**STATE OF MAINE**

**SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

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**LAW COURT DOCKET NO. YOR-25-416**

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**JUDITH ANDREWS**

Plaintiff/Appellant

v.

**TOWN OF KITTERY**

Defendant/Appellee

and

**CHIP ANDREWS, ET AL.**

Parties in Interest

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**ON APPEAL FROM THE**
**YORK COUNTY SUPERIOR COURT**

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# BRIEF OF PLAINTIFF/APPELLANT

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## INTRODUCTION

This appeal presents the question of whether a municipality's planning board commits an error of law by purporting to waive certain general zoning standards that regulate all streets in that municipality in the course of approving the development of a subdivision. Appellant Judith Andrews ("**Andrews**") respectfully submits that this question must be answered in the affirmative because that is the conclusion that is required by this Court's decisions in *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106; *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172 and *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58. As established by that precedent, planning boards do not have the authority to "waive" compliance with ordinance standards of general applicably. Only a municipality's board of appeals has that power, which it wields by granting variances in accordance with 30-A M.R.S.A. § 4353. This is true regardless of whether the planning board attempts to waive a general ordinance standard in the context of reviewing and approving a subdivision. Therefore, the Planning Board ("**Board**") for appellee Town of Kittery (the "**Town**") erred as a matter of law when it approved the application submitted by parties-in-interest Chip Andrews and Anne Andrews (collectively the "**Developers**") to develop the "Twin Oaks" subdivision (the "**Subdivision**") and purported to waive the Developers' obligation to construct what is known as "Acorn Lane" in accordance with the general zoning standards that govern all streets in the Town. Despite the clarity of the law in this area, the Superior Court (*Mulhern, J.*) entered an order denying Andrews's appeal of that decision. Because the

Board's approval of the Subdivision constitutes an error of law, the Court must vacate the Superior Court's order and remand this matter to the Superior Court for the entry of an order vacating that approval.

## STATEMENT OF FACT

The Developers began the process of applying for the Subdivision on March 2, 2023 by filing, through Attar Engineering ("**Attar**"), a plan set showing the potential development of the Subdivision as, among other possibilities, a "Hybrid Conservation Subdivision" subject to (a) the provisions of the Town's Land Use and Development Ordinance ("**LUDO**") contained in Chapter 16.5, which sets forth the Town's "General Performance Standards" (the "**General Standards**") (App. 96–103); (b) the Town's subdivision ordinance, which is codified in Chapter 16.8 (the "**Subdivision Ordinance**") (App. 109–147); and (c) Chapter 16.10, which regulates conservation subdivisions (the "**Conservation Subdivision Ordinance**") (App. 148–159). (App. 163–168.) The plan sheet for the "hybrid" version of the Subdivision—and all subsequent development plans—showed a roadway that was later named "Acorn Lane" running *directly* along the northwesterly boundary line of Andrews's residence at 25 Andy's Lane (the "**Andrews Property**") that was designed to provide access to several residential lots located in immediate proximity to her property.[1] (App. 168, 171–174, 188, 195–197, 206–209.) At that time, Attar indicated that "all proposed interior

[1] The approval of the other roads and ways shown on plans for the Subdivision are not at issue in this appeal.

travelways" would be constructed in accordance with the "Class II Private Street Standards," which apply to streets on which there is expected 35 to 71 "Average Daily Trips" ("**ADT**"). (App. 163; *see* App. 160.) Those standards are contained in the table that is labeled "General Performance Standards" and titled "Table 1 Design and Construction Standards for Streets and Pedestrianways" (the "**Street Design Standards**"). (App. 160–162.) The Street Design Standards are attached to and incorporated into the Town's "Streets and pedestrianways/sidewalks site design standards" (the "**Street Standards**"),[2] which are codified in Section 27 of the General Standards.[3] (App. 96–103, 160–162.) They are not part of the Subdivision Ordinance.[4] (App. 109–147.)

[2] The Board only waived the Developers' obligation to comply with a subset of the Street Design Standards that regulate "Class III" streets. (App. 26–35, 255–256; *see* App. 160–161.) Andrews does not challenge the Board's interpretation of the other Street Design Standards through this appeal.

[3] The Street Design Standards are attached to the General Standards and incorporated into that chapter of the LUDO by reference. (App. 97–103 (LUDO ch. 16.5, § 27 (explaining that the provisions of that subsection, which includes Chapter 16.5, § 27, "must be met by *all streets within Kittery*" (emphasis added))); App. 99 (LUDO ch. 16.5, § 27.D ("Design standards for classified streets and sidewalks are those contained in attachment Table 1, Design and Construction Standards for Streets and Pedestrianways, *which is attached to this chapter*." (emphasis added))).)

[4] It is true that the digital copy of the LUDO maintained by the Town has a hyperlink to the Street Design Standards at the head of the Subdivision Ordinance. (App. 109.) However, nowhere in the text of the Subdivision Ordinance itself does it indicate that the Street Design Standards are part of—or attached to—that ordinance. (App. 109–147.) Indeed, the Street Design Standards are not even mentioned in the Subdivision Ordinance. (App. 109–147.) As will be discussed in greater detail *infra,* the Town, at all times, referenced the Street Design Standards as part of the General Standards (Chapter 16.5) and not the Subdivision Ordinance (Chapter 16.7). (App. 175–182, 244–252.) Regardless, what matters is the *substance* and *effect* of the Street Design Standards in regulating all streets in the Town, not merely their *location* in the LUDO. *York*, 2001 ME 53, ¶¶ 11–12, 769 A.2d 172.

