

MINUTES

ROAD CLOSURE APPEAL - WYNES VS TOWN OF HODGDON - SEPTEMBER 8, 2023 - 1:00 PM
SHERIFF'S OFFICE BUILDING – 25 SCHOOL ST, HOULTON
2ND FLOOR CONFERENCE ROOM

PRESENT

Paul J. Underwood, Chair, County Commissioners
Norman L. Fournier, County Commissioner
William T. Dobbins, County Commissioner
Ryan D. Pelletier, County Administrator
Tammy Pelletier, Operations Assistant
Stephen Wagner, Attorney - Rudman Winchell
Ryan Licanecz, Associate - Rudman Winchell
Deborah Jagow Wynes, Co-Appellant
Timothy Wynes, Co-Appellant
Robert Burgess III, Property Owner, London Rd
Richard Currier, Attorney - Currier, Trask, Dunleavy
Jacob Flewelling, Associate - Currier, Trask, Dunleavy
Darcy Oliver, Town Manager - Hodgdon
Shiela Murchie, Selectman - Hodgdon
Roger Larson, Selectman - Hodgdon
Joel Duff, Selectman - Hodgdon
John Gaddis, Selectman - Hodgdon
Clayton Quint, Selectman - Hodgdon
Richard Tidd, Head Selectman - Hodgdon
Sam Henderson, Selectman - Hodgdon
Dean Porter, Resident of Hodgdon
Clarissa Porter, Resident of Hodgdon

ART. 1. Chair Paul J. Underwood called the meeting to order at 1:00 pm.

ART. 2. A) Chair Paul J. Underwood requested an amendment to Article 2 to include 2. B) Disclosure statement by Commissioner William T. Dobbins.

MOTION:

Motion by Norman L. Fournier and seconded by William T. Dobbins to approve the agenda as amended.

VOTE:

Motion voted on and passed.

B) Commissioner William T. Dobbins read a disclosure statement that he was a select person for the Town of Hodgdon between April 2018 and June 2022. Currently, there is no conflict of interest with his personal or professional circumstances in hearing this appeal.

Attorneys Stephen Wagner and Richard Currier had no objections to Commissioner Dobbins hearing the appeal.

ART. 3. Chair Paul J. Underwood provided the structure for the hearing. The Appellant will present their case first, and the Town of Hodgdon will go second, followed by questions from both sides and

the Board of Commissioners. A decision will be made within 30 days and sent by mail to all parties. Chair Underwood reiterated to everyone that this is not a court of law.

Mr. Ryan Pelletier, County Administrator, administered the Oath to Witness for Mr. Stephen Wagner, attorney for the Appellant. Mr. Wagner began by summarizing the position statement previously submitted to the record. In order for a town to discontinue a road for winter maintenance it must be deemed unnecessary based on population, use, and travel. The town vote improperly focused on cost, which is not part of the statute for determining a winter road closure. 2 supporting affidavits were also received by the Commissioners' Office on September 7, 2023. Mr. Robert Burgess III is attending in person to support his statements, and a notarized copy of the statement from Mr. James Buchanan was admitted to the record. Additionally, exhibits containing a Google map of London Rd and additional Facebook posts were also submitted to the record after no objections from Mr. Currier, attorney for the Town of Hodgdon.

Commissioner Dobbins asked Mr. Wagner for the definition of population. Mr. Wagner indicated that the statute does not include a specific definition. He believes that population in this instance is not only the population of the area of London Rd, but the surrounding population that would use the road, including visitors to the area. Population is not necessarily referring to a head count of people who have a domicile on London Rd, but any population that could make use of the road if it were to be open year-round.

Mr. Pelletier administered the Oath to Witness for Mrs. Deborah Jagow Wynes, Co-Appellant. Mrs. Jagow Wynes, verified that the statements made in the materials submitted to the Commissioners by Mr. Wagner were accurate and true. She and her husband purchased the property on London Road in 2002. They were aware that the road was posted as closed during the winter. They had numerous conversations with the prior town manager, Mr. Jim Griffin, regarding the road closure and the process. During those conversations, they were led to believe that the road could be opened in the future as more land was developed and there became a need. Mr. Griffin had shared that there was a five (5) year plan to spread out the cost of the improvements needed to open the road during the winter in the future. In 2010, they built their home on the property. In 2012 she lost her job in New York and they moved to Maine. They own a home in Monticello where they reside during the winter months. They have made many improvements to the land including a foundation, buildings, installing power lines, septic, and well systems. Very busy road in the summertime. They appealed the winter road closure for London Road in 2013 to the Board of Commissioners, which was denied. Since that time, they have opened a popcorn stand and are in the process of installing a commercial kitchen to support their business on the property. Mrs. Jagow Wynes indicated that it is her family's hope to be able to move to the property full-time. They have a disabled relative who is going to need to come to live with them and they are building a living space for her in the same building as the commercial kitchen. In 2018, they requested a road review which was also declined. They made the request in 2022 to see if the road could be opened for the winter. The town created a Road Committee to determine what needed to be done to bring the road up to standards that would make it safe to plow and determine the costs involved. Mrs. Jagow Wynes indicated that the specifications and standards kept changing and becoming more expensive. During the June 7th meeting, the town discussed the contract for plowing, for which they said the 0.6-mile portion of London Road would be \$13,500 per year. The contract indicated that the fee was \$5,400/mile with all additional routes needing to be negotiated. Her husband had gotten bids that were much lower and he could speak to that. There was no bidding process for the plowing of London Road. There were bids for bringing the road up to the standards recommended by the road committee in order for it to be open/plowable. The costs involved were highlighted in several Facebook posts which Mrs. Jagow Wynes felt were inflammatory due to the language and the use of all capital letters in the portion of the notice that was relevant to London Rd. Mrs. Jagow Wynes went to the town office to talk with Mrs. Darcy Oliver, Town Manager, about the post. She refused to take it down and said it was not how she meant it. It was just how she talked and she used those

terms regularly. Mrs. Jagow Wynes believes that the Facebook posts and subsequent discussions during town meetings only focused on the cost of opening the road and the potential that it would increase taxes for residents. There was no focus on how the property has been developed by the Wynes', how another property has since been built, how their business brings in tourists/travelers to the area, or any of the things that had positive impacts on the land and town. They need the road open in the winter in order to start living there year-round. Her husband plows when he is able, but he is gone for weeks at a time for his job, so the snow can pile up and make it difficult to access their property and buildings. Not having access in the winter has liability issues and prevents them from properly maintaining their buildings. Mrs. Jagow Wynes stated that the town advised her that they neither give permission nor condone private citizens plowing roads that the town has closed for the winter months. She also indicated that at one of the town meetings, another resident had indicated that he was also plowing a road that the town had closed for winter so that he could access his property. Mrs. Jagow Wynes indicated that the town made no comment to this gentleman like they had to her and her husband.

Mr. Pelletier administered the Oath to Witness for Mr. Richard Currier, attorney for the Town of Hodgdon. Mr. Currier then asked Mrs. Jagow Wynes about the need for a turnaround for the plow truck. She responded that she has seen other areas of town where the plow truck will turn in someone's driveway. She said no one had discussed that with her but that she and her husband were not opposed to letting the town use their driveway as the turnaround without the need to have to modify the road to accommodate a plow turnaround. Mr. Currier asked about private maintenance of roads which was discussed at the meeting on June 7, 2023. Mrs. Jagow Wynes responded that yes, others indicated that they plow roads that are closed for the winter to access their properties. The town did not respond or make comment about the private plowing of closed winter roads. Mr. Currier asked Mrs. Jagow Wynes if she believed if cost should be a consideration for the town when determining if a road should be open or closed for the winter. Mrs. Jagow Wynes responded "yes."

Mr. Wagner asked Mrs. Jagow Wynes if she was an attorney or an expert who understood the statutes that govern winter road closure in the state of Maine, to which she responded she was not. Mr. Wagner reiterated that the statute was specific to 'population, use, and travel' with no mention of cost as a factor.

Chair Underwood asked if the Wynes' had gotten town approval to put in the power lines, to which Mrs. Jagow Wynes responded in the negative. She stated that were conversations with the prior town manager, Mr. Griffin, but that there was no formal request or approval made when power lines were installed on that portion of London Road to accommodate their property.

Commissioner Fournier asked about the 2 affidavits that were received overnight that were unsigned/unnotarized, to which Mr. Wagner responded that the statement from Mr. James Buchanan has been notarized and that copy was submitted to the Commissioners at the beginning of the hearing. The second affidavit was from Mr. Robert Burgess III, who was present at the hearing to provide in person testimony in support of the road opening in the winter.

Mr. Pelletier administered the Oath to Witness for Mr. Timothy Wynes, Co-Appellant. Mr. Wynes confirmed his wife's statements that he does, in fact, plow the road during the winter when he is home, but that his work keeps him away for periods of time and so he is unable to keep the road clear consistently for access to their property. He has been plowing the road for 8 years on his own using a truck with a plow and a tractor with a blower if the situation requires it. The road doesn't drift much if he is able to keep it clean versus having to wait a week after a storm where the wind has blown all the snow. Mr. Wagner asked if others benefited from his plowing of the road, to which Mr. Wynes responded that they do. He's seen multiple vehicles use the road in the winter and has even seen a Dead River truck come up the road in the winter. Mr. Wagner asked about the bids he had received for plowing that section of London Road. Mr.

Wynes responded that he has gotten quotes from others to plow the road when he is not able to and it was \$100/hour which is huge difference between the bid the town got for plowing.

Mr. Currier asked Mr. Wynes details about plowing the road, what equipment is used, if he finds it difficult or dangerous. Mr. Wynes reiterated his prior testimony that he uses a truck with a plow and sometimes a tractor with a blower attachment. He has never had any problems plowing and once it is done a few times, a bank forms on the right-hand side of the road that would stop cars from sliding over the side of the slope. Mr. Currier clarified that the bids Mr. Wynes obtained for plowing were simply a per hour, per occurrence and not a full bid for doing the plowing year-round. Mr. Wynes confirmed that the bid was hourly and per occurrence. Mr. Currier asked if Mr. Wynes believed that cost should be a consideration when determining if the town should maintain a road in the winter. Mr. Wynes responded “yes.”

Mr. Wagner asked Mr. Wynes if he was an attorney or an expert who understood the statutes that govern winter road closure in the state of Maine, to which he responded he was not. Mr. Wagner reiterated that the statute was specific to ‘population, use, and travel’ with no mention of cost as a factor.

Mr. Pelletier administered the Oath to Witness for Mr. Robert Burgess III, a property owner on London Road. Mr. Wagner asked Mr. Burgess III where he lived and why he made the trip up to Maine for this hearing. Mr. Burgess III responded that he lives in Rhode Island with his wife and 2 young children. He made the trip because his and his wife’s schedules allowed for this time off and since he was going to be in the area, he wanted to support the need to open the road. He purchased the property in 2018 and built his home in 2019. He was aware that the road was closed in the winter when he purchased the property and when he built his home. He had many conversations with the prior town manager, Mr. Griffin, that were always optimistic about opening the road. Mr. Griffin indicated to Mr. Burgess III that they were doing a little work at a time to the road so that it could be opened to the public in the future. Since those conversations, the town has widened the road and the cleared the trees back to make it possible to plow in the winter. Mr. Burgess III admitted that he did not really understand everything that went into closing a road or opening a road, but that he felt reassured by Mr. Griffin that it was a possibility. He stated that he comes here to get rid of all the drama and have peace. He has been to prior town meetings on this subject, but has never spoken publicly or made a request to the town regarding the road in order to avoid the drama. He visits his home at least 2 times per month in the summer and at least 1 time a month in the winter. He parks his vehicle at a neighbor’s home where the road is plowed and then snowmobiles into his property. His wife and children are not able to come with him when he goes to the property in the winter as his children are only 1 and 3 and are too young to be snowmobiling in to a home that has no winter road access. Mr. Burgess enjoys all seasons and wants to be able to enjoy all that the area has to offer all year round with this family and eventually plans to move his family there permanently. He is also concerned with any emergency or maintenance to his property over the winter months. A delay in access could be devastating for his property.

Chair Underwood asked if there were any other witnesses for the Appellants, to which Mr. Wagner replied ‘no.’ Chair Underwood then advised Mr. Currier that he could begin with his presentation.

Mr. Pelletier administered the Oath to Witness for Mrs. Darcy Oliver, Town Manager, Hodgdon. Mrs. Oliver stated that she is new to the Town Manager role and admits that she does know a lot about town business, but does not know anything about roads. The prior town manager was in place for 30 years and knew everything. The decision was made to form a road committee that would review all roads, not just London Rd, and make recommendations to the town about road maintenance, closures, etc. Mrs. Oliver stated that the portion of London Road in question has never been opened during the winter months. The road is very dangerous. It is narrow,

slope/slant to one side and a steep slope on the right makes it dangerous for the road to be plowed. The road is not a thruway or connector for point A to point B and does not require year-round access. Mrs. Oliver confirmed that the town did not put out a request for bids for plowing the road. In the past, no one would bid on it due to the significant danger it posed to the contractors. The only bid was from A. Quint and the bid was higher than his standard per mile rate due to the danger posed by plowing the road. The town did get bids for bringing the road up to standards. Those standards did change from the first recommendation the Road Committee submitted because members of the Selectboard did not believe that the first set of standards/requirements were accurate. The town had the estimates redone using the proper tools to ensure that they had a full understanding of what was needed to bring the road up to a safe, plowable standard. They did get 3 bids, of which they selected the lowest one at \$148k. Mrs. Oliver explained that her Facebook posts were simply how she spoke and common phrases she uses. They were not meant to be inflammatory, but rather to be informational to the residents of Hodgdon so they could be fully informed of the town business and the matter at hand regarding the request to open London Road and what that would require, including how much that would cost the town and taxpayers. London Road was the only winter road closure that was being brought up for discussion. During the meeting, a resident indicated that he was plowing his closed road to access his home. Mrs. Oliver said the town was unaware that this was happening and that they did not make comment at the time of the meeting. They had previously advised the Wynes' that the town could not approve or condone private plowing of a town road. Mrs. Oliver also noted that if anyone was using a posted closed road, that it was against the law and they would be driving on that road illegally. The town voted overwhelmingly to keep the road closed. There were over 200 registered voters at the town meeting where road closures were being voted on. 5 voted to keep this section of London Road open while the remaining voters voted for its closure instead of approving the costs needed to bring the road up to a safe standard that would allow the road to be traveled on year-round. Mrs. Oliver reiterated that the town has not ignored the requests from the Wynes'. At each occurrence that this has been brought up, the town has taken steps to determine what is needed and the costs involved to allow the road to open. They have entertained every request to the best of their ability. The road is simply not safe for travel in the winter and requires an excessive amount of work and funding in order to make it safe. There are not enough year-round residents or thruway traffic to make it necessary to keep the road open in the winter. Mrs. Oliver stated that the Wynes' and other property owners were fully aware of the winter road closure before they even purchased their properties. There was never a guarantee that the road would ever be open over the winter months. The town did agree to review London Road every 5 years instead of every 10 at the request of the Wynes'.

