

**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 PARTIES IN INTEREST**

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NOW COME Chip Andrews and Anne Andrews, Parties-in-Interest, by and through undersigned counsel, and submit this brief in opposition to the Rule 80B appeal of Judith Andrews (“Plaintiff”).

## INTRODUCTION

Plaintiff has appealed from the August 7, 2025 decision of the York County Superior Court upon a single claim that the Kittery Planning Board, and subsequently the York County Superior Court, erred in concluding that certain Street Design and Construction Standards were subdivision standards within the waiver authority of the Planning Board rather than general zoning standards within the variance jurisdiction of the Kittery Board of Appeals. The Street Design and Construction Standards are contained in the Table 1 attached at the beginning of Kittery’s subdivision provisions. Chapter 16.8 of Kittery’s Land Use and Development Code (the “Ordinance”) begins as follows:

<p><b>Chapter 16.8 Subdivision Review</b></p> <p>[Adopted 1-24-2022 by Ord. No. 22-01<sup>[1]</sup>. Amendments noted where applicable.]</p> <p><b>ATTACHMENTS</b></p> <p>Attachment 1 - Table 1 Design and Construction Standards for Streets and Pedestrianways </p> <p>[1] <i>Editor's Note: This ordinance also superseded former Ch. 16.8, Design and Performance Standards for Built Environment, as amended.</i></p>
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Reproduced from **Appendix, page 109 (“App. 109”)**<sup>1</sup>

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<sup>1</sup> For reasons not entirely clear, Plaintiff asserts in her brief that “[t]he Street Design Standards are not contained in or incorporated by reference into the Subdivision Ordinance” notwithstanding that Parties in Interest, in their Superior Court Brief, reproduced the same Ordinance language showing that the Street Design and Construction Standards are attached as Table 1 under the Subdivision

The general zoning sections of the Ordinance, at section 16.5.27, establish several other street standards. **App. 97-103.** The Planning Board did not waive any of these street standards.

### **SUMMARY OF THE ARGUMENT**

Plaintiff claims that the Planning Board, when granting waivers of certain Street Design and Construction Standards, exercised variance authority that rests not with the Planning Board but with the Kittery Board of Appeals. To advance her appeal, Plaintiff makes an expansive argument from a turn-of-the-century line of cases beginning with *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106 (the *Perkins* line of cases) and misapplies them to the facts of the matter before the Court.

The case at bar is more like the 2021 case *Houseal v. City of Portland*, 2021 Me. Super. LEXIS 110 than the *Perkins* line of cases. In *Houseal*, the Superior Court affirmed a decision where the Portland Planning Board, when conducting a subdivision review, granted a waiver of a technical parking standard contained in Portland's Technical Manual, where street and parking design standards reside. The Court concluded that the waiver grant was not an

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Review section of the Ordinance. **Plaintiff's Brief at 17.** Moreover, the Superior Court expressly recognized and addressed this fact in its August 7, 2025 Order.

exercise of variance authority reserved to the Board of Appeals. In the case at bar, the Kittery Planning Board waived certain technical Street Design and Construction Standards contained in a table of technical standards attached to the Subdivision Review section of the Ordinance. The Table of Street Design and Construction Standards in Kittery is analogous to the Technical Manual applicable in Portland. Both contain technical provisions that, upon a certain showing, can be waived by a Planning Board. Granting such waivers did not usurp the variance authority of the Board of Appeals.

### **STANDARD OF REVIEW**

The scope of judicial review under Rule 80B is deferential and limited. *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 13, 153 A.3d 768. The court examines the municipality's decision for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record. *Bryant v. Town of Wiscasset*, 2017 ME 234, ¶ 11, 176 A.3d 176. "Substantial evidence" exists if there is any evidence in the administrative record that a reasonable mind would accept as sufficient to support the municipality's conclusion. *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 8, 746 A.2d 368. The party seeking to overturn a municipal decision bears the burden of persuasion and the court will not overturn a board's decision "unless

the record compels a contrary finding[.]” *Northeast Empire v. Town of Ashland*, 2003 ME 28, ¶ 9, 818 A.2d 1021. Interpreting the plain language of an ordinance is guided by the subject matter and purposes of the ordinance and the consequences of a particular interpretation. *Olson v. Town of Yarmouth*, 2018 ME 27, 179 A.3d 920. Terms of an ordinance are construed “reasonably, considering its purposes and structure and to avoid absurd or illogical results.” *Fryeburg Tr. v. Town of Fryeburg*, 2016 ME 174, 151 A.3d 933.

