

Minutes and Exhibits From January 4, 2023 Lovell Planning Board Meeting

1. Call to Order: 7:00 PM

Heinrich: PB meeting started, there is no public right to speak, however, we do allow relevant comment from the public.

Heinrich: No screen share

Heinrich: Secretary role is open, presented to Selectboard, anyone interested

2. Attendance

Heinrich: Kevin retired. Select board can determine if assign alternate replacement before March

Heinrich: Dave Durrenberger promoted to full board member, will be secretary tonight.

Heinrich:

- PB Members present: Eugene Jordan (Eugene), Andrew Brosnan (Andrew), Diane Caracciolo (Diane), Jane Lansing (Jane), Heinrich Wurm (Heinrich), Dave Durrenberger (Dave).
- CEO Present: Alan Broyer (Alan)
- Also present: Jim Katsiaficas (Jim) Town Attorney, Mark Lopez (Mark) Bridgton Investment Fund LLC, Gordon Smith (Gordon) Attorney for Mark Lopez, and many members of the public (see attached list Public Sign In Sheet).

3. Review, Accept / Correct Minutes

Heinrich: Topic - Minutes for December 7th, amended added a sentence, noting the Library EV Charging station allowed without a Conditional Use permit, it was allowed as an Accessory Use based on current Library use. Call for vote to accept minutes of December 7th 2022; Vote unanimous to accept.

4. Conditional Use Applications – (See below)

5. New Business Conditional Use Application – None

6. Old Business Conditional Use Application - Bridgton Investment Fund LLC – Warehouse, Distribution Center

Heinrich: Applicant request to recuse PB member Dave Durrenberger. What did Dave discuss that would warrant a recusal?

Dave: Read a written explanation of one time contact with Mr. Lopez: In February 2022, a Lovell resident and Land Trust donor asked Dave to make a phone call to Mr. Lopez, February 2022, to ask Mr. Lopez if interested in selling his land for donation to Land Trust, no interest. No further calls or discussions

Mr. Lopez: Had no further questions after Dave read statement, but said was not aware of the Land Trust aspect during the phone call, but did recall stating he is not a philanthropist during the phone call

Diane: Down the road, what if questioned?

Jim: Land Trust is not personal finance issue, PB to consider if there is bias, the board can vote as to the question; can every member of the board be impartial

Heinrich Wurm: When was call made to Mr. Lopez?

Dave Durrenberger: February 2022, no cutting or digging had occurred, land was not developed.

Jim: Question the board would vote on is should Mr. Durrenberger recuse because of bias

Heinrich: Call for Vote result Eugene – Yes recuse, Heinrich – No, Andrew – No, Diane – No, Jane – No. Result = No Recusal

Heinrich: Our Eden interprets application as a Warehouse, Distribution Center, a warehouse that is specifically to be used as a distribution center.

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Gordon: The argument, Warehouse, Distribution Center and what it means, but in the Land Use, there is Church, Synagogue, so this argument of the “,” being a specific type of warehouse would make Church, Synagogue discriminatory.

Paul Denis: Board of Appeals letter from Mark Lopez to build a Phase 2 Self-Storage, indicated the Self-Storage was a Warehouse, and it was denied, so now this Distribution Center is not a Distribution Center, it's a Warehouse?

Dave: Lovell Land Use has Dwelling, Single Family; Dwelling, Two-Family; Dwelling, Multi-Family where the “,” is used to identify each specific type of dwelling unit that is permitted, as in the Warehouse, Distribution Center. So we need to consider this application as a Distribution Center.

Gordon: The terms are not defined, so courts in Maine have confirmed, they are the same. So a user will come and go and drop off and pick up.

Heinrich: This is pushing the capacity of PB, Mr. Lopez can build whatever horrible structure he can build, why do we care about what it is called

Jim: Ordinance changed since 1st self-storage was built, so when applicant came in for self-storage, BOA decided NO, then the application came in as Warehouse – Distribution Center. So is there a question about whether Warehouse, Distribution Center are two different things or not. Is the proposed use listed in the Table of Uses?

Dave: What is the proposed use?

Jim, it is a Warehouse Distribution Center, so if it meets the Land Use, it does not get referred to the CEO.

