

MAINE PLANNING BASICS PRESENTATION SITE PLAN REVIEW¹

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[1] These materials are based largely on the "Site Plan Review Handbook," originally prepared for the Maine State Planning Office, Community Planning & Investment Program in 1997 by Planning Decisions, Inc. For access to the full handbook, see <https://www.maine.gov/dacf/municipalplanning/docs/siteplanfull.pdf>. These materials also rely on information from Maine Municipal Association's, "Manual for Local Planning Boards: A Legal Perspective." See https://www.memun.org/DesktopModules/Bring2mind/DMX/API/Entries/Download?EntryId=1720&Command=Core_Download&language=en-US&PortalId=0&TabId=230.



WHAT IS SITE PLAN REVIEW?

- Site plan review is a locally developed system for reviewing new commercial, retail, service, industrial, other nonresidential development (and sometimes multi-family residential uses) to assure that it meets public health, safety, and environmental concerns. In some cases, site plan review also involves “good neighbor” standards and criteria to ensure compatibility with surroundings.
- Used for development that is larger in scale with potential impacts on community and neighbors that would not otherwise receive broader review (such as subdivision review).

WHAT DOES SITE PLAN REVIEW ADDRESS?

- How a particular development is designed.
- Issues related to public health, public safety, and environmental factors such as:
 - Access into and out of the site
 - Pedestrian and vehicular circulation within the site
 - Parking requirements (layout, number of spots, etc.)
 - Provisions for emergency vehicle access
 - Stormwater management
 - Erosion and sedimentation control
 - The protection of the water quality in water bodies
 - Groundwater quality protection and recharge
 - Solid and hazardous wastes management
 - Provisions for water supply and sewage disposal
 - Handicapped accessibility
 - Provisions for fire protection
 - The management of important natural resources (floodplains, unique natural areas, wildlife habitat, etc.)
 - The protection of historic and archaeological resources

WHAT DOES SITE PLAN REVIEW ADDRESS?

- Some communities also choose to address “good neighbor” standards to minimize impacts of development on neighboring properties, including:
 - Buffering and screening
 - Noise levels
 - Odors
 - Vibrations
 - Exterior lighting
 - Storage of materials
- Some communities go further and govern how new projects fit into its environment and the character of the surrounding neighborhood. Considerations can include:
 - Landscape design
 - Site utilization
 - Visual and scenic impact
 - Compatibility with neighboring properties
 - Architectural and design standards²
 - Relationship of buildings to the street and/or adjacent structures.

For each factor to be reviewed, the governing ordinance provide a tangible substantive standard that the reviewing body can use to determine if the site plan satisfactorily addresses the issues raised. Otherwise, the governing provisions are susceptible to legal challenge as “void for vagueness” or as an “unlawful delegation of legislative authority.”

WHAT DOES SITE PLAN REVIEW ADDRESS?

- Increasingly, given climate variability, communities are striving to increase their resiliency by assuring new development is designed to minimize the impacts of more frequent severe storm events (by enhancing erosion control, stormwater, and impervious surface standards).
- In many ways, site plan review is analogous to subdivision review for new residential developments. When a developer proposes to create a subdivision, that project must be reviewed by the planning board to assure that it meets basic standards (as established in state statute and local ordinances). Site plan review does the same thing for nonresidential projects (and some multi-family projects) except unlike subdivision review, site plan review is not mandatory under state statute. Rather, whether to conduct site plan review (and to what extent) is a function of municipal home rule authority.

WHAT DOES SITE PLAN REVIEW ADDRESS?

- Maine's subdivision statute was amended such that as of July 1, 2018, a division of a new or existing structure into 3 or more dwelling units is exempt from subdivision review if it is subject to municipal site plan review. *See* 30-A M.R.S. § 4402(6).³
 - This allows municipalities to choose to include multifamily development in their site plan review process. Since the potential impacts of this type of use are often similar to those experienced with nonresidential uses, the construction or enlargement of multifamily housing is best included under site plan review, but the review process must assure that the review is at least as stringent as it would receive under subdivision review.
 - If you choose to use site plan review in lieu of subdivision review for multifamily housing, your review standards should include all of the subdivision review criteria set forth in 30-A M.R.S.A. § 4404.

[3] For the purposes of 30-A M.R.S. §4402(6)(A), "municipal site plan review" means review under a municipal ordinance that sets forth a process for determining whether a development meets certain specified criteria, which must include criteria regarding stormwater management, sewage disposal, water supply and vehicular access and which may include criteria regarding other environmental effects, layout, scale, appearance and safety.