Mr. Pelletier administered the Oath to Witness for Mrs. Sheila Murchie, Selectman of the Town of Hodgdon. Mrs. Murchie stated that the road is dangerous, steep, requires a lot of work to make it safe to plow. The road needs to be widened, ditches need to be dug, guard rails need to be put in place, the slant/slope of the road needs to be engineered to be the complete opposite the way the slant/slope is now to allow for proper runoff of water from the mountain and to prevent vehicles from sliding off the road way and down the mountain on the right-hand side of the roadway. Cost needs to be a part of the decision because you can't bankrupt a town to keep a dangerous road open that only 2 families live on seasonally and the business located on the property is also seasonal. Mrs. Murchie explained that her understanding of population was the residents of the property where the road would be closed. In this case, that's 2 seasonal homes, 1 season business and 1 undeveloped property that is currently starting to be built upon. The Wynes' account for 1 home, 1 business and are currently developing another building. It doesn't make sense to open a dangerous road for 2 people or have the town incur the cost to make it safe to be open year-round when the town is already struggling to stay within its budget.

Commissioner Dobbins asked Mrs. Murchie how she would classify the road and she responded "as a farm rd."

Mr. Pelletier administered the Oath to Witness for Mr. Roger Larson, Selectman of the Town of Hodgdon. Mr. Larson stated that this portion of London Road is dangerous and will be very expensive to be made safe for everyday travel in the winter. He believes that the town has already spent too much of its money on work trying to improve the road. There are other more traveled roads that should be getting the attention than this small section of road is getting. He believes the town needs to stop spending money on London Road.

Mr. Pelletier administered the Oath to Witness for Mr. Joel Duff, Selectman of the Town of Hodgdon. Mr. Currier asked Mr. Duff about his knowledge and experience with roads. Mr. Duff explained that he has built and maintained roads for many years. He knew that the first specifications recommended by the road committee were not accurate. He explained that measurements were done using a board on the road to determine the amount of material needed to build up the road so it slanted the correct way. He went and used the proper tools to determine what was needed for material and it was significantly more than what the first recommendation indicated. The revised recommendation is what was put out to bid. Mr. Duff explained that the road needs a lot of work to be brought up to standards and for it to be deemed safe for winter travel and winter maintenance. The road is a significant danger to anyone who drives on it in the winter. The road is on the side of a mountain, it slopes the wrong way, there are no ditches for water runoff, so all the water comes down the mountain across the road and there is no bank or rail on the other side so if you slide, you will topple down the side of the mountain as there is nothing to catch you or keep you on the road. Building up the road so that it slants the correct way for water runoff to not cross over the road, will only cause the steepness of the slope on the side of the road to become even more steep, still posing a danger should anyone ever go off the road. The only place to go is down the mountain.

Commissioner Fournier asked Mr. Duff if the road would ever meet state DOT standards, to which he responded, "no."

Mr. Wagner impressed upon the Board of Commissioners that the statute is clear that when determining to close a road, that the only thing that plays a part in that decision is population, use and travel. Cost is not part of the statute. That might be bad policy, but we have to stay within the bounds of the current statute. In order for a road to close, winter maintenance must be deemed unnecessary based on population, use, and travel. In this instance, you have 3 property owners who all have plans to live year-round on their properties on London Rd. However, the road closure prevents that. The statute does not indicate that cost should be a deciding factor, or whether a road is dangerous, or safe should have any impact on the winter road closure process. It is simply a matter of necessity based on population, use, and traffic. The Wynes' have significantly improved their property, as have other property owners and they require year-round access. Mr. Wagner cited 2 cases to support his position that population, use, and travel are exhaustive lists and no other factor should be included in determining road closure; 2012 ME 53 Page 21 & 2008 ME 184 Page 13.

Mr. Currier impressed upon the Board of Commissioners that cost needs to be a factor in all town decisions as they operate under a strict budget. The town has a liability if the road is not made safe to be open and so the cost to make that road safe must be considered. Property owners knew this road was closed in the winter months when they purchased and subsequently built on their properties and made improvements. The Town of Hodgdon followed all the rules and regulations required to designate the winter road closure for this section of London Road and the town's vote should be upheld.

ART. 4. Adjournment.

MOTION:

A motion was made by Norman Fournier and seconded by William Dobbins to adjourn the meeting at 4:07 pm.

VOTE:

Motion voted and passed.

ATTEST: A True Copy

of Commissioners' Meeting

Ryan D. Pelletier
County Administrator

AROOSTOOK COUNTY COMMISSIONERS
DATE: September 20, 2023

Aroostook County Commissioner's Discussion Points

Wynes v. Town of Hodgdon

1. Review Relevant Statute MRSA 23 MRSA 2953
2. Review Minutes of the Appeal Hearing held September 8, 2023
3. Review Position Papers provided by the Town of Hodgdon & the Petitioners/Appellants
4. Discuss Case History (if any) & Deliberate on the Testimony Provided at the Hearing
5. Formally Vote to Approve or Deny the Appeal



Positive

As of: September 11, 2023 2:16 PM Z

Francis v. Dana-Cummings

Supreme Judicial Court of Maine

October 22, 2008, Argued; December 11, 2008, Decided

Docket: Was-08-223

Reporter

2008 ME 184 *; 962 A.2d 944 **; 2008 Me. LEXIS 187 ***

PAMELA F. FRANCIS v. COLLEEN DANA-CUMMINGS
et al.

Prior History: Francis v. Dana-Cummings, 2007 ME 16, 915 A.2d 412, 2007 Me. LEXIS 16 (2007)

Disposition: [***1] Judgment affirmed.

Core Terms

tribal, Tribe, matters, state court, damages, rights, reservation, territories, regulation, factors, summary judgment

Case Summary

Procedural Posture

A former resident of property located on an Indian reservation sued defendants, an Indian Tribe, its housing authority, and the authority's commissioners, alleging illegal eviction, trespass, and civil rights violations. The Superior Court, Washington County, Maine, granted defendants summary judgment on grounds it lacked subject matter jurisdiction over the resident's claims pursuant to 30 M.R.S. § 6206(1) (2007). The resident appealed.

Overview

The authority forcibly entered and took possession of a home the resident had formerly occupied. She sued the authority in tribal court, claiming she owned the property, and also filed the instant suit. While the state court suit was pending, the tribal court held that the authority violated the Tribe's fair housing code and, thus, the resident's rights as a tenant/homebuyer. It awarded her comensatory but not punitive damages and ordered the authority to deliver the deed to unit to her when she paid the balance due on the home. Both parties appealed. The state trial court then held that it lacked jurisdiction over the resident's suit because it

involved an internal tribal matter. The high court agreed. All of the individual parties were members of the Tribe; the dispute involved occupancy and rights to use property on the reservation; a forum to redress any violation of rights and provide remedies existed in the tribal court; and resolution of the dispute required the interpretation and application of tribal law, regulations, rules, and policies. That certain remedies available in state court were not available in tribal court was immaterial to the analysis.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Governments > Native Americans > Authority & Jurisdiction

HN1[↓] Native Americans, Authority & Jurisdiction

See 30 M.R.S. § 6206(1) (2007).

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[↓] Appellate Review, Standards of Review

An appellate court reviews a summary judgment de novo, considering the evidence in the light most favorable to the party against whom judgment was entered, to determine whether the parties' statements of material facts and the record evidence referenced therein indicate that there is no genuine issue of material fact such that the moving party is entitled to

2008 ME 184, *184; 962 A.2d 944, **944; 2008 Me. LEXIS 187, ***1

judgment as a matter of law.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3 Standards of Review, De Novo Review

An appellate court reviews the interpretation of a statute de novo and accords the words of the statute their plain, ordinary meaning.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Governments > Native Americans > Authority & Jurisdiction

HN4 Jurisdiction, Subject Matter Jurisdiction

Despite the otherwise broad grant of jurisdiction to Maine state courts with respect to the Passamaquoddy Tribe and Penobscot Nation, a Maine state court has no subject matter jurisdiction over internal tribal matters. *30 M.R.S. § 6206(1)* (2007) does not define "internal tribal matters" over which state courts have no subject matter jurisdiction, instead stating that internal tribal matters include, in a non-exhaustive list: membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income. *§ 6206(1)*.

Governments > Native Americans > Authority & Jurisdiction

HN5 Native Americans, Authority & Jurisdiction

The factors to be applied to determine if an issue involves "internal tribal matters" under *30 M.R.S. § 6206(1)* (2007) are: (1) the effect on nontribal members including members of the public outside of tribal lands; (2) the subject matter of the dispute, particularly when related to Indian lands or the harvesting of natural resources on Indian lands; (3) the interests of the State

of Maine; and (4) prior legal understandings.

Governments > Native Americans > Authority & Jurisdiction

HN6 Native Americans, Authority & Jurisdiction

An Indian Tribe's own methods of convening and engaging in government will in most instances be matters "internal" to the Tribe. The methods by which the Tribes govern themselves are not matters of interest to the citizenry of Maine at large. Tribal government will ordinarily be focused on Indian territory, tribal resources, and members of the Tribe. Though tribal efforts that have a direct impact on non-tribal members may not constitute "internal tribal matters," not all actions affecting non-Indians necessarily fall outside of the definition of "internal tribal matters" as used in *30 M.R.S. § 6206(1)* (2007).

Governments > Native Americans > Authority & Jurisdiction

Public Health & Welfare Law > Housing & Public Buildings > Low Income Housing

HN7 Native Americans, Authority & Jurisdiction

The Pleasant Point Passamaquoddy Housing Authority (PHA) is a quasi-municipal corporation, separate and independent from the Passamaquoddy Tribe. However, the PHA is governed by a commission consisting of five commissioners who are appointed by the Tribe and who appoint the PHA's executive director. The PHA is the Tribe's federally-recognized representative for purposes of administering the Tribe's housing program pursuant to the Native American Housing Assistance and Self-Determination Act of 1996, *25 U.S.C.S. §§ 4101-4243*.

Governments > Native Americans > Authority & Jurisdiction

HN8 Native Americans, Authority & Jurisdiction

Whether a matter is an "internal tribal matter" under *30 M.R.S. § 6206(1)* (2007) must be determined on a case-by-case basis.

Governments > Native Americans > Authority & Jurisdiction

HN9 Native Americans, Authority & Jurisdiction

The important policies of the law to support tribal self-government over internal tribal matters limits claims involving such matters where some remedy and a forum to assert entitlement to the remedy is available within the Tribe.

Counsel: For Pamela Francis: Curtis Webber, Esq. (orally), Linnell, Choate & Webber, LLP, Auburn, Maine.

For the Tribal Defendants: William H. Dale, Esq., Jensen Baird Gardner & Henry, Portland, Maine; Kaign Smith, Jr., Esq. (orally), DrummondWoodsum, Portland, Maine.

Judges: Panel: SAUFLEY, C.J., and CLIFFORD, ALEXANDER, LEVY, and SILVER, JJ.

Opinion by: ALEXANDER

Opinion

[**945] ALEXANDER, J.

[*P1] Pamela F. Francis appeals from a summary judgment entered in the Superior Court (Washington County, *Hunter, J.*) in favor of Colleen Dana-Cummings, the Passamaquoddy Tribe (the Tribe), the Pleasant Point Passamaquoddy Housing Authority (PHA), and five of the PHA's commissioners (collectively, the Tribal Defendants). Francis contends that the Superior Court erred in ruling that: (1) the Tribal Court, sitting without a jury, has exclusive jurisdiction pursuant to 30 M.R.S. § 6206(1) (2007) to hear her claims against the PHA and the individually-named defendants;¹ (2) the court did

¹Title 30 M.R.S. § 6206(1) (2007), part of the Maine Implementing Act, 30 M.R.S. §§ 6201-6214 (2007), provides in relevant part:

HN1 Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities . . . of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal

not have jurisdiction to hear her claims and allow her a jury trial pursuant to the Maine Civil Rights Act, 5 M.R.S. §§ 4681-4685 (2007) and the Maine Constitution; and (3) this case is not governed by the provision of the Tribe's Constitution stating [***2] that tribal law will not apply when it conflicts with State laws. We affirm.

I. CASE HISTORY

[*P2] The issues before us arise out of three separate lawsuits, two of which were consolidated, that Pamela F. Francis filed in the Superior Court against the PHA; the PHA's former Executive Director, Colleen Dana-Cummings; and five individually-named PHA commissioners. All individual parties are members of the Passamaquoddy Tribe.

[*P3] On or about February 24, 1998, while Francis [***3] was residing in Old Orchard Beach, representatives of the PHA forcibly entered and took possession of a residence, Unit 25, that Francis had formerly occupied on the Passamaquoddy Reservation at Pleasant Point. Francis asserts that the residence was her private property, acquired as the successor to her father's interest as the lease-purchaser, and that she suffered the loss of household items and other damages as a result of the entry into her residence.

[*P4] Francis first filed a four-count complaint in 2002 against the PHA in the Passamaquoddy Tribal Court, based on the same facts as in the case before the Superior Court, alleging violations of the Tribe's Fair Housing Code, damages due to trespass, unlawful entry, and illegal possession of personal property. The PHA filed a counterclaim, seeking to quiet title to the property and alleging that Francis never had legal rights to the residence at issue and that her occupation of the unit [**946] violated applicable U.S. Department of Housing and Urban Development and PHA regulations, policies and procedures, resulting in trespass. Francis subsequently filed the actions in Superior Court against the Tribal Defendants, seeking damages and alleging [***4] illegal eviction, trespass, and civil rights violations. The Superior Court actions are subject to the appeal now before us.

[*P5] We have previously considered several appeals in Francis's state court claims against the Tribal Defendants. The lengthy history of the cases is reviewed in our opinion in *Francis v. Dana-Cummings*

organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

(*Francis IV*), 2007 ME 16, 915 A.2d 412. Except for reference to events that occurred since our remand in *Francis IV*, that history is not repeated here.