### **FACTUAL BACKGROUND**

Rather than repeating the factual background of the administrative proceeding before the Kittery Planning Board, the Parties-in-Interest reference and incorporate herein the factual background as set forth by the Town of Kittery in its Rule 80B brief filed with this Court.

### **ARGUMENT**

- I. The Perkins Line of Cases is Distinguishable and Does Not Require the Outcome Urged by Plaintiff.*

In *Perkins v. Ogunquit*, the Ogunquit Planning Board waived a core frontage requirement, a requirement that the Ogunquit Ordinance expressly made subject to the variance jurisdiction of the Ogunquit Board of Appeals. In reliance on a separate provision giving waiver authority to the Planning Board,

the Planning Board waived the core zoning requirement, circumventing the Board of Appeals variance jurisdiction.

The *Perkins* Court rightfully concluded that the Ogunquit Planning Board did not have authority to grant a waiver of the frontage requirement and that doing so circumvented Ogunquit's Board of Appeals in contravention of state statute. In the case at bar, the Kittery Planning Board did not waive a core zoning requirement that is subject to variance review by the Ogunquit Board of Appeals. Instead, it waived a technical street standard contained in the Street Design and Construction Standards Table located in the Subdivision Review section of the Ordinance.

In *York v. Ogunquit*, 2001 ME 53, 769 A.2d 172, the Ogunquit Planning Board granted five waivers relating to sidewalk width, cul de sac street end design, road grade, street connection requirements, and street width. The Court affirmed four out of the five waivers granted and remanded the fifth waiver back to the Planning Board for review. The fifth waiver, like the lot frontage in *Perkins*, involved a requirement that was mandated expressly in the Ogunquit Zoning Ordinance. Ogunquit Zoning Ordinance § 10.2(B)(3) (April 5, 1999) required that "collector roads" have a "...paved travel surface at least 32' wide." *York* citing Ogunquit Zoning Ordinance § 10.2(B)(3).

In the case at bar there is no general zoning ordinance provision establishing a maximum road length, right of way width, travel way width, or grade. The project complied with all zoning ordinance requirements. The Planning Board did not waive any zoning ordinance requirement. In the absence of a waiver of an express zoning ordinance standard, the case at bar is distinct from *York*.

In *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A2d. 58, the Cape Elizabeth Planning Board granted a waiver of a building envelope requirement which, in turn, affected core zoning setback requirements. The *Sawyer* Court concluded that these were core “space and bulk” zoning requirements, not subdivision review requirements. These were standards subject to variance review by the Cape Elizabeth Board of Appeals. As such, the Court rightly concluded that the Planning Board’s waiver was tantamount to a grant of a variance.

In the case at bar, the Kittery Planning Board did not waive any core space and bulk zoning ordinance standards. *Sawyer*, is thus, not germane.

*II. The Case at Bar is Similar to that in Houseal, Not Those in the Perkins Line of Cases.*

*Houseal v. City of Portland* involved an appeal from a decision of the Portland Planning Board on the grounds that the Planning Board impermissibly granted a variance when it, in the context of subdivision review, granted a waiver of a Parking Lot and Parking Space Design Standard contained in Portland's Technical Manual. In that case, the Planning Board waived parking standards contained in the Technical Manual that are generally applicable throughout Portland for any project triggering minor or major site plan review. At the time the *Houseal* Court was reviewing this matter, any new construction or addition of greater than 500 square feet or earthwork activity above 1,000 square feet triggered site plan review in Portland<sup>2</sup>.

Portland's Zoning Ordinance included an article governing Site Plan review and an article governing Subdivision. Both invoked the standards contained in the Technical Manual. On appeal, the Plaintiff before the Superior Court argued that the grant of the waiver by the Planning Board constituted an improper grant of a variance. The *Houseal* Court, citing *Perkins v Ogunquit*, concluded that "[a] Planning Board has the authority to grant waivers from Site

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<sup>2</sup> Portland's Ordinance effective at the time of the case is found at <https://static1.squarespace.com/static/5a75f43a692eb1159413d/t/5fc53db06457125654e6e6ea/1606761971059/Adopted+Land+Use+Code.pdf>

Plan and Technical Manual requirements” provided that the “waiver authority cannot, in reality, operate so as to allow for variances to a town’s zoning ordinance.” *Houseal v. City of Portland*, 2021 Me. Super. LEXIS 110, citing *Perkins v Town of Ogunquit*, 1998 ME 42, ¶ 9, 709 A.2d 106. The Court concluded that the waiver authority granted to, and exercised by, the Planning Board did not operate so as to allow a variance issued by the Planning Board.

