

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. YOR-26-59

CURTIS SAND & GRAVEL LLC et al.

Plaintiff/Appellant

v.

TOWN OF NORTH BERWICK

Defendant/Appellee

ON APPEAL FROM THE
YORK COUNTY SUPERIOR COURT

REPLY BRIEF OF PLAINTIFF/APPELLANT

Sean R. Turley, Esq.
Michael D. Traister, Esq.
MURRAY PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
Counsel for Plaintiff/Appellant
Curtis Sand & Gravel LLC

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ARGUMENT

The Town defends the Board's decision to impose the Condition on three grounds,¹ none of which is meritorious.²

The first is that the Town misreads the Ordinance to vest in the Board the broad authority to attach whatever conditions it happens to believe are necessary to advance what it considers to be the intent or objective of an ordinance standard. Town Br. 23–27. But because the Ordinance limits the scope of the Board's authority far more narrowly than the Town suggests, the Board committed legal error when it imposed the Condition. The second is that the Town claims that the Board properly interpreted the Impairment Standard to regulate the terrestrial movements of a species that *might* spend part of its life in two of the minor wetlands located on the Pit Site that are themselves exempt from regulation.³ Town Br. 28–35. That interpretation is directly contrary to the plain language and structure of the Impairment Standard and violates the applicable canons of statutory construction. Consequently, it must be rejected. The third is that

¹ The Town has apparently abandoned the argument that the Board did not err when it imposed the Condition because it was dutifully implementing the recommendations offered by MDIFW in the Second MDIFW Letter. See *Defendant Town of North Berwick's M.R. P. 80B Brief* 18–19. The Town is therefore barred from advancing that position at oral argument. See, e.g., *Chadwick-BaRoss, Inc. v. Martin Marietta Corp.*, 483 A.2d 711, 717 (Me. 1984).

² This brief uses the terms defined by Curtis in its brief-in-chief in an identical manner.

³ The Town claims in its brief that “Yorks concluded that the Blanding’s turtle travels overland, across the land area where Curtis proposes to extract gravel, to [the Proximal Wetlands] from the [IWWH].” Town Br. 15. That is simply untrue. There is no evidence in the record to support that assertion including, but not limited to, Yorks’s report, which stated only that Proximal Wetlands are “*likely* to be utilized” by the Blanding’s turtle. (App. 179 (emphasis added).)

there is allegedly substantial evidence in the record to support the Board's decision to implement the Condition, which is a transparent (and futile) attempt by the Town to recast Curtis's argument that the Board abused its discretion as if it was a challenge to the Final Decision on grounds that would require the Court to show some level of deference to the Board's actions.⁴ Town Br. 35–43. As Curtis is not attacking the Condition on the basis of whether there is substantial evidence in the record concerning the Condition; Curtis preserved its abuse of discretion argument; and the Town waived any argument that the Board did not exceed the bounds of reasonable choices available to it by failing to raise that argument with the Superior Court, the Town's evidentiary argument is inapposite to the matter at hand and not grounds to affirm the Board's decision.

I. THE ORDINANCE DOES NOT GRANT THE BOARD THE AUTHORITY TO IMPOSE THE CONDITION.

As the Town recognizes and accepts (Town Br. 23), the Board any lacks inherent authority and can only wield the powers that have been expressly granted to it by the Ordinance or that arises “by necessary inference as an incidence essential to the full exercise of [the] powers specifically granted.”⁵ *Mick Land Dev., Inc. v. Town of South*

⁴ This Court has never held that any deference is owed to a municipal tribunal when it considers an appeal premised on an alleged abuse of discretion.

⁵ This limitation exists because municipal tribunals like the Board are not legislative bodies free to decide matters before them based on policy considerations or the public interest; their only role is to apply the applicable ordinance standards to the applications before them. *Stucki v. Plavin*, 291 A.2d 508, 511 (Me. 1972).

Bernick, 2026 ME 53, ¶ 18, -- A.3d --. If no such authority exists, the Board’s actions are void. *Small v. Gartley*, 363 A.2d 724, 729 (Me. 1976).