[*P6] In *Francis IV*, we remanded the case to the Superior Court with instructions to allow the Tribe to intervene as a defendant. *Id.* P 24, 915 A.2d at 417. Additionally, clarifying that any party, not just the Tribe itself, "may assert that a court of the State lacks jurisdiction over a particular claim," we remanded the case to the court to determine whether Francis's claims involve any "'internal tribal matters' not subject to state regulation and thus, not subject to the jurisdiction of the Superior Court" pursuant to section 6206(1). *Id.* PP 21-22, 915 A.2d at 416-17.

[*P7] On remand, the Tribe filed motions to dismiss and for summary judgment. The individual defendants filed nearly identical motions for summary judgment, as [***5] did the Tribe and the PHA in Francis's separate case against the PHA.

[*P8] After our remand in *Francis IV*, but before the Superior Court acted on the Tribal Defendants' motions, the Tribal Court (Pleasant Point Division, *Irving, J.*) tried Francis's claim against the PHA. The Tribal Court entered a judgment for Francis, finding that Francis's father's agreement with the PHA to lease-purchase Unit 25 was valid and that Francis was the successor-in-interest to the residence under the agreement following her father's death. The Tribal Court concluded that the PHA violated the Tribe's Fair Housing Code and, thus, Francis's rights as a tenant/homebuyer. The court awarded Francis \$ 10,461.75 in compensatory and emotional distress damages and ordered the PHA to deliver the deed to Unit 25 to Francis upon her payment of the \$ 3048.60 balance due on the home. The Tribal Court held that punitive damages were not available because the PHA is a governmental entity immune from such damages. The PHA is appealing the judgment to the Appellate Division of the Tribal Court, as is Francis who asserts that the Tribal Court erred in denying her request for attorney fees.

[*P9] Shortly after the Tribal Court issued [***6] its judgment, the Superior Court granted summary judgments in favor of the Tribal Defendants. The court concluded that there were no genuine issues of material fact and that, as a matter of law, the issues, "sounding as [they do] in basic issues of housing on the Tribal reservation," involve "an internal tribal matter." Accordingly, the court concluded that state courts lack subject matter jurisdiction over Francis's claims

pursuant to section 6206(1).² Francis appeals the court's grant of summary judgments.

II. LEGAL ANALYSIS

[*P10] HN2 We review a summary judgment de novo, considering the evidence [***947] in the light most favorable to the party against whom judgment was entered, to determine whether the parties' statements of material facts and the record evidence referenced therein indicate that there is no genuine issue of material fact such that the moving party [***7] is entitled to judgment as a matter of law. *Dyer v. Dep't of Transp.*, 2008 ME 106, P14, 951 A.2d 821, 825.

[*P11] HN3 We also review the interpretation of a statute de novo and accord the words of the statute their plain, ordinary meaning. *Maddocks v. Whitcomb*, 2006 ME 47, P 4, 896 A.2d 265, 267. "Statutory schemes must be interpreted as a whole to avoid inconsistent results." *Boyer v. Boyer*, 1999 ME 128, P 14, 736 A.2d 273, 278.

[*P12] The central issue on appeal is whether, as a matter of law, Francis's claims involve internal tribal matters, thus barring a state court from exercising subject matter jurisdiction over them. The statute central to this appeal, section 6206(1) of the Maine Implementing Act, provides in relevant part:

Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities . . . of a municipality of and subject to the laws of the State, provided, however, that *internal tribal matters*, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal [***8] government, tribal elections and the use or disposition of settlement fund income *shall not be subject to regulation by the State*.

30 M.R.S. § 6206(1) (emphasis added). Thus, HN4 despite the otherwise broad grant of jurisdiction to state courts with respect to the Passamaquoddy Tribe and

² As we suggested in *Francis v. Dana-Cummings (Francis IV)*, 2007 ME 16, P 25, 915 A.2d 412, 417, the trial court also considered whether Francis's claims against the PHA and the individual defendants have an affirmative defense from suit under the Maine Tort Claims Act, 14 M.R.S. §§ 8101-8118 (2007), but did not reach the merits of the issue.

Penobscot Nation, see, e.g., 30 M.R.S. §§ 6204, 6206(2) (2007), a state court has no subject matter jurisdiction over internal tribal matters. See Maine v. Johnson, 498 F.3d 37, 46 (1st Cir. 2007); Penobscot Nation v. Stilphen, 461 A.2d 478, 488-90 (Me. 1983).

[*P13] Section 6206(1) does not define "internal tribal matters" over which state courts have no subject matter jurisdiction, instead stating that internal tribal matters include, in a non-exhaustive list: "membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." 30 M.R.S. § 6206(1). Although Francis's claims involve her right to possession or ownership of a residence on tribal land, they do not involve her right to reside within the Tribe's territory, which has been undisputed.

[*P14] Because Francis's [***9] claims do not fit squarely within any of the examples of "internal tribal matters" listed in section 6206(1), we look to case law to address this issue. We have previously analyzed whether an issue involves an "internal tribal matter" in two opinions, Stilphen and Great Northern Paper, Inc. v. Penobscot Nation, 2001 ME 68, 770 A.2d 574, and we addressed the issue in Francis IV.

[*P15] In Stilphen, we considered whether the Tribe's provision of beano games to the public, in violation of state law, was an "internal tribal matter" within the meaning of section 6206(1). 461 A.2d at 488. Because offering beano games is not one of the internal tribal matters listed in section 6206(1), we applied the *ejusdem generis* rule that "a general term followed by a list of illustrations is ordinarily assumed to embrace only concepts similar to those illustrations" to determine whether the Tribe's provision of beano games was [***948] of a nature sufficiently similar to the listed examples of "internal tribal matters" to also constitute an internal tribal matter. Id. at 489. We analyzed the list of "internal tribal matters," looking also to the legislative history of the Maine Implementing Act and of the federal Settlement [***10] Act, 25 U.S.C.S. §§ 1721-1735 (2004 & Supp. 2008), which ratified the Implementing Act. Id. at 488-90.³ We concluded that matters involving

"internal tribal matters" would generally include matters concerning "action by the Nation *directly* affecting them" and matters concerning "the Penobscot Nation's historical culture or development." Id. at 489-90. Applying this interpretation of what constitutes "internal tribal matters," we held that the Penobscot Nation's operation of beano games was "fundamentally unlike" the listed internal tribal matters, was "not embraced within the general term" of "internal tribal matters", and was, therefore, subject to enforcement under state law. Id.

[*P16] In Great Northern Paper, we did not discuss the *ejusdem generis* approach taken in Stilphen. Instead, we adopted the non-exclusive, non-dispositive factors described in Akins v. Penobscot Nation, 130 F.3d 482, 486-87 (1st Cir. 1997), and we reviewed legislative history,⁴ to aid in determining whether the disputed issue related to an internal tribal matter. Great N. Paper, 2001 ME 68, P 48-50, 60, 770 A.2d at 588-89, 591 (holding that the Maine Freedom of Access Act does not apply, pursuant to section 6206(1), to the Tribe's internal conduct of their government, but does apply when the Tribe communicates and interacts with other governments). HNS[↑] The factors applied in Great Northern Paper were: (1) the effect on nontribal members including members of the public outside of tribal lands; (2) the subject matter of the dispute, particularly when related to Indian lands or the harvesting of natural resources on Indian lands, (3) the interests of the State of Maine, and (4) prior legal understandings. Id. PP 49, 55-56, 770 A.2d at 589-90,

96-957, at 50 (1980)). The Court also observed that the United States "House Report stated that the settlement acts would protect the Indians against [***11] 'acculturation' by providing for tribal governments . . . which control all such internal matters." Id. (citing H.R. Rep. No. 96-1353, at 17 (1980)).

⁴ In Great Northern Paper, Inc. v. Penobscot Nation, 2001 ME 68, P 48, 770 A.2d 574, 588 (citing H.R. Rep. No. 96-1353 (1980)), we noted that the legislative history to the federal Settlement Act provided:

Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes. . . . While the settlement [***13] represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act . . . the settlement provides that henceforth the Tribes will be free from state interference in the exercise of their internal affairs.

³ The Stilphen Court noted that, at the time the Implementing and Settlement acts were under consideration, Maine's Attorney General "understood the 'internal tribal affairs' exception to have been drafted 'in recognition of [the Indians'] unique cultural or historical interest.'" Penobscot Nation v. Stilphen, 461 A.2d 478, 490 (Me. 1983) (citing S. Rep. No.

2008 ME 184, *184; 962 A.2d 944, **948; 2008 Me. LEXIS 187, ***13

see [***12] also *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709-13 (1st Cir. 1999) (applying the *Akins* factors, and adding as a factor the nature of the employment position at issue, to conclude that Fellencer's claim against the Nation for unlawful termination of employment as a community nurse involved an "internal tribal matter" over which the Tribal Court had exclusive jurisdiction, even though Fellencer was not a member of the Nation); *Akins*, 130 F.3d at 487-88, 490 (concluding that no claim [**949] was stated under federal or Maine law because the Penobscot Nation's regulation of stumpage permits was an "internal tribal matter" within the meaning of section 6206(1) where the permit policy affected only tribal members and natural resources within tribal territories).

[*P17] Applying these factors, we concluded in *Great Northern Paper* that:

[A] Tribe's *HN6* own methods of convening and engaging in government will in most instances be matters "internal" to the Tribe. The methods by which the Tribes govern themselves are not matters of interest to the citizenry of the state at large. Tribal government will ordinarily be focused on Indian territory, tribal resources, and members of the Tribe. Moreover, treating the processes of tribal government as free from state interference is entirely consistent with the intent of the settlement acts.

2001 ME 68, P 50, 770 A.2d at 589 (internal citations omitted). We indicated that, though tribal efforts that have a direct impact on non-tribal members may not constitute "internal tribal matters," not all actions affecting non-Indians would necessarily fall outside of the definition of "internal tribal matters." *Id.* PP 54-56 n.19, 770 A.2d at 589-90.

[*P18] In *Francis* [***14] IV, we instructed the trial court to make factual findings to determine: (1) whether the dispute is between tribal members; and (2) who has ownership or possessory rights to the property in dispute and, if unclear, whether that question is resolved by the application and interpretation of tribal law. *2007 ME 16, P 22, 915 A.2d at 417*.

[*P19] With the guidance of this history, particularly referencing the factors to consider in determining if a disputed issue relates to an internal tribal matter listed in *Great Northern Paper*, *Fellencer* and *Akins*, we look to the facts of this case.

[*P20] Here, the record establishes, without dispute, that:

1. All of the individual parties are members of the Passamaquoddy Tribe.
2. The property involved in the dispute is a low-income housing unit located on the Pleasant Point Passamaquoddy Reservation on land owned by the Tribe.
3. The dispute involved occupancy and rights to use property on the reservation.
4. All questioned actions occurred on the reservation and involved only members of the Tribe and agencies controlled by the Tribe.⁵
5. A forum to redress any violation of rights and provide remedies exists in the Tribal Court.
6. This dispute can be resolved without [***15] participation by or communication with parties or agencies outside of the reservation community.
7. Resolution of this dispute requires the interpretation and application of tribal law, regulations, rules, and policies.

[*P21] Judged against the criteria discussed in *Great Northern Paper*, *Fellencer*, and *Akins*, and as the Superior Court determined, these factors demonstrate that the dispute here is an internal tribal matter over which the Tribe and the Tribal Court have exclusive jurisdiction, not "subject [**950] to regulation by the State" pursuant to 30 M.R.S. § 6206(1).⁶

[*P22] Francis argues that she must have access to State court remedies because the PHA was the only defendant in her Tribal Court litigation and because a

⁵We have previously held that *HN7* the PHA is a "quasi-municipal corporation, separate and independent from the Tribe." See *Francis IV*, 2007 ME 16, P 23, 915 A.2d at 417. However, the undisputed facts show that the PHA is governed by a Commission consisting of five commissioners who are appointed by the Tribe and who appoint the PHA's executive director. The PHA is the Tribe's federally-recognized representative for purposes of administering the Tribe's housing program pursuant to the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C.S §§ 4101-4243 (2004 & Supp. 2008).

⁶In reaching this conclusion, we do [***16] not suggest that all seven factors we list must always be present for a *HN8* matter to be an internal tribal matter. Such must be determined on a case-by-case basis. The seven factors listed here demonstrate the strength of the view that this matter is an internal tribal matter.

jury trial, attorney fees, punitive damages, and the capacity to seek relief pursuant to the Maine Civil Rights Act (MCRA) were not available to her in Tribal Court. If such were the case, any claim involving an internal tribal matter could be shifted to State court by the simple device of pleading an entitlement to a remedy not available in Tribal Court.

[*P23] HN9 [↑] The important policies of the law to support tribal self-government over internal tribal matters limits claims involving such matters where, as here, some remedy and a forum to assert entitlement to the remedy is available within the Tribe. See Fellencer, 164 F.3d at 707, 713 (holding that the Nation's decision to terminate Fellencer's employment was an "internal tribal matter" within the meaning of *section 6206(1)* [***17] over which state courts lacked jurisdiction, notwithstanding the fact that its decision foreclosed Fellencer's ability to pursue a claim under the Maine Human Rights Act over which, like MCRA claims, Maine Superior Courts have exclusive jurisdiction); see also Akins, 130 F.3d at 485, 486 n.5. Finally, contrary to Francis's contention, the Tribe's Constitution is in accord with the result of this case.

The entry is:

Judgment affirmed.

2007 30 M.R.S. § 6206

2007 Maine Code Archive

Maine Revised Statutes Annotated by LexisNexis(R) > TITLE 30. MUNICIPALITIES AND COUNTIES > PART 4. INDIAN TERRITORIES > CHAPTER 601. MAINE INDIAN CLAIMS SETTLEMENT

§ 6206. Powers and duties of the Indian tribes within their respective Indian territories

1. GENERAL POWERS. Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State. The Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and administer those laws of the State applicable to the respective Indian territories and the residents thereof. Any resident of the Passamaquoddy Indian territory or the Penobscot Indian territory who is not a member of the respective tribe or nation nonetheless shall be equally entitled to receive any municipal or governmental services provided by the respective tribe or nation or by the State, except those services which are provided exclusively to members of the respective tribe or nation pursuant to state or federal law, and shall be entitled to vote in national, state and county elections in the same manner as any tribal member residing within Indian territory.