The facts in the case at bar are similar to the facts in the case in *Houseal*. Here, the Kittery Planning Board exercised its express waiver authority to waive technical street standards contained in the Table of Design and Construction Standards attached to the Subdivision Review section of the Ordinance. The Planning Board did not grant a waiver of a general ordinance provision within the purview of the Kittery Board of Appeals and thus did not exceed its authority.

*III. The Kittery Planning Board Did Not Usurp the Authority of the Kittery Board of Appeals.*

The Kittery Planning Board did not infringe upon the variance authority belonging to the Kittery Board of Appeals. Maine statute establishes that when a municipality adopts a zoning ordinance it shall establish a board of appeals that, among other things, can grant variances from zoning standards. 30-A M.R.S.A. § 4353. The statute prescribes the standard that must be met for a

variance. 30-A M.R.S.A. § 4353 (4). The statute enables a municipality to limit the scope of a board of appeals' jurisdiction over variances. 30-A M.R.S.A. § 4353 (4). Kittery adopted a zoning ordinance and established the variance jurisdiction of its Board of Appeals to include the core zoning matters of "a reduction in dimensional requirements related to height, area, and size of structure or size of yards and open spaces. Town of Kittery Land Use and Development Code, § 16.2.12 (D)(2)(a)(1). **App. 42.**

In *Perkins*, the Ogunquit Planning Board used its waiver authority to alter a street frontage requirement. Ogunquit's Zoning Ordinance itself established a street frontage standard and clearly gave authority to the Board of Appeals to consider variance requests on street frontage. In fact, in *Perkins*, the Board of Appeals had already heard and denied a request for a variance of the street frontage requirement. The applicant then requested that the Planning Board waive the street frontage requirement, and the Planning Board did so. There, the Planning Board usurped the jurisdiction of the Board of Appeals and its waiver which, in reality, constituted a variance of the street frontage standard. The *Perkins* Court was right to invalidate that grant of waiver while simultaneously affirming four other grants of waiver by the Ogunquit Planning Board that did not usurp the authority of the Board of Appeals.

*IV. The Technical Street Design and Construction Standards are Part of, and in the Nature of, Subdivision Standards.*

The Street Design and Construction Standards are contained in Table 1 attached at the beginning of Kittery’s Subdivision Review section of the Ordinance. Chapter 16.8 begins as follows:

<p><b>Chapter 16.8 Subdivision Review</b></p> <p>[Adopted 1-24-2022 by Ord. No. 22-01<sup>[1]</sup>. Amendments noted where applicable.]</p> <p><b>ATTACHMENTS</b></p> <p>Attachment 1 - Table 1 Design and Construction Standards for Streets and Pedestrianways </p> <p>[1] <i>Editor’s Note: This ordinance also superseded former Ch. 16.8, Design and Performance Standards for Built Environment, as amended.</i></p>
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Reproduced from **App 109**.

It makes sense that Table 1 is attached to the Subdivision Review section of the Ordinance because it is in the context of proposed subdivisions that streets are going to be proposed and reviewed by the Town. It should not be fatal that the Table of Design and Construction Standards is also referenced in general performance standards or that the performance standards essentially require compliance with the Table of Design and Construction Standards within the Subdivision Review provisions. Doing so does not make the technical street standards into zoning standards that fall within the jurisdiction of the Board of Appeals. The Board of Appeal’s jurisdiction is clearly defined and does not include review of technical street standards contained in Table 1. These standards are attached to the Subdivision Review section of the Ordinance and

are in the nature of subdivision standards reviewable by the Planning Board.

Notably, Kittery's Land Use and Development Code does have specific street requirements contained at section 16.5.27(B). **App.97-103.** These zoning ordinance standards are not adopted from the Subdivision Review section but are requirements set forth in the general zoning ordinance provisions themselves. Had the Planning Board waived these zoning ordinance street layout standards, Plaintiffs argument would be more compelling. However, the Planning Board did not waive these standards—it only waived certain technical street standards found in Table 1 of the Subdivision Review section of the Ordinance.

