

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

*Appellant*

v.

TOWN OF KITTEERY *et al.*

*Appellee*

And

CHIP ANDREWS, *et al.*

*Parties-in-Interest*

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

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BRIEF OF APPELEE TOWN OF KITTEERY

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Dated: January 22, 2026

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## **I. INTRODUCTION**

Plaintiff/Appellant Judith Andrews (“Appellant”) has alleged that the Town of Kittery Planning Board (the “Board”) erred in waiving the Class III Street Standards (the “Street Standards”) outlined in the Town’s Subdivision Review Standards, which themselves are housed within the Town’s Land Use and Development Ordinance (“LUDO”), when reviewing a conservation subdivision application submitted by Parties-in-Interest Chip Andrews and Anne Andrews (the “Applicants”). Because the Board is empowered to waive specific review standards when evaluating subdivision applications, and the Street Standards are review standards, this appeal should be denied.

## **II. STATEMENT OF FACTS**

On February 8, 2022, the Applicants submitted a sketch plan application for a subdivision proposed at 47 Cutts Road, Kittery, Maine to the Town for review in accordance with the LUDO (the “Application”). (R. 1.) Between February 2022 and October 2024, the Application underwent extensive review and consideration in the sketch plan, preliminary plan, and final plan reviews before the Board over the course of ten separate meetings conducted between March 10, 2022 and October 24, 2024 (R. 14, 19, 44, 63; 319; A. 183, 189, 199, 236, 254). During this review process the Application underwent multiple revisions in response to comments from Town Staff, the Board and members of the public, including the Appellant. The modifications most relevant to this appeal are the Application’s change from a

cluster development application (R. 1, 58-60; A. 163) to a conservation subdivision (A. 175) and changes to Acorn Lane, a proposed road within the subdivision.

Conservation subdivisions are governed by Chapter 16.10 of the LUDO. (A. 148-159.) The LUDO provides that conservation subdivisions are intended to:

[A]llow new concepts and innovative approaches to housing and environmental design so that the Town's natural, scenic, cultural, marine and historic resources may be preserved, thus meeting the relevant objectives of the Comprehensive Plan, while limiting the costs and impacts of development on the community and mitigating the effects of climate change.

LUDO, §16.10.1 (A. 148.)

Conservation subdivisions are subject to the same application and review process as conventional subdivisions and must meet the same performance standards as convention subdivisions, with some additional requirements. LUDO, §§ 16.10.4(A), 16.10.5(B) (A. 149, 151.) Conservation subdivisions differ from the conventional subdivisions governed by Chapter 16.8 of the LUDO in their emphasis on the preservation of natural features and preservation of open space LUDO, §16.10.1 (A. 150-151.) The Town has incentivized the use of conservation subdivisions by allowing them as a permitted use in certain zoning districts while making conventional subdivisions a special exception use. LUDO, § 16.4.10(D) (A. 91-92.) Additionally, the Town has provided for relaxed dimensional standards within conservation subdivisions to give applicants and the Planning Board the flexibility necessary to balance the Town's conservation and environmental goals with an applicants' need for economically feasible development. *Id.* (A. 92-93.)

Acorn Lane is a proposed private street within the subdivision. (A. 195.) It serves as the primary access point for the subdivision and runs from Cutts Road to the four most northerly lots. *Id.* Acorn Lane is also proposed to serve as a means of public access to trails located on property abutting the subdivision and owned by the Kittery Land Trust. (R. 24, A. 195.) As a proposed street within a subdivision, Acorn Lane must be constructed in accordance with the Street Standards, which are contained within Section 16.5.27 and a referenced Table 1 of the LUDO. (A. 97-103, 160-161.) The Applicants initially proposed that Acorn Lane and other interior roads would be built to the standards for a Minor Street, with a 22-foot-wide paved surface. (R. 7.) At the sketch plan review phase, the Board requested that the Applicants provide narrower roads within the subdivision to minimize the development's footprint and environmental impacts. (A. 176.) To accommodate this request, the Applicants subsequently proposed constructing Acorn Lane to the standard for a Class II Private Street. (A. 163.) Because the total length of Acorn Lane is approximately 1,450 feet and the Street Standards limit the length of Class II Private Streets to 600 feet, the Applicants requested a waiver of the maximum length requirement on September 7, 2023. (A. 170, 160.) Based on input from the Board and Town staff, the Applicants subsequently proposed constructing Acorn Lane to the standards of a Class III Private Street, which have a maximum length of 1,200 feet (A. 160), and requested waivers from several other applicable standards to accommodate the Board's earlier requests. (A. 176.) The Applicants requested waivers of the Street Standards' right-of-way width, maximum grade, sidewalk, and