Diane: What is it being used for?

Heinrich: We have opportunity to put in Conditional requirements, per Section 9.9, Lovell has to be safe, we realize we have emotions, we can't be totally closed to business.

Eugene: The new 6.2 is about the fact that we gave permission to CEO to make decision, then there is BOA. I think there is a written determination needed per Section 6.2

Multiple PB members: What is the use; we have not been told how the building will be used?

Gordon: We don't know.

Mark: We build it and then get a tenant

Diane: What would happen if the building was built and then someone arbitrarily started using the building for whatever reason?

Gordon: The building needs to be used as a warehouse

Diane: So no storage of cars?

Gordon: So that would be automotive graveyard

Jim: Warehouse definition is “commodities” to be sold

Gordon: If tenant wanted to store other items?

Mark: It is not my intent

Paul Denis: Self-storage phase 2, they called it a Warehouse, we have been through the process once before with the same applicant. The rules are not written for the applicant to define things how they want.

Heinrich: Straw poll in favor of referring to CEO? 3 in favor, out of 5, that it should go to the CEO

Eugene: We are debating, so it should go to the CEO

Alan: I don't think it should go to CEO

Heinrich: As soon as there is a renter, it could go to CEO for a permit.

Sheri Paulette: Is our Eden a party, why are they involved?

Dave: PB questioned Warehouse, Distribution Center, and what it would really be used for, without Our Eden involvement.

Eugene: I think we need to settle the question about the issue of the definition

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Mike Lewis: Self-storage, was supposed to be closed in, it's not. And lights, are like Shawnee peak. I could drive into that place right now, no fencing, it's all lit up. What has happened already, hasn't been what they said it was going to be

Penney Williams: Will there be bathroom facilities?

Mark: Yes, 1 bathroom

Dave: Will there be heat?

Mark: No heat

Heinrich: Ready to vote?

Jim: The question is whether the application is for a Use in the Table, or if we are going to defer to the CEO to decide?

Diane: No

Jane: No

Dave: Yes, to CEO

Eugene: Yes, to CEO

Gordon: Problem is it could, go to CEO, to BOA, then Court

Heinrich: No, I want Lovell to deal with a structure like this in a reasonable way. I have a sense there are a lot of questions. I have confidence in the applicant will do the right thing.

Vote = 3 No (Do not send to CEO), 2 Yes (Send to CEO)

Gordon: Problem is it could, go to CEO, to BOA, then Court

Heinrich: Adjourn on this topic at this time, and let the CEO specify, we have many things to do

Mark Lopez: The lights were dark when I went by

Mike Lewis: Every single light was on

7. CEO Report – No report presented

8. Public Hearing – Amendments to Lovell Zoning Ordinances

Heinrich: Fortunate for citizens, Jill Rundle, Chris Brink, Linda Dunlea, Janice Arsenault, Mike Lewis, Sandy Drew, Paul Denis who were screening, researching, they created definitions, created text, Paul and Chris did a lot of work on this.

Heinrich: Article 11, this is 1 step, more to come, after presentation, there has to be a vote by the PB to send the amendment to the Select Board, they have to approve it to put it on the Warrant

Cannabis Wording Changes

Diane: Adopting words of State of Maine

Heinrich: Vote to approve? Vote = Unanimous to approve

Photographic Record

Jane: Bring up to State code, photographs, pre and post (20 days), has been State requirement for a while

Alan: I have taken photographs before and after

Eric Eames: How to photograph in the dead of winter?

Heinrich: Vote to approve? Vote = Unanimous to approve

Dock Ordinance Changes

Heinrich: Changes started from a Bliss request to change the setback (this is speculative, may have come from CEO not sure how to measure size to the current Ordinance). Ordinance came from Falmouth. We removed some language that was not scientific, added 6 feet width, 320 sq. ft. before that it was 128 sq. ft. at terminus, increased water depth to 5 feet, CEO makes decision, Waiver has been removed.

Erin Kenealy: Most people do not meet the 5 foot depth requirement in Lower Bay

Chris Brink: It's high-water mark

Erin Kenealy: I would have to go way, way out.