In an effort to establish the Board’s supposedly “broad and permissive” powers to impose conditions of approval, the Town looks far afield for any provision that makes even a passing reference to such a condition, from the definition of a “conditional use” to a requirement that the Board specify any conditions it lawfully imposes in writing.⁶ See Town Br. 20, 22–27. But the *definition* of a term is not a source of *authority* for a municipal tribunal to take any action. See Town Br. 24. Nor is a provision governing the contents of the Board’s written decisions on an application for a conditional use permit.⁷ See Town Br. 25. By raising these points, the Town apparently seeks to distract from Curtis’s argument regarding the Board’s authority to impose the *specific* condition under consideration in the instant action by attempting to focus the Court’s attention on whether the Ordinance vests in the Board the power to impose conditions of approval at all, which is not an issue in this appeal. References to the Board’s power to attach conditions to its approvals *in general* does not establish that the Board has the

⁶ While it is true that ordinance provisions must be *interpreted* harmoniously, see, e.g., *Wolfram v. Town of North Haven*, 2017 ME 114, ¶ 9, 163 A.3d 835, this is a rule of construction that guides the Court in its analysis of a specific ordinance provision—not a legal doctrine or principle that vests in a municipal board whatever authority might be inferred when an ordinance is construed as a whole. See Town Br. 25. That type of argument is *precisely* what the Law Court has rejected in this context. *Newfield Sand v. Town of Newfield*, 2025 ME 45, ¶ 24, 335 A.3d 626.

⁷ That requirement in the Ordinance addresses a separate requirement, which is that “any conditions imposed must be . . . defined clearly when a permit is granted so that the permittee understands what is required.” *Newfield Sand*, 2025 ME 45, ¶ 17, 335 A.3d 626.

authority to impose the specific condition under consideration in this appeal or that the Board did not act *ultra vires* when requiring Curtis to comply with *that* condition. As in any appeal of a municipal action that depends on the interpretation of a zoning ordinance, the Court is tasked with “deciding not what an ordinance *may* do, but what this ordinance *in fact does do*, i.e., whether the Board acted correctly under the ordinance.” *Your Home v. City of Portland*, 432 A.2d 1250, 1259 (Me. 1981) (emphasis added). Because the Board misinterpreted what the Ordinance “in fact does do,” the Board committed legal error when it attached the Condition to its approval of the Pit.

It is also irrelevant whether a setback is a *type* of condition the Board may, in theory, require an applicant to satisfy. *See* Town Br. 24. Instead, the pertinent inquiry is the *scope* of authority to set conditions the Ordinance grants to the Board, which *is* expressly limited by Ordinance § 6.9.7 to “such conditions” (a) that are “required elsewhere in [the] Ordinance” or (b) that “would mitigate any adverse effects on adjoining or neighboring properties[] which might otherwise result from the proposed use.”⁸ (R. 811 (Ordinance § 6.9.7).) Importantly, this language authorizes the Board to impose a condition of approval when the *Ordinance* “require[s]” that such a condition *must* be attached to an approval—not when the *Board* makes an ad hoc determination that an

⁸ The ordinance before the Court in *Mick Land Development, Inc. v. Town of South Berwick* apparently had no such restraint on the power of the planning board to attach conditions to its approval of an application. 2026 ME 53, ¶¶ 17–21, -- A.3d --. Instead, it broadly provided—without limitation—for the board to “modify and approve” those applications. *Id.* ¶ 19. *Mick* is therefore distinguishable from the instant action and does not govern the outcome of this appeal.

applicant *should* be required to comply with a particular condition.⁹ See Town Br. 26 n.11.

The Town acknowledges—but then glosses over—the fact that the Ordinance *does* contain a provision (Ordinance § 5.2.2.d) that *requires* the Board to impose conditions that the Board finds to be necessary to ensure compliance with eighteen enumerated standards that apply to the Pit.¹⁰ (App. 107–108.) Critically, none of them authorize the Board to attach conditions of approval designed to protect any animal species. (App. 107–108.) Nor does the Impairment Standard, which is *not* contained in Ordinance § 5.2.2.d, “require[]” the Board to attach a condition of approval to ensure compliance with that provision. (App. 106.)

As there is no section of the Ordinance that obligates the Board to impose the Condition, including, but not limited to, the Impairment Standard, the Board only had that authority if it attached that condition to “mitigate any adverse effects on adjoining or neighboring properties, which otherwise might result from the proposed use.”¹¹ (R.

