

AGENDA
FREEPORT TOWN COUNCIL MEETING #16-97
TOWN HALL COUNCIL CHAMBERS
JULY 1, 1997 - 7:00 P.M.

FROM: Dale C. Olmstead, Jr.

TO: Genie Beaulieu, Chairperson, Larue Drive
Edward Campbell, Vice Chairperson, Gay Drive
Alan Hindley, Wardtown Road
Kenneth Mann, Mann Road
Charlotte Bishop, Maquoit Drive
Stafford Soule, Arnold Road
David Solely, Arnold Road

FIRST ORDER OF BUSINESS: To waive the reading of the Minutes of #15-97 June 3, 1997 Meeting and accept the Minutes as printed.

SECOND ORDER OF BUSINESS: Public Comment Period - 30 Minutes
(Non-Agenda Items Only)

THIRD ORDER OF BUSINESS: To take action on the following items of business as read by the Council Chairperson.

COUNCIL MEETING #16-97
JULY 1, 1997

ITEM #123-97 To consider action relative to an appointment to the Shellfish Commission.

BE IT ORDERED: That Garrett Simmons be appointed, effective immediately, to serve as a member of the Shellfish Commission until July 1, 2000.

BE IT FURTHER ORDERED: That Mr. Simmons qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #124-97 To consider action relative to a re-appointment to the Shellfish Commission.

BE IT ORDERED: That Stan Burnham be re-appointed, effective immediately, to serve as a member of the Shellfish Commission until July 1, 2000.

BE IT FURTHER ORDERED: That Mr. Burnham qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #125-97 To consider action relative to an appointment to the Conservation Commission.

BE IT ORDERED: That Stephen Walker be appointed, effective immediately, to serve as a member of the Conservation Commission until July 1, 2000.

BE IT FURTHER ORDERED: That Mr. Walker qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #126-97 To consider action relative to an appointment to the Conservation Commission.

BE IT ORDERED: That Lex Houey be appointed, effective immediately, to serve as a member of the Conservation Commission until July 1, 2000.

BE IT FURTHER ORDERED: That Mr. Houey qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #127-97 To consider action relative to a re-appointment to the Conservation Commission.

BE IT ORDERED: That Mary Sauer be re-appointed, effective immediately, to serve as a member of the Conservation Commission until July 1, 2000.

BE IT FURTHER ORDERED: That Ms. Sauer qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #128-97 To consider action relative to a re-appointment to the Conservation Commission.

BE IT ORDERED: That Stewart Fefer be re-appointed, effective immediately, to serve as a member of the Conservation Commission until July 1, 1998.

BE IT FURTHER ORDERED: That Mr. Fefer qualify by swearing an oath of office before the Town Clerk before July 11, 1997.

ITEM #129-97 To consider action relative to a re-appointment to the Board of Appeals.

BE IT ORDERED: That Edward Bueter be re-appointed, effective immediately, to serve as a member of the Board of Appeals until July 1, 2000.

BE IT FURTHER ORDERED: That Mr. Bueter qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #130-97 To consider action relative to an appointment to the Board of Appeals.

BE IT ORDERED: That Patrick Norton be appointed, effective immediately, to serve as a member of the Board of Appeals until July 1, 2000.

BE IT FURTHER ORDERED: That Mr. Norton qualify by swearing an oath of office before the Town Clerk by July 11, 1997.

ITEM #131-97 To consider action relative to extending the terms of the Historic Resources Committee.

BE IT ORDERED: That the terms of members of the Historic Resources Committee be extended until September 1, 1998.

ITEM #132-97 To consider action relative to the acceptance of Library Association Trust Funds.

BE IT ORDERED: That the following Library Association Trust Funds be accepted by the Town of Freeport to be used for the purposes given.

1.	<u>FUND</u>		<u>AMOUNT</u>
	Albert Conley Fund	Principal:	\$21,536.80
		Interest:	<u>22,482.66</u>
		Total:	\$44,019.46

PURPOSE: Purchase of books from earned interest only.