WHAT SITE PLAN REVIEW DOES NOT ADDRESS

- Provisions dealing with the creation of lots. These should be addressed in the community's subdivision regulations.
- Standards for the construction of single-family homes. This should be dealt with in a zoning or land use ordinance and/or through building permits.
- Provisions dictating where in the community nonresidential development should and should not occur. This is a zoning question; it should be addressed through zoning.
- Space and bulk issues such as the size of lots, street frontage, height of buildings, setbacks from property lines, and similar dimensional issues. These are essentially policy issues that should be addressed in a zoning ordinance.

WHERE ARE SITE PLAN REGULATIONS FOUND?

- Standards are either included in land use or zoning ordinances, or they can be contained in freestanding site plan review ordinances.
- If they are contained in freestanding ordinances, care should be taken that they do not conflict with existing land use or zoning ordinances by imposing different standards. Freestanding ordinances are more appropriate for communities that have few or no other local land use regulations.
- In communities with townwide zoning or where they have a comprehensive land use ordinance (i.e., incorporating zoning, shoreland zoning, and subdivision), including the site plan review provisions within the land use ordinance allows the administrative provisions (enforcement, definitions, appeals, etc.) to apply to site plan review. It also allows for easy referencing of the various standards and minimizes the potential for conflict between different requirements.

SITE PLAN REVIEW PROCESS

- While many communities see the desirability of site plan review for larger projects or that generate significant impacts, they are concerned about imposing the burdens of site plan review on small scale or low impacts projects.
- Some communities address this concern by creating a two-level review process. Small projects with limited impacts are processed through a simplified submission and review procedure, while larger projects that may raise significant issues are handled through a more detailed process (analogous to the distinction between minor and major subdivisions that many communities use in their subdivision review process).

SITE PLAN REVIEW PROCESS

- How a community structures its site plan review process and who is designated to review site plans is determined by the local municipality based on factors such as existing workloads (as between Planning Board and available municipal staff or contract consultants).
 - Planning Board (most communities select this option because the board already exists)
 - Site Plan Review Committee (some communities have created a separate municipal board to review site plans - similar to a Planning Board but deals only with site plans)
 - Staff Review Committee (an increasing number of communities, which are large enough to do so, assign some or all of the site plan review functions to a committee made up of municipal staff such as the planner, public works director, fire chief, police chief, code enforcement officer, etc.)
 - Since most aspects of site plan review involve technical issues, involving a municipality's technical staff directly in the review process can be a good approach. Staff review committees can also process reviews on a more timely basis.

SITE PLAN REVIEW PROCESS

- Staff Sign-off Process - An alternative to a formal staff committee process is a sign-off process in which designated municipal departments must review and approve the site plan. Under this system, a central contact point (planner, CEO, etc.) distributes the site plan and supporting materials to designated departments (public works, fire department, police department, engineering, etc.), who then review the proposal independently. If they approve the site plan, they sign off on the project. If not, they identify their concerns and needed changes to the plan.
- Some combination of the above options (i.e., bi-level review depending on size/kind of development whereby Staff Review or Staff Sign-off is used for smaller projects and Planning Board or Staff Review Committee is used for larger projects).
- Possible issues with Staff Review and/or Staff Sign-off Process Involve Freedom of Access Issues (i.e., public meeting requirements, issuance of findings and conclusions).

HOW DOES THE REVIEW PROCESS WORK?

The Preapplication Process

- What happens *before* a formal application for site plan review is submitted is an important factor in assuring that positive development occurs. Communications between the applicant and municipality as early in the process as possible is helpful, even before formal design of the project is started.
- Ideally, the review process should provide an opportunity for a prospective applicant to meet with a designated representative of the municipality prior to preparing the actual application. Some communities make a preapplication meeting mandatory for larger or more complex projects.
- If the municipality has staff, the preapplication meeting should occur with the staff person who has the most involvement with site plan review (i.e., the Planner, CEO, or Town Manager). If the Town has limited staff, the process should provide the opportunity for a preapplication conference with the reviewing body (i.e., Planning Board, Site-Plan Review Board, etc.).
- The preapplication phase should be informal and no *substantive* decisions should be made about the project.

HOW DOES THE REVIEW PROCESS WORK?

The Preapplication Process

- Some review systems do allow *procedural* decisions to be made at this time such as whether certain information will be required. Any procedural decisions of this type should be in writing. The objectives of the preapplication phase should be to:
 1. Provide the prospective applicant with an understanding of the review process, what information will be required, who will be involved in the review, and what the timeline will be.
 2. Provide the municipality with an understanding of the development proposal and the possible implications of the development activity for the community.
 3. Assure that issues or concerns that need to be addressed in the development proposal are clearly identified and understood by the applicant.