⁹ Whether a particular provision of the Ordinance “required” the Board to impose the Condition is a question of law, as it depends entirely on the construction of the ordinance itself. *Newfield Sand*, 2025 ME 45, ¶ 11, 335 A.3d 626.

¹⁰ Ordinance § 5.2.2.d directs that the “Planning Board *shall* specify such requirements in any conditional Use Permit issued for earth material removal as it deems necessary or desirable to assure compliance with” the eighteen “requirements” listed in that subsection. (App. 107–108 (emphasis added).) “The term ‘shall’ generally renders a provision mandatory.” *Portland Sand & Gravel, Inc. v. Town of Gray*, 663 A.2d 41, 43 (Me. 1995).

¹¹ Although the Town mentions in passing the possibility that the Board may have had the authority to impose the Condition as a power incidental to the authority expressly granted to the Board, it fails to substantively develop that argument, instead relying on conclusory statements that such authority must exist (without even identifying the express grant of power to which such authority is supposedly

811.) But none of those considerations were the basis for the Board’s imposition of the Condition, which was to “to ensure that the [the Pit] does not impair the endangered Blanding's Turtle species that is known to inhabit the [IWWH], and could possibly travel between that Wetland overland to [the Proximal Wetlands” (R. 541). *See Cannon v. Town of Mount Desert*, 2025 ME 86, ¶ 28, 345 A.3d 115 (“As a court reviewing the decision of an administrative body, we cannot affirm the body’s decision on a ground that the body did not rely upon in its decision.”))

No provision of the Ordinance expressly granted the Board the authority to impose the Condition. Therefore, it is void. *Gartley*, 363 A.2d at 729.

II. THE IMPAIRMENT STANDARD DOES NOT PROTECT AGAINST POTENTIAL INTERFERENCE WITH THE TERRESTRIAL MOVEMENTS OF A SEMI-AQUATIC SPECIES.

Given the Town’s repeated efforts in its brief to chop up and rearrange the Impairment Standard to force its text to align with the Board’s contrived reading of that standard, it is important to revisit that text. It provides that:

[E]xcavation, processing and storage of soil, earth, loam, sand, gravel, rock, peat or any other mineral or organic deposits, which would result in

incidental). *See* Town Br. 25–26 n.10. The Town has therefore waived this argument. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (“An issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all.”) Regardless of the fact that this argument has not be properly presented to the Court, any reading of the Ordinance to provide the Board with the incidental power to attach conditions related to *any* applicable standard is directly contrary to express limitation on the Board’s authority to attach conditions set forth in Ordinance § 6.9.7. *See Cent. Maine Power Co. v. Pub. Utilities Comm’n*, 405 A.2d 153, 171 (Me. 1979) (“[An] agency may not do by indirection what is forbidden it to do directly.”). Although the drafters of the Ordinance could have broadly granted the Board the authority to attach conditions related to any standard in the Ordinance, it decided to instead constrain that power through Ordinance § 6.9.7, and that *express* constraint prevents the Board from exercising any powers that may be *implied* in this context.

erosion, sedimentation or impairment of water quality or fish and aquatic life, is prohibited.

(App. 106.) As is evident, the portion of the Impairment Standard on which the Board relied to impose the Condition, which prohibits “impairment of water quality or fish and aquatic life,” is *not*, as the Town claims, divided into a series of independent clauses, each separated by a comma or a coordinating conjunctive.¹² Town Br. 31–32. It plainly does not read: “[E]xcavation . . . which would result in . . . impairment of water quality, fish, *and* aquatic life is prohibited.” Instead, there are two independent clauses, which are separated by the disjunctive “or.” *See, e.g., Chaves v. Garland*, 602 U.S. 447, 457 (2024). The first is “water quality.” The second is “fish *and* aquatic life.” In this context, that “and” functions as a conjunctive requiring that there be impairment to *both* “fish and aquatic life,” not as a disjunctive listing “fish” or “aquatic life” as alternative conditions that trigger the Impairment Standard.¹³ *United States v. Walker*, 665 F.3d 212, 224 (1st Cir. 2011) (“[W]hen a rule lists two requirements in the conjunctive, both must be