Attar filed a preliminary application with an updated plan set for the Subdivision on September 7, 2023. (App. 169–174.) In that application, Attar (a) acknowledged that the ADT for the proposed streets in the Subdivision was 142, which was well above the maximum for "Class II" streets (of 71), but (b) still proposed to construct those streets in accordance with the Class II standards. (App. 170; *see* App. 160.) The plans submitted by Attar showed that Acorn Lane would run 1450' to the radius of a cul-de-sac and have a width of 40' and a maximum gradient of 9%. (App. 171–174.) A street with those dimensions fails to comply with not only Street Design Standards that apply to "Class II" streets but also the regulations that govern "Class III" streets (like Acorn Lane) with ADT of between 72 and 800. (App. 160–161.) In particular, the proposed dimensions of Acorn Lane—from the preliminary application to the final, approved plan for the Subdivision—violate the maximum (a) "street-length to radius" standard (1,200'), (b) width standard (60') and (c) gradient standard (8%) (collectively the "**Class III Standards**").[5] (App. 171–174, 188, 195–197, 206–209; *see* App. 160–161.)

| Dimensions | Class III Standards [Maximum] | Acorn Lane |
|---|---|---|
| **Street-Length to Radius** | **1,200'** | **1,450'** |
| **Width** | **40'** | **60'** |
| **Gradient** | **8%** | **9%** |

[5] The Street Design Standards include other regulations that control the dimensions of "Class III" streets that are not relevant to this action. For the purposes of this appeal, Andrews uses the term "Class III Standards" to refer only to the "street-length to radius" standard, the width standard, and the gradient standard that govern the Town's "Class III" streets.

Attar, in its cover letter to the preliminary application, requested, for the first time, waivers of the maximum width standard and gradient standard for Class III streets—but not the "street-length to radius" standard. (App. 170.) Attar did not explain the basis for that request (other than that Acorn Lane violated both of those Class III Standards). (App. 170.)

The Board scheduled a meeting on the preliminary application for the Subdivision for September 28, 2023. In advance of that meeting, the Town Planner drafted a memorandum that summarized the status of the discussions between Attar and the Town regarding the development of the roads in the Subdivision as "Class III" streets with "a modification to road width" and "a modification to the Class III grade maximum from 8% to 9%." (App. 175–182.) The memorandum did not mention any potential waiver or modification of the "street-length to radius" standard. (App. 175–182.) At its September 28th meeting, the Board accepted the application for the Subdivision as complete and scheduled a public hearing. (App. 183–184.)

The Board held its only public hearing on the Subdivision on October 26, 2023. (App. 189–191.) Andrews appeared at that hearing and spoke in opposition to the potential approval of the Subdivision. (App. 191.) The Board ended the portion of its meeting on the Subdivision by continuing its review for a period of no more than 90 days. (App. 191.)

Attar filed another revised application for preliminary approval on January 11, 2024. (R. 192–197.) The cover letter submitted with those materials did not reference any

waivers to any of the Class III Standards or include any narrative explaining any basis for the Board to grant the pending waiver requests. (App. 192–194.) The Board reconvened to consider the preliminary application for the Subdivision on January 25, 2024, at which time it preliminarily approved the Subdivision. (App. 198–200.)

Attar submitted the final application for the Subdivision on June 27, 2024 (the "**Application**"). (App. 201–209.) A plan sheet included in the application materials listed waiver requests for the maximum width standard and gradient standard for "Class III" streets but not the "street-length to radius" standard. (App. 206.) Nowhere in the materials filed by Attar for sketch plan approval, preliminary plan approval or final plan approval did Attar even attempt to explain how those waiver requests satisfied the standard that must be met for the Board to exercise its limited waiver authority under Chapter 16.8, § 7 of the LUDO (the "**Waiver Provision**"), which requires an applicant to affirmatively demonstrate that either the granting of a waiver would not harm "the interest of public health, safety, the natural environment, and general welfare" or that the "improvements [would be] inappropriate because of inadequacy or lack of connecting facilities adjacent or in proximity to the proposed development."[6] (App. 163–164, 169–170, 185–187, 192–194, 201–205; *see* App. 111 (LUDO ch. 16.8, § 7).)

[6] While the absence of any record evidence supporting the Developers' waiver request is indicative of their general failure to comply with the Subdivision Ordinance and the superficial review of that request by the Board, Andrews does not raise this error as grounds for this appeal because the Class III Standards are simply *not waivable,* regardless of the Developers' compliance with that provision. Even if the Developers *had* submitted sufficient evidence to satisfy the Waiver Provision, the purported waiver of the Class III Standards would still constitute an error of law by the Board that triggers vacatur.

As depicted on the plans included in the Application, Attar proposed to construct Acorn Lane on the incredibly narrow strip of land located between (a) the outer limit of the Shoreland Overlay Protection District, which extends 250' from wetlands located westerly of Acorn Lane that are within the Resource Protection Overlay District, and (b) the westerly boundary line of the Andrews Property. (App. 207–209.)