2. POWER TO SUE AND BE SUED. The Passamaquoddy Tribe, the Penobscot Nation and their members may sue and be sued in the courts of the State to the same extent as any other entity or person in the State provided, however, that the respective tribe or nation and its officers and employees shall be immune from suit when the respective tribe or nation is acting in its governmental capacity to the same extent as any municipality or like officers or employees thereof within the State.

3. ORDINANCES. The Passamaquoddy Tribe and the Penobscot Nation each shall have the right to exercise exclusive jurisdiction within its respective Indian territory over violations by members of either tribe or nation of tribal ordinances adopted pursuant to this section or section 6207. The decision to exercise or terminate the jurisdiction authorized by this section shall be made by each tribal governing body. Should either tribe or nation choose not to exercise, or to terminate its exercise of, jurisdiction as authorized by this section or section 6207, the State shall have exclusive jurisdiction over violations of tribal ordinances by members of either tribe or nation within the Indian territory of that tribe or nation. The State shall have exclusive jurisdiction over violations of tribal ordinances by persons not members of either tribe or nation.

Maine Revised Statutes Annotated by LexisNexis(R)

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LILLY v. TOWN OF WESTPORT ISLAND

LAW DOCKET NO. LIN-18-143
SUPREME JUDICIAL COURT OF MAINE

September 27, 2018

Reporter

2018 ME S. CT. BRIEFS LEXIS 315 *

LESLIE B. LILLY et al., Plaintiffs - Appellees v. TOWN OF WESTPORT ISLAND et al., Defendants - Appellants

Type: Other

Prior History: ON APPEAL FROM SUPERIOR COURT (LINCOLN COUNTY), DOCKET NO. AP-15-9.

Counsel

William H. Dale, Bar No. 408, Mark A. Bower, Bar No. 4132, JENSEN BAIRD GARDNER & HENRY, Portland, ME, Attorneys for Defendants-Appellants.

Title

REPLY BRIEF OF DEFENDANTS - APPELLANTS TOWN OF WESTPORT ISLAND et al.

Text

[*1] INTRODUCTION

Defendant-Appellants Town of Westport Island (the "Town") submit this Reply Brief in response to the arguments raised by Plaintiff-Appellees in their initial brief.

REPLY ARGUMENT

I. THE SUPERIOR COURT ERRED IN APPLYING THE DOCTRINE OF MERGER TO EXTINGUISH THE TOWN'S ROAD RIGHTS.

Plaintiffs advance two subsidiary arguments on this first point: namely, that the Town failed to carry its burden of proof on prescriptive use and maintenance of the disputed portion of the Baker Road and that the Superior Court correctly applied the doctrine of merger to extinguish any public road rights. The Town respectfully disagrees with both arguments.

A. Twenty Years of Prescriptive Use and Town Maintenance.

First Selectman George Richardson testified that the Town has been maintaining Baker Road all the way to the Wollins bam for more than twenty years. Tr. at 65-66; *see* Defs. Exs. 20-D and 20-E.

Plfs.' Attorney: When you said it was-the road, the disputed portion of the road was graded every summer-every year it was maintained summer and winter. Was it maintained every summer, every winter?

Sel. Richardson: It was plowed in the winter; it was maintained in the spring, [*2] summer and fall.

Plfs.' Attorney: Was this road on the excluded road list [statutorily closed to winter maintenance ¹]?

Sel. Richardson: Not that I have any evidence of but that doesn't mean it wasn't.

Plfs.' Attorney: Okay, and the grading and adding gravel, that was an every year thing?

Sel. Richardson: That is every year.

Tr. at 66.

He also referenced the lists of Town roads on the snow plow contracts over that same time period. *See* Defs. Exs. 6, 7 and 8; A. 76-78. That Plaintiffs, who lived in the winter in Colorado, did not see that winter maintenance is not surprising. And, without exception, all of the Town road records show the distance to be maintained to be .62 miles, which means all the way to the barn and the snowplow turn-around. Tr. at 31-32; 71-82; Defs. Exs. 6, 7 and 8; A. 76-78.

B. The Doctrine of Merger is Inapplicable.

Contrary to Plaintiffs' argument, the doctrine of merger is inapplicable here. In addition to the holding in Dority v. Dunning, 78 Me. 381 (Me. 1884), as argued in the Town's initial brief at 16-17, the Town's rights in town ways or public easements are substantially [*3] different than the rights held by a private property owner in his or her land. Because of the public nature of these travel way rights, and because the Legislature has by statute established specific procedures to discontinue those public travel rights, 23 M.R.S. § 3026, ² the doctrine does not apply here.

And finally, the Law Court's decision in Stickney v. City of Saco, 2001 ME 69, 770 A.2d 592, makes clear that the tax lien mortgage provisions serve to merge underlying easement rights if, but only if, the value of the easement(s) is included in the property's tax assessment. However, that is not true here as the Town's tax liens were based exactly on the rights of the delinquent tax payer, Marine Research and Development Corp., and the description in the deed by which Marine Research had acquired the property from the Bakers in 1964 provided expressly that it was "EXCEPTING ... (1) the town roads..." *See* Defs. Ex. 4 and 5; A. 70-73. Without question, the value of any easement rights was "excepted out."

II. THE SUPERIOR COURT ERRED IN INTERPRETING 1785 MASSACHUSETTS ROAD LAW

Both of Plaintiffs' arguments regarding the 1785 Edgecomb town meeting vote are [*4] incorrect as there can be little question that the road at issue then is the Baker Road today, and similarly there can be little question that the 1785 town meeting vote established the way as a "statutory private way" ³ and not a "county highway" as discussed in the Superior Court's Judgment After Trial. A, 12.

The minutes of the old Edgecomb town meeting read as follows:

"Voted = To lay out a road from Josiah Parson's house to the main road on his own cost."

Defs. Ex. 3, p. 2; A. 67.

First, is there a chance that the road referenced is not today's Baker Road? Yes, but the greater weight of evidence strongly suggests that it is. Testimony from Plaintiff Lilly was that her property in the late 1700's was known as the Josiah Parsons "homestead" with a "trading post" on the water—just as her property in Westport Island is improved today with a grand, old main house high on the hill looking down at a wharf jutting out over the Sheepscot River. Tr. at 156 and 177. Her husband conceded that the historic plaque for his wife's house described it as a trading post wharf over the river and then an adjacent main house. [*5] Tr. at 157. Obviously that fits Plaintiffs' current improvements to a tee. And, on cross examination, both Plaintiffs admitted that they did not really know whether Josiah Parsons owned more than one homestead on Westport Island, but it unlikely that he would have

¹ *See* 23 M.R.S. § 2953 (authority to close roads for winter months November through April).

² Recently amended, 23 M.R.S. § 3026-A.

³ In Maine today, a "public easement." *See* 23 M.R.S. § 3021(2).

more than one homestead. Tr. at 157 and 179. Just how many coincidences are necessary to show that this is the same property and the same way in question?

Second, the Superior Court's discussion of the old Massachusetts law is simply inapplicable. The Court identified a number of procedural prerequisites for laying out a "county road" from town to town under the 1785 statute, but the court was referencing the wrong Massachusetts law; the travel way it was discussing was a county way. However, as true in Avaunt v. Town of Gray with the language of that warrant article, "be at no expense to the Town for the land," the old Edgcomb warrant article here, "at his own cost," was discussing a "statutory private way." Defs. Ex. 4; A. 67. Compare Avaunt v. Town of Gray, 634 A.2d 1258, 1260 (Me. 1993), with United States of America v. 125.07 Acres of Land, 707 F.2d 11 (1st. Cir. 1983) (discussing and distinguishing the three types of ways under the old Massachusetts law). All of the various [*6] procedural requirements that the Superior Court found missing here were for establishing a "county way"-not a statutory private way. Without a doubt, that is what Edgcomb was voting on in 1785.⁴

III. THE SUPERIOR COURT ERRED IN INTERPRETING THE DEEDS IN PLAINTIFF LILLY'S CHAIN OF TITLE.

Least persuasive of Plaintiffs' arguments is that the "exclusionary" language in the deeds in Plaintiff Lilly's chain of title couldn't possibly be meant to refer to the Baker Road and the Fowles Point Road, the only roads that crosses her property. The thrust of this argument, adopted by the Superior Court and argued by Plaintiffs, is that since the Town had not proven the Baker Road to be a formal town road, the deed language excluding the [*7] "town roads" couldn't possibly refer to the Baker Road at issue in this case. Defs. Exs. 4 and 5; A. 70 and 73. Or, put another way, when the Bakers conveyed the surrounding property to Ms. Lilly's father's corporate entity in 1964, their deed's express reference to "EXCEPTING from the above (1) the town ways" could only be meant to apply to "roads that met all of the legal niceties of Maine road law." That's fatuous. As argued in the Town's initial brief, pp. 20 -21, the case law of Maine is that, whenever possible, deeds are to be interpreted according to their plain language. Gillespie v. Worcester, 322 A.2d 93, 95 (Me. 1974). It strains credibility to suggest that the Bakers intended to exclude only "formal roads."

Add to that argument that there are only two travel ways across Plaintiff Lilly's property-the Fowles Point Road and the Baker Road-such that the deed reference to "roads" in the plural must certainly have referred to the Baker Road as one of them. Tr. at 185-86 (only two travel ways on Plaintiff Lilly's property). And, most importantly, if the 1964 Bakers' deed to Marine Research is read to exclude the Baker Road-which it certainly must be, then Marine Research never acquired title to the [*8] Baker Road, and that, in turn, means the Town never acquired the road by foreclosure of its tax lien mortgage, and so did not convey it to her by deed in 2014. Defs. Ex. 4 and 5; A. 71 and 74.

In short, the only legally persuasive conclusion is that Edgcomb laid out what is now the Baker Road in 1785 as a statutory private way, it was never discontinued or lost by abandonment,⁵ the Town has elected to maintain it as is permissible under the law, and the Town's summer and winter maintenance efforts all the way up to the bam and the snowplow tum-around makes perfect sense and the Simmons family, owners of the adjacent land, is not "squeezed out" of the only, practical year-round access to their property.

CONCLUSION

For all of the reasons argued above and in the Town's initial brief, the Superior's Order must be vacated and judgment entered in favor of the Town that the disputed portion of the Baker Road is a public easement and the Town has the right to insist [*9] that its travel way not be obstructed by Plaintiffs.

⁴ Plaintiffs' further argument that the 1785 warrant article is insufficient because it fails to provide for the Town's "acceptance" of the way confuses the statutory procedures: acceptance is only necessary for a voluntary dedication. However, when a municipality lays out a way, it is taking it by eminent domain and a separate vote to accept the same is unnecessary. Compare 23 M.R.S. § 3023 (eminent domain) with § 3025 (dedication and acceptance).

⁵ Even though the Town has the burden of proof in this case, Plaintiffs nonetheless bore the burden to show the way had been lost by "abandonment" and they offered no proof on that point. See Gav v. Dube, 2012 ME 30, 56, III 10 and 11.

DATED at Portland, Maine this 27th day of September, 2018.

/s/ [Signature]

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CERTIFICATE OF SERVICE

I, William H. Dale, attorney of record for Defendants-Appellants Town of Westport Island et al., hereby certify that I have this 27th day of September, 2018, caused two (2) copies of the foregoing Reply Brief of Defendants-Appellants to be served upon counsel of record in this action, by depositing the same in the United States mail, postage prepaid, addressed to his business office at the address below, and have forwarded to him one copy by electronic mail to his email address,

Justin@justinandrus.com.

Justin Andrus, Esq.

25 Mill Street, Second Floor

Brunswick, ME 04011.

DATED at Portland, Maine this 27th day of September, 2018.

By: /s/ [Signature]

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Cited

As of: September 11, 2023 1:52 PM Z

Friends of the Boundary Mts. v. Land Use Regulation Comm'n

Supreme Judicial Court of Maine

September 14, 2011, Argued; April 5, 2012, Decided

Docket: LUR-11-61

Reporter

2012 ME 53 *; 40 A.3d 947 **; 2012 Me. LEXIS 54 ***; 2012 WL 1134914

FRIENDS OF THE BOUNDARY MOUNTAINS v. LAND USE REGULATION COMMISSION et al.

Disposition: [***1] Judgment affirmed.

Core Terms

tangible benefit, benefits, wind, public hearing, reopen, energy, deliberation, pre-amendment, operation and maintenance, package, effective, staff, host, fact finding, parties, argues, taxes

Case Summary

Procedural Posture

Pursuant to *Me. Rev. Stat. Ann. tit. 12, § 689* (2011), appellant association appealed from a decision of appellee Land Use Regulation Commission (Maine) (LURC) approving the issuance of a permit to appellee applicant to construct a wind energy facility.

Overview

The association argued that the LURC violated its rules by refusing to hold a public hearing on the applicant's amended application. After the amendment, the LURC reopened the record but not the hearing. The association was given, and acted on, the opportunity to introduce additional documents and make arguments opposing the amended application. The appellate court found that, while the LURC's rules expressly provided that intervenors, like the association, had the right of oral cross-examination, under 04 061 005-4 Me. Code R. § 5.16(1)(b) (2011), that right was contingent on the discretionary decision to open or reopen an application for public hearing. The procedural right to cross-examination could not have, in these circumstances, been antecedent to the hearing itself. The LURC's decision to allow the association and other interested parties time to submit comments and provide oral

argument satisfied a constitutional inquiry. The LURC did not err in declining to reopen the hearing. The LURC properly considered the applicant's community benefits package and the grants to the Department of Labor and the High Peaks Alliance in its "tangible benefits" analysis.

Outcome

The determination was affirmed.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN1 [↓] Standards of Review, Deference to Agency Statutory Interpretation

An agency's interpretation of its own internal rules will be given considerable deference and will not be set aside unless the rule plainly compels a contrary result, or the rule interpretation is contrary to the governing statute.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN2 [↓] Formal Adjudicatory Procedure, Hearings

The Maine Land Use Regulation Commission's rules give it discretion to hold or reopen a hearing. The rules state that, in accordance with ch. 4 Me. Code R., the Land Use Regulation Commission shall provide the applicant, the petitioner, or any other interested person the opportunity to request a public hearing on any application. 04 061 005-1 Me. Code R. § 5.02 (2011).

Administrative Law > ... > Formal Adjudicatory
Procedure > Hearings > General Overview

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Administrative Procedure

HN3 Formal Adjudicatory Procedure, Hearings

See 04 061 004-4 Me. Code R. § 4.04(5)(b) (2011).