Chris Brink: It's defined by a mark on the Lake

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Jack Jones: If someone can't meet the 5 ft, will they be denied?

Alan: Nothing in the ordinance says I can deny them a dock

Public woman: What constitutes re-doing the dock?

Public man: Why are Docks grandfathered, these are non-permanent, why would they be grandfathered?

Heinrich: Good question, needs work, further discussion

Public man: Why don't we have permit fees, we are doing a lot to restrict people

Heinrich: Homeowners want docks, their houses are pushed back into the woods

Bill Paulmann: There has no permanent dock allowed since 1987, has to come out of water for so many months of the year, and it is Chapter 1000.

Public man: My landlords dock, that I caretake, has been in water year round, there may need to be some exceptions, to pull the dock out of the water, it will take some work. If I take it up on the beach it will destroy the beach.

Chris Brink: So if it has been in since 1920, you don't have to pull it out.

Sarah Clemons: I am concerned that state of Maine makes money from waterbody, and it is State Law, we have not been following the Law, but we are allowing grandfathering, this is very disappointing to me. If the dock is that large, it is very wrong.

Bill Paulmann: There are over 400 camps, the shoreline needs to be protected, that is the reason codes were put into place.

Heinrich: This dock ordinance has gone to the DEP and it will go back to the DEP.

Eugene: I think it is a good compromise

Sara: Did the DEP see the waiver?

Eugene: Not sure

Heinrich: Vote to approve? Vote = Unanimous to approve

Information Posting on Town Website

Heinrich: Some for and some against.

Lynn Hurd: I think the people need to know

Public woman: I think we should have timely information, I think we should do it.

Eugene: Vote to approve? Vote = Unanimous to approve

Retail Consolidation

PB member: Section 6.2 was implemented, with this amendment, will have a listing of particular retail uses you want to allow.

Vote to approve? Vote = Unanimous to approve

Land Use Edits

Public woman: Some comments, change something to Conditional

Public man: Kennels, Daycare center, why would we not allow it. Storage of chemicals, if someone wanted to be landscaper, if we look at these in total, it is all more restrictions, want to make sure we know why. Also confused about some other distinctions, and changes.

Jane: There is a distinction between having your own children or a daycare center

Eric Eames: Manufacturing is blank

Paul Denis: Next to lines are the definition

Heinrich: Vote to Approve? Vote = Unanimous to approve

Formula Business Prohibited

Dave: Presented the documented definition of a Formula Business.

Lynn Hurd: Comprehensive survey is unanimous to do what we must to preserve Lovell, we do not want a proliferation of fast food, franchises etc. Last year's comprehensive results, Lovell's future, need careful planning. Page 4 of survey: Rural character, outdoor recreation, page 9: 54% of respondents were oppose to a chain store. Page 13: Balanced growth, preserve rural character.

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Heinrich: Vote to approve? Vote to approve Formula Business Ordinance prohibiting formula businesses
= Unanimous to approve

Charging Station

Heinrich: Simple ordinance, library wanted charging stations, overview of land use by district, based on minimum parking space requirements. Questions?

Mike: What about Tesla charging stations, would they be prohibited under Formula Business?

Dave: Formula Business does not exclude automated machines

Eric Eames: Districts RP and SP say N for EV Charging, change them to P

Heinrich: Vote to approve? Vote is unanimous to approve

9. Meeting Adjourned: ~9:30 PM

- Date and Time of Next Meeting – February 1, 2023 7 PM

Additional Exhibits

Planning Board
1/4/23

Name	Address optional
William Fitzgerald	450 & 440 W Lovell RD
Janice Arsenault	230 Shave Hill Rd
LINDA NISTA	120 Cushman Rd.
Linda Durka	249 Shave Hill Rd
Mary Haron	378 Old Stage Rd.
Gary's Veramp	378 old stage Rd
Lois Boyser	191 old stage Rd.
Sandra Bell	26 EATMAN HILL RD.
David Foley	183 Christian Hill Road.
LYNN HULCI	171 Christian Hill Road
LAUREL COLE	470 SABATHUS Rd, Lovell.
Michael Yuskus	180 Christian Hill Rd, Lovell
Bill PAULMANH	67 POWERS Cmp. RD. JACKSON, ME
Jill Rundie	107 Andrew Lane
Penny Williams	274 Shave Hill Rd Lovell, ME
Dave Davis	212 Merrill Rd.
Robby Binder	485 West Lovell
Orin Kenneally	87 Mtn View Pines
Kate Gordon Jr	252 W Lovell Rd + 275 Stan City Rd
Jack Jones	289 Sabathus Road
Ama Schmitt	Mt View Pines Rd