maximum length requirements, which were considered by the Board on September 28, 2023 (A. 176), October 26, 2023 (R. 134-35), January 25, 2024 (R. 165), August 8, 2024 (R. 253) and October 24, 2024 (R. 326, A, 244). All requested waivers, including the waiver of the maximum street length from 1,200 feet to 1,450, were included on the final plan submitted to the Board on October 10, 2024. (A. 239-240, 195.)

On October 24, 2024, the Board approved each requested waiver and the Application. (R. 365, A. 27.) The Appellant brought this Rule 80B appeal by complaint dated December 6, 2024. The Superior Court denied the Appellant's appeal by written order dated August 7, 2024. (A. 7). The Appellant filed this appeal by notice of appeal dated August 22, 2025.

### **III. ISSUE PRESENTED**

Does the mere inclusion of the Street Standards within the Town's Land Use and Development Code render them unwaivable zoning standards?

### **IV. SUMMARY OF ARGUMENT**

This Court has repeatedly held that planning boards do not have the authority to modify zoning standards due to the limitations on municipal home rule authority established by 30-A M.R.S. §4353. However, where an ordinance is not in the nature of zoning, a planning board may exercise waiver authority, as long as doing so does not circumvent a zoning requirement. *Compare Perkins v. Town of Ogunquit*, 1998 ME 42, ¶ 13, 709 A.2d 106 (invalidating planning board waiver of zoning standards) *with York v. Town of Ogunquit*, 2001 ME 53, ¶ 10, 769 A.2d 172 (approving

planning board waiver of municipal subdivision standards). Here, the Appellant misreads State law and this Court's prior holdings to argue that *any* provision of a land use ordinance that is not specifically located within the provisions governing subdivision review and approval constitutes zoning and cannot be modified except by a variance granted by a board of appeal. The Appellant is incorrect and her expansive argument should not be adopted by this Court.

The Street Standards are not an exercise of the Town's zoning authority and do not constitute "zoning" within the ambit of 30-A M.R.S. §4353 or this Court's relevant precedent. Because the Street Standards apply uniformly across Kittery, they do not meet this Court's test set forth in *Wister v. Town of Mt. Desert* to qualify as a zoning standard. The Street Standards are general land use standards, not zoning, and in their application are more akin to subdivision standards than to zoning standards. As a result, this Court's holdings in *Perkins*, *York* and *Sawyer*, upon which Appellant's argument is wholly premised, are both factually and legally distinct from the instant appeal and should not apply. The Planning Board has the authority to modify the Street Standards under the LUDO and State law, and the Appellant's appeal should be denied.

Adopting the Appellant's position that only the Board of Appeals may waive non-zoning or subdivision standards would hamstring municipal administrative review processes, lead to disjointed development review and require unnecessary duplication of land use ordinance provisions, inviting further administrative errors. Well established precedent militates against adopting an ordinance interpretation

that would have such illogical results.

## V. STANDARD OF REVIEW

When evaluating a municipal decision where the Superior Court acted in an appellate capacity, the Law Court directly reviews the operative decision of the municipality. *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 5, 237 A.3d 175. “The interpretation of an ordinance is a question of that that [this Court] review[s] de novo, with no deference to the local board’s interpretation.” *Stiff v. Belgrade*, 2024 ME 68, ¶ 12, 322 A.3d 1167. An ordinance shall be construed “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. Last, in construing ordinances, this Court’s task is to “discern the intent of the legislative bodies that enact them.” *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 18, 772 A.2d 256.