¹² The construction of the Impairment Standard in no way resembles the statutory language before the Supreme Court in *Pulsifer v. United States*, which is the only case cited to by the Town for its proposition that the “and” in the Impairment Standard serves as a coordinating conjunction between three independent categories (i.e., “water quality,” “fish,” and “aquatic life”). 601 U.S. 124, 136–37 (2024). There, the Supreme Court considered the meaning of “and” positioned between the second and third clause in an enumerated list. *Id.* Here, the Court has before it an “or” that serves as a disjunctive, separating two independent clauses, “water quality” and “fish and aquatic life,” and a conjunctive connecting two related concepts, “fish” and “aquatic life.” (App. 106.) Consequently, *Pulsifer* in no way supports the Town’s preferred interpretation of the Impairment Standard.

¹³ There is no doubt that “and” *may*, in certain circumstances, be reasonably interpreted in a statute or ordinance as a disjunctive, such as when it is used to identify alternatives in a list. *See, e.g., Pulsifer*, 601 U.S. at 136–37. But that is not how that word appears in the Impairment Standard, which is all that matters for the Court’s review.

satisfied.”). Because the Town’s interpretation of the Impairment Standard only makes sense by removing part of its text, that construction cannot stand given that “a reasonable construction supplying meaning and force is otherwise possible.” *Home Builders Ass’n of Maine, Inc. v. Town of Eliot*, 2000 ME 82, ¶ 7, 750 A.2d 566.

Despite the Town’s tendency towards hyperbole, Curtis’s reading of the Impairment Standard is not “fantastical,” “contrived,” or “patently absurd” merely because the Town disagrees with it. *See* Town Br. 28–29. Unlike the Town’s construction of that provision, Curtis’s interpretation is based on its plain text and grammar, which speaks directly to its purpose and intent.¹⁴ *See, e.g., FPL Energy Maine Hydro LLC v. Dep’t of Envtl. Prot.*, 2007 ME 97, ¶ 25, 926 A.2d 1197. The intent of the Impairment Standard, as expressed by its text, is to protect waterbodies and the species that, like fish, reside within them from impairment caused by extraction activities; it operates as a restriction on those activities that have a direct impact on the waterbodies themselves—not on the overland movement of species *between* those waterbodies. That is the reason it is not illogical for the Impairment Standard to be triggered only when there is both impairment of “fish and aquatic life.” Town Br. 29–30. Any impairment to the quality of the waterbody will invariably harm *both* “fish” *and* “aquatic life,” when the latter term is properly construed in context as capturing only aquatic lifeforms akin to fish. *See In*

¹⁴ The Town does not identify *any* legal authority for its proposition that a Court may rely on statements in a comprehensive plan to determine the meaning and effect of a provision in an ordinance. Town Br. 34 n.12. That is not surprising, because none exists.

re Scates, 94 Me. 579, 48 A. 113, 113 (1901) (“Associated words are properly held to take their color from each other.”); *Fischer v. United States*, 603 U.S. 480, 487 (2024) (“[T]he canon of *noscitur a sociis* teaches that a word is given more precise content by the neighboring words with which it is associated. That avoids ascribing to one word a meaning so broad that it is inconsistent with the company it keeps.” (quotations marks, citations and alterations omitted)). If its drafters desired to extend those same protections to species crossing the land dividing one waterbody from another, then they could have written the Impairment Standard that way. But that is not what it says, and the fact that the Town strongly objects to that textualist construction does not render that reading inherently absurd. That is especially true given that the Impairment Provision, as a limitation on the use of private property, must be strictly construed. *Zappia v. Town of Old Orchard Beach*, 2022 ME 15, ¶ 20, 271 A.3d 753. Because the Impairment Provision cannot be reasonably interpreted to regulate the terrestrial movements of the Blanding’s turtle in light of its plain text and the applicable rules of statutory construction, the Board erred as a matter of law when it applied that standard in that fashion and the Decision must be vacated.

