of the Board who had been present for the workshop; namely, Thomas Hughes, Thomas Fickett and Edward Zelmanow.

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**MUNICIPAL BOARDS' WORKSHOP – PRESENTED BY JENSEN BAIRD, TOWN ATTORNEYS**

William Dale, Esquire, presented the Board and those in the audience with a written 3-page outline handout attached hereto of the items and issues to be covered in his remarks and those of Natalie Burns, Esquire. He introduced Ms. Burns and Mark Bower, a new associate attorney with the firm.

Mr. Dale explained that each year a presentation is made to the Town about administrative boards' law in the State of Maine. He began his presentation with a discussion on jurisdictional issues, stressing that administrative boards in Maine, particularly Planning Boards and Zoning Boards, have authority to act only where it is expressly indicated, either by State statute or town ordinance. For the Planning Board principally, authority is given not so much by State statute as by local ordinance, a zoning ordinance enacted by the Town Council for both text portion and map portion, and authority delegated pursuant to the text portion of the zoning ordinance for the Planning Board to hear and decide certain matters such as district regulations, site plan review, and general standards as applicable in Gorham's Land Use Chapter IV.

Mr. Dale explained that Maine law is very strict, and zoning is one of those instances in Maine law where local municipalities do not have home rule authority. Expressly by statute, municipalities can enact only those zoning ordinances and zoning ordinance provisions that State law allows. Mr. Dale said that Planning Boards administering zoning ordinances do not have the authority to grant variances; that is by State statute reserved exclusively for the province of zoning boards of appeal. Similarly, as part of that same restriction, a zoning board is constrained by a set of standards contained in State statutes for granting variances. In response to a query from Mr. Hughes, Mr. Dale said that by State statute, if there is going to be either the initial adoption of a zoning ordinance, text and map, or subsequent amendment, first the matter has to be heard by the Planning Board, with a recommendation provided to the Town Council, but the legislative body, in Gorham's case the Town Council, votes on the adoption or amendment. The change according to State statute must be "pursuant to and consistent with" the Comprehensive Plan; however, occasionally the Comprehensive Plan can be amended to accommodate a proposed change.

Continuing, Mr. Dale said that site plan review, one of the major functions conducted by the Planning Board which is not expressly provided for by State law, nor is it expressly denied by implication, is common across the State. State subdivision statute and the Town's ordinance contain some 20 mandatory approval standards, and every subdivision must meet all those approval standards. If the subdivision ordinance allows waivers, it is permissible for the Planning Board to grant them under that ordinance, as

distinguished from granting variances under the zoning ordinance, which by State law can only be done by the Zoning Board.

Mr. Dale discussed the Town's impact fee ordinance, Shoreland Zoning mandatory State law requirements, with local Shoreland zoning being at least as strict as DEP's model ordinance, and Comprehensive Plan and zoning ordinance amendments. He also touched on the subject of special exceptions, which according to the Maine Supreme Court are not "maybe" uses but are allowed uses in a particular district. This will mean that the majority of these uses will be allowed under Maine State law.

Mr. Dale then discussed boards of appeal, noting the difference between administrative appeals and variances, with an administrative appeal being an instance of a property owner claiming that some action is permitted by ordinance but a code officer's interpretation is incorrect in denying that action. He explained that a variance is an instance of someone admitting that what he wants to do is not allowed by the ordinance but he believes that there is some hardship which should permit him to do it anyway. He said that the reason variance sections are put into zoning ordinances and in State statute is to prevent regulatory takings, or the imposition of so many regulations on the use of a piece of property that its value has disappeared. This is opposed to physical taking by eminent domain where a piece of property is taken and paid for a specific purpose such as a highway or a school or a park.

Mr. Dale also discussed the various administrative functions of boards of appeal, such as the regulation of nonconforming uses (also known as "grandfathered" uses), which need to be lawful to start with. Nonconforming uses are allowed some ability to change under certain conditions, varying from community to community. Also mentioned was the role of boards of appeals regarding the Shoreland Zoning Ordinance.