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NAME	Address
Joseph + Jane Davis	106 Moosewood Road
Peter Henz	60 Hatches Hill Rd
Ann Prescott	60 HATCHES ROAD
Anne Pilsbury	462 Stet City
Susan Welchman	118 Stab City Rd.
Laura Sullivan	616 Stab City Rd.
Robert Prescott	51 Hatches Hill Rd.
Duff Prescott	"
Sheri Paulette	1340 main st
Norma Hamilton	133 W. Lovell Rd, Lovell
STEVE MARKOVIS	133 W. LOVELL RD
Tommie McKenzie	14 Mill St
Tim Cyr	85 Farrington Pond Rd.
Anne E Lynch	2 NORTH LOWER BAY RD.
MORA YIP	260 Sorbattus Rd.
RICHARD DUNHAM	122 MARSH ST,
Chris Bink	107 Andrews Lane
Travis Moore	1250 Wrenn St.
Erik Eames	137 Stearns Rd.

----- Forwarded Message -----

Subject: January 4, 2023 Public Hearing

Date: Wed, 04 Jan 2023 17:11:04 +0000

From: MLANIEWSKI@roadrunner.com

To: hwurm@lovelldmaine.org <hwurm@lovelldmaine.org>, planningboard@lovelldmaine.org <planningboard@lovelldmaine.org>, whwurm@gmail.com <whwurm@gmail.com>

CC: ceo@lovelldmaine.org <ceo@lovelldmaine.org>

Dear Planning Board members,

Happy New Year! I am writing this email for submission into the record for tonight's Public Hearing. I want to express my gratitude to all who have diligently worked on issues that impact our quality of life in Lovell. I support the recommended Zoning Ordinance amendments.

In particular, the Notice and Information amendment is paramount to allow for Lovell stakeholders to remain informed, engaged and active in local issues that can affect our daily lives. Lovell is blessed with many community members who are willing to lend their time and expertise to help keep our town a

Submitted by Dave Durrenberger

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cherished destination or place to call home. The Notice and Information amendment will allow for an easier flow of important information for responsible development in Lovell.

The Land Use amendment is also timely and necessary to reflect the results of the most recent Comprehensive Plan survey results. Keeping our rural character and protecting our natural resources continues to remain important to Lovell stakeholders. I support this amendment.

The Retail and Formula Business amendments also have my support. Both of these amendments bring clarity and guidance to the development of retail and formula businesses within Lovell.

Thank you for your time, expertise and dedication to our town. 2022 was a busy year for the Planning Board and I appreciate all of your hard work.

Respectfully submitted,

Mary Jo Laniewski
Christian Hill Rd
Lovell, ME

----- Forwarded Message -----

Subject:Bridgton Investment Fund, LLC CU application - January 4, 2023

Date:Wed, 04 Jan 2023 16:04:04 +0000

From:MLANIEWSKI@roadrunner.com

To:'hwurm@lovellmaine.org' <hwurm@lovellmaine.org>, 'planningboard@lovellmaine.org' <planningboard@lovellmaine.org>, 'whwurm@gmail.com' <whwurm@gmail.com>

CC:'ceo@lovellmaine.org' <ceo@lovellmaine.org>

Dear Lovell Planning Board members,

I am writing to you to express my concern over Bridgton Investment Fund, LLC's most recent attempt to add additional building space to the property on Route 5- Lake Region Safe Storage. Please enter my following thoughts and concerns into the public record.

I have been actively following the case of Bridgton Investment Fund, LLC and development of the land on Route 5. It appears that the most recent Conditional Use application submitted is yet another attempt to circumvent the will of the people of Lovell. The current application under review appears to be woefully incomplete and devoid of the necessary details for consideration of a "Warehouse, distribution center".