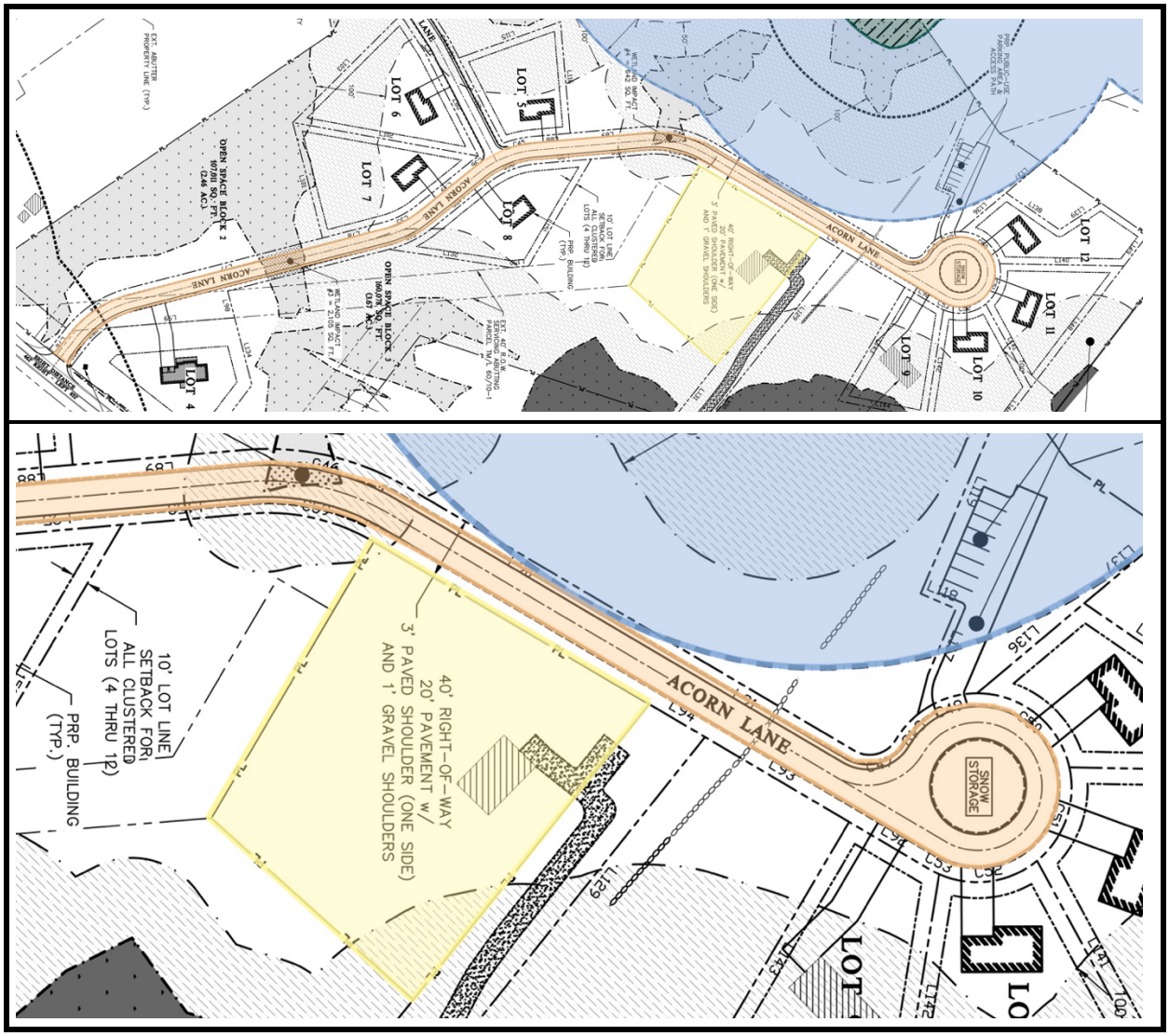


**Figure 1:** Portion of the "Conservation Subdivision Plan" sheet with revision date of June 27, 2024 with Acorn Lane highlighted in orange, the Andrews Property highlighted in yellow and the portions of the site for the Subdivision shown on that plan as burdened by the Shoreland Overlay Protection District and Resource Protection Overlay District highlighted in blue and green, respectively. (App. 207; *see* App. 214–215.)

Without waivers of the Class III Standards, it is impossible to construct Acorn Lane in the proposed location. (*See* App. 207–209.)

The Board scheduled its meeting on the Application for August 8, 2024. Before that meeting, Andrews, on August 5, 2024, filed a letter outlining several fatal defects with the Application, including, *inter alia,* the fact that (a) Acorn Lane violated the Class III Standards, (b) the Board did not have the authority to waive the Class III Standards, and (c) Attar never even requested in writing a waiver of the "street-length to radius" standard. (App. 210–235.) The Board ultimately voted at that meeting to continue its review of the Application. (App. 236–237.)

Attar submitted revised plan sheets for the Subdivision to the Board on October 10, 2024, which, for the first time, included a note referencing the potential waiver of the "street-length to radius" standard for Class III streets. (App. 239–243.)

The Board scheduled its final meeting on the Subdivision on October 24, 2024. The memorandum the Town Planner provided to the Board in advance of that meeting included the following summary of the status of the Developers' waiver requests:

> Road modification: At the sketch review, the planning board asked the applicant to provide narrower roads in their preliminary application. To comply with this, the applicant built to the standards of a Class II private street and requested a modification of road length from a maximum of 600 feet to 1,030 feet and 1,520 feet. Because this length exceeds the maximum allowable for Class II, Fire and Public Works staff requested the applicant instead build a Class III private street and seek a modification to road width. The applicant was amenable to this, and the modifications for the street are as follows:

1. Request a modification to the Class III ROW requirements from 60 feet to 40 feet, with a travel pavement minimum of 23 feet and 1-foot gravel shoulders.

2. Request a modification to the Class III ROW requirements from a maximum of 1,200 feet length to 1,450 feet for Acorn Lane.

3. Request a modification to the Class III grade maximum from 8% to 9% in a few locations of the road to be notated on the plan set . . . .

(App. 246.) The Town Planner concluded the memorandum by providing the Board the following guidance:

> Staff believe the revised plan set has taken efforts to prevent adverse impacts to the abutting property on 25 Andy's Lane. Beyond this, the Town maintains their stance that all other issues between the applicant and the residents of 25 Andy's Lane are civil issues, and not to be factored into planning board determination. Now that the applicant has provided a revised final subdivision plan, and wetland alteration plan (both of which have been vetted by relevant staff members), the plan appears ready for final approval.

(App. 253.) At that October 24th meeting, the Board voted to approve the Subdivision, adopt the draft "Findings of Fact" as the writing evidencing that approval (the "**Findings**"), and to grant waivers of the Class III Standards (the "**Waivers**"). (App. 26–35, 254–256.) The Findings include a single finding of fact on the Waivers:

> The Planning Board and Technical Review Committee both requested the applicant modify their proposed travel-way design standards from that of a Class II Private Street (with waivers) to that of a Class III Private Street (with waivers) to allow for a more substantial road base and subbase, while accommodating the narrower road width originally requested by the Planning Board to minimize the development's impacts to the natural environment.

> The Planning Board determined the requested waivers met the special circumstances and objectives set in the Subdivision Review Ordinance in section §16.8.7, as they posed no adverse impact to public health, safety, natural environment, or general welfare. With the requested modifications, the proposed subdivision and wetland alteration application conform to Title 16 and the dimensional standards in the applicable zone and overlay zones.[7]

(App. 27; *see* App. 33–34 (listing the waivers issued to the Developers).) Andrews filed an appeal of the Board's approval of the Subdivision on December 9, 2024 in accordance with Rule 80B of the Maine Rules of Civil Procedure, arguing, *inter alia,* that the Board committed an error of law by purporting to waive the Class III Standards and authorizing the Developers to develop Acorn Lane as a substandard street. (App. 18–25.) On August 7, 2024, the Superior Court denied her appeal. (App. 7–17.) This appeal followed on August 25, 2025. (App. 6.)