## VI. ARGUMENT<sup>1</sup>

### A. The Street Standards are not “Zoning.”

Title 30-A, section 4301 of the Maine Revised Statutes differentiates between a “land use ordinance” and a “zoning ordinance”, defining the later as subset of land use ordinance “that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district.” 30-A M.R.S. §4301(15-A). This Court has repeatedly acknowledged the difference between “zoning” and other

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<sup>1</sup> In her brief to the Superior Court, Appellant argued, in part, that: (1) the Board’s modifications to the street in question were not related to an improvement within the meaning of the Board’s waiver authority; and (2) the Board does not have the authority to waive requirements of conservation subdivisions. It appears that Appellant has not raised these arguments on appeal to this Court. However, to the extent that Appellant does seek again to litigate these issues, the Town incorporates by reference its arguments previously made in briefing to the Superior Court. *See* Rule 80B Brief of Town of Kittery, Feb. 25, 2025, at 7-11.

municipal regulation. In *LaBay v. Town of Paris*, this Court concluded that a building code ordinance containing minimum construction standards was not zoning because the ordinance “regulates in a general and uniform city- or town-wide manner[.]” 659 A.2d 263, 265 (Me. 1995). In *Shadan v. Town of Skowhegan*, this Court differentiated between subdivision regulations and zoning, stating “[r]egulation of a subdivision is not zoning. Rather, such regulation protects the public health, safety, and welfare through the imposition of reasonable site-specific restrictions that ensure municipal control by ‘flexible and practical means.’” *Shadan*, 1997 ME 187, ¶ 15, 700 A.2d 245 (citation omitted). In *Perkins*, this Court acknowledged the distinction between ordinances that “are ‘general and uniform city-wide’ from those that by statutory definition necessarily divide a municipality into different zones[.]” *Perkins v. Ogunquit*, 1998 ME 42, ¶ 11, 709 A.2d 106. In *Wister v. Town of Mt. Desert*, this Court summarized prior case law, noting a city-wide ordinance for gravel excavation was “general and uniform citywide” and not “zoning” which “necessarily divide[s] a municipality into different zones in which different proscriptions apply.” *Wister*, 2009 ME 66, ¶ 24, 974 A.2d 903. Each of these cases stands for the proposition that not all ordinances or provisions that apply standards to the use of land within a municipality constitute “zoning.” Therefore, such provisions do not trigger the statutory limitations on municipal home rule provided by 30-A M.R.S. §4351.

The Street Standards are not “zoning” and are not part of the Town’s “zoning ordinance.” The Street Standards are contained in Chapter 16.5.27 of the Town’s

LUDO and provide general standards that apply to municipal review of proposed streets. (A. 97-103). Notably, the Street Standards are contained in a chapter that is wholly separate from the Town’s zoning provisions. (A. 97-103). The Appellant has not provided any argument or evidence suggesting that the Street Standards are incorporated or contained in the Town’s zoning provisions or that they are applied differentially based on zoning districts. (*See generally* Blue Br.). Instead, the Appellant has repeatedly stated that the Street Standards apply Town-wide and are not differentially applied based upon the particular zone or district in which a development is located. (Blue Br. at 16, 17, 18, 22, 23, 24, 27). Despite asserting these facts, the Appellant fails to acknowledge that, as a result, the Street Standards do not satisfy the fundamental requirement of a “zoning ordinance” under 30-A M.R.S. §4301—the application of different regulations in different districts. *See LaBay v. Town of Paris*, 659 A.2d at 265. Because the Street Standards apply uniformly across the Town, they do not involve the “different proscriptions and reasonable application of different regulations in [ ] different zones.” *See Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 24, 974 A.2d 903. Consequently, the Street Standards cannot and should not be considered zoning and the limitations of 30-A M.R.S. §4353 do not apply to bar their waiver.

The Appellant’s attempts to cover up this glaring issue are unavailing. The Appellant first points to *York v. Town of Ogunquit*, in which this Court held that the inclusion of a street width requirement within both a subdivision ordinance and zoning ordinance triggered the application of 30-A M.R.S. §4353. (Blue Br. at 22).