HOW DOES THE REVIEW PROCESS WORK?

Sketch Plan Phase

- The sketch plan phase is not necessary for the review of site plans, especially if provisions are made for a preapplication phase. However, if the application involves large scale projects or the development of large pieces of land, sketch plan review will often apply.

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

The review process needs to address a number of issues in this phase:

1. Submission Requirements:

- The site plan review process cannot begin until all required information under the ordinance is received from the applicant. Many communities provide a level of flexibility in what is required (especially depending on the scope and size of the project).

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

- Typical submission requirements include:
 - Background information regarding applicant
 - Evidence of right, title, and interest
 - Application fee
 - Abutter information (for notification purposes) (who provides notice, i.e., municipality or applicant?)
 - Scaled drawings/surveys
 - Information to address substantive criteria (both existing conditions and proposed development along with required reports/plans such as traffic analysis, stormwater management and erosion plans)
 - Waiver requests (submission vs. substantive)
- Once the reviewers determine that all required information has been submitted, formal review of the application can begin.

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

2. Public Notification and Involvement:

- This includes notification to neighbors within a designated distance from the subject development that an application is pending, and provides the opportunity for neighbors and the general public to comment on the application. Local practice varies a great deal on these matters:
 - Notification - Since the type of development covered by site plan review are often of interest to nearby property owners, the review system should make provision for notifying them of the submission of the application.
 - Participation - The role of the public in site plan review varies. Some communities hold public hearings on each application while others allow the public to speak at the meeting at which the project is reviewed or to provide written comments on the application.

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

3. Site Walks:

- Reviewing a site plan without firsthand knowledge of the site is difficult. A common way to accomplish this is through a site walk in which the members of the review body visit the site in a group. Proper public notice of the site walk needs to be provided to interested parties and abutters since the site walk is technically a meeting.

4. Technical Review:

- The review process should establish procedures to assure that the technical aspects of the proposal are reviewed by competent professionals.
- This can be accomplished either by involving these professionals directly in the process such as through staff review committees or by referring the plans to the appropriate outside professionals for their review and comment. The cost of these outside services can be offset by charging the applicant a "peer review" fee or requiring them to establish an escrow account.
- Sources of Technical Review Assistance. Even if a municipality has its own staff, it still may need to obtain outside technical assistance to review certain aspects of development proposals. The following are sources of technical assistance.

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

- Planning and Site Design
 - Councils of government
 - Regional planning commissions
 - Private planning consultants
- Engineering and Utilities
 - Local water districts
 - Local sewer/sanitary districts
 - Private engineering firms
- Traffic Impacts, Driveway Locations, Design of Vehicular and Pedestrian Access
 - MDOT regional offices
 - Private traffic engineers
- Groundwater Impacts
 - Hydrogeology consultants
 - Maine DEP
- Drainage, Erosion, and Sedimentation Controls
 - County Soil and Water Conservation Districts
 - Maine DEP
 - Private engineering firms
- Historic and Archaeological Resources
 - State Historic Preservation Office
- Wildlife and Plants/Ecosystems
 - Maine Inland Fisheries & Wildlife (Rare, Threatened, and Endangered species and habitats; Significant Wildlife Habitats; and Protected Natural Resources) See <https://www.maine.gov/ifw/programs-resources/environmental-review/index.html/>
 - Natural Areas Program (Maine Department of Agriculture, Conservation & Forestry) See <https://www.maine.gov/dacf/mnap/>

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

5. Compliance with the Review Standards:

- The reviewing body and its technical reviewers must evaluate the application and determine if it complies with the standards set forth in the regulations.
- Ultimately, the reviewing authority must act to deny, approve, or approve the application with conditions.
- The reviewing authority generally may impose such conditions as it deems advisable to assure compliance with the standards of the ordinance.
- The review body must make written "findings of fact and conclusions of law" that describe the project and how it conforms (or does not) with each standard.