## STATEMENT OF THE ISSUES

1. Whether the Board erred as a matter of law by waiving the Class III Standards and approving the Subdivision despite Acorn Lane violating those standards.

[7] It is debatable whether the Board's rationale for granting the waivers satisfies the applicable legal standard, which requires a planning board to "make written factual findings sufficient to show the parties, the public, and an appellate court the basis for its decision to grant the waiver." *Bodack v. Town of Ogunquit,* 2006 ME 127, ¶ 16, 909 A.2d 620 (affirming the trial court vacating a planning board decision when the board did not make "written factual findings as to why it granted the waiver"). The Board was also obligated to consider and address Andrews's argument that the Board lacked the power to waive the Class III Standards, which it ultimately failed to do. *Portland Sand & Gravel, Inc. v. Town of Gray*, 663 A.2d 41, 43 (Me. 1995) ("A planning board has an obligation and responsibility to decide issues properly presented to it." (quotation marks omitted)); *LaPointe v. City of Saco,* 419 A.2d 1013, 1015 n.2 (Me. 1980). Nonetheless, whether or not the Board's findings are sufficient is irrelevant to this action, as the grounds Andrews has raised for her appeal concern the *authority* of the Board to grant waivers of the Class III Standards, which in no way depends on the quality of the evidence in the record or the Board's explanation for their decision to waive those regulations.

## SUMMARY OF ARGUMENT

The Board's approval of the Subdivision must be vacated because it constitutes an error of law. The Board simply lacked the authority to waive the Class III Standards because they are ordinance standards of general applicability that regulate "all streets within Kittery"—not just roads and ways within the Town's subdivisions. (App. 97; *see* App. 97–103, 160–162.) Only the Town's Board of Appeals ("**BOA**") had the power to provide relief from general ordinance regulations like the Street Design Standards, which it exercises by granting variances pursuant to 30-A M.R.S.A. § 4353. *Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58; *York*, 2001 ME 53, ¶ 9, 769 A.2d 172; *Perkins,* 1998 ME 42, ¶ 9, 709 A.2d 106. Because the Board was not vested with the power to waive the Class III Standards and Acorn Lane fails to satisfy those standards, the Board's actions in approving the Subdivision were "beyond its authority" and unlawful. *York*, 2001 ME 53, ¶¶ 11–12, 769 A.2d 172; *see Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58; *Perkins,* 1998 ME 42, ¶¶ 9–15, 709 A.2d 106. Accordingly, this Court must vacate the approval of the Subdivision. *Bizier v. Town of Turner*, 2011 ME 116, ¶ 12, 32 A.3d 1048 ("[W]e will vacate a Planning Board's decision if it includes an error of law[.]")

## STANDARD OF REVIEW

When considering an appeal of a decision by a municipal board in which the Superior Court acted in an intermediate capacity, the Law Court reviews the board's decision directly "for error[s] of law, abuse[s] of discretion or findings not supported by substantial evidence in the record," *21 Seabran, LLC v. Town of Naples*, 2017 ME 3,

¶¶ 9–10, 153 A.3d 113, "without deference to the Superior Court's ruling on the intermediate appeal," *Bizier*, 2011 ME 116, ¶ 8, 32 A.3d 1048. The proper construction of an ordinance provision is a question of law considered by the Court *de novo,* and a municipal board's interpretation of the relevant language is not entitled to any deference.[8] *Cannon v. Town of Mount Desert,* 2025 ME 86, ¶ 7, 345 A.3d 115; *Newfield Sand v. Town of Newfield*, 2025 ME 45, ¶ 11, 335 A.3d 626; *Tominsky v. Town of Ogunquit*, 2023 ME 30, ¶ 22, 294 A.3d 142. The plain meaning of the ordinance controls if its language is clear on its face. *Grant v. Town of Belgrade,* 2019 ME 160, ¶ 14, 221 A.3d 112; *Rudolph v. Golick*, 2010 ME 106, ¶ 9, 8 A.3d 694. But if a provision is ambiguous, the Court is required to "construe the terms of an ordinance reasonably, considering its purposes and structure and to avoid absurd or illogical results." *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920.

## ARGUMENT

### I. THE BOARD'S DECISION TO APPROVE THE SUBDIVISION MUST BE VACATED BECAUSE IT CONSTITUTES AN ERROR OF LAW.

#### A. The Street Standards, including the Class III Standards, are Ordinance Standards of General Applicability—not Subdivision Standards.

The Street Standards, generally, and the Class III Standards, specifically, apply to "all streets within Kittery." (App. 97, *see* App. 97–103, 160–162.) Consequently, they

[8] Likewise, the Court interprets a statute *de novo* as a matter of law. *See, e.g., FPL Energy Maine Hydro LLC v. Dep't of Envtl. Prot.*, 2007 ME 97, ¶ 11, 926 A.2d 1197.

are ordinance standards of general applicability that could not have been waived by the Board. *Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58; *York*, 2001 ME 53, ¶¶ 11–12, 769 A.2d 172; *Perkins,* 1998 ME 42, ¶¶ 9–15, 709 A.2d 106.

Although they appear on an attached table, the Street Design Standards are codified at Chapter 15, § 27.D of the LUDO, which is part of the General Standards:

> Street design standards. Design standards for classified streets and sidewalks are those contained in attachment Table 1, Design and Construction Standards for Streets and Pedestrianways, which is attached to this chapter.[9]

(App. 99 (emphasis added).) As explained in the prefatory language to the Street Standards, its subsections, including Chapter, 16.5, § 27.D, apply with equal force and effect to "all streets within Kittery"—not just streets within its subdivisions:

> The design of streets must provide for proper continuation of streets from adjacent development and for proper projection into adjacent undeveloped and open land. These design standards must be met by all streets within Kittery and control street shoulders, curbs, pedestrianways/sidewalks, drainage systems, culverts and other appurtenances.

(App. 97 (emphasis added).) The Street Design Standards are not contained in or incorporated by reference into the Subdivision Ordinance. (App. 109–147.) In fact, the Street Design Standards are not even *mentioned* in any section or subsection of that ordinance. (App. 109–147.) Nor are they referenced in any way in the Conservation

[9] "[T]his chapter" is the General Standards (Chapter 16.5)—not the Subdivision Ordinance (Chapter 16.8). (App. 99; *see* App. 96–103.)