2.	<u>FUND</u>		<u>AMOUNT</u>
	Paul & Emma Bennett Fund	Principal:	\$6,579.69
		Interest:	<u>2,059.74</u>
		Total:	\$8,639.43

PURPOSE: Purchase of books from earned interest only.

3.	<u>FUND</u>		<u>AMOUNT</u>
	Eleanor Brewer Fund	Principal:	\$100.00
		Interest:	<u>23.71</u>
		Total:	\$123.71

PURPOSE: For the purchase of books for the new library.

4.	<u>FUND</u>	<u>AMOUNT</u>
	Bartol Association Fund	\$5,479.14

PURPOSE: Any use related to Library Services.

**COUNCIL MEETING #16-97
JULY 1, 1997**

BE IT FURTHER ORDERED: That the Library Trustees and Head Librarian be authorized to expend there Trust Funds in accordance with the purposes donated.

ITEM #133-97 To consider action relative to accepting a bid for the 1982 Fire Ladder Truck.

MOTION: That the Fire Chief report on bids received.

BE IT ORDERED: That the bid from E.J. Murphy & Co. in the amount of \$5,000 for the purchase of the 1982 Fire Ladder Truck be accepted.

ITEM #134-97 To consider action relative to proposed amendments to the Solid Waste Disposal Ordinance concerning licenses (Chapter 28).

BE IT ORDERED: That a Public Hearing be scheduled for July 15, 1997 at 7:00 p.m. in the Town Hall Council Chambers to discuss proposed amendments to the Solid Waste Disposal Ordinance.

BE IT FURTHER ORDERED: That 30 copies be distributed equally between the Town Clerk's office and the B.H. Bartol Library for inspection by citizens.

ITEM #135-97 To consider action relative to awards from the Dr. Gould Trust Fund.

BE IT ORDERED: That eight individuals receive awards totaling \$1,389.83 from the Dr. Gould Trust Fund providing for payment of medical expenses.

NOTE: All recipients have qualified with the General Assistance Office.

OTHER BUSINESS:

1. Update on Rescue Services to the Town of Durham.
2. Road Turnback Update.

COMMITTEE REPORTS:

1. Municipal Facilities Committee - Report and Recommendations.

TOWN COUNCIL MEETING #16-97
JULY 1, 1997 - 7:00 P.M.
TOWN COUNCIL CHAMBERS

SUMMARY AGENDA

- Item #123-97 To consider action relative to an appointment to the Shellfish Commission of Garrett Simmons.
- Item #124-97 To consider action relative to a re-appointment to the Shellfish Commission of Stan Burnham.
- Item #125-97 To consider action relative to an appointment to the Conservation Commission of Stephen Walker.
- Item #126-97 To consider action relative to an appointment to the Conservation Commission of Lex Houey.
- Item #127-97 To consider action relative to a re-appointment to the Conservation Commission of Mary Sauer.
- Item #128-97 To consider action relative to a re-appointment to the Conservation Committee of Stewart Fefer.
- Item #129-97 To consider action relative to a re-ppointment to the Board of Appeals of Edward Bueter.
- Item #130-97 To consider action relative to an appointment to the Board of Appeals of Patrick Norton.
- Item #131-97 To consider action relative to extending the terms of the Historic Resources Committee.
- Item #132-97 To consider action relative to the acceptance of Library Association Trust Funds.
- Item #133-97 To consider action relative to accepting a bid for the 1982 Fire Ladder Truck.
- Item #134-97 To consider action relative to proposed amendments to the Solid Waste Disposal Ordinance concerning licenses (Chapter 28).
- Item #135-97 To consider action relative to awards from the Dr. Gould Trust Fund.

OTHER BUSINESS:

1. Update on Rescue Services to the Town of Durham.

2. Road Turnback Update.

COMMITTEE REPORTS:

Municipal Facilities Committee - Report and Recommendations.