III. THE TOWN HAS WAIVED ANY ARGUMENT THAT THE BOARD DID NOT EXCEED THE BOUNDS OF REASONABLE CHOICES AVAILABLE TO IT.

The Town, for the first time in its brief to this Court, addresses the substance of Curtis’s abuse of discretion argument—i.e., that the Board, when imposing the Condition, exceeded the bounds of reasonable choices available to it. Town Br. 39–43;

see Curtis Br. 35–40. This is true despite the fact that the Town, in its brief to the Superior Court, expressly recognized that Curtis attacked the Condition on those grounds. *See Defendant Town of North Berwick’s M.R. P. 80B Brief* (“**Town Super. Ct. Br.**”) 32 (characterizing Curtis’s argument as “claiming that the Planning Board’s imposition of the condition to carry out MDIFW’s recommendation exceeded the bounds of the Planning Board’s discretionary authority”). But rather than respond to *that* argument, the Town defended the Board’s decision by claiming that substantive record evidence supported it—even though the sufficiency of the evidence in the administrative record is not at issue raised by Curtis in this appeal.¹⁵ Town Super. Ct. Br. 27–32. Nowhere in the brief it filed with the Superior Court did the Town address, let alone refute, Curtis’s contention that the Board abused its discretion. Critically, the doctrines of waiver and preservation apply with equal force and effect to parties in a Rule 80B appeal, including a governmental entity whose decision is under review, *see, e.g., Seymour*, 2004 ME 115, ¶ 13, 855 A.2d 1159, even though the Superior Court acted as the intermediate appellate tribunal and this Court directly reviews the administrative action that is the subject to appeal, *Sherwood v. Town of Kennebunkport*, 589 A.2d 453, 454 & n.1 (Me. 1991); *Valente v. City of Westbrook*, 543 A.2d 1373, 1374 n.1 (Me. 1988). While the Town might find it strategically advantageous to fight a strawman instead of Curtis’s actual abuse of

¹⁵ The Town also never raised with the Superior Court the argument appearing in its brief to this Court that Curtis had somehow waived its contention that the Board abused its discretion by exceeding the bounds of the reasonable choices available to it, thereby waiving that argument as well. *See, e.g., Town of Levant v. Seymour*, 2004 ME 115, ¶ 13, 855 A.2d 1159.

discretion argument, the Town has, by ignoring that argument in its briefing to the Superior Court, waived the argument the Town advances for the first time in Section 4.B of its brief.

Try as it might, the Town cannot blame Curtis for the Town’s decision to waive the argument the Town advances for the first time here.¹⁶ *See* Town Br. 39–43. Curtis properly preserved *its* abuse-of-discretion argument by raising it at the earliest possible moment—in its appeal to the ZBA, which immediately followed the actions Curtis contends constitute an abuse of the Board’s discretion that occurred at the Board’s meeting on April 12, 2024.¹⁷ Curtis clearly identified as a basis for its appeal the “arbitrary and capricious manner” in which the Board imposed the Condition (App.

¹⁶ The Town’s insinuation that Curtis had somehow failed to preserve its abuse of discretion argument by not raising it prior to the Board’s decision to impose the Condition on April 14, 2024 is incredibly disingenuous. Town Br. 35–39. As the Town is well aware and the record clearly establishes, when the Board took its initial vote in favor of adopting the Condition on December 14, 2023, it did so based on (a) its misinterpretation of the Second MDIFW Letter as recommending a 250’ “setback” and (b) its reading of the comprehensive plan. (App. 253–254.) As those were the *only* grounds identified by the Board as the basis for its vote in favor of that motion, Curtis’s filings with the Board between that vote (on December 14, 2023) and its final decision on the Pit (on April 12, 2024) necessarily focused on *that* legal error. (App. 263–273.) But when the board ultimately decided to impose the Condition, it changed its tune: instead of claiming that it had interpreted the Second MDIFW Letter to require a setback, it acknowledged in the FOFCOL that the Condition went beyond what MDIFW had, in fact, recommended because the Board (not MDIFW) believed that the only way to protect the Blanding’s turtle was to prohibit all excavation activities within 250’ of the Proximal Wetland. (App. 77.) As that was the *first* time the Board articulated that rationale for its decision, Curtis could not have possibly raised its abuse of discretion argument before then.