Subdivision Ordinance (LUDO § 16.10). (App. 148–159.) That makes sense given that they regulate all streets in the Town, regardless of whether they are located within an approved subdivision. As they apply Town-wide, it would be redundant—and unnecessary—for each chapter of the LUDO that applies to different types of developments to separately reference the obligation of a developer to comply with the Street Design Standards.[10]

Notably, the definition of a "Street" adopted by the Town is quite expansive:

> STREET
> A way established or maintained under public authority, or a minimum forty-foot-wide private way constructed to Town standards as contained in Chapters 16.5 and 16.8, approved by the Planning Board and plotted, dedicated and recorded, or a way shown on a plan of a subdivision duly approved by the Planning Board. Also included are such ways as alleys, avenues, boulevards, highways, roads, streets and other rights-of-way.

(App. 83.) Incorporated into that definition are the following categories of accessways:

1. Public streets maintained by the Town;

2. Private ways of at least 40' in width that satisfy the General Standards and the Subdivision Ordinance that are "approved by the Planning Board and plotted, dedicated and recorded";

3. A way depicted on a subdivision plan that has been approved by the Board; and

4. All other "such ways," including "alleys, avenues, boulevards, highways, roads, streets and other rights-of-way."

[10] According to the bracketed note appearing on the Street Design Standards, they have been repeatedly amended by the Town through the adoption of various ordinances. (App. 160.) They are therefore part of the LUDO itself and not a separate set of technical standards that are used by the Town's planning department but that have never been formally adopted by the Town.

(App. 83.) As is evident, a "Street" is not merely a road shown on a subdivision plan but is instead multitude of means of access, ranging from alleys to highways, that are located within the Town and subject to its jurisdiction. (App. 83.)

Throughout its review of the Subdivision, the Town and the Board accurately identified the Street Design Standards as contained in Chapter 16.5 of the LUDO (i.e., the General Standards)—not in the Subdivision Ordinance (Chapter 16.8). For example, in the tables appearing in the memoranda prepared for the Board, the Town Planner uniformly listed Chapter 16.5, § 27 of the LUDO as the reference for the Town's "Street Standards" and addressed the waiver of the Class III Standards in that portion of those tables. (App. 178–180, 250–252.)

| | | |
|---|---|---|
| §16.5.27 | Street Standards | Staff suggest the right-of-way be built to the standards of a Class III private street, with the necessary modifications listed above.<br><br>Sidewalks are a requirement for a Class III private street. If the applicant requests a waiver, staff instead suggest a modification to allow a paved pedestrian way. |
| §16.5.27 | Street Standards | The plan set details the road with the proposed modifications listed above. Planning Board approval of said street modifications is required. |

**Figure 2:** Above is the portion of the table appearing in the Town Planner's September 28, 2023 memorandum discussing the Subdivision's compliance with the "Street Standards" in "§ 16.5.27." (App. 180.) Below is the row from the table addressing those standards in the Town Planner's final October 24, 2024 memorandum. (App. 252.)

Likewise, the Town Planner, when responding to an email from a member of the Board asking questions about the provisions of the LUDO that regulate streets, correctly explained that the Town's "road standards table in [the LUDO] dictat[e] *general standards for streets* based on classification." (App. 238 (emphasis added).) *Nowhere* in any materials prepared by the Town's staff did anyone ever identify the Street Design Standards as part of the Subdivision Ordinance. (App. 175–182, 244–252.) Moreover, the Town has never argued or claimed during any part of the proceedings before the Superior Court that the Street Design Standards are contained *in* or incorporated *into* the Subdivision Ordinance.

Despite the fact that the Town has at all times recognized the Street Design Standards *are* part of the General Standards and not the Subdivision Ordinance, the Superior Court denied Andrews's appeal based on (a) the premise that the Street Design Standards are "attached" to the Subdivision Ordinance and (b) the reference to the Subdivision Ordinance in the definition of a "Street." (App. 14–15.)

In reaching this conclusion, the Superior Court made five critical mistakes in interpreting the LUDO.[11]

[11] Andrews is well aware that the operative decision for the purposes of this appeal is the Board's approval of the Subdivision and that this Court owes no deference to the Superior Court's consideration of that decision. *21 Seabran, LLC*, 2017 ME 3, ¶¶ 9–10, 153 A.3d 113; *Bizier*, 2011 ME 116, ¶ 8, 32 A.3d 1048. Nonetheless, Andrews believes that a discussion of its *Order* is instructive and will help this Court understand the issues and arguments raised on appeal because the Superior Court, like the Board, misinterpreted the applicable provisions of the LUDO as granting the Board the authority to issue the Waivers. For that reason, Andrews provides the following analysis of the errors the Superior Court committed when it denied her appeal.

*First,* it is simply inaccurate that the Street Design Standards are "attached" to the Subdivision Ordinance: as clearly stated in Chapter 16.5, § 27.D, the Street Design Standards are "attached to *this chapter*" (i.e., Chapter 16.5).[12] (App. 99 (emphasis added).) No provision in the Subdivision Ordinance references the Street Design Standards, let alone states that they are "attached" to that ordinance.[13] (App. 109–147.)

*Second,* even if it was true that the Street Design Standards are attached to the Subdivision Ordinance, the fact that they are *also* attached to and incorporated into the General Standards indicates that they are ordinance standards of general applicability because the General Standards regulate not only subdivisions but also all other types of developments in the Town. (App. 96–103.) The Superior Court conceded as much in its *Order* denying Andrews's appeal:

> If [the Street Design Standards] was intended to set forth general zoning standards, as [Andrews] suggests, it would likely be attached to LUDO Ch. 16.5–General Performance Standards.[14]

(App. 8.) Yet that is *exactly* what Chapter 16.5, § 27.D says: that the Street Design Standards are "attached" to the General Standards. (App. 99.) The decision by the

[12] *See* footnote 3 and footnote 9 *supra.*

[13] *See* footnote 4 *supra.*

[14] Confusingly, the Superior Court then went on to (a) find that the Street Standards, which are part of the General Standards, both "referenc[e]" and "incorporate[e] the Street Design Standards but (b) hold that they are not general zoning standards. (App. 8.) There is simply no way to square the Superior Court's concession regarding the effect of the Street Design Standards being attached to the General Standards and its finding that they are, in fact, both "referenc[ed]" and "incorporat[ed]" into that chapter with its ultimate conclusion.

drafters of the LUDO to expressly state that the Street Design Standards are attached to the General Standards reflects their intent that the Street Design Standards serve as general ordinance standards that apply Town-wide. *Grant,* 2019 ME 160, ¶ 14, 221 A.3d 112 ("If an ordinance is clear on its face we will look no further than its plain meaning.").