*v. The Court Should Construe the Ordinance as a Whole to Avoid an Absurd Result.*

Adopting Plaintiff's argument would have a perverse and absurd result. Terms of an ordinance are construed "reasonably, considering the purposes and structure" and "to avoid absurd or illogical results." *Fryeburg Tr. v. Town of Fryeburg*, 2016 ME 174, 151 A.3d 933. Kittery has established a zoning ordinance. It has established a Board of Appeals pursuant to 30-A M.R.S.A. § 4353. It has defined the scope of zoning ordinance provisions eligible for a

variance upon the variance standard of review by the Board of Appeals<sup>3</sup> The set of criteria that require that highest level of scrutiny are those that are at the core of zoning – lot size, setbacks, building heights, and road frontage. The Planning Board cannot waive any of these standards and, importantly, the Kittery Planning Board did not waive any of these standards.

However, Kittery’s Ordinance authorizes that more technical components of land use review, like the Street Design and Construction Standards found in Table 1 attached to the Subdivision Review section of the Ordinance, are subject to a different, lower, standard of review applied by the Planning Board through its waiver authority. Since the Board of Appeals does not have authority to consider a variance of a technical street design standard, deciding that the Planning Board cannot waive a relatively minor technical Street Design and Construction standard makes such standards immutable, not subject to Planning Board waiver nor Board of Appeal variance. Technical standards would thus be elevated as though they are more essential to a zoning scheme than the core zoning standards that are subject to variance review. As a result,

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<sup>3</sup> Consistent with statutory mandate, Kittery’s Ordinance establishes the following “undue hardship” variance standard where: 1) the land in question cannot yield a reasonable return unless a variance is granted; 2) the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood; 3) the granting of a variance will not alter the essential character of the locality; and 4) the hardship is not the result of action taken by the applicant or prior owner. **App. 42.**

a subdivision street could never be altered to allow one foot more of length, for example, even when particulars of a project site, considerations of life safety, and good planning might warrant it. Perversely, core zoning requirements like lot size or setback are not immutable—they can be modified through a variance. Technical standards applicable to subdivisions should not be held to an even higher standard than those core zoning components eligible for variance review. Doing so would turn the whole zoning ordinance on its head with the absurd result that a core bulk and space zoning requirement may be modified but a technical standard of a private subdivision street may not.

*VI. Affirming the Planning Board Decision Balances the Statutory Zoning Scheme with the Practical Need to Be Able to Waive Subdivision Technical Standards.*

A decision in favor of the Plaintiff would undermine the Kittery Ordinance's intention of enabling its Planning Board to consider the particulars of any given development site and consider sensible modifications to certain technical standards applicable to subdivisions. Plaintiff argues that the Court should invalidate the waiver of technical street standards on the grounds that the subdivision standard being waived is also referenced in the general zoning Ordinance. Such a reading would elevate form over substance and would unnecessarily hobble sensible planning at a time when Maine has identified the

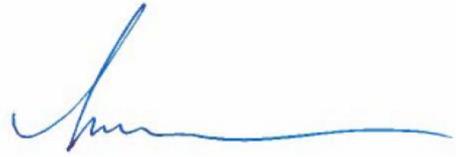
need for additional housing. Since the Planning Board did not waive a core zoning requirement, waive a standard that would be reviewable by the Board of Appeals, nor waive one of the specific street standards expressly articulated in the general zoning section of the Ordinance, the Court should affirm the Planning Board decision as a proper balance between zoning provisions subject to variance review and subdivision standards subject to waiver review. A contrary decision would be antithetical to sensible land use planning and Maine's imperative to foster good housing development.

### **CONCLUSION**

The Kittery Planning Board acted within its waiver authority when it waived certain technical Street Design and Construction Standards. The standards were established in a table attached to the Subdivision Review section of the Ordinance and are in the nature of technical standards subject to subdivision review and eligible for Planning Board waiver. In granting these waivers, the Planning Board did not usurp the variance authority of the Kittery Board of Appeals. For all of the reasons stated herein, the Planning Board decision should be affirmed.

Dated: January 5, 2026

Respectfully Submitted,



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