¹⁷ Until the exercise of discretion *happens*, it is impossible to raise that as grounds for an appeal, as whether (or not) a municipal board will abuse its discretion is unknowable *a priori*. It is therefore absurd for the Town to argue that Curtis needed to object to the approval of the Pit on the grounds that the Board might *possibly* abuse its discretion when it imposed the Condition on April 12, 2024 in any filing prior to that date.

282–284), and the ZBA considered that argument when adjudicating Curtis’s administrative appeal (App. 66). Curtis then referenced the Board “exceed[ing] its discretionary authority” as the basis for its appeal to the Superior Court in each of pleadings (App. 54, 64) and extensively developed that argument in its briefing to the Superior Court (*Rule 80B Brief of Plaintiff Curtis Sand & Gravel LLC* 40–44). Curtis need not have used magic words to invoke “abuse of discretion” as a basis to overturn the Decision: because Curtis’s articulation of that argument was “sufficient to alert the court and any opposing party to the existence of that issue,” Curtis preserved that grounds for its appeal. *Chasse v. Mazerolle*, 580 A.2d 155, 156 (Me. 1990). Consequently, the fault lies entirely with the Town for failing to preserve its own argument on that issue.

Turning briefly to the substance of the argument the Town actually preserved, a municipal board does not, as the Town suggests, act within its discretion merely because the Board found there to be substantial evidence in the record to support its decision. Town Br. 36–39. Whether that quality of evidence exists in the record is only one of three factors for the Court to consider when hearing an appeal premised on an abuse of discretion:

Review for an abuse of discretion involves resolution of three questions: (1) are factual findings, if any, supported by the record according to the clear error standard; (2) did the [tribunal] understand the law applicable to its exercise of discretion; and (3) given all the facts and applying the appropriate law, was the court's weighing of the applicable facts and choices within the bounds of reasonableness.

Pettinelli v. Yost, 2007 ME 121, ¶ 11, 930 A.2d 1074. Consequently, the existence of substantial record evidence to support a decision is not dispositive.

Moreover, if all that was necessary to show that a municipal tribunal did not abuse its discretion was for an appellee to point to substantial evidence in the record supporting that decision, then an “abuse of discretion” would not be an independent basis for prosecuting an appeal under Rule 80B at all because it would be subsumed into the Court’s analysis of whether there is substantial evidence in the record supporting the decision under review. *Cf. D’Alessandro v. Town of Harpswell*, 2012 ME 89, ¶ 5, 48 A.3d 786 (identifying as separate grounds to overturn a municipal board’s decision “an error of law, an abuse of discretion, or a finding not supported by substantial evidence.”). As that is an unsound reading of cases establishing the grounds for challenging municipal action, the Town’s position is meritless.

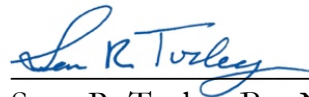
It is Curtis’s contention that regardless of whether there is substantial evidence in the record about the potential impacts of the Pit on the terrestrial movements of the Blanding’s turtle, the Board’s deliberate decision to ignore the recommendation of MDIFW, which is the expert state agency whose responsibility it is to protect that species, set forth in the Second MDIFW Letter and impose a 250’ setback from the Proximal Wetlands when MDIFW determined that Curtis limiting disturbances “as much as practicable” within that area was sufficient to protect the turtle constitutes an abuse of the Board’s discretion because that decision “exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the

particular case and the governing law,” *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74, and is not a “reasonable means of achieving the goals stated in the Ordinance,” *Total Quality, Inc. v. Town of Scarborough*, 588 A.2d 283, 285 (Me. 1991).

CONCLUSION

For the foregoing reasons, Curtis respectfully requests that this honorable Court hold that the Board erred as a matter of law and abused its discretion when it imposed the Condition and that, therefore, the Condition is unlawful; vacate the Superior Court’s judgment; and remand this matter to the Superior Court with instructions to remand it to the Board for further action on Curtis’s application for the Pit consistent with the Court’s decision.

Dated: July 20, 2026.



Sean R. Turley, Bar No. 6351
sturley@mpmlaw.com
Michael D. Traister, Bar No. 8138
mtraister@mpmlaw.com
MURRAY PLUMB & MURRAY
75 Pearl Street, P.O. Box 9785
Portland, Maine 04104-5085
(207) 773-5651