Administrative Law > Agency Rulemaking > Rule
Application & Interpretation > General Overview

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Administrative Procedure

Administrative Law > ... > Formal Adjudicatory
Procedure > Hearings > General Overview

HN4 Agency Rulemaking, Rule Application & Interpretation

The rules provide that the Maine Land Use Regulation Commission (LURC) may elect to reopen a hearing, 04 061 005-5 Me. Code R. § 5.18(3) (2011), and vest the LURC with discretion to deviate from its procedural rules in certain circumstances, 04 061 005-1 to -2 Me. Code R. § 5.06(2)(f) (2011).

Administrative Law > ... > Formal Adjudicatory
Procedure > Hearings > General Overview

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Administrative Procedure

HN5 Formal Adjudicatory Procedure, Hearings

The rules do not mandate that once the Maine Land Use Regulation Commission (LURC) holds a public hearing on an application, it is then required to reopen the hearing upon a reopening of the record. As the plain

language of the rules indicates, whether the LURC opens the matter for a public hearing upon receiving an initial application is, in the first place, a decision committed to its discretion, and the LURC may thereafter "elect" to reopen a hearing prior to the issuance of a final order or decision. 04 061 004-4 Me. Code R. § 4.04(5)(b); 04 061 005-5 Me. Code R. § 5.18(3).

Administrative Law > ... > Formal Adjudicatory
Procedure > Hearings > General Overview

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Administrative Procedure

HN6 Formal Adjudicatory Procedure, Hearings

Although the Maine Land Use Regulation Commission's rules expressly provide that intervenors shall have the right of oral cross-examination, that right is contingent on the discretionary decision to open or reopen an application for public hearing. 04 061 005-4 Me. Code R. § 5.16(1)(b) (2011). The procedural right to cross-examination contained in the rules cannot, in these circumstances, be antecedent to the hearing itself.

Administrative Law > Judicial Review > Standards
of Review > Abuse of Discretion

Evidence > Burdens of Proof > Allocation

Administrative Law > Judicial Review > Standards
of Review > General Overview

HN7 Standards of Review, Abuse of Discretion

A party appealing a decision committed to the reasonable discretion of a state or local decisionmaker has the burden of demonstrating that the decisionmaker abused its discretion in reaching the decision under appeal.

Administrative Law > Agency
Adjudication > Decisions > Contents

HN8 Decisions, Contents

See *Me. Rev. Stat. Ann. tit. 5, § 9061* (2011).

2012 ME 53, *53; 40 A.3d 947, **947; 2012 Me. LEXIS 54, ***1

Administrative Law > Agency
Adjudication > Decisions > Contents

Energy & Utilities Law > Administrative
Proceedings > General Overview

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Administrative Procedure

[HN9\[↓\]](#) Decisions, Contents

The Wind Energy Act, Me. Rev. Stat. Ann. tit. 35-A, §§ 3401-3457, and provisions in the Maine Land Use Regulation Commission's enabling statute, Me. Rev. Stat. Ann. tit. 12, § 685-B(4), (4-B), require the Land Use Regulation Commission to make certain findings when reviewing "expedited wind energy development" applications. Although these statutes do not require an agency to make a detailed incident-by-incident fact finding, the findings must be sufficiently specific to permit meaningful appellate review.

Administrative Law > Agency
Adjudication > Decisions > Contents

Administrative Law > Judicial Review > General
Overview

Administrative Law > Judicial
Review > Administrative Record > Remands

Administrative Law > Judicial Review > Remand &
Remittitur

[HN10\[↓\]](#) Decisions, Contents

If an agency fails to make sufficient and clear findings of fact and such findings are necessary for judicial review, the appellate court will remand the matter to the agency or board to make the findings.

Real Property Law > Zoning > General Overview

[HN11\[↓\]](#) Real Property Law, Zoning

The Maine Land Use Regulation Commission is not required to consider a project's effects on Canada, but rather its effects on the scenic character or existing uses related to scenic character of the scenic resource of

state or national significance. Me. Rev. Stat. Ann. tit. 35-A, § 3452(1).

Real Property Law > Zoning > General Overview

[HN12\[↓\]](#) Real Property Law, Zoning

No statutory provision requires the Maine Land Use Regulation Commission to consider an offset of the dollar amount for the public subsidies an applicant will receive in analyzing whether a project will provide significant tangible benefits. Me. Rev. Stat. Ann. tit. 12, § 685-B(4-B)(D); Me. Rev. Stat. Ann. tit. 35-A, § 3451(10).

Administrative Law > Judicial Review > Standards
of Review > Abuse of Discretion

Administrative Law > Judicial Review > Standards
of Review > General Overview

Administrative Law > Judicial Review > Standards
of Review > Substantial Evidence

[HN13\[↓\]](#) Standards of Review, Abuse of Discretion

An appellate court directly reviews an agency's decision for an abuse of discretion, error of law, or findings not supported by the evidence.

Governments > Legislation > Interpretation

[HN14\[↓\]](#) Legislation, Interpretation

As a general principle of statutory construction, enactments made by a subsequent legislature may be examined to illuminate the meaning of prior legislative terminology that is ambiguous.

Energy & Utilities Law > General Overview

Real Property Law > Zoning > General Overview

[HN15\[↓\]](#) Energy & Utilities Law

Pursuant to Me. Rev. Stat. Ann. tit. 12, § 685-B(4-B)(D), the developer of a wind energy development must demonstrate that the proposed generating facility will

2012 ME 53, *53; 40 A.3d 947, **947; 2012 Me. LEXIS 54, ***1

provide significant tangible benefits. In turn, *Me. Rev. Stat. Ann. tit. 35-A, § 3451(10)* defines "tangible benefits."

[Energy & Utilities Law > General Overview](#)

[Real Property Law > Zoning > General Overview](#)

[HN16](#) [Energy & Utilities Law](#)

See *Me. Rev. Stat. Ann. tit. 35-A, § 3451(10)* (2011).

[Energy & Utilities Law > General Overview](#)

[Real Property Law > Zoning > General Overview](#)

[HN17](#) [Energy & Utilities Law](#)

Pursuant to 2009 Me. Laws ch. 642, § A-6, "other payments to a host community" and "payments under a community benefit agreement" are now specifically included in the definition of "tangible benefits."

[Energy & Utilities Law > General Overview](#)

[Real Property Law > Zoning > General Overview](#)

[HN18](#) [Energy & Utilities Law](#)

Former *Me. Rev. Stat. Ann. tit. 35-A, § 3451(10)* defines "tangible benefits" as environmental or economic improvements attributable to the construction, operation and maintenance of an expedited wind energy development. The pre-amendment definition further provides a non-exhaustive list of examples.

[Energy & Utilities Law > General Overview](#)

[Real Property Law > Zoning > General Overview](#)

[Energy & Utilities Law > Administrative Proceedings > General Overview](#)

[HN19](#) [Energy & Utilities Law](#)

Prior to the 2009 amendments to *Me. Rev. Stat. Ann. tit. 35-A, § 3451(10)*, the Maine Land Use Regulation Commission's "Policy on implementing the tangible

benefits provision" stated that tangible benefits in the form of payments to the state or third-parties to undertake projects that will provide tangible benefits, such as land conservation, habitat improvement, or recreational access, are acceptable so long as additional to required regulatory compensation.

[Governments > Legislation > Interpretation](#)

[HN20](#) [Legislation, Interpretation](#)

The plain meaning of "attribute" is to assign to a cause or source.

[Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation](#)

[Governments > Legislation > Interpretation](#)

[HN21](#) [Standards of Review, Deference to Agency Statutory Interpretation](#)

To determine the reasonableness of an agency's interpretation of a statute, a court examines the legislative history as well as the context of the whole statutory scheme of which the section at issue forms a part, so that a harmonious result, presumably the intent of the legislature, may be achieved.

[Energy & Utilities Law > General Overview](#)

[HN22](#) [Energy & Utilities Law](#)

The Wind Energy Act, *Me. Rev. Stat. Ann. tit. 35-A, §§ 3401-3457*, codifies the legislature's determination that it is in the public interest to explore opportunities for and encourage the development, where appropriate, of wind energy production in Maine, and that development of the state's wind energy resources should be undertaken in a manner that ensures significant tangible benefits to the people of the state. *Me. Rev. Stat. Ann. tit. 35-A, § 3402*.

[Administrative Law > Judicial Review > Standards of Review > General Overview](#)

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > Appeals > Standards of Review > General Overview

HN23 Judicial Review, Standards of Review

An appellate court does not substitute its own judgment for that of an agency and must affirm findings of fact if they are supported by substantial evidence in the record.

Counsel: On the briefs: Philip C. Worden, Esq., Northeast Harbor, for appellant Friends of the Boundary Mountains.

William J. Schneider, Attorney General, and Amy Mills, Asst. Atty. Gen., Office of Attorney General, Augusta, for appellee Land Use Regulation Commission.

Juliet T. Browne, Esq., and Scott D. Anderson, Esq., Verrill Dana LLP, Portland, for appellee TransCanada Maine Wind Development, Inc.

At oral argument: Philip C. Worden, Esq., for appellant Friends of the Boundary Mountains.

Amy Mills, Asst. Atty. Gen., for appellee Land Use Regulation Commission.

Juliet T. Browne, Esq., for appellee TransCanada Maine Wind Development, Inc.

Judges: Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

Opinion by: JABAR

Opinion

[**948] JABAR, J.

[*P1] Pursuant to 12 M.R.S. § 689 (2011), Friends of the Boundary Mountains [****949**] (FBM) appeals from a decision of the Land Use Regulation Commission approving the issuance of a permit to TransCanada Maine Wind Development, Inc. to construct a wind energy facility in Franklin County. FBM argues that LURC erred by (1) denying FBM's request to reopen a public hearing to consider TransCanada's amended

application; (2) failing to abide by its own procedural rules; (3) [****2**] ignoring several issues raised by FBM during the administrative proceedings; and (4) finding that TransCanada's wind energy project will provide "significant tangible benefits," 12 M.R.S. § 685-B(4-B)(D) (2011); 35-A M.R.S. § 3451(10) (2009).¹ We disagree and affirm the judgment.

I. BACKGROUND

[*P2] In December 2009, TransCanada filed an application with LURC for a permit to construct the Kibby Expansion Wind Power Project in the Townships of Kibby and Chain of Ponds. *See generally* 12 M.R.S. §§ 681-689 (2011);² 35-A M.R.S. §§ 3401-3457 (2009). As initially proposed, the project was a forty-five megawatt wind energy generation facility, including fifteen wind turbines, created as an expansion of an existing forty-four-turbine wind facility operated by TransCanada.

[*P3] On May 11 and 12, 2010, LURC held a public hearing to allow interested parties [****3**] to comment on the application, present testimony, and submit information associated with the project. FBM, as one of four intervenors, participated in this public hearing. FBM raised several issues at the hearing, as well as in their June 6, 2010, brief. Following the hearing, LURC planned to hold a public deliberation on July 7, 2010, in accordance with the "Third Pre-hearing Procedural Order," which stated that LURC "will deliberate with proposed findings of fact, as drafted by [LURC] staff . . . , but will deliberate without a staff recommendation as to whether to grant or deny the permit." On July 7, 2010, LURC held a public deliberation in compliance with the Third Pre-hearing Procedural Order, after which it directed its staff to draft a decision denying TransCanada's application.

[*P4] On August 4, 2010, prior to the scheduled vote on the draft decision, LURC, over FBM's objection, granted TransCanada's request to reopen the record to allow TransCanada to amend its application. TransCanada's amended application proposed an eleven-turbine expansion, eliminating the four

¹Title 35-A M.R.S. § 3451(10) (2009) has since been amended. *See* P.L. 2009, ch. 642, § A-6 (effective July 12, 2010) (codified at 35-A M.R.S. § 3451(10) (2011)).

²Although some of these statutes were amended after these proceedings were commenced, none of the amendments affect the present appeal, and we therefore cite to the current codification of Title 12.

southernmost turbines and the associated access road contained in the original proposal. In response to the amended [***4] application, FBM requested that LURC conduct a public hearing, while TransCanada asked that LURC solicit written comments from the public. The remaining intervenors "neither request[ed] nor . . . object[ed] to a public hearing," but "recommend[ed] that [LURC] allow a 30 day public comment period." LURC voted to review the amended proposal after a public comment period and not to hold an additional hearing.

[*P5] Following the public comment period and written and oral arguments by the parties, and with the benefit of a "deliberation notebook" prepared by staff,³ [**950] LURC voted to approve TransCanada's amended application on December 1, 2010. At LURC's direction, staff prepared a written decision, which LURC approved with minor changes on January 5, 2011. Among other things, LURC's decision found that the project would provide "significant tang[ible] benefits" as a result of the following: the employment of several hundred workers during construction; economic benefits to local businesses during the construction period; the creation of one permanent job in operations and maintenance; a \$110,000 grant from TransCanada to the Department of Labor (DOL) to support green jobs training in Franklin [***5] County; \$13 million in anticipated income taxes over the next twenty-five years; a \$110,000 grant from TransCanada to the High Peaks Alliance (HPA) to support land conservation in Franklin County; and \$10 million in property taxes over the next twenty years. Despite finding that "a community benefits package in accordance with PL 2009, Ch. 642 is not required," LURC noted that TransCanada also planned to contribute approximately \$660,000 to the local community over the next twenty years. FBM timely appealed LURC's decision. See 5 M.R.S. §§ 11001(1), 11002(3) (2011); 12 M.R.S. § 689; M.R. Civ. P. 80C.

II. DISCUSSION

A. Public Hearing

[*P6] FBM argues that LURC violated its own rules by refusing to hold a public hearing on TransCanada's amended application. HN1 [†] An agency's interpretation of its own internal rules will be given considerable deference and will not be set aside unless the rule plainly compels a contrary result, or the rule

³The "deliberation notebook" contained recommended findings on applicable review criteria, but it did not contain a proposed recommendation on whether to grant or deny the permit.

interpretation is contrary to the governing statute. See Beauchene v. Dep't of Health and Human Servs., 2009 ME 24, P 11, 965 A.2d 866; [***6] Schwartz v. Unemployment Ins. Comm'n, 2006 ME 41, P 9, 895 A.2d 965.

