



**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

NOTICE OF INVITATION TO FILE AMICUS BRIEFS

**Law Court invites amicus briefs on
standard of review applicable to
Boards of Appeals in land-use matters
and on waiver of objection to use
of incorrect standard of review**

The Maine Supreme Judicial Court, sitting as the Law Court, invites briefs of amici curiae in the appeal of *Kimberly Lamarre et al. v. Town of China et al.*, Law Court docket number Ken-20-134, an appeal from the Superior Court's decision on an appeal pursuant to M.R. Civ. P. 80B from a decision of the Town's Zoning Board of Appeals affirming a building permit issued by the Town's Code Enforcement Officer. The Board of Appeals conducted an "appellate" review rather than a de novo review. The parties did not object to the standard applied by the Board of Appeals, and the appellants do not argue on appeal that the Board's decision is affected by the standard of review it applied.

The Court invites briefs of amici curiae on the following issues:

1. In an appeal pursuant to M.R. Civ. P. 80B from a decision of a municipal Board of Appeals in proceedings pursuant to 30-A M.R.S. 2691(3)-(4), must the Superior Court determine whether the Board of Appeals applied the proper standard of review—de novo or appellate—even if the parties failed to raise the issue at the municipal level?

Comment: In *Gensheimer v. Town of Phippsburg*, the Court stated: “Before we address the substantive merits of the appeal, we have to determine which municipal decision we review, and we must examine whether the Board of Appeals undertook an appropriate review of the decision of the Planning Board.” 2005 ME 22, ¶ 5, 868 A.2d 161 (citing *Stewart v. Town of Sedgwick*, 2000 ME 157, 757 A.2d 773). *See also Stewart*, 2000 ME 157, ¶ 5, 757 A.2d 773 (“[I]n order to determine what decision is under review here, we must begin with a determination of the nature of the Board’s role in the matter at hand.”) Conversely, in *Brown v. Town of Starks*, 2015 ME 47, ¶ 7, 114 A.3d 1003, the Court held that by not raising the issue at the municipal level, the appellants had failed to preserve the issue for judicial review.

2. In order to provide for appellate—and not de novo—review by a Board of Appeals, must an ordinance explicitly state that the review is “appellate”?

Comment: In *Stewart v. Town of Sedgwick*, 2000 ME 157, ¶ 7, 757 A.2d 773, the Court held that a Board of Appeals must conduct a hearing de novo “unless the municipal ordinance explicitly directs otherwise.” Since that ruling in 2000, however, the Court has interpreted ordinance language that does not state expressly that the review is appellate to nevertheless “authorize[] a board of appeals to undertake appellate review of a permitting decision made by the [code enforcement officer] or planning board.” *Mills v. Town of Eliot*, 2008 ME 134, ¶ 15, 955 A.2d 258. *But see Logan v. City of Biddeford*, 2001 ME 84, ¶ 7, n.1,

772 A.2d 1183 (“The . . . [o]rdinance does not expressly provide that the Zoning Board of Appeals hears appeals in an appellate capacity. Therefore, the Zoning Board of Appeals should have heard the appeal de novo.”). In 2017, in “An Act to Clarify Appeals of Municipal Land Use Decisions,” P.L. 2017, ch. 241, § 1, the Maine Legislature added the following language to 30-A M.R.S. § 2691(3)(C):

Unless otherwise established by charter or ordinance, the board shall conduct a de novo review of any matter before the board subject to the requirements of paragraph D. If a charter or ordinance establishes an appellate review process for the board, the board shall limit its review on appeal to the record established by the board or official whose decision is the subject of the appeal and to the arguments of the parties. The board may not accept new evidence as part of an appellate review.

In light of this history, can a charter or ordinance “establish[] an appellate review process” without using the word “appellate” or otherwise prescribing that the board is limited to the record established by the board or official whose decision it is reviewing and that it may not accept new evidence as part of the review.

3. Does limiting a Board of Appeals to appellate review implicate procedural due process concerns? Does it matter whether the decision under consideration by the Board of Appeals was made by a code enforcement officer or by a planning board?

Comment: Procedural due process requirements normally include adequate notice and “the right to present evidence and ... to rebut opposing evidence[.]” *Town of Ogunquit v. Cliff House & Motels, Inc.*, 2000 ME 169, ¶ 11, 759 A.2d 731. Under what circumstances could due process requirements be met

when a Board of Appeals engages in appellate review of a code enforcement officer's decision?

The parties' briefs and the appendix are available on the Court's website at www.courts.maine.gov/courts/sjc/lamarre.

An amicus brief may be filed by or on behalf of any individual, entity, or group of individuals and/or entities without separate leave of the Court. Any amicus brief must be filed on or before **January 26, 2021**. An amicus brief must be filed at the address listed below and must comply with M.R. App. P. 7A. In addition to filing and serving the required number of copies, any amicus must send a copy of the brief electronically, as a single "native" or text-based .pdf file, to the Clerk of the Law Court at lawcourt.clerk@courts.maine.gov.

Dated: December 22, 2020

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