MINUTES
FREEPORT TOWN COUNCIL MEETING #16-97
July 1, 1997 – 7:00 P.M.

CHAIRPERSON'S CALL TO ORDER:

Genie Beaulieu, Chairperson
Larue Drive

Present

X

Absent

Excused

Edward Campbell, Vice-Chairperson
Gay Drive

X

Alan Hindley
Wardtown Road

X

Kenneth Mann
Mann Road

X

Charlotte Bishop
Maquoit Drive

X

Stafford Soule
Arnold Road

X

David Soley
Arnold Road

X

FIRST ORDER OF BUSINESS: TO WAIVE THE READING OF THE MINUTES OF MEETING #15-97, HELD ON JUNE 3, 1997, AND ACCEPT THE MINUTES AS PRINTED. (Councilors Campbell & Hindley)

MOVED AND SECONDED: TO AMEND THE MINUTES ON PAGE 3, UNDER BE IT ORDERED, CORRECT THE VOTE TO READ, "(ABSTAIN-SOLEY RE: PAUL KELLEY)". (Councilors Soley & Campbell) (6 Ayes) (1 Excused-Bishop)

MOVED AND SECONDED: TO WAIVE THE READING OF THE MINUTES OF MEETING #15-97, HELD ON JUNE 3, 1997, AND ACCEPT THE MINUTES AS AMENDED. (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

SECOND ORDER OF BUSINESS: PUBLIC COMMENT PERIOD – 30 MINUTES.

1. Councilor Mann stated that he has done considerable research in the Registry of Deeds on the Wolf Neck Road and welcomes any residents coming to see the deeds and plans that he has acquired.

Chairperson Beaulieu added that because of the situation, the Town is also looking into this; we will have a better understanding of this in a week or two.

Manager Olmstead stated the issue that surfaced was whether or not the dirt section of road to the water is public or private. If, in fact, it is private (and the Town thought it was public), then that leads to a problem, in that the road should not be maintained with public dollars. The Town will have some decisions to make regarding the maintenance of this section. Under current case law, it would be illegal (for the Town) to maintain it. We are trying to get the answers and hope to discuss this further at the July 15th meeting. The Conservation Trust claims to have an easement over that road which renders that section of road a private way.

Chairperson Beaulieu stated that there is a great deal of need to discuss this and it will be placed on the Agenda. She added that residents should call the Town Hall or the Councilors to confirm the date that this item will be addressed.

Councilor Soley stated that he has gotten many calls raising concern for trees that may be cut down on that road.

Joseph Hahn, Conservation Commission, stated that this seems to be a critical issue; we are spending a lot of money to develop an open space plan. He suggested that this be submitted to the Commission to address.

Councilor Mann asked if we would be getting legal opinion in writing.

Manager Olmstead confirmed that we will.

Discussion followed re: paving in that area, etc.

MOVED AND SECONDED: THAT THE PUBLIC COMMENT PERIOD BE CLOSED. (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

THIRD ORDER OF BUSINESS: TO TAKE ACTION ON THE FOLLOWING ITEMS OF BUSINESS AS READ BY THE COUNCIL CHAIRPERSON.

ITEM #123-97 TO CONSIDER ACTION RELATIVE TO AN APPOINTMENT TO THE SHELLFISH COMMISSION.

BE IT ORDERED: THAT GARRETT SIMMONS BE APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE SHELLFISH COMMISSION UNTIL JULY 1, 2000. BALLOT VOTE (Councilors Mann & Campbell) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MR. SIMMONS QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. ROLL CALL VOTE (Councilors Mann & Campbell) (6 Ayes) (1 Excused-Bishop)

ITEM #124-97 TO CONSIDER ACTION RELATIVE TO A RE-APPOINTMENT TO THE SHELLFISH COMMISSION.