[*P7] HN2 [†] LURC's rules give it discretion to hold or reopen a hearing. The rules state that, in accordance with "Chapter 4 of these rules," LURC "shall provide the applicant, the petitioner, or any other interested person the opportunity to request a public hearing on any application." 4 C.M.R. 04 061 005-1 § 5.02 (2011). Chapter 4 of the Rules provides:

HN3 [†] Hearings on an application are *at the discretion of the Commission* unless otherwise required by the Constitution of Maine or statute. In determining whether a hearing is advisable, the Commission shall consider the degree of public interest and the likelihood that information presented at the hearing will be of assistance to the Commission in reaching its decision.

4 C.M.R. 04 061 004-4 § 4.04(5)(b) (2011) (emphasis added). HN4 [†] The rules also provide that "the Commission *may elect* to reopen a hearing," 4 C.M.R. 04 061 005-5 § 5.18(3) (2011) (emphasis added), and vest LURC with discretion to deviate from its procedural rules in certain circumstances, see 4 C.M.R. 04 061 005-1 to -2 § 5.06(2)(f) (2011); see also 5 M.R.S. § 9053(4) (2011).

[*P8] HN5 [†] The rules do not mandate that once LURC holds [***7] a public hearing on an application, it is then required to reopen the hearing upon a reopening of the record. As the plain language of the rules indicates, whether LURC opens the matter for a public hearing upon receiving an initial application is, in the first place, a decision committed to its discretion, and LURC may thereafter "elect" to reopen a hearing prior to the issuance of a final order or decision. 4 C.M.R. 04 061 004-4 § 4.04(5)(b); 4 C.M.R. 04 061 005-5 § 5.18(3). After TransCanada amended its application, LURC reopened the record [**951] but did not reopen the hearing. FBM was given, and acted upon, the opportunity to introduce additional documents and make arguments opposing TransCanada's amended application.

[*P9] Part of FBM's claim that LURC abused its discretion either by not reopening the public hearing on TransCanada's initial application or by not conducting a new hearing on the amended application is the

argument that FBM was not given the opportunity to cross-examine witnesses regarding the amended eleven-turbine proposal. HN6 Although LURC's rules expressly provide that intervenors, like FBM, "shall have the right of oral cross-examination," that right is contingent on the discretionary [***8] decision to open or reopen an application for public hearing. See 4 C.M.R. 04 061 005-4 § 5.16(1)(b) (2011). The procedural right to cross-examination contained in the rules cannot, in these circumstances, be antecedent to the hearing itself. Although FBM does not expressly make the argument that principles of due process required a hearing on the amended eleven-turbine proposal, LURC's decision to allow FBM and other interested parties time to submit comments and provide oral argument in response to the amended proposal would satisfy a constitutional inquiry. See Fichter v. Bd. of Env'tl. Prot., 604 A.2d 433, 436-38 (Me. 1992). At no point during the administrative process was FBM inhibited from expressing the basis for its opposition to either the original fifteen-turbine proposal or the amended eleven-turbine proposal.

[*P10] Given the voluminous existing record and the limited nature of the changes made to the original proposal, the Board did not abuse its discretion in denying FBM's request to reopen the hearing on the original application or to conduct a new hearing on the amended application. ⁴ See Sager v. Town of Bowdoinham, 2004 ME 40, P 11, 845 A.2d 567 (HN7) "A party appealing a decision [***9] committed to the reasonable discretion of a State or local decisionmaker has the burden of demonstrating that the decisionmaker abused its discretion in reaching the decision under appeal."; Forest Ecology Network v.

⁴We have affirmed decisions in which expedited wind energy applications have been reviewed without a public hearing. See Martha A. Powers Trust v. Bd. of Env'tl. Prot., 2011 ME 40, 15 A.3d 1273; Concerned Citizens to Save Roxbury v. Bd. of Env'tl. Prot., 2011 ME 39, 15 A.3d 1263. These cases involved Board of Environmental Protection review of licensing decisions of the Commissioner of the Department of Environmental Protection. Martha A. Powers Trust, 2011 ME 40, P 1, 15 A.3d 1273; Concerned Citizens to Save Roxbury, 2011 ME 39, P 1, 15 A.3d 1263. In each case, this Court found no abuse of discretion in the Board's decision that public hearings were not necessary. Martha A. Powers Trust, 2011 ME 40, PP 9-10, 15 A.3d 1273; Concerned Citizens to Save Roxbury, 2011 ME 39, PP 18-23, 15 A.3d 1263. [***10] These cases are distinguishable from this case, however, because in this case full public hearings on the applications were initially held at the Department level.

Land Use Regulation Comm'n, 2012 ME 36, PP 34-41, 39 A.3d 74 (holding that LURC did not violate its rules or abuse its discretion by not conducting new hearings on an applicant's amended plan).

B. LURC's Third Procedural Order

[*P11] FBM argues that LURC violated the Third Pre-hearing Procedural Order because the staff's "deliberation notebook" contained "a series of recommendations on the key issues that lead to the conclusion that [LURC] should grant the permit." FBM's arguments are unpersuasive. In particular (1) the Third Pre-hearing Procedural Order applied to the July 7, 2010, deliberation, not to the December 1, 2010, deliberation; [**952] (2) even if the Third Pre-hearing Procedural Order applied to the December 1, 2010, deliberation, there was no violation because the staff's "deliberation notebook" did not provide LURC with a recommendation as to whether to grant or deny the permit; and (3) FBM has not shown that it was prejudiced by any violation of the Third Pre-hearing Procedural Order, see Town of Jay v. Androscoggin Energy, LLC, 2003 ME 64, P 9, 822 A.2d 1114.

C. Other Relevant Issues

[*P12] FBM argues that LURC ignored several issues raised by it during the administrative hearings. These issues include whether the project [***11] had any effect on Canada, whether an offset for public subsidies was considered when examining tangible benefits, whether LURC considered the effect on wildlife in determining noise levels, and whether LURC considered the potential for congestion of transmission lines. These arguments are not persuasive. Pursuant to 5 M.R.S. § 9061 (2011), HN8 "[e]very agency decision made at the conclusion of an adjudicatory proceeding . . . shall include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision." HN9 The Wind Energy Act, 35-A M.R.S. §§ 3401-3457, and provisions in LURC's enabling statute, see 12 M.R.S. § 685-B(4), (4-B), require LURC to make certain findings when reviewing "expedited wind energy development" applications. Although these statutes do "not require an agency to make a detailed incident-by-incident fact finding," Murphy v. Bd. of Env'tl. Prot., 615 A.2d 255, 260 (Me. 1992), the findings must be sufficiently specific to permit meaningful appellate review, see Schwartz, 2006 ME 41, P 10, 895 A.2d 965. HN10 If an "agency fails to make sufficient and clear findings of fact and such findings are necessary for judicial review, [***12] [this Court] will remand the matter to the agency or board to

make the findings." *Carroll v. Town of Rockport*, 2003 ME 135, P 30, 837 A.2d 148.

[*P13] Contrary to FBM's assertions, LURC was not required to consider the first two issues raised by FBM, LURC considered everything statutorily required for the third issue, and the party on whose behalf the fourth issue was raised did not appeal the issue.

[*P14] Regarding the first issue, HN11 LURC is not required to consider the project's effects on Canada, but rather its effects "on the scenic character or existing uses related to scenic character of the scenic resource of state or national significance." 35-A M.R.S. § 3452(1) (emphasis added). As to the second issue, HN12 no statutory provision required LURC to consider an offset of the dollar amount for the public subsidies TransCanada will receive in analyzing whether the project will provide "significant tangible benefits." 12 M.R.S. § 685-B(4-B)(D); 35-A M.R.S. § 3451(10). Regarding the third issue—the effects of noise generated by the project on wildlife—LURC summarized the positions of FBM and IF&W in its decision, and it ultimately made the finding required by statute: that the noise generated by the ***13 project satisfied applicable noise-control laws. See 12 M.R.S. § 685-B(4-B)(A). Finally, regarding the fourth issue, none of the applicable review criteria requires a finding relating to the potential for congestion of transmission lines, and the interested party on whose behalf the argument is being raised has not appealed the decision.

D. "Tangible Benefits"

[*P15] FBM argues that LURC erred in interpreting the term "tangible benefits" to include TransCanada's grants to DOL and HPA, as well as the payments proposed in the "community benefits package." **953 "[W]e HN13 directly review an agency's decision for an abuse of discretion, error of law, or findings not supported by the evidence." *York Ins. of Me., Inc. v. Superintendent of Ins.*, 2004 ME 45, P 13, 845 A.2d 1155.

[*P16] HN14 "As a general principle of statutory construction, enactments made by a subsequent Legislature may be examined to illuminate the meaning of prior legislative terminology that is ambiguous." *Lee v. Massie*, 447 A.2d 65, 69 (Me. 1982). At issue is the definition of "tangible benefits." HN15 Pursuant to 12 M.R.S. § 685-B(4-B)(D), the developer of a wind energy development—here, TransCanada—must demonstrate that the proposed generating facility ***14 "[w]ill provide significant tangible benefits." In turn, 35-A

M.R.S. § 3451(10) defines "tangible benefits." Effective July 12, 2010, section 3451(10) was amended in the following way:

HN16 "Tangible benefits" means environmental or economic improvements or benefits to residents of this State attributable to the construction, operation and maintenance of an expedited wind energy development, including but not limited to: property tax payments resulting from the development; other payments to a host community, including, but not limited to, payments under a community benefit agreement; construction-related employment; local purchase of materials; employment in operations and maintenance; reduced property taxes; reduced electrical rates; land or natural resource conservation; performance of construction, operations and maintenance activities by trained, qualified and licensed workers in accordance with Title 32, chapter 17 and other applicable laws; or other comparable benefits, with particular attention to assurance of such benefits to the host community or communities to the extent practicable and affected neighboring communities.

P.L. 2009, ch. 642, § A-6 (effective July 12, 2010) (codified ***15 at 35-A M.R.S. § 3451(10) (2011)). The parties and LURC agree that the pre-amendment version of this definition applies to the project. See P.L. 2009, ch. 642, § A-10. Thus, factors such as "property tax payments resulting from the development" and "other payments to a host community" were not explicitly included in the applicable version of section 3451(10), and TransCanada was not required to make "payments under a community benefit agreement" to satisfy the definition of "tangible benefits." See P.L. 2009, ch. 642, §§ A-2 to A-7. ⁵

[*P17] LURC properly considered TransCanada's proposed grants and payments. Under the amendments effective on July 12, 2010, TransCanada's proposed payments are properly considered "tangible benefits." HN17 Pursuant to P.L. 2009, ch. 642, § A-6, "other payments to a host community" and "payments under a community ***16 benefit agreement" are now specifically included in the definition of "tangible

⁵With certain exceptions, an applicant seeking to demonstrate significant tangible benefits is now "required to establish a community benefits package valued at no less than \$4,000 per year per wind turbine included in the expedited wind energy development, averaged over a 20-year period." P.L. 2009, ch. 642, § A-7 (codified at 35-A M.R.S. § 3454(2) (2011)).

benefits." See also P.L. 2009, ch. 642, §§ A-2, A-3 (defining "community benefits package" and "community benefit agreement"). Although the 2010 amendments do not apply to TransCanada's project, FBM itself asserts that the 2010 amendments *clarify* existing law. Thus, pursuant to FBM's own analysis, the pre-amendment definition of "tangible benefits" would include "other payments to a host [**954] community" and "payments under a community benefit agreement."

[*P18] Furthermore, LURC properly interpreted the pre-amendment definition of "tangible benefits" to include TransCanada's proposed "community benefits package" and the grants to DOL and HPA. ⁶ The pre-amendment version of HN18 [↑] 35-A M.R.S. § 3451(10) defines "tangible benefits" as "environmental or economic improvements attributable to the construction, operation and maintenance of an expedited wind energy development." The pre-amendment definition further provides a non-exhaustive list of examples.

[*P19] FBM disputes whether TransCanada's payments are "attributable to the construction, operation and maintenance" of the project. 35-A M.R.S. § 3451(10) (emphasis added). HN20 [↑] The plain meaning of "attribute" is "[t]o assign to a cause or source." Webster's New College Dictionary 75 (3d ed. 2008). TransCanada and LURC argue that the proposed "community benefits package" and the grants to DOL and HPA constitute "tangible benefits" because they would not occur but for the construction, operation and maintenance of the project. Conversely, FBM asserts that these payments come from TransCanada's general wealth and do not result from the "the construction, operation and maintenance" of the project. 35-A M.R.S. § 3451(10).

[*P20] To the extent that the term "attributable" in 35-A M.R.S. § 3451(10) is ambiguous, LURC's interpretation is reasonable and should be accorded deference. See Dep't of Corr. v. Pub. Utils. Comm'n, 2009 ME 40, P8, 968 A.2d 1047. [***18] HN21 [↑] "To determine the reasonableness of an agency's interpretation, [this

⁶ LURC's determination in this case is consistent with its stated policy. HN19 [↑] Prior to the 2009 amendments, LURC's "Policy on implementing the tangible benefits provision" stated [***17] that tangible benefits in the form of "payments to the State or third-parties to undertake projects that will provide tangible benefits, such as land conservation, habitat improvement, or recreational access, are acceptable so long as additional to required regulatory compensation."

Court] examine[s] the legislative history as well as the context of the whole statutory scheme of which the section at issue forms a part, so that a harmonious result, presumably the intent of the Legislature, may be achieved." Allied Res., Inc. v. Dep't of Pub. Safety, 2010 ME 64, P 21, 999 A.2d 940 (quotation marks omitted). HN22 [↑] The Wind Energy Act codified the Legislature's determination that "it is in the public interest to explore opportunities for and encourage the development, where appropriate, of wind energy production in the State," and "that development of the State's wind energy resources should be undertaken in a manner that ensures significant tangible benefits to the people of the State." 35-A M.R.S. § 3402. Given these goals, LURC's broad interpretation of the term "attributable" furthers the purpose of the statute as a whole. Payments to host communities, such as those at issue here, benefit those communities and the State regardless of whether they flow directly and organically from the project itself or from the applicant's own wealth. In either case, such payments would not occur or benefit the State [***19] but for the approval and resultant "construction, operation and maintenance" of the project. 35-A M.R.S. § 3451(10).

[*P21] Notwithstanding LURC's conclusion that the "community benefits package" and the payments to DOL and HPA fell within the definition of the "tangible benefits" that are "attributable to the construction, operation and maintenance" found in the pre-amendment version of 35-A M.R.S. § 3451(10), LURC made findings that would independently support its decision [**955] to approve TransCanada's amended application. Specifically, LURC found that the project, as proposed, would "result in the employment of several hundred workers during construction, with a large majority being from Maine," provide "indirect benefits to local businesses during the construction period," and create "1 additional permanent job in operations and maintenance." See 35-A M.R.S. § 3451(10) (including, among the non-exhaustive list of "tangible benefits" to be considered during the expedited permitting process, "construction-related employment[,] local purchase of materials[,] [and] employment in operations and maintenance") (enacted by P.L. 2007, ch. 661, § A-7 (effective April 18, 2008)). In addition, LURC concluded [***20] that the project would generate "an estimated \$13 million in State income taxes over a 25-year period."