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

- It is not simply enough to prepare detailed minutes. Both Maine’s Freedom of Access Act and case law require written findings and conclusions. *See* 1 M.R.S. § 407; *Comeau v. Town of Kittery*, 2007 ME 76, 926 A.2d 189.
- What are findings of fact?
 - A summary of the basic facts, based on the evidence submitted (not only by the applicant but all interested parties, including opponents), on which the reviewing authority bases its decision.
 - Can members of the reviewing authority’s personal knowledge factor in?
- What are conclusions of law?
 - Statements linking the specific facts covered in the findings of fact to the performance standards/review criteria in the ordinance or statute which the applicant must meet in order to receive the board’s approval.
 - For example, a conclusion of law pertaining to sewage disposal would be: “We conclude that the applicant will provide adequate sewage disposal for the lots in the subdivision as required by section [fill in] of the ordinance. Soils reports have been submitted for each site prepared by a site evaluator showing that at least one spot on each lot could support a subsurface wastewater disposal system which complies with the State Plumbing Code.”

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

- Who drafts? Staff or board? Are parties allowed to present drafts?
- Why are findings and conclusions important?
 - In addition to being legally required, they inform the applicant, the public, and (in the event of an appeal) the board of appeals or reviewing court of the basis of the reviewing authority's decision.
 - Courts have been increasingly inclined to remand matters back to the original decision maker for better findings and conclusions. *See Christian Fellowship and Renewal Center v. Town of Limington*, 769 A.2d 8342001 ME 16; *Murray v. City of Portland*, 2023 ME 57, 301 A.3d 777.

HOW DOES THE REVIEW PROCESS WORK?

Application Phase

6. Notice of Decision:

- Following a decision on the application, the review body should provide written notice to the applicant. Some ordinances also require notice be provided to other interested parties like the CEO, the municipal officers, and others.

7. Appeals:

- The site plan review process should clearly spell out how decisions of the review body can be appealed. There are two basic avenues of appeal possible.
 - The first is a direct appeal to a local board of appeals.
 - The second is to have appeals go directly to Superior Court via a Rule 80B appeal.
 - Some communities view appeals to a local appeals board as beneficial because they provide a check and balance and keep the review of the decision (at least initially) in the hands of members of the community.
 - Some communities seek to avoid the perception of pitting one local board against another. However, if the site plan review process involves a staff review committee or a staff sign-off process, an appeal a local board may be more appropriate.
 - Regardless of where the appeal goes, it is critical to have solid findings and a preserved administrative record.
 - *De novo* vs. appellate review determines the “operative decision” for judicial review.

HOW DOES THE REVIEW PROCESS WORK?

Post-Approval Phase

- Action by the review board does not end the process. Site plan review regulations should also address what happens following approval, including:
 - Coordination with Other Permits - The site plan approval needs to be incorporated into the building permit for the project and any conditions of approval should be noted.
 - Inspection During Construction - The project needs to be inspected while it is being built to assure that it conforms to the approved plans.
 - Performance Guarantee - Performance guarantees may be provided by a variety of means including, a bond, letter of credit, or escrow account.
 - Storage/Retention of Approved Plans - The site plan regulations should state where the approved plans are to be kept. This might be the office of the CEO, Town Clerk, Planner, or some other staff person. Also be aware that the Maine State Archives establishes certain local government record retention schedules. See <https://www.maine.gov/sos/arc/records/local/localschedules.html>

HOW DOES THE REVIEW PROCESS WORK?

Post-Approval Phase

- Recording of the Approved Plan - The State Subdivision Law requires that approved subdivision plans be recorded in the local registry of deeds so that there is a public record of approvals.⁴ For site plans, there is no such statutory requirement for recording, but most ordinances do so. Some indicate that if the plan has not been recorded, it becomes void within a certain period of time.
 - If a municipality reviews multifamily housing under site plan review instead of under subdivision regulations, the approved site plan for these projects must be recorded.
- Minor Changes - During construction of a project, the need for minor field changes often occurs. The regulations should stipulate how this will be handled, who can approve them, and what record of these minor changes will be made.
- Submission of "As-Built Plans" - Since minor field changes do often occur during a construction project, the regulations should require the submission of "as-built plans" showing the actual completed project as constructed, especially for larger scale projects.
- Amendments (vs. "minor" or "field" changes) to Approved Plans - The site plan provisions should establish a procedure for amending previously approved plans.

⁴ See 30-A M.R.S. § 4408.

MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- Right, Title, and Interest
 - *Tomasino v. Town of Casco*, 2020 ME 96.
- Standing
 - Who has it? (Applicant vs. Appellant)
 - Why is it relevant? (Jurisdictional issue)
- Impact of ordinance changes or moratoria on “Pending Proceedings”
 - Under Title 1 M.R.S.A. § 302, “[a]ctions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby.” It is therefore critical to determine whether an applicant is “pending.”
 - According to governing statute and case law, an application can only be considered a “pending” when “the reviewing authority has conducted at least one substantive review of the application and not before.”
 - What then, is a “substantive review”? It is a review of the application “to determine whether it complies with the review criteria and other applicable requirements of law.”