*Third,* this Court established in *York v. Town of Ogunquit* that the mere fact that regulations of general applicability appear *both* in a subdivision ordinance *and* a general zoning ordinance does not transform them into subdivision standards that can be waived. 2001 ME 53, ¶¶ 11–12, 769 A.2d 172 (holding that a planning board lacked the power to waive an ordinance provision governing the width of "collector streets" even though that regulation could be found in both the municipality's subdivision ordinance and its general zoning ordinance). Instead, what matters is whether those standards apply to streets located outside of subdivisions. *Id.* When they do, they are not waivable. *Id.*

*Fourth,* the Superior Court, in interpreting the definition of "Street," focused only on the portion of that definition referencing the Subdivision Ordinance. By doing so, the Superior Court ignored not only the other categories of roads and ways that the Town defines as "Street[s]" (and which are therefore subject to the Street Design Standards) but also the reference to the General Standards in the same part of that definition in which the Subdivision Ordinance is mentioned. Because that construction renders the reference to the General Standards in that part of the definition mere

surplusage, it must be rejected.[15] *Jade Realty Corp. v. Town of Eliot*, 2008 ME 80, ¶ 8, 946 A.2d 408 ("An ordinance may not be interpreted in such a way to read a provision out of existence or to render it surplusage.").

*Fifth,* the Superior Court evidently did not understand that the Subdivision Ordinance *does* contain separate standards that *only* regulate traffic and streets in subdivisions that are simply not at issue in this appeal.[16] *In addition* to the Street Design Standards, the Developers had to satisfy Chapter 16.8, § 10.G, which required them to design all roads and ways in the Subdivision to, *inter alia,* (a) "provide the minimum sight distance according to the Maine Department of Transportation Standards" (Chapter 16.8, § 10.G(3)(a)); (b) "have sufficient capacity to avoid queuing of entering vehicles on any public street" (Chapter 16.8, § 10.G(3)(g)); and (c) "harmonize with the topographic and natural features of the site insofar as practicable by minimizing filling, grading, excavation or other similar activities which result in unstable soil conditions or soil erosion" (Chapter 16.8, § 10.G(3)(h)[1]). (App. 133–136.) Critically, *none* of those

[15] The Superior Court's interpretation is also contradicted by the plain text of the part of the definition of "Street" on which it relied, which references the "*Town standards* as contained in Chapter 16.5 and 16.8." (App. 15; *see* App. 83.) The use of the descriptor "Town standards" indicates that the regulations that follow in that clause *apply Town-wide.* If, instead, the drafters the LUDO meant to only refer to "subdivision standards" in the definition of "Street" and to imply that the Street Design Standards *are* subdivision regulations, then "[i]t is fair to presume that . . . [they] would have expressed that intention in unmistakable terms[.]" *Oakland Mfg. Co. v. Lemieux*, 98 Me. 488, 57 A. 795, 796 (1904).

[16] The Superior Court, when addressing an argument Andrews does not advance on this appeal, did cite to a portion of Chapter 16.8, § 10.G. (App. 16.) Despite that citation, the Superior Court apparently did not consider that the reference to the Subdivision Ordinance in the definition of "Street" was to that specific subsection of that ordinance. Instead, the Superior Court concluded that because the definition of "Street" references the Subdivision Ordinance, it *must* be referring to the Street Design Standards. (App. 15.) That is tautological.

subdivision-specific street standards were waived by the Board or are the subject of this appeal. (*See* App. 26–35.) The reference, then, to the Subdivision Ordinance in one *part* of the definition of "Street" cannot reasonably be interpreted as indicating that the Street Design Standards (a) are part of the Subdivision Ordinance and (b) apply exclusively to streets within subdivisions.

The Street Design Standards are, instead, ordinance standards of general applicability that regulate *not only* roads and ways shown on an approved subdivision plan *but also* all other *public* and *private* roads and ways in the Town, from "highways" to "alleyways." (*See* App. 83.) That is the only possible conclusion given the express language of the LUDO and its general structure.[17] *Chamber of Com. v. City of Portland,* 2021 ME 34, ¶ 24, 253 A.3d 586 ("We construe words in an ordinance according to their plain meaning and construe undefined or ambiguous terms reasonably with regard to both the objects sought to be obtained and to the general structure of the ordinance

[17] This conclusion is reinforced by, among other provisions of the LUDO, the repeated references in the Street Standards to streets serving any "development," which is broadly defined to mean any "change in land use involving alteration of the land, water or vegetation" or "[t]he addition or alteration of structures or other construction not naturally occurring." (App. 57–58.) For instance, the stated purpose of the Street Standards is to "provide for proper continuation of streets from adjacent *development* and for proper projection into adjacent undeveloped and open land." (App. 97 (LUDO ch. 16.5, § 27 (emphasis added)).) Likewise, subsection B, which sets standards for the "[l]ayout" of a street, requires that any "development"—not "subdivision"—"expected to generate [ADT] of 201 or more trips per day is to have at least two street connections with existing public street(s)." (App. 97 (LUDO ch. 16.5, § 27.B(3).) If legislative body of the Town intended that the Street Standards, including the Street Design Standards, applied *only* to streets in subdivisions, then it is reasonable to expect that the text would reflect that intention. *Lemieux*, 98 Me. 488, 57 A. at 796. Rather, the plain text of the Street Standards evidences an opposite intention—viz., to set forth standards that apply to *all* streets in the Town. *See Power v. Town of Shapleigh*, 606 A.2d 1048, 1049 (Me. 1992) ("In determining that intent, the plain meaning of the language controls.").

as a whole." (quotation marks omitted)). The mere fact that developers of subdivision need to comply with the Street Design Standards does not transform them into subdivision standards. *York*, 2001 ME 53, ¶ 12, 769 A.2d 172. Because the Street Design Standards are indisputably ordinance standards of general applicability, they could not have been, for the reasons outlined below, "waived" by the Board.