[*P22] LURC's additional findings comport with the type of tangible, economic benefits that are expressly stated in the pre-amendment version of 35-A M.R.S. §

3451(10). FBM does not, and cannot, make the argument that these "tangible benefits" fall outside the scope of the pre-amendment definition of the term in 35-A M.R.S. § 3451(10). The creation of jobs, the indirect benefits to local businesses during the construction period, and the generation of 13 million dollars in State income taxes over a 25-year period are all directly "attributable to the construction, operation and maintenance" of the project. That LURC reasonably construed 35-A M.R.S. § 3451(10) to include the "community benefits package" and the payments to DOL and HPA in its "tangible benefits" analysis—beyond what the express language of the pre-amendment definition required at the time—proves to be of little consequence to the disposition of this appeal. See *Rangeley Crossroads Coal. v. Land Use Regulation Comm'n*, 2008 ME 115, P 10, 955 A.2d 223 (HN23[↑]) "We . . . do not substitute our own judgment for that of the agency and [***21] must affirm findings of fact if they are supported by substantial evidence in the record.").

[*P23] For these reasons, LURC's interpretation of "tangible benefits" was reasonable, and LURC committed no error in considering TransCanada's community benefits package and the grants to DOL and HPA.

The entry is:

Judgment affirmed.

2012 35-A M.R.S. § 3451

2012 Maine Code Archive

Maine Revised Statutes Annotated by LexisNexis(R) > TITLE 35-A. PUBLIC UTILITIES > PART 3. ELECTRIC POWER > CHAPTER 34-A. EXPEDITED PERMITTING OF GRID-SCALE WIND ENERGY DEVELOPMENT

§ 3451. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. ASSOCIATED FACILITIES. "Associated facilities" means elements of a wind energy development other than its generating facilities that are necessary to the proper operation and maintenance of the wind energy development, including but not limited to buildings, access roads, generator lead lines and substations.

1-B. COMMUNITY BENEFIT AGREEMENT. "Community benefit agreement" means an agreement between the developer of an expedited wind energy development and a host community that involves payments by the developer to the host community to be utilized for public purposes, including, but not limited to, for property tax reductions, economic development projects, land and natural resource conservation, tourism promotion or reduction of energy costs, and that specifies in writing:

A. The value of any lump sum payments made by the developer to the host community; and

B. Any payment schedule and associated terms and conditions for payments to be made over time by the developer to the host community.

1-C. COMMUNITY BENEFITS PACKAGE. "Community benefits package" means the aggregate collection of tangible benefits resulting from any of the following:

A. Payments, not including property tax payments, to the host community or communities, including, but not limited to, payments under community benefit agreements;

B. Payments that reduce energy costs in the host community or communities; and

C. Any donations for land or natural resource conservation.

2. DEPARTMENT. "Department" means the Department of Environmental Protection.

3. EXPEDITED PERMITTING AREA. "Expedited permitting area" means:

A. The organized areas of the State in their entirety, but not including waters subject to tidal influence, so that the edge of the area that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the United States Department of Commerce,

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National Oceanic and Atmospheric Administration, National Ocean Service defines the boundary of the expedited permitting area on lands abutting waters subject to tidal influence; and

- B. Specific places within the State's unorganized and deorganized areas, as defined by Title 12, section 682, subsection 1, that are identified by rule by the Maine Land Use Regulation Commission in accordance with this chapter.

4. EXPEDITED WIND ENERGY DEVELOPMENT. "Expedited wind energy development" means a grid-scale wind energy development that is proposed for location within an expedited permitting area.

5. GENERATING FACILITIES. "Generating facilities" means wind turbines and towers and transmission lines, not including generator lead lines, that are immediately associated with the wind turbines.

6. GRID-SCALE WIND ENERGY DEVELOPMENT. "Grid-scale wind energy development" means a wind energy development that is of a size that would qualify as a development of state or regional significance that may substantially affect the environment as defined under Title 38, section 482, subsection 2, paragraph A or paragraph C.

7. HOST COMMUNITY. "Host community" means :

A. The following entities:

- 1) A municipality or plantation in which the generating facilities of an expedited wind energy development are located;
 - 2) If the generating facilities of an expedited wind energy development are located in a township, the county in which those facilities are located;
 - 3) If the generating facilities of an expedited wind energy development are located on Passamaquoddy Indian territory, as defined in Title 30, section 6203, subsection 6, the Passamaquoddy Tribe, if the Passamaquoddy Tribe notifies the primary siting authority that it chooses to be considered a host community for purposes of this chapter with respect to the expedited wind energy development;
 - 4) If the generating facilities of an expedited wind energy development are located on Penobscot Indian territory, as defined in Title 30, section 6203, subsection 9, the Penobscot Nation if the Penobscot Nation notifies the primary siting authority that it chooses to be considered a host community for purposes of this chapter with respect to the expedited wind energy development;
- or
- 5) If the generating facilities of an expedited wind energy

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development are located on Qualifying Band Trust Land, the Aroostook Band of Micmacs, if the Aroostook Band of Micmacs notifies the primary siting authority that it chooses to be considered a host community for purposes of this chapter with respect to the expedited wind energy development; and

B. When the generating facilities of an expedited wind energy development are located within the State's unorganized or deorganized areas and the developer selects a municipality; plantation; township; Passamaquoddy Indian territory, as defined in Title 30, section 6203, subsection 6; Penobscot Indian territory, as defined in *Title 30, section 6203*, subsection 9; or Qualifying Band Trust Land proximate to the location of the generating facilities for the purpose of providing specific tangible benefits:

- 1) In the case of a municipality or plantation that is selected, the municipality or plantation;
- 2) In the case of a township that is selected, the county in which that township is located;
- 3) In the case of Passamaquoddy Indian territory that is selected, the Passamaquoddy Tribe if the Passamaquoddy Tribe notifies the primary siting authority that it chooses to be considered a host community for purposes of this chapter with respect to the expedited wind energy development;
- 4) In the case of Penobscot Indian territory that is selected, the Penobscot Nation if the Penobscot Nation notifies the primary siting authority that it chooses to be considered a host community for purposes of this chapter with respect to the expedited wind energy development; and
- 5) In the case of Qualifying Band Trust Land that is selected, the Aroostook Band of Micmacs, if the Aroostook Band of Micmacs notifies the primary siting authority that it chooses to be considered a host community for purposes of this chapter with respect to the expedited wind energy development.

An expedited wind energy development may have multiple host communities.

8. PRIMARY SITING AUTHORITY. "Primary siting authority" means:

- A. The department, in the case of an expedited wind energy development subject to the department's jurisdiction pursuant to Title 38, chapter 3, subchapter 1, article 6, including, but not

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limited to, a development subject to the department's jurisdiction pursuant to *Title 38, section 488*, subsection 9-A; or

- B. The Maine Land Use Planning Commission, in the case of a community-based offshore wind energy project as defined in Title 12, section 682, subsection 19 and a wind energy development in the unorganized and deorganized areas as defined in Title 12, section 682, subsection 1 that is not grid-scale wind energy development.

8-A. QUALIFYING BAND TRUST LAND. "Qualifying Band Trust Land" means Band Trust Land, as defined in the federal Aroostook Band of Micmacs Settlement Act, Public Law 102-171, *105 Stat. 1143 (1991)*, over which the Aroostook Band of Micmacs possesses municipal authority with respect to expedited wind energy development. For purposes of this subsection, "municipal authority" means the rights, privileges, powers and immunities of a municipality that are specified in legislation specifically authorizing the exercise of those government powers and that are equivalent to the rights, privileges, powers and immunities possessed by the Penobscot Nation and the Passamaquoddy Tribe with respect to expedited wind energy development within their respective Indian territories pursuant to *Title 30, section 6206*.

9. SCENIC RESOURCE OF STATE OR NATIONAL SIGNIFICANCE. "Scenic resource of state or national significance" means an area or place owned by the public or to which the public has a legal right of access that is:

- A. A national natural landmark, federally designated wilderness area or other comparable outstanding natural and cultural feature, such as the Orono Bog or Meddybemps Heath;
- B. A property listed on the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended, including, but not limited to, the Rockland Breakwater Light and Fort Knox;
- C. A national or state park;
- D. A great pond that is:
 - 1) One of the 66 great ponds located in the State's organized area identified as having outstanding or significant scenic quality in the "Maine's Finest Lakes" study published by the Executive Department, State Planning Office in October 1989; or
 - 2) One of the 280 great ponds in the State's unorganized or deorganized areas designated as outstanding or significant from a scenic perspective in the "Maine Wildlands Lakes Assessment" published by the Maine Land Use Regulation Commission in June 1987;
- E. A segment of a scenic river or stream identified as having unique or outstanding scenic attributes listed in Appendix G of the "Maine Rivers Study" published by the Department of Agriculture,

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Conservation and Forestry in 1982;

- F. A scenic viewpoint located on state public reserved land or on a trail that is used exclusively for pedestrian use, such as the Appalachian Trail, that the Department of Agriculture, Conservation and Forestry designates by rule adopted in accordance with section 3457;
- G. A scenic turnout constructed by the Department of Transportation pursuant to Title 23, section 954 on a public road that has been designated by the Commissioner of Transportation pursuant to Title 23, section 4206, subsection 1, paragraph G as a scenic highway; or
- H. Scenic viewpoints located in the coastal area, as defined by Title

38, section 1802, subsection 1, that are ranked as having state or national significance in terms of scenic quality in:

- 1) One of the scenic inventories prepared for and published by the Executive Department, State Planning Office: "Method for Coastal Scenic Landscape Assessment with Field Results for Kittery to Scarborough and Cape Elizabeth to South Thomaston," Dominie, et al., October 1987; "Scenic Inventory Mainland Sites of Penobscot Bay," Dewan and Associates, et al., August 1990; or "Scenic Inventory: Islesboro, Vinalhaven, North Haven and Associated Offshore Islands," Dewan and Associates, June 1992; or
- 2) A scenic inventory developed by or prepared for the Executive Department, former State Planning Office or the Department of Conservation in accordance with section 3457.

10. TANGIBLE BENEFITS. "Tangible benefits" means environmental or economic improvements or benefits to residents of this State attributable to the construction, operation and maintenance of an expedited wind energy development, including but not limited to: property tax payments resulting from the development; other payments to a host community, including, but not limited to, payments under a community benefit agreement; construction-related employment; local purchase of materials; employment in operations and maintenance; reduced property taxes; reduced electrical rates; land or natural resource conservation; performance of construction, operations and maintenance activities by trained, qualified and licensed workers in accordance with Title 32, chapter 17 and other applicable laws; or other comparable benefits, with particular attention to assurance of such benefits to the host community or communities to the extent practicable and affected neighboring communities.

11. WIND ENERGY DEVELOPMENT. "Wind energy development" means a development that uses a windmill or wind turbine to convert wind energy to electrical energy for sale or use by a person other than the generator. A wind energy development includes generating facilities and associated facilities.

History

P.L. 2007 ch. 661, part A, § A-7 (NEW); *2009 ch. 642*, §§ A-2, A-3, A-4, A-5, A-6 (AMD); *2011 ch. 655*, § KK-22 (AMD); *2011 ch. 682*, § 26 (AMD).

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Ryan D. Pelletier

From: Todd Collins
Sent: Thursday, September 14, 2023 12:36 PM
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Subject: FW: Email:Light v. Town of Livermore_ 2022 U.S. Dist. LEXIS 158735
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This is heavy lifting but there are some useful nuggets:

B. Count I: Judicial Review Under Maine Rule of Civil Procedure 80B

Count I alleges that the Town's June 8, 2021, amendments to the marijuana ordinance were "affected by bias or error of law, [and] unsupported by substantial evidence on the whole." *Second Am. Compl.* ¶ 72. Accordingly, Mr. Light seeks judicial review of the amendment pursuant to Maine Rule of Civil Procedure 80B. *Id.* ¶¶ 71-72. Maine Rule of Civil Procedure 80B provides that a plaintiff may appeal an "action or failure or refusal to act by a governmental agency" where "provided by statute" or "otherwise available by law." M. R. CIV. P. 80B. However, other independent claims do not trigger Rule 80B review. *Nadeau v. Kempen*, No. 96-0012-B, 1996 U.S. Dist. LEXIS 11199, at *16-17 (D. Me. July 15, 1996) (citing *Int'l Paper Co. v. Town of Jay*, 665 A.2d 998, 1000 (Me. 1995)).

The Law Court has explained that "Rule 80B does not create judicial authority to review governmental action or inaction." *F.S. Plummer Co.*, 612 A.2d at 859. Rather "[t]he rule provides the *procedure* when governmental conduct is subject to direct judicial review by statute or when judicial intervention is otherwise available by law." *Id.* (emphasis in original). Maine courts have made clear that "[j]udicial review pursuant to Rule 80B is only available for administrative or quasi-judicial actions" [*53] and thus "not available for challenges to legislative actions by a governmental agency." *City of Lewiston v. Androscoggin Cnty.*, No. AUBSC-CV-15-118, 2016 Me. Super. LEXIS 44, at *12 (Me. Super. Ct. Mar. 18, 2016) (citing *F.S. Plummer Co.*, 612 A.2d at 859). Such legislative decisions are "entitled to great deference from the courts." *Bog Lake Co. v. Town of Northfield*, 2008 ME 37 ¶ 11, 942 A.2d 700. A plaintiff may challenge a legislative action by seeking a declaratory judgment, although "that review [is limited] to a determination of whether the ordinance itself is constitutional." *Id.* (citing *F.S. Plummer Co.*, 612 A.2d at 859).