However, the present case is factually distinct from *York* because the Street Standards are not contained in the Town’s zoning ordinance and are therefore not subject to the restrictions of 30-A M.R.S. §4353. *See York*, 2001 ME 53, ¶11. Second, the Appellant simply asserts that the limitation imposed by 30-A M.R.S. §4353 apply not just to zoning ordinances but to all “general ordinance standards.” (Blue Br. at 22). This expansive argument must fail because it ignores both the explicit wording of 30-A M.R.S. §4353, which limits its application to “zoning ordinances” and the limitation on the Legislature’s preemption of municipal home rule. *See* 30-A M.R.S. §4353, 30-A M.R.S. §3001 (“The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.”). Furthermore, none of the precedent the Appellant relies upon supports the argument that planning boards cannot waive generally applicable ordinance standards—rather, these cases merely hold that planning boards may not waive generally applicable zoning standards. *See Perkins*, 1998 ME 42, ¶13 (“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.”); *York*, 2001 ME 53, ¶ 12 (“Although the Board may waive Subdivision Standards requirements, it is not granted the authority to waive Zoning Ordinance Provisions.”); *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, ¶ 19 (“[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 ZBA.”). Since the

Street Standards are not in the nature of a zoning ordinance or contained within the Town's zoning regulations, they are not subject to the limitations of 30-A M.R.S. §4353, and may be waived by the Planning Board.

**B. The Planning Board's waiver of the Street Standards does not frustrate or circumvent zoning requirements.**

The Planning Board's waiver authority does not function as a means of circumventing applicable zoning requirements. In *Perkins*, this Court noted that a waiver granted from a non-zoning municipal ordinance "whose direct effect is to circumvent a zoning requirement" may be considered an impermissible variance. *See Perkins*, 1998 ME 42, ¶12. Here, there is no evidence before the Court that the Board's waiver circumvented or affected any Town ordinance provisions other than the generally applicable Street Standards. However, there is evidence before this Court demonstrating that the Planning Board's waiver was granted to further, rather than frustrate, the purposes of the LUDO.

In granting the requested waivers from the Street Standards, the Planning Board concluded that the waivers would both improve the construction of Acorn Lane and minimize impacts to the natural environment while posing no adverse impacts to public health, safety, the natural environment or general welfare. (A. 26-35). This supports both the central purpose of conservation subdivisions under the LUDO by minimizing development footprint and preserving natural resources (A. 148-149, LUDO §16.10.1) while also ensuring the safety and welfare of Town residents by creating an improved roadway (A. 148, LUDO §16.8.1.A). The

Appellant has not provided any argument or evidence to contradict the Planning Board's conclusions or suggest that they were unfounded. Similarly, the Appellant has not argued that granting the requested waivers ran contrary to the fundamental purposes of the LUDO or circumvented any specific requirements of the Town's zoning requirements. As such, the Planning Board's conclusions are owed deference. *See Day v. Town of Hiram*, 2025 ME 8, ¶ 9, 331 A.3d 365 (affording substantial deference to fact-finder's determination of what meets ordinance standards). In the absence of any evidence indicating that the Planning Board's waiver of the Street Standards circumvented or frustrated the Town's zoning standards, the Appellant's appeal must be denied.

**C. The Street Standards are comparable to subdivision standards and the Planning Board properly exercised its waiver authority.**

The Street Standards function as subdivision standards for purposes of the LUDO and the Planning Board's waiver authority is therefore well established. The Street Standards are not zoning ordinances or standards, rather they are generally applicable performance standards governing the development of streets. Under the Town's LUDO, municipal review of the development of streets is virtually limited to either site plan or subdivision review in all cases. (*See* A. 83, 97-103, LUDO § 16.5.27). The Street Standards are designed to ensure that streets are developed to, *inter alia*, provide adequate circulation, access to lots, and proper grading and sightlines. (A. 97, LUDO §16.5.27) These various requirements are intended to protect public health, safety and welfare and are therefore more like subdivision

standards than zoning standards. *See Shadan v. Town of Skowhegan*, 1997 ME 187, ¶ 15 (noting that subdivision regulations protect public health, safety and welfare by ensuring municipal control). Additionally, while they are not incorporated into the Town’s subdivision review standards directly by reference, the Street Standards are necessarily implicated in subdivision approval and are therefore comparable to a subdivision standard. (*See* A. 122, LUDO § 16.8.9.D(4)(b)(1) (requiring compliance with Town ordinances); A. 142, LUDO § 16.8.11.C(2) (requiring compliance with Street Standards prior to issuance of certificates of occupancy within an approved subdivision).) It would strain reason to suggest that the Town’s functional limitation of the review of streets to site plan and subdivision review was intended to have them treated as anything other than a subdivision or site plan review standard. *See Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 18, 772 A.2d 256 (noting that in construing ordinances, this Court’s task is to “discern the intent of the legislative bodies that enact them”). As with subdivision standards, the generally applicable Street Standards are capable of waiver by the Planning Board. *See York v. Town of Ogunquit*, 2001 ME 53, ¶ 10 (“The Planning Board does have the authority to waive strict application of Subdivision Standards in certain circumstances”). The Town has conferred upon the Planning Board the authority to grant waivers from the Street Standards and subdivision standards, generally, within Section 16.8.7 of the LUDO, where doing so is in the interest of public health, safety, and the natural environment. (A. 111). Given their limited application and close relationship to subdivision review and approval, the Street Standards may properly