**B. The Board Did Not Have the Authority to Waive the Class III Standards.**

This Court's precedent could not be clearer on this point: any purported waiver of general ordinance standards by a planning board is a legal nullity because only a municipality's zoning board of appeals has been vested with that power under 30-A M.R.S.A. § 4353.[18] *Sawyer*, 2004 ME 71, ¶ 12, 852 A.2d 58 ("Based on the home rule

[18] Planning boards, as tribunals of limited jurisdiction, do not possess any *inherent* authority to regulate or control private property; instead, they are creatures of statute with only those powers conferred upon them by the Legislature or arising by necessary implication. *Hopkinson v. Town of China*, 615 A.2d 1166, 1167 (Me. 1992); *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223, 225 (Me. 1983); *see Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 17, 45 A.3d 707 ("Land use regulation is an area in which the Legislature has explicitly restricted the home rule authority of municipal governments. Thus, municipalities may not, under the guise of home rule authority, circumvent the zoning procedures of the land use regulation statute." (citations omitted)). The Legislature, through 30-A M.R.S.A. § 4353, has purposefully curtailed the authority of planning boards to vary compliance with general ordinance standards by exclusively granting that power to boards of appeals:

> The Legislature had no trouble specifying the precise and limited circumstances in which planning boards would be accorded limited powers. The statutory language is clear that allowing planning boards variance-granting powers would frustrate the purpose of the statute.

*Perkins*, 1998 ME 42, ¶ 9, 709 A.2d 106; *see York*, 2001 ME 53, ¶ 10 n.9, 769 A.2d 172 (explaining that the power of a municipality to grant waiver authority to a planning board is restrained by 30-A M.R.S.A. § 3001, which vests home rule authority in a municipality); As a result, a municipality cannot get around this restraint on the power of planning boards to, in effect, grant variances by redefining the "waiver" of a general ordinance standard as something other than a variance. *Sawyer*, 2004 ME 71, ¶ 4, 852 A.2d 58. Nor does the remit of a planning board expand to fill any void resulting from a municipality limiting the jurisdiction of its board of appeals. The Legislature, by vesting in boards of

provisions in 30–A M.R.S.A. § 3001 . . . . a zoning ordinance that gives a Planning Board waiver authority is preempted by 30–A M.R.S.A. § 4353 if the waiver is in reality the power to grant a variance." (quotation marks omitted)); *York*, 2001 ME 53, ¶ 12, 769 A.2d 172 ("[A planning board] is not granted the authority to waive Zoning Ordinance provisions. This is the basis of our holding in *Perkins*, that Zoning Ordinance provisions are specifically subject to the variance analysis mandated by state statute in 30–A M.R.S.A. § 4353(4)[.]"); *Perkins,* 1998 ME 42, ¶ 9, 709 A.2d 106 ("To the extent, however, that, pursuant to [the town's waiver provision], the Planning Board's authority to grant a waiver is in reality the power to grant a variance, such authority is prohibited by clear implication. Such a scheme would permit a town to circumvent the Legislature's express and implicitly exclusive grant of variance-granting authority to boards of appeals.").

This bright-line rule is easy to understand and straightforward to apply. As explained in and required by *York,* the simple question for this Court to answer is whether the Street Design Standards, which include the Class III Standards, apply solely to subdivisions. If they do, then the Board potentially had the power to waive the

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appeals the power to provide relief from ordinance standards of general applicability, has impliedly preempted municipalities from granting that same authority to their planning boards. *Sawyer,* 2004 ME 71, ¶ 12, 852 A.2d 58, 62 ("Based on the home rule provisions in 30–A M.R.S.A. § 3001[,] . . . a zoning ordinance that gives a Planning Board waiver authority is preempted by 30–A M.R.S.A. § 4353 if the waiver 'is in reality the power to grant a variance.'" (quoting *Perkins*, 1998 ME 42, ¶ 9, 709 A.2d at 108)). This means that even if the Town had, through the LUDO, restricted the power of the BOA to grant variances for regulations like the Street Design Standards, that authority is not somehow transferred to the Board by implication.

Developers' compliance with those regulations through the exercise of the authority granted to the Board by the Waiver Provision. *York,* 2001 ME 53, ¶¶ 10–11, 769 A.2d 172 (recognizing that planning boards do have the power to waive "Subdivision Standards alone"). If they do not, then only the BOA could relieve the Developers of their obligation to construct Acorn Lane in accordance with the Class III Standards by granting them a variance. *Id.* ¶ 12. The result is the same regardless of whether (a) the ordinance expressly states that any waiver by a planning board "shall not be construed as granting variances to relieve hardship,"[19] *Sawyer*, 2004 ME 71, ¶ 4, 852 A.2d 58, and/or (b) the standard is imposed by the provisions of a subdivision ordinance *and* a general zoning ordinance,[20] *York*, 2001 ME 53, ¶ 12, 769 A.2d 172.

Because the Street Design Standards *do not* apply exclusively to subdivisions, the Board acted unlawfully by issuing the Waivers and approving the development of Acorn Lane as a substandard street. *It is that simple.* As explained above, the Class III Standards, like the rest of the Street Design Standards, regulate "all streets within Kittery." (App. 97.) They are expressly attached to and incorporated into the General Standards. (App.

[19] It is therefore irrelevant that the Waiver Provision states that the Board can exercise its limited authority to waive compliance with subdivision regulations only when such "waivers do not have the effect of nullifying the intent and purpose of the [Town's] Comprehensive Plan and [the LUDO]." (App. 111.)

[20] Notably, this case does not even present as close a call as *York*. There, the Court held that a planning board could not waive an ordinance standard even though that regulation, which governed the width of "collector streets," was contained in both the municipality's subdivision ordinance and its general zoning ordinance. *York*, 2001 ME 53, ¶¶ 11–12, 769 A.2d 172. Here, the Class III Standards are only incorporated into and attached to the General Standards, which are set forth in LUDO § 16.5. (App. 96–103.)