Mr. Light notes that a Rule 80B appeal of the original ordinance, as well as a declaratory judgment, are currently pending before the Androscoggin Superior Court, and thus in this Court, he is solely challenging the amendment to the ordinance. *Pl.'s Opp'n* at 11-12. In the Second Amended Complaint Mr. Light alleges that the Town's amended marijuana ordinance went into effect after it was approved by voters on June 8, 2021. *Second Am. Compl.* ¶ 70. The Law Court has consistently held that enactment of an ordinance or amendment through the will of the voters constitutes a legislative, rather than quasi-judicial, act. See *Bog Lake Co.*, 2008 ME 37 ¶ 11, 942 A.2d 700 ("When the voters of Northfield denied Bog Lake Company's request to amend the shoreland area ordinance, they did so acting as the legislative body of the Town"); *Vella v. Town of Camden*, 677 A.2d 1051, 1055 (Me. 1996) ("The voters at a town meeting comprise [*54] the legislative body of the Town"); see also *Curnin v. Town of Egremont*, 510 F.3d 24, at 29 (1st Cir. 2007) ("The registered voters who speak and vote at Egremont's town meeting do so in their capacity as legislators"). Because the amendment is a legislative act, Mr. Weaver may not challenge it by seeking judicial review pursuant to Rule 80B. See *F.S. Plummer Co.*, 612 A.2d at 859 ("Because the Town Council was performing a legislative function, as opposed to an administrative or quasi-judicial function, the court erred in undertaking a direct judicial review in the nature of an appeal. . ."); *City of Lewiston*, 2016 Me. Super. LEXIS 44 at *12.

To the extent that Mr. Light alleges that the Court should reject the Defendants' argument that he cannot challenge the ordinance amendment through Rule 80B because the Maine Medical Use of Marijuana Act (MMUMA) "provide[s] for direct review of municipal actions that run afoul of this provision," *Pl.'s Opp'n* at 12,

the Court rejects Mr. Light's argument. Mr. Light specifically cites section 2429-D, which pertains to local medical marijuana regulations, as providing statutory authorization for judicial review under Rule 80B. *Id.* (quoting *F.S. Plummer Co.*, 612 A.2d at 859).

However, as the Defendants note, the MMUMA does not address direct review of a local medical marijuana ordinance pursuant to Rule 80B. *See* 22 M.R.S. § 2429-D; *Defs.' Reply* at 2. The statute only sets forth that "[p]ursuant [*55] to home rule authority . . . a municipality may regulate registered caregivers, [and] caregiver retail stores" but may not "[p]rohibit or limit the number of registered caregivers; . . . [p]rohibit caregiver retail stores . . . that are operating with municipal approval in the municipality prior to the effective date of this section." § 2429-D(1)-(2). However, municipal authorization is needed to "[a]uthorize caregiver retail stores . . . that are not operating on the effective date of this section to operate in the municipality unless the municipal legislative body . . . has voted to adopt or amend an ordinance or approve a warrant article allowing caregiver retail stores . . . to operate within the municipality." *Id.* § 2429-D(3). The statutory provision is silent on judicial review.

Finally, even if the "otherwise available by law" provision of Rule 80B applied, Mr. Light's challenge to a legislative action is categorically ineligible for judicial review under Rule 80B. *Cf. La Bonta v. Waterville*, 528 A.2d 1262, 1263 (Me. 1987) (referencing the "otherwise available by law" provision as the "outer perimeter of Rule 80B" separate from an action for declaratory judgment). The Court concludes that judicial review of the ordinance amendment pursuant to Rule 80B is improper because passage of the [*56] amendment was a legislative action.

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The exclusivity principle provides that:

when a legislative body has made a provision, by the terms of a statute or an ordinance, for a direct means by which the decision of an administrative body can be reviewed in a manner to afford adequate remedy, such direct avenue is intended to be exclusive. Resort to the courts by alternative routes will not be tolerated, subject only to an exception for those circumstances in which the course of "direct appeal" review by a court is inadequate and court action restricting a party to it will cause that party irreparable injury.

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The First Circuit and courts in this District have noted that "[f]ederal courts do not 'sit as a super zoning board or a zoning board of appeals'" and that generally, "cases involving 'run of the mill dispute[s] between a developer and a town planning agency' do not rise to the level of a federal due process violation." [Coastal Me. Botanical Gardens v. Town of Boothbay, No. 2:17-cv-00493-JDL, 2018 U.S. Dist. LEXIS 67607, at *9 \(D. Me. Apr. 23, 2018\)](#) (first quoting [Raskiewicz, 754 F.2d at 44](#) then [Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 \(1st Cir. 1982\)](#)). Applying this principle, because there was a clear administrative and judicial remedy available for Mr. Light to challenge the original ordinance on equal protection and due process grounds, Mr. Light cannot now bring a § 1983 claim. However, given the competing conclusions of the caselaw as to the scope and appropriateness of the exclusivity principle, the Court finds it prudent to consider the merits of Mr. Light's constitutional claims. This is especially [*61] true in light of the Court's conclusion that Rule 80B is not the proper mechanism for challenging the legislatively enacted ordinance amendment.

In response [*73] to the Town's motion to dismiss Mr. Light must show that the Town's decisions "were irrational and not motivated by any conceivable legitimate reason." [Toledo, 454 F.3d at 33](#). Mr. Weaver must also identify comparators who are similarly situated "in all relevant respects." *See* [K., 407 F. Supp. 2d at 300](#) (citing [Barrington Cove Ltd. P'ship, 246 F.3d at 8](#)).

ii. Substantive Due Process

When a plaintiff challenges the executive acts of a municipality by alleging a substantive due process violation, "the plaintiff must show *both* that the acts were so egregious as to shock the conscious *and* that they deprived him of a protected interest in life, liberty, or property." [Pagan, 448 F.3d at 32](#) (emphasis in original); *see also* [Copp, 2018 U.S. Dist. LEXIS 206973 at *49](#) (quoting [Collins v. Nuzzo, 244 F.3d 246, 250 \(1st Cir. 2001\)](#)) ("To establish a substantive due process claim, a plaintiff must demonstrate an abuse of government power that shocks the conscience or action that is legally irrational in that it is not sufficiently keyed to any

legitimate interest"). [*92] There is no specific formula for determining whether government conduct is "conscience shocking" but "[e]xecutive acts that shock the conscience must be 'truly outrageous, uncivilized, and intolerable' and 'the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error.'" *Harron*, 660 F.3d at 536 (first quoting *Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999), then *Amsden v. Moran*, 904 F.2d 748, 754 n.5 (1st Cir. 1990)). The First Circuit has described that "[a] hallmark of successful challenges is an extreme lack of proportionality" and "so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhuman abuse of official power literally shocking to the conscience." *Id.* (quoting *Gonzalez-Fuentes*, 607 F.3d at 881).

The Court agrees with the Defendants that the conduct here is not conscience shocking. Mr. Light points to a handful of paragraphs in his complaint as evidence of conscience shocking conduct including the Board's conduct in November 2019 when Mr. Weaver was told to "get the fuck out" and get a spokesman so they could understand him, the Board's failure to grant Mr. Weaver his license even after they told him his application was approved; the Board's different treatment of Inside Out Indoor [*93] Garden Supply; the board's email meeting in violation of FOAA; the Board's decision to amend the ordinance so that it included proximity to childcare facilities, including the children's speech therapists office; that the Town measured his property from the vacant lot, which rendered his property noncompliant under the ordinance; that he was frequently given the runaround by the Town and the Town's building was frequently closed to the public; the Town did not give him the up to date draft of the marijuana ordinance; the Town made him go through a misguided process while other license applicants were guided through a simpler process; that he had difficulty communicating with the Board because of his disability, which was made worse by the Zoom meetings; that the Town put him at increased risk of violations of the federal criminal code; and that, more generally, the Board acted with bias, discriminatory animus, hostility toward him and rudeness. *Second Am. Compl.* ¶¶ 22, 28-33, 37, 43, 52-54, 67, 75, 77-79, 86, 88.

As a threshold matter, the First Circuit has concluded that "any permit or license denial, no matter how unattractive, that falls short of being 'truly horrendous' is unlikely [*94] to qualify as conscience-shocking." *Harron*, 660 F.3d at 536 (quoting *Pagan*, 448 F.3d at 33). The Court does not approve of the alleged conduct by some members of the Planning Board and wishes that the members had treated a member of the public and resident of the Town with more respect. Nevertheless, none of the Town's conduct rises to the level of being "truly horrendous" and courts have repeatedly concluded that government decisions driven by bias and animus is not "conscience shocking," nor is selective enforcement, singling out one person or entity, or making decisions that are in violation of state law. See *Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 639 (1st Cir. 2013) (reasoning that "a pattern of selective and excessive enforcement of municipal regulations" did not "plausibly allege" a substantive due process violation); *Freeman*, 714 F.3d at 34, 40 (concluding that disparaging comments were not conscience shocking); *Clark*, 514 F.3d at 112-13 (concluding that an alleged pattern of "arbitrary, unreasonable, and capricious acts" did not rise to the level of "conscience shocking"); *Mongeau*, 492 F.3d at 19 (rejecting plaintiff's substantive due process claim because denial of a building permit and "interfer[ence] in the zoning process for improper reasons" does not shock the conscience); *Collins v. Nuzzo*, 244 F.3d 246, 251 (1st Cir. 2001) (concluding that a contentious relationship with a board did not rise [*95] to the level of a substantive due process violation where the plaintiff alleged that the board's decisions were driven by animus); *Licari v. Ferruzzi*, 22 F.3d 344 346, 349-50 (1st Cir. 1994) (holding that "a regulatory board does not transgress constitutional due process requirements merely by making decisions for erroneous reasons or by making demands which arguably exceed its authority under the relevant state statutes" and rejecting a substantive due process claim based on allegations of hostility and animus); *Raskiewicz*, 754 F.2d at 45 (rejecting the plaintiff's substantive due process claim alleging bias and conspiracy where a board stated the plaintiff would "never be given a . . . permit" but granted a competitor the same permit); *Stuart v. City of Gloucester*, No. 18-cv-11877-ADB, 2019 U.S. Dist. LEXIS 117327, at *29 (D. Mass. July 15, 2019) (concluding that "unfair" and "biased" government conduct does not rise to the level of a substantive due process claim).

Setting aside this robust First Circuit precedent, the alleged acts are themselves not conscience shocking. Taking Mr. Light's allegations as true, the Board's conduct and statements regarding Mr. Weaver's disability, singling him out, and making the licensure process more difficult than for other businesses, while objectionable, is not so horrendous to rise to the level of an actionable substantive due process [*96] claim. Moreover, because "[c]harges of bias, bad faith, and other 'opprobrious epithets of malice,'" are common in such cases, the First Circuit has routinely concluded that "[if] all that were required to secured federal jurisdiction were loose claims of conspiracy and corruption, virtually any case of this type could be brought into federal court. *Raskiewicz*, 754 F.2d at 44 (citation omitted).

Such is the case here. Mr. Weaver may have been dissatisfied with the outcome, but Mr. Light's recitation of his late father's allegations does not arise to the level of a substantive due process violation. This is especially true, as the Board had an interest in regulating medical marijuana retail stores and creating mechanisms for ensuring safety in certain areas of the municipality. *See Harron*, 660 F.3d at 536 (explaining that the municipality had a legitimate government interest in enforcing the town's liquor licensing laws) (citing *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 883 (1st Cir. 2010) ("[T]he executive actions most likely to shock the conscience are those that are 'intended to injure in some way unjustifiable by any government interest'" (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998))). The Court dismisses Mr. Light's substantive due process claims.

In sum, the Court concludes that Mr. Light has not stated a claim for constitutional [*97] violations under § 1983 on which relief can be granted, the Court grants the Defendants' motion to dismiss as to Count II of the Amended Complaint.

Light v. Town of Livermore, 2022 U.S. Dist. LEXIS 158735, *91-97, 2022 WL 4016809
Be Well and Stay Safe,

Todd R. Collins
District Attorney, Aroostook County



207-498-2557

From: LexisNexisDelivery@lexisnexis.com <LexisNexisDelivery@lexisnexis.com>

Sent: Thursday, September 14, 2023 12:17 PM

To: Todd Collins <todd@aroostook.me.us>

Subject: Email:Light v. Town of Livermore_ 2022 U.S. Dist. LEXIS 158735



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COMMISSIONERS' OFFICE

COUNTY ADMINISTRATOR

RYAN D. PELLETIER

COMMUNITY SERVICES DIRECTOR

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COUNTY COMMISSIONERS

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WILLIAM T. DOBBINS
HOULTON

MEMORANDUM

DATE: September 13, 2023
TO: Ryan D. Pelletier, County Administrator
Dana Gendreau, Finance Director
FROM: Paul Bernier, Community Services Director
RE: FY 23 Account Balances

Below are two account balances for the FY23 UT year end. I would like to roll-over the following amounts into the respective Capital Accounts.

- 230907-31120 (\$1,975.00) Recreation – My recommendation is to transfer **\$1,975.00** into the Connor Recreation Capital Account (2-3411). **Improvements to the park and replacement of playground equipment is badly needed.**
- 230152-30302 (\$3,958.00) Roads/Bridge Maintenance – My recommendation is to transfer **\$3,958.00** into the UT Roads / Bridges Capital Account (2-3401). **To support various projects on County roads.**

County of Aroostook

COMMISSIONERS' OFFICE

COUNTY ADMINISTRATOR

RYAN D. PELLETIER

COMMUNITY SERVICES DIRECTOR

PAUL G. BERNIER



COUNTY COMMISSIONERS

PAUL J. UNDERWOOD
PRESQUE ISLE

NORMAN L. FOURNIER
WALLAGRASS

WILLIAM T. DOBBINS
HOULTON

MEMORANDUM

DATE: September 14, 2023
TO: Ryan D. Pelletier, County Administrator
FROM: Paul Bernier, Community Services Director
RE: Snow Removal Contract for Connor Township

July 14, 2022 MEMO:

Attached is the proposed Snow Removal Contract with the **Town of New Sweden** for snow removal services in Connor Township.

This contract is for a three (3) year period of July 01, 2022 through June 30, 2025, however, due to the uncertainty of costs for diesel and road salt, both the County and New Sweden officials agreed on a one-year agreement followed by annual reviews for the remaining two years of the contract.

Sept. 18, 2023 MEMO:

Based on conversations with Teresa LaMothe from the Town of New Sweden, along with Town Selectmen, we have agreed to a 5% increase for FY 24, and a 3% increase for FY 25 for snow removal in Connor Township.

- July 01, 2022 to June 30, 2023 \$36,285.00 (7% increase)
- July 01, 2023 to June 30, 2024 \$38,099.00 (5% increase)
- July 01, 2024 to June 30, 2025 \$39,242.00 (3% increase)

FYI – The actual contract documents for the 3 year term were approved on July 13, 2022 by the New Sweden Town Selectmen.