Since I am a layperson unfamiliar with nuances of building a distribution center, I reached out to my nephew who is an active duty Marine who is tasked with setting up distribution centers/warehouses after weather related catastrophes, war stricken zones in need of humanitarian aid, rebuilding impoverished regions, etc. The following were some of his initial questions:

Submitted by Dave Durrenberger

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- What intent is being met? For Profit vs Non-Profit? Disaster relief? Industrial?
- has coordination been established with entities responsible for distribution or is it simply storage with the reported intent to facilitate distribution? What separates the former from simply being a warehouse?
- what is being distributed? Is the intent to subcontract to independent distributors or is there a specific distribution model in place?
- are there specific regulations or ordinances that are required to be met by distribution centers? Safety features? Sanitation?
- is there infrastructure for the reported goods? Commercial refrigeration for food/medical supplies? If automotive/industrial are there HAZMAT requirements?
- is the only infrastructure storage? Are there echeloned, designated areas for staging, processing, distributing, administration? 3 most basic components of a DA: receiving dock, storage area, shipping dock. Is there a control center and offices? Are there telecommunication areas for subcontractor to control the flow of goods. Is there a way to control dispatch of incoming and outgoing goods?

As evidenced by his line of questioning, it appears that the Conditional Use application is in fact woefully incomplete. His inquiries even call into question intent- is this storage or distribution? With so many facts absent, it appears that the Code Enforcement Officer should determine if the submitted application is an allowed Land Use. A legitimate distribution center should possess an adequate infrastructure to be operational. Yet, these important details are lacking with the current application.

I appreciate your time and dedication to our town.

Respectfully submitted,

Mary Jo Laniewski
Christian Hill Rd
Lovell, ME

On 1/4/2023 3:12 PM, d.durrenberger@lovellmaine.org wrote:

PB Team,
Thoughts in red below (can't see red, please let me know).
Thanks,
Dave

From: Heinrich Wurm [<whwurm@gmail.com>](mailto:whwurm@gmail.com)

Sent: Monday, January 2, 2023 10:59 AM

To: Heinrich Wurm [<hwurm@lovellmaine.org>](mailto:hwurm@lovellmaine.org); Jane Lansing [<jane.s.lansing@gmail.com>](mailto:jane.s.lansing@gmail.com); kevin mcdonald [<coachkxc@hotmail.com>](mailto:coachkxc@hotmail.com); Kevin McDonald [<kmcdonald@fryeburgacademy.org>](mailto:kmcdonald@fryeburgacademy.org); Diane Caracciolo [<d.caracciolo@lovellmaine.org>](mailto:d.caracciolo@lovellmaine.org); 'Eugene Jordan' [<eugene@jordancustomcarpentry.com>](mailto:eugene@jordancustomcarpentry.com); Dave Durrenberger [<d.durrenberger@lovellmaine.org>](mailto:d.durrenberger@lovellmaine.org); Andrew Brosnan [<a.brosnan@lovellmaine.org>](mailto:a.brosnan@lovellmaine.org)

Submitted by Dave Durrenberger

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Cc: ceo@lovellmaine.org

Subject: Jan 4. Added Issues

Hello and Happy New Year,

In addition to our two big agenda items for Wednesday, several other issues need to be addressed. I chose to send this by email hoping we could streamline the process during the actual meeting. This email will be entered into the record of the January 4 meeting. No further discussion by email should occur.

Added Agenda items for January 4 Planning Board session:

1. Kevin McDonald decided to retire from the Planning Board effective December 31, 2022.

A. That means Dave moves up to become a regular member AND

B. We need to add to the agenda appointment of a secretary - at least for the Jan 4 meeting to get started. I am willing to volunteer as secretary. I think memorializing substantive statements and those specific numbered ordinances they pertain to, by applicant, by public or by PB is super important. I also think memorializing the wording of the motions being voted on, is super important. And when spoken words and phrases are not clear, clarification should be requested, by the secretary, real-time, before scribing the note(s), because in the end, words matter.