BE IT ORDERED: THAT STAN BURNHAM BE RE-APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE SHELLFISH COMMISSION UNTIL JULY 1, 2000. BALLOT VOTE (Councilors Soley & Campbell) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MR. BURNHAM QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. ROLL CALL VOTE (Councilors Soley & Campbell) (6 Ayes) (1 Excused-Bishop)

ITEM #125-97 TO CONSIDER ACTION RELATIVE TO AN APPOINTMENT TO THE CONSERVATION COMMISSION.

BE IT ORDERED: THAT STEPHEN WALKER BE APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE CONSERVATION

COMMISSION UNTIL JULY 1, 2000. **BALLOT VOTE** (Councilors Hindley & Soule) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MR. WALKER QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. **ROLL CALL VOTE** (Councilors Hindley & Campbell) (6 Ayes) (1 Excused-Bishop)

ITEM #126-97 TO CONSIDER ACTION RELATIVE TO AN APPOINTMENT TO THE CONSERVATION COMMISSION.

BE IT ORDERED: THAT LEX HOLLEY BE APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE CONSERVATION COMMISSION UNTIL JULY 1, 2000. **BALLOT VOTE** (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MR. HOLLEY QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. **ROLL CALL VOTE** (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

ITEM #127-97 TO CONSIDER ACTION RELATIVE TO A RE-APPOINTMENT TO THE CONSERVATION COMMISSION.

BE IT ORDERED: THAT MARY SAUER BE RE-APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE CONSERVATION COMMISSION UNTIL JULY 1, 2000. **BALLOT VOTE** (Councilors Soule & Campbell) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MS. SAUER QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. **ROLL CALL VOTE** (Councilors Soule & Campbell) (6 Ayes) (1 Excused-Bishop)

ITEM #128-97 TO CONSIDER ACTION RELATIVE TO A RE-APPOINTMENT TO THE CONSERVATION COMMISSION.

BE IT ORDERED: THAT STEWART FEFER BE RE-APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE CONSERVATION COMMISSION UNTIL JULY 1, 1998. **BALLOT VOTE** (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MR. FEFER QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BEFORE JULY 11, 1997. **ROLL CALL VOTE** (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

ITEM #129-97 TO CONSIDER ACTION RELATIVE TO A RE-APPOINTMENT TO THE BOARD OF APPEALS.

BE IT ORDERED: THAT EDWARD BUETER BE RE-APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE BOARD OF APPEALS UNTIL JULY 1, 2000. **BALLOT VOTE** (Councilors Soule & Campbell) (4 Ayes) (2 Nay-Mann, Hindley) (1 Excused-Bishop) (Order fails for lack of Super Majority Vote due to the fact that Mr. Bucter has served more than two terms)

ITEM #130-97 TO CONSIDER ACTION RELATIVE TO AN APPOINTMENT TO THE BOARD OF APPEALS.

BE IT ORDERED: THAT PATRICK NORTON BE APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE BOARD OF APPEALS UNTIL JULY 1, 2000. **BALLOT VOTE** (Councilors Campbell & Hindley)

MOVED AND SECONDED: TO NOMINATE PAM LEONE TO BE APPOINTED, EFFECTIVE IMMEDIATELY, TO SERVE AS A MEMBER OF THE BOARD OF APPEALS UNTIL JULY 1, 2000. (Councilors Mann & Soule)

Jane Benson, Board of Appeals, spoke in support of Pam Leone for reappointment.

Councilor Mann stated that this nomination does not reflect in any way upon Mr. Norton.

Councilor Soley added that Ms. Leone has done an outstanding job; it is important at times to bring new blood onto the Board, but it is also important to have people on the Board who know what they are doing and Ms. Leone does.

Councilor Hindley stated that this is an excellent opportunity to bring forward the point of the Appointments Committee having an opportunity to interview applicants prior to the selection and vote.

Pam Leone stated that this Board is a judiciary board and that experience on it is helpful, but members have to be willing to learn and serve on an unbiased way.