be considered subdivision standards within the Planning Board's waiver authority. As a result, the Planning Board's approval of the requested waivers was proper, and the Appellant's appeal should be denied.

**D. The Appellant's expansive interpretation of this Court's precedent would unnecessarily hamper municipal review and should not be endorsed.**

The Appellant's contention that the Street Standards may only be waived by the Town's Board of Appeals leads to illogical outcomes. *See Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920 (noting ordinances should be interpreted to avoid absurd and illogical results). Maine municipalities have expansive home rule authority and are free to structure their ordinances in ways that facilitate the orderly functioning of their governments. *See* 30-A M.R.S. § 2101 *et seq.* Under Appellant's interpretation, any development performance standard not specifically segregated into a subdivision ordinance could only be modified by a variance from a board of appeal; however, municipal ordinances must be considered as a whole and interpreted to effect the town's intent. *See Jade Realty Corp v. Town of Eliot*, 2008 ME 80, ¶ 9; 946 A.2d 408; *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 16. While a strict application of *York* and *Sawyer* would suggest that the mere separation of a subdivision standard into another section of an ordinance prohibits it from being waived by a planning board, this severe interpretation should not be adopted where a more rational and harmonious interpretation is available. *See Stiff v. Town of Belgrade*, 2024 ME 68, ¶ 23, 322 A.3d 1167 ("We should read all the provisions in an ordinance in harmony and, if possible, consistent with their purposes, and not

read some provisions in a way that would subvert other provisions in the same ordinance”).

Neither 30-A M.R.S. §4353 nor this Court’s precedent prohibit a municipality from organizing their ordinances in a manner that suits their administrative processes. While municipalities may not circumvent their zoning ordinances, they should not be unnecessarily penalized for locating generally applicable performance standards separately from subdivision or site plan review ordinances. *See Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11 (instructing the Court to “construe the terms of an ordinance reasonably, considering its purpose and structure...”). From a practical point of view, it is often simpler to house the standards that apply to multiple review processes in one location rather than to replicate them multiple times throughout an ordinance. Here, the Town did just that. The Street Standards are implicated in two separate chapters of the LUDO governing the different varieties of subdivisions, as well as the Town’s site plan review process. (A. 104-108, 142, 150-151, LUDO §§ 16.7, 16.8.11, 16.10.5). Rather than repeating the Street Standards separately within each chapter and inviting inadvertent errors or omissions, the Town chose to house them in a single location for ease of reference, and they should be read through the lens of practical application. *See Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 22, 252 A.3d 504 (weighing the purpose of statute when interpreting); *Reagan v. Racal Mortg.*, 1998 ME 188, ¶ 8, 715 A.2d 925 (construing statute “in the light of the subject matter, the purpose of the statute and the consequences of particular interpretation”) (emphasis added).

Appellant's interpretation would inhibit the Town and other municipalities' ability to efficiently organize their ordinances and effectively administer development review. Simply put, it would require additional municipal resources to accomplish routine tasks and may result in significant confusion. If the Appellant's argument is endorsed, the likely outcome would be costly and unnecessary duplication within municipal ordinances to preserve authority already properly possessed by planning boards. The resulting inefficiency and confusion militate against finding in the Appellant's favor and her appeal should be denied.

## **VII. CONCLUSION**

For the foregoing reasons the Town respectfully requests that this Court: (1) deny Appellant's appeal; and (2) affirm the ruling of the Superior Court in this matter.

Dated this 22<sup>nd</sup> day of January, 2026.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, Cameron Ferrante, Esq . hereby certify that I served electronically the foregoing Brief of Appellee Town of Kittery and two copies via U.S. mail, first-class, postage prepaid when prompted to the parties listed below addressed as follows:

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