By State statute special amusement permits and resulting disputes involving those establishments which serve liquor and live music come under the purview of boards of appeal, as well as farmland registration variances. Mr. Dale also discussed the role of the Board of Assessment Review, dealing with property tax assessments, abatement appeals and poverty abatement appeals.

Mr. Dale discussed the duties of the Code Enforcement Officer, as outlined on page 2 of the Jensen Baird handout attached hereto and made a part hereof.

Mr. Dale said that when someone comes before administrative boards, either the Planning Board or the zoning Board of Appeals, he is entitled to have an impartial decision maker to make a fair decision. There are to be no contacts with applicants or opponents in advance, lobbying in the grocery store or barber shop is not permitted. Should this occur, the other party would not be present and would have no way to respond to whatever had been said. If such lobbying inadvertently occurs, the Board member needs to so advise the rest of the Board at a subsequent meeting of what was said, which will allow all the other Board members to hear it, as well as allowing the applicant or the other side to hear it.

Mr. Dale's final topic dealt with the Right-to-Know Law, noting that the Council, the Planning Board, the Zoning Board of Appeals, all conduct the public's business in the public's facilities with public funding. The very limited ability to go into "executive session" is proscribed by State law with very specific procedures, the most important of which is that the meeting must be in public and vote to go into executive session. Mr. Dale noted that State law prohibits conducting public business by email; although scheduling may be done by email, nothing substantive may be discussed in an email message.

With the conclusion of Mr. Dale's portion of the presentation, Ms. Burns came to the podium. She said that the Board knows that emails from the public should be forwarded unread to staff through a centralized location; however, emails sent or received in someone's capacity as a Board member are public records. She recommends that a separate email folder be set up on each person's computer to file

any emails having anything to do with Planning Board matters, even if it is only a note about scheduling, so that all the emails are available should someone ask for them. She stressed that no Board member may ask any questions about an application in an email, even if copying other Board members, as that becomes a public meeting under the Right-to-Know Law and is prohibited because no members of the public are privy to the exchange of emails. The same procedure for dealing with emails should be followed in referring telephone callers to staff.

Ms. Burns then discussed the issue of a member coming into a meeting and not having been at a prior meeting or not having had a chance to review the pertinent materials, with the member then having to excuse himself from participation or ask the questions for which answers are required in order to participate fully. If a member misses a prior meeting where an application has been discussed, he must at the subsequent meeting state that he has reviewed the materials, tapes, and the minutes and is prepared to participate fairly and impartially. This way everyone is on the same page.

Ms. Burns spoke about site walks, noting that they are public meetings under the Right-to-Know Law which are advertised as public meetings. She said that maintaining written minutes, while not required, is an excellent procedure to follow. One of the things to be remembered is that neither the applicant nor members of the public in attendance are allowed to lobby the Board members; the public and the applicant are simply there to witness the Board's public meetings. Board members should be careful not to split off from the rest of the group. Occasionally there will be a property owner who will not want members of the public on his property for whatever the reason, so the Board's choice must be that if the public cannot go, then the Board does not go.

Ms. Burns spoke about decision making, saying that findings are critical in all decisions, and if there are no findings for a denial or a condition approval, that is a violation of the Right-to-Know Law. The best practice is to always do findings. The more detailed the application is, the more detailed the findings need to be to explain the basis of a Board's decision.

Ms. Burns talked about taking public comments, saying that it is perfectly acceptable to place time limits on speakers during a complicated application review on a per meeting basis.

Ms. Burns explained that a majority vote for the Planning Board is a majority of those present and voting. In Gorham, a tie vote means that a motion fails; it is recommended that if it looks like a final decision vote will result in a tie, it is better to postpone voting until there are enough members present to ensure that there will be a majority vote.