C. I am not sure the Select Board will appoint an Associate member to take Kevin's place before March Town meeting.

2. With Dave in the new position, and given the fact that the applicant and Dave have some type of prior business interaction which - in the applicant's view - should preclude Dave to participate in the decision making process, I am of the opinion that there is enough reason to recommend that Dave recuse himself from the discussion and decision based on possible bias which may negatively influence the overall discussion and decision making process. If Dave does disagree, the Planning - Board needs to determine whether he should recuse himself. Please review the applicable chapter in the Planning Board handbook on bias and conflict of interest re. that issue below. Pertinent sections are in bold.

In reviewing the Chapter below, it can only be tested, with specific facts, not "some type of prior business interaction" which seems very broad, from which to make decisions. We all have interactions, and opinions.

Specific facts: In February 2022, a land trust donor, on behalf of himself and like-minded potential land trust donors, asked me (Dave) to call Mark Lopez, and ask him if his land on Rte. 5 was available for purchase, with the intent of passing it to the land trust. I too have made direct contribution to the land trust, in the past. I made the phone call to Mark Lopez. I reported back to the donor, there was a lack of interest by Mark Lopez, whereas the donor also advised, there was a lack of interest by the land trust. Done.

Thanks,

Dave

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Heinrich Wurm 617-640-4395 (m) 207-925-1121 (h) Conflict of Interest; Bias; Family Relationships

The following is an excerpt from the 2017 Planning Board Manual - see attached pdf as well.

Financial Conflict of Interest

This section discusses what is legally called a "conflict of interest." It is a different type of "conflict" than the "incompatibility of office" rule discussed in Chapter 1 of this manual. This type of conflict involves a direct or indirect financial interest.

- Statutory Test. There are several tests of what constitutes a conflict of interest. One is

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established by statute in 30-A M.R.S.A. § 2605. The statutory test applies only to a board member who (1) is an “officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity” which is making the application to the board or which will be affected by the board’s decision and (2) is “directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity.” If a board member falls into one of the relationships listed in category 1 but does not have the 10% interest covered by category 2, then that board member does not have a financial conflict of interest as defined in § 2605.

- **Case Law Test.** For a board member whose conflict of interest is not governed by Title 30-A (because that board member does not fall within both categories discussed in the preceding paragraph), there is a common law (case law) standard defining activity which may constitute a conflict of interest. That standard is “whether the town official, by reason of his interest, is placed in a situation of temptation to serve his own personal interest to the prejudice of the interests of those for whom the law authorized and required him to act...” *Lesieur v. Inhabitants of Rumford*, 113 Me. 317 (1915), as cited in *Tuscan v. Smith*, 130 Me. 36 (1931).
- **Examples.** Under the statutory test, if a board member were an employee of a company which had a subdivision application before the board, there would be no legal conflict of interest requiring that board member to abstain unless he or she also had a 10% stock or ownership interest in that company. An example of an indirect conflict of interest controlled by the statute is where a board member owns a company which owns 10% of the stock of a private corporation which is making an application to the board. Under the case law test, a board member who is also the applicant would have a conflict of interest. A court probably would find that a board member also had a conflict of interest under that test where the board member is a real estate agent trying to sell the property which is the subject of the application and his or her commission on the sale hinges on whether the board grants approval of the proposed use. Likewise, if a board member is a secured creditor of the applicant whose security interest will be affected by the board’s decision on the application or an abutting property owner whose property value will be affected by the board’s action, a court might find that the board member has a common law conflict of interest. (Regarding a board member who is an abutter and whether he/she must abstain, see two articles from the May 2007 and June 2007 Maine Townsman magazine (“Ethics for Quasi-Judicial Boards” by Douglas Rooks and “Letter to the Editor” by Fred Snow), available on MMA’s website at www.memun.org. If someone from a board member’s family who lives with that board member and contributes to household expenses is employed by the person applying to the board for a permit, a court might find that a common law conflict of interest exists if approval or denial of the application will directly affect that family member’s job. See *Hughes v. Black*, 156 Me. 69, 160 A.2d 113 (1960).
- **Failure to Abstain.** If a board member who has a legal conflict of interest fails to abstain from the discussion and from the vote and fails to note the nature of his or her interest in the record of the meeting, a court could declare the board’s vote void if someone challenged it. (This abstention and reason must be permanently recorded with the town or city clerk.) But see *Nestle Waters North America, Inc. v. Town of Fryeburg*, 2009 ME 30, 967 A.2d 702 (court refused to invalidate a 4-1 vote in 2005 in which the board chair had participated, even though the board later forced the recusal of the chair in connection with a 2007 vote).
- **Appearance of Impropriety. Even if no legal conflict of interest exists, a board member would be**