Chairperson Beaulieu stated that Ms. Leone is very capable. Mr. Norton is also a wonder candidate.

BALLOT VOTE (5 Ayes for Leone) (1 Aye for Norton) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MS LEONE QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. **ROLL CALL VOTE** (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

MOVED AND SECONDED: TO RECONSIDER ITEM #129-97. (Councilors Mann & Campbell)

ITEM #129-97 **BE IT ORDERED:** THAT PATRICK NORTON BE APPOINTED EFFECTIVE IMMEDIATELY TO SERVE ON THE BOARD OF APPEALS UNTIL JULY 1, 2000. **BALLOT VOTE** (Councilors Mann & Campbell) (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: THAT MR. NORTON QUALIFY BY SWEARING AN OATH OF OFFICE BEFORE THE TOWN CLERK BY JULY 11, 1997. **ROLL CALL VOTE** (Councilors Mann & Campbell) (6 Ayes) (1 Excused-Bishop)

ITEM #131-97 TO CONSIDER ACTION RELATIVE TO EXTENDING THE TERMS OF THE HISTORIC RESOURCES COMMITTEE.

BE IT ORDERED: THAT THE TERMS OF MEMBERS OF THE HISTORIC RESOURCES COMMITTEE BE EXTENDED UNTIL SEPTEMBER 1, 1998. **ROLL CALL VOTE** (Councilors Mann & Soule)

Sally Rand, Vice-Chair Historic Resources Committee, stated that her committee was appointed for just one year, but they have much more work to do and request that they be extended. She reviewed the work done and the work yet needed to be done.

Councilor Mann asked for clarification for grant money received by the Committee.

Ms. Rand stated that they have received two grants, one for \$4,500 from Maine Historic Preservation Commission, and matching funds of \$2,500 from the Town. She added that they will be conducting a survey, covering the Harraseeket Historic District, including South Freeport, Wolf Neck, Porter's Landing, Mast Landing and Main Street from Kendall's Corner to the barn. The final report will be on file at the Library and Town Hall.

ROLL CALL VOTE (6 Ayes) (1 Excused-Bishop)

BE IT FURTHER ORDERED: TO NARROW THE FOCUS OF THE CHARGE OF THE COMMITTEE TO:

1. REVIEW AND UPDATE THE FREEPORT HISTORIC BUILDING SURVEY FOR THE MAIN STREET AREA AND THE NATIONAL REGISTER DISTRICTS.
2. IDENTIFY BUILDINGS AT RISK, AND RECOMMEND TO THE PLANNING BOARD WAYS TO REDUCE OR ELIMINATE RISK(S).
(Councilors Beaulieu & Campbell)

Ms. Rand stated that it would have been beneficial for the Committee to review the proposed amendments.

Chairperson Beaulieu stated that the original perception focused on buildings and historical significance only.

Councilor Mann stated that this list for the charge of the Committee came from the Comprehensive Plan.

Mac Collins, Committee member, stated that they do have grant requirements to follow. He added that we need to keep the (old) #1, #4 and #7.

Chairperson Beaulieu stated that these were not what they talked about doing, and all of these things should be done at some point.

Discussion followed re: the list (of buildings) as it exists, the historic past "slipping away", the Town should not be involved in things that should be done by the Historical Society, etc.

Councilor Soule asked if the new #1 and #2 will cover the old #1, #4 and #5.

Chairperson Beaulieu confirmed this; we all understand what needs to be done, but from the minutes of the Committee, it seemed that they were going beyond the charge; she does not see this committee as a perpetual committee.

MOVED AND SECONDED: TO AMEND ITEM #131-97 TO ADD #3 REVIEW AND UPDATE EXISTING NATIONAL REGISTER DISTRICT DOCUMENTATION, INDIVIDUAL SITES DOCUMENTATION, AND EXISTING ARCHITECTURAL

SURVEY DATA ACCORDING TO THE LATEST STANDARDS. (Councilors Soley & Campbell)

Charles Fischman, Committee member, suggested that the Committee review and revise these changes and bring these back to the Council. He reviewed the Committee's focus, the importance of preservation of the historical areas attracting economics and community life, etc.