Ms. Burns talked about motions for reconsideration, noting that the Planning Board follows the general Roberts Rules of Order, which requires that a motion for reconsideration must be made no later than the next meeting and must be made by someone who voted in the majority on the prior vote. If the motion is made and voted on, it can then be postponed, particularly if there has not been notice that there is a possibility of reconsideration. If the Board does move to reconsider, the matter goes back to exactly where it was before the final vote was taken, so even if the motion to reconsider is to fix one small error, everything must be readopted as it was initially. In response to a query from Mr. Zelmanow, Ms. Burns said that a request for reconsideration can come verbally from a member of the public to staff, it does not need to be in writing. Finally, Ms. Burns said that a motion to reconsider is discretionary within the Board, as the Board is not required to do it, even if staff asks for it.

Ms. Burns spoke about the Board's authority to amend a subdivision and a site plan; findings must be made on whatever standards are being considered.

Ms. Burns replied to Mr. Zelmanow's question about whether the law court provides any guidance about what a conflict of interest is, saying that there is a statutory test for conflict of interest, which is 10% or

more ownership share in a business. In addition, there are the issues of bias and appearance of conflict of interest must be avoided as well. If there is a question about whether a member has bias or a conflict of interest or appearance of conflict of interest sufficient to disqualify him from participation, the member must disclose his relationship to the applicant/application and state he has no financial interest in the matter, has not prejudged the application in any manner, and feel that he can judge it fairly. The rest of the Board then votes on whether the member can participate under those circumstances.

Mr. Hickey and Ms. Burns discussed the technical difference between waivers and variances. The Board can grant waivers in subdivision review, but if there is a dimensional requirement in the zoning ordinance, that has to be dealt with through the granting of a variance.

Mr. Dale returned to the podium to stress three points: 1. Site walks - be disciplined, people can lobby Board members with chocolate chip cookies. The site walk is not to take new evidence, it is to help explain what has been testified to. Point 2: Decisions – don't feel compelled to rush into a decision, a decision can be postponed to a subsequent meeting, even if it is necessary to schedule a special meeting. Point 3: Tie votes – Mr. Dale discussed ties using a baseball analogy.

### **OTHER BUSINESS**

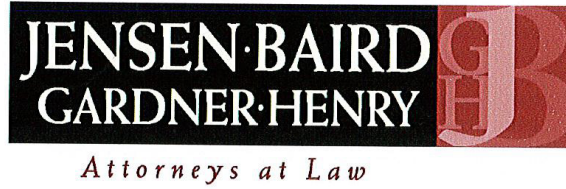
### **ADJOURNMENT**

The workshop was adjourned at 7:15 p.m. to proceed to the regularly scheduled Planning Board meeting.

Respectfully submitted,

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Barbara C. Skinner, Clerk of the Board  
\_\_\_\_\_, 2010



**TOWN OF GORHAM  
BOARD TRAINING WORKSHOP**

**April 26, 2010**

**Presented by:**

**William H. Dale, Esq.**

**Natalie L. Burns, Esq.**

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**TOWN OF GORHAM**  
**BOARD WORKSHOP SESSION**  
**APRIL 26, 2010**

- I. Jurisdictional Issues - who has authority to do what?**
- A. Planning Board
1. Zoning Ordinance
    - a. District regulations that dictate Planning Board site plan review
    - b. General standards as applicable (Chap. IV)
    - c. No authority to grant zoning variances:  
*Perkins v. Town of Ogunquit*, 1998 ME 42  
(impermissible variance)
  2. Site Plan Review Ordinance (Chap. IV, pp. 180--209)
  3. Subdivision Statute (30-A M.R.S.A. §§ 4401-4407)  
and Ordinance (Chap. III, pp. 168--178):  
*York v. Town of Ogunquit*, 2001 ME 53  
(waiver of subdivision standard ok)
  4. Impact Fee Ordinance (Chap. VII, pp. 260--270)
  5. Shoreland Zoning Ordinance
    - a. Chap. II, § I, pp. 110—128
  6. Recommendations to Town Council on Land Use Code or Comprehensive Plan amendments-requires 4 votes (Planning Board Ordinance)
  7. Special exception review (Chap. I, Sec. IV.E, pp. 17-18) *Cope v. Town of Brunswick*, 464 A.2d 223 (Me. 1983)
- B. Board of Appeals (pp. 14--19)
1. Zoning Ordinance
    - a. Administrative appeals (Chap. I, § IV)
    - b. Variance requests (30-A M.R.S.A. § 4353 (copy attached) and § IV(B)(2 & 3); disability variance
    - c. Change/enlargement of nonconforming use (Chap. I, § II, pg. 8)
  2. Shoreland Zoning Ordinance
    - a. Administrative appeals-relocation and reconstruction of nonconforming buildings (Chap. II, § I, pp. 111--112)
    - b. Variance requests (38 M.R.S.A. § 439-A; 30-A M.R.S.A. § 4353)
  3. Special amusement appeals (28-A M.R.S.A. § 1054)
  4. Farmland Registration Variances (7 M.R.S.A. § 57)