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MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- Maine Courts have noted that ordinances and moratoria with retroactivity provisions are legal. *See City of Portland v. Fisherman’s Wharf Associates II*, 541 A.2d 160 (Me. 1988); *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183).
 - In light of these decisions, are permits ever safe? Yes. In response to the *Fisherman’s Wharf* and *Kittery Retail Ventures* cases, the Legislature enacted 30-A M.R.S. § 3007(6), which prevents the nullification of a final permit by any subsequent enactment, amendment or repeal of a local ordinance after 45 days has passed since the permit became final.
- Freedom of Access Act (“FOAA”) Issues
 - Notification of Meetings
 - Intersection between “public records” and “public proceedings”
 - *Ex parte* communications
 - Site visits
- How much guidance should staff provide in the decision-making process?

MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- Waivers (from submission vs. substantive requirements)
 - If your ordinance allows for waivers of substantive criteria, beware of inadvertently granting an unlawful variance). *See Hartwell v. Town of Ogunquit*, 2015 ME 51, 115 A.3d 81.

MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- In 2005 section 4353 (4-C) was amended to allow a zoning ordinance to explicitly authorize the planning board to approve applications that do not meet required zoning dimensional standards in order to promote cluster development, accommodate lots with insufficient frontage or to provide for reduced setbacks for lots or buildings made nonconforming by a zoning ordinance. An approval which falls within these guidelines does not constitute a zoning variance. This authority does not include shoreland zoning dimensional standards. The amendment was enacted in response to the Maine Supreme Court decision in *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58. See also, *Wyman v. Town of Phippsburg*, 2009 ME 77, 976 A.2d 985 (construing two different buffer provisions in a zoning ordinance and concluding that the planning board decision regarding buffer width was not tantamount to the granting of a variance).

MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- Some subdivision, site plan review, or other non-zoning ordinances give the reviewing authority power to waive certain requirements of the ordinance if they would cause hardship to the applicant. The definition of “hardship” in that context is not necessarily the same as the definition of undue hardship in 30-A M.R.S. § 4353 (i.e., variance criteria), unless the ordinance expressly refers to that statute. Although the municipality may give the authority to grant these waivers to the board of appeals, there is no conflict with § 4353 if a non-zoning ordinance empowers the planning board to grant waivers but such ordinance provisions should set out the standards to use in determining whether an applicant will suffer a hardship without a waiver. However, if the provision attempts to authorize waive dimensional standards or other requirements established under a zoning ordinance, such a waiver provision is beyond the municipality’s home rule authority, unless it falls within the guidelines under section § 4353 described above.

See Sawyer v. Town of Cape Elizabeth, 2004 ME 71, 852 A.2d 58. *See also York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172.

MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- Transferability of Approvals
 - In most cases, approvals “run with the land.” Accordingly, a subsequent purchaser would step in to the shoes of the prior owner with respect to the approval.
 - However, at least one Maine Superior Court case has held otherwise, at least with respect to technical and financial capacity. *Inland Golf Properties, Inc. v. Inhabitants of Town of Wells*, AP-98-040 (Me. Super. Ct., York Cty., May 11, 2000). It is advisable to include language in the applicable ordinance which expressly addresses this issue (i.e., if the project is conveyed to another developer prior to completion) to avoid any confusion.
- Second Request for Approval of Same Project
 - If an application for a land use activity has been denied, the board is not legally required to entertain subsequent applications for the same project, unless the board finds that “a substantial change of conditions has occurred or other considerations materially affecting the merits of the subject matter had intervened between the first application and the [second].” *Silby v. Allen’s Blueberry Freezer, Inc.*, 501 A.2d 1290, 1295 (Me. 1985). However, an ordinance may provide a different rule regarding subsequent requests which would govern the board’s authority.

MISCELLANEOUS LEGAL ISSUES RELATING TO SITE PLAN REVIEW

- Vague Ordinance Standards; Improper Delegation of Legislative Authority
 - It is very important for land use ordinances to include specific review standards that will apply to the issuance of a permit or approval. The standards must be more specific than “as the Board deems to be in the best interests of the public” or “as the Board deems necessary to protect the public health, safety and welfare.” *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d 223 (Me. 1983). It also is very important to have language in the ordinance instructing the board as to the action which the board must take. It is not enough merely to say that the board must “consider” or “evaluate” certain information. *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985). Rather, it must find that the criteria have actually been met. Otherwise, the provisions are subject to legal challenge based on constitutional due process claims.

Q&A