well advised to avoid even the appearance of a conflict by abstaining from the board's discussion and vote. This practice will help maintain the public's confidence in the board's work. *Aldom v. Roseland*, 42 NJ Super. 495, 127 A.2d 190 (1956); 30-A M.R.S.A. § 2605. However, if abstaining where not legally required would deprive the board of a quorum, then abstaining is not recommended.

- Defined by Ordinance or Charter; Authority of Board to Determine. A municipality may define what constitutes a conflict of interest by local charter or ordinance. Even without such an ordinance provision, the courts have recognized that a board has general authority to determine whether one of its members has a legal conflict. Such a decision can be made either at the request of the affected board member or on the initiative of the rest of the board.
- Former Board Member Representing Clients Before the Board. Another conflict issue addressed by § 2605 arises in the situation where a board member who leaves the board attempts to represent a private client before the board. If the board member is trying to represent the client on a matter in which he or she had prior involvement as a board member, the statute establishes certain waiting periods before this representation would be legal. If the matter was completed at least one year before the board member left office, then there is a one year waiting period from the time the board member left. If the matter was still pending at the time the board member left and within one year of leaving, then the board member is absolutely prohibited from representing a client on that matter.
- Current Board Member Representing Clients Before the Board. Title 30-A M.R.S.A. § 2605 requires that a member of a board refrain from otherwise attempting to influence a decision in which that official has an interest. While it would not be reasonable to interpret this law as prohibiting a board member from abstaining and stepping down as a board member to present his/her own application to the board, it probably does prohibit a board member (including alternate members) from representing another applicant who is seeking the board's approval or some other party to the proceeding.

Bias

This section discusses a type of conflict that is based on a board member's state of mind or family relationship to a party to the application process.

- Bias Based on Blood/Marital Relation to Applicant or Other Party. Title 1 M.R.S.A. § 71 (6) states that a board member must disqualify himself or herself if a situation requires that board member to be disinterested or indifferent and the board member must make a quasi-judicial decision which involves a person to whom the board member is related by blood or marriage within the 6th degree (parents, grandparents, great-grandparents, great-great grandparents, brothers, sisters, children, grandchildren, great-grandchildren, aunts, uncles, great aunts/uncles, great-grand aunts/uncles, first cousins, first cousins once removed, first cousins twice removed, second cousins, nephews, nieces, grandnephews/nieces, great grandnephews/nieces). (See chart in Appendix 2)
- Bias Against a Party Based on State of Mind. Various court decisions also have established a rule requiring a board member to abstain from the discussion and the vote if that board member is so biased against the applicant or the project that he or she could not make an impartial decision, thereby depriving the applicant of his or her due process right to a fair and objective hearing. *Gashgai v. The Board of Registration in Medicine*, 390 A.2d 1080 (Me. 1978); *Pelkey v. City of*

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Presque Isle, 577 A.2d 341 (Me. 1990); Moore, Inc. v. City of Westbrook, AP-09-11 (Me. Super. Ct., Cum. Cty, March 23, 2010). [See discussion in Grant's Farm Associates v. Town of Kittery, 554 A.2d 799, 801, fn. 1 (Me. 1989) where the developer alleged that proceedings were tainted by the board's predisposition against development of the site, but the court found that there was ample record evidence to support the board's decision to deny approval.] [See also, Widewaters Stillwater Co. LLC v. City of Bangor, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001), where the court refused to find that a letter written in support of a zone change constituted evidence of a board member's bias regarding the application which was being reviewed by the board.] See also Walsh v. Town of Millinocket, 2011 ME 99, 28 A.3d 610, where the Maine Supreme Court held that the discriminatory state of mind of one board member tainted the entire proceedings because it was the motivating factor for the board's decision.