99.) They are not part of or referenced in the Subdivision Ordinance. (App. 109–147.) The definition of "Streets" includes *not only* streets depicted on approved subdivision plans *but also* several other categories of roads and ways within the Town's jurisdiction. (App. 83.) The Class III Standards are therefore *not* subdivision regulations subject to the Board's waiver authority, *see York,* 2001 ME 53, ¶¶ 10–11, 769 A.2d 172, but instead ordinance standards of general applicability that the Developers were required to satisfy, absent the grant of a variance by the BOA, *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, ¶ 19, 852 A.2d 58 ("As we held in *Perkins* and *York*, a Planning Board's modification of a binding zoning requirement is, in effect, a variance that must instead be committed to the discretion of a [zoning board of appeals].").

### C. The Board Erred as a Matter of Law by Approving the Subdivision and the Development of Acorn Lane as a Substandard Street.

By issuing the Waivers, the Board effectively granted the Developers a variance.[21] *Perkins*, 1998 ME 42, ¶ 12, 709 A.2d 106 (explaining that "a waiver whose direct effect

[21] Variances are a remedy of last resort intended to be limited to only "those situations where the application of the ordinance bears so little relationship to the purposes of zoning that, as to that property, the regulation is, in effect, confiscatory or arbitrary." *Hill v. Town of Wells*, 2021 ME 38, ¶ 22, 253 A.3d 1161 (alterations omitted); *DeSomma v. Town of Casco*, 2000 ME 113, ¶ 13, 755 A.2d 485 ("[P]roviding for variances prevents a municipality's zoning ordinance from constituting a regulatory taking when applied to particular properties."). They are not a tool to be used regularly or routinely in the context of approving potential land uses like subdivisions. Nor are they to be granted based merely on applicants demonstrating (a) that no "harm[ ]" will result if they do not abide by a general ordinance standard or (b) that complying with that standard would be "inappropriate" under the circumstances. (*See* App. 111 (the Waiver Provision).) The policy and intent behind allowing for variances in only exceptional cases would be significantly—if not completely—undermined if planning boards could effectively grant variances from general zoning ordinances as "waivers" and allow applicants to circumvent the strict standard to establish the requisite "undue hardship" that has been set forth by the Legislature in 30-A M.R.S.A. § 4353(4).

is to circumvent a zoning requirement" is a variance); *see Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden*, 2000 ME 179, ¶ 18, 760 A.2d 257 (defining a "variance" as "authority . . . to use property in a manner prohibited by a zoning ordinance absent such a variance.")

That was illegal.[22] *Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58; *York*, 2001 ME 53, ¶¶ 9, 11–12, 769 A.2d 172 ("[O]nly the board of appeals is vested with the authority to grant a variance of zoning ordinance provisions."); *Perkins,* 1998 ME 42, ¶ 15, 709 A.2d 106 ("Because 30–A M.R.S.A. § 4352 and the statutory scheme of which it is a part impliedly preempt municipal authority from granting relief equivalent to a zoning variance, the waiver provision is invalid.").

The Board therefore erred as a matter of law by approving the Subdivision despite Acorn Lane violating the Class III Standards. *See Camp v. Town of Shapleigh*, 2008 ME 53, ¶ 13, 943 A.2d 595 (characterizing a municipal approval based on a misinterpretation of an ordinance standard as an error of law). Because that error is a fatal defect, the

[22] It does not matter whether the Developers, in fact, applied for and/or were denied a variance for the Class III Standards. In none of the precedent that governs the resolution of this appeal did the Court indicate that whether an applicant had gone through the process of seeking a variance had any bearing on the power of a planning board to waive general ordinance standards. Instead, the scope of that authority depended entirely on the Court's interpretation of 30-A M.R.S.A. § 4353 and 30-A M.R.S.A. § 3001, *Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58; *York*, 2001 ME 53, ¶ 12, 769 A.2d 172; *Perkins,* 1998 ME 42, ¶ 15, 709 A.2d 106, which is purely a matter of law, *see, e.g., York Mut. Ins. Co. v. Bowman*, 2000 ME 27, ¶ 5, 746 A.2d 906 ("Statutory interpretation is a matter of law[.]").

approval of the Subdivision "*must* be vacated."[23] *Sawyer*, 2004 ME 71, ¶ 19, 852 A.2d 58 (emphasis added).

## CONCLUSION

For the foregoing reasons, Andrews respectfully requests that this honorable Court (1) vacate the Superior Court's order denying Andrews's appeal and (2) remand this matter to the Superior Court for the entry of an order vacating the approval of the Subdivision.

Dated: December 5, 2025.

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[23] Andrews is cognizant of the language in *York* indicating that the Court may opt to vacate only the portion of an approval through which a planning board improperly waived a general ordinance standard. *York*, 2001 ME 53, ¶ 13, 769 A.2d 172. However, it is unclear how the remainder of the Board's decision to approve the Subdivision can possibly survive in its current form if only the Waivers are vacated given that Acorn Lane is the street providing access to several proposed lots within the Subdivision. (App. 242.) At the very least, the Developers will need to either obtain a variance of the Class III Standards from the BOA or submit a new plan for a redesigned Subdivision that does not involve the development of Acorn Lane, which would trigger additional review by the Board. Notably, when faced with a similar situation, this Court simply affirmed the Superior Court's decision to vacate a subdivision approval instead of remanding the matter to the planning board for further proceedings. *Bodack,* 2006 ME 127, ¶¶ 13–16, 909 A.2d 620. This Court provided that remedy even though the board's written findings on the waivers it issued were legally deficient. *Id.* ¶ 16. Consequently, Andrews believes it is prudent for the Court to follow the general rule that an error of law triggers vacatur, even though the Developers may ultimately be able to proceed with the development of the remainder of the Subdivision that does not rely on Acorn Lane for access. *See, e.g., D'Alessandro v. Town of Harpswell,* 2012 ME 89, ¶ 5, 48 A.3d 786. ("In general, we will vacate a municipal board's decision on appeal if it includes an error of law[.]")