- C. Board of Assessment Review (36 M.R.S.A. § 843)
  - 1. Abatement appeals
  - 2. Poverty abatement appeals
- D. CEO
  - 1. Administration/enforcement of Zoning Ordinance (incl. building permits and Certificates of Occupancy)
  - 2. Administration/enforcement of Shoreland Zoning Ordinance
  - 3. Subdivision Statute & Ordinance (in the context of building permits)
  - 4. Administration/enforcement Floodplain Management Ordinance
  - 5. Building Code
  - 6. Dangerous Buildings
  - 7. Automobile Graveyards/Junkyards
  - 8. Failed Septic Systems; Plumbing Codes
  - 9. Biennial report to DEP re shoreland zoning: including applications submitted, permits granted or denied, variances granted or denied, revocation actions, revocation of permits, appeals, court actions, violations investigated, violations found and fees collected
  - 10. Final determination of district boundaries in shoreland zones

**II. Administrative Board Decision Making**

- A. Impartial Decision-maker, including conflicts of interest, bias, *ex-parte* communications
- B. Right-to-Know Law, including public meeting v. public hearing, site visits, use of e-mail and common violations
- C. Hearing Procedures: 30-A M.R.S.A. § 2691 (copy attached)
- D. Authority of Board to Modify
- E. Written Decision Requirements – findings & conclusions:  
*Widewaters Stillwater Co., LLC*, 2002 ME 27, 790 A.2d 597
- F. Reconsideration – Board of Appeals requirements in 30-A M.R.S.A. § 2691

**III. Variances**

- A. Types of Variances
  - (1) Dimensional variance
    - a. Zoning Ordinance Chap. I, § IV, pg. 15
    - b. Practical difficulty if not in shoreland area (Gorham has not adopted this type of variance)
    - c. Undue Hardship Test if located in shoreland area
  - (2) Use variances
    - a. Zoning Ordinance Definition (no use variances)(pg. 33)
    - b. Undue Hardship Test (pg. 15)
  - (3) Disability (30-A M.R.S.A. § 4353(4-A)) -  
Board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in

or regularly uses the dwelling [applies statewide regardless of whether adopted into ordinance]

(4) Setback variance for single family dwellings

(30-A M.R.S.A. § 4353(4-B)) [Gorham *has* adopted this test](pg. 15)

B. "Undue Hardship" Test

- (1) the land in question can not yield a reasonable return unless a 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; and
- (4) the hardship is not the result of action taken by the applicant or a prior owner

•*Brooks v. Cumberland Farms, Inc.*, 703 A.2d 223 (Me. 1997) (copy attached)

C. Single-Family Variance Test

Limited to setbacks for single-family dwelling that is applicant's primary year-round residence

- (1) same as undue hardship #2
- (2) same as undue hardship #3
- (3) same as undue hardship #4
- (4) the granting of the variance will not substantially reduce or impair the use of abutting property; and
- (5) the granting of the variance is based upon demonstrated need, not convenience and no other feasible alternative is available

D. Recording of Variance – applicant's responsibility to record within 90 days; if not recorded, variance is void.

E. Commencement and completion of construction time requirements

IV. **Question and Answer Session** (not about pending applications)