- **Burden of Proof; Examples.** The burden of proving bias is on the applicant. In *Re: Maine Clean Fuels, Inc.*, 310 A.2d 736 (Me. 1973). If a board member reaches a conclusion based on the application and other information in the record and expresses that opinion to the press before the board has voted, a court probably would not find that the board member was biased against the project. This also would be true where a board member had expressed an opinion regarding the proper interpretation of an applicable ordinance or statute. Cf., *New England Telephone and Telegraph Co. v. Public Utilities Commission*, 448 A.2d 272, 280 (Me. 1982) and *Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation*, 473 A.2d 406, 410 (Me. 1984). However, if, for example, the applicant could show (1) that the board member had a personal grudge against him because they were involved in a lawsuit relating to another matter or (2) that the board member in question had repeatedly stated that he personally found all projects of that type to be offensive and had stated further that there was no way that he (the board member) would ever vote to approve any project of that type, or (3) that prior to becoming a board member, the member in question had testified against the application in earlier planning board proceedings, a court probably would view the board member as biased. *Pelkey*, supra.

- **Investigations Conducted by Board Members; Preparation of Memo for Board's Consideration.** Sometimes board members want to collect information to help the board make its decision rather than relying solely on information presented by the applicant or other parties. Such a practice could be viewed as evidence of bias on the part of that board member, so probably should be avoided except where publicly authorized by a vote of the board. See, *Lane Construction Corp. v. Town of Washington*, 2008 ME 45, 942 A.2d 1202. If a board member does engage in such conduct, he or she should be sure that it is done in an objective way and that any information collected is entered into the board's record. The board should provide an opportunity for the applicant and members of the public to respond. 18 A.L.R.2d 562. See, *City of Biddeford v. Adams*, 1999 ME 49, 727 A. 2d 346, *In RE: Villeneuve*, 709 A. 2d 1067 (Vt. 1998), and *Duffy v. Town of Berwick*, 2013 ME 105, 82 A. 3d 148.

The Maine Supreme Court has held that it is legally permissible and not evidence of bias for a board member to review materials submitted by the parties in advance of the board's meeting and prepare a memo or an outline of issues and potential findings in order to assist the board in consideration of matters that might arise at the board's meeting. *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.

- **Local Ordinance Definition of Bias; Authority of Board to Decide.** As with conflict of interest, a municipality may attempt to define what constitutes bias through a provision in a local

ordinance. In the absence of an ordinance, the board may decide.

How the Affected Board Member Should Handle a Conflict or Bias

What does a board member do if a conflict or bias arises? If a process is spelled out in board bylaws or rules of procedure, the board member should follow that. If none, the member should make

full disclosure for the record of his or her financial interest in the matter or any bias which might prevent him or her from being impartial in the matter before the board. The board member must

abstain from any further discussion and voting as a board member on that matter. Burns v. Town of Harpswell, CV-90-1083 (Me. Super. Ct., Cum. Cty., July 10, 1991). After making these disclosures, if the board member wants to participate as a member of the public, he/she should leave his/her place at the decision-making table and take a seat in the audience.

If a board member does not believe that he or she has a conflict or bias but other members of the board disagree, the board may vote on that issue; the member with the alleged conflict or bias must abstain. State Taxpayers Opposed to Pollution v. Bucksport Zoning Board of Appeals (and AES-Harriman Cove, Inc. v. Town of Bucksport), CV-91-217 and 92-41 (Me. Super. Ct., Han. Cty., January 21, 1993). If the board finds that a conflict or bias does exist based on the facts, then the board may order the conflicted or biased board member not to participate as a member. If a board member thinks that he or she may have a conflict or bias which would legally disqualify him or her but isn't sure, that board member may ask the rest of the board to consider the facts and vote on the matter. Adelman v. Town of Baldwin, 2000 ME 91, 750 A.2d 577.

Participation by a board member with a legal conflict of interest or bias may taint the board's decision and cause a reviewing court to remand for a new hearing. A board should address issues of conflict and bias early on in the process of reviewing an application.