Vicky Lowell, Committee member, stated that the problem is we do not understand that we are talking about the same thing, to identify sites along this area and this is not a "one shot" deal.

Pat Anderson, Committee member, stated that there are two historic districts in Freeport; each district has boundaries; to be eligible to be included in a National Register District, a building has to be at least 50 years old. She suggested that they include the (old) #1, #2 and #4.

Councilor Soley stated that his amendment includes these.

Mary Lou Collins, Executive Director, Freeport Historical Society, requested that the Council table this item, go back to the Committee and review.

Chairperson Beaulieu stated that we want the survey done and need to clarify the parameters of the survey.

Councilor Soule stated that everyone understands the intent and it takes time to review the language.

Councilor Mann agrees that this should be tabled for review.

VOTE ON AMENDMENT (4 Ayes) (2 Nays-Mann, Hindley) (1 Excused-Bishop)

MOVED AND SECONDED: TO TABLE THE AMENDMENT TO ITEM #131-97 UNTIL JULY 15, 1997. (Councilors Soley & Soule) (6 Ayes) (1 Excused-Bishop)

Manager Olmstead stated that this will be put on the Agenda as an item for a vote and then amendments can be made at that time.

ITEM #132-97 TO CONSIDER ACTION RELATIVE TO THE ACCEPTANCE OF LIBRARY ASSOCIATION TRUST FUNDS.

BE IT ORDERED: THAT THE FOLLOWING LIBRARY ASSOCIATION TRUST FUNDS BE ACCEPTED BY THE TOWN OF FREEPORT TO BE USED FOR THE PURPOSES GIVEN.

<u>I.</u>	<u>FUND</u>		<u>AMOUNT</u>
	Albert Conley Fund	Principal:	\$21,536.80
		Interest:	<u>22,482.66</u>
		Total:	\$44,019.46

PURPOSE: Purchase of books from earned interest only.

2.	<u>FUND</u>		<u>AMOUNT</u>
	Paul & Emma Bennett Fund	Principal:	\$6,579.69
		Interest:	<u>2,059.74</u>
		Total:	\$8,639.43

PURPOSE: Purchase of books from earned interest only.

3.	<u>FUND</u>		<u>AMOUNT</u>
	Eleanor Brewer Fund	Principal:	\$100.00
		Interest:	<u>23.71</u>
		Total:	\$123.71

PURPOSE: For the purchase of books for the new library.

4.	<u>FUND</u>		<u>AMOUNT</u>
	Bartol Association Fund		\$5,479.14

PURPOSE: Any use related to Library Services.

BE IT FURTHER ORDERED: THAT THE LIBRARY TRUSTEES AND HEAD LIBRARIAN BE AUTHORIZED TO EXPEND THERE TRUST FUNDS IN ACCORDANCE WITH THE PURPOSES DONATED.

Discussion followed re: purpose of the funds, the funds being very old, the Council being asked to accept these funds and only spend as designated, etc.

ROLL CALL VOTE (Councilors Soley & Campbell) (6 Ayes) (1 Excused-Bishop)

ITEM #133-97 TO CONSIDER ACTION RELATIVE TO ACCEPTING A BID FOR THE 1982 FIRE LADDER TRUCK.

MOVED AND SECONDED: THAT THE FIRE CHIEF REPORT ON BIDS RECEIVED. (Councilors Hindley & Campbell) (6 Ayes) (1 Excused-Bishop)

Chief Daly stated that there was one bid received in the amount of \$5,000 from E. J. Murphy & Co.

Discussion followed re: bid process, lack of interest in the truck, refusal of the bid, condition of the vehicle, advertisement procedures for this vehicle, value of vehicle, etc.

BE IT ORDERED: THAT THE BID FROM E. J. MURPHY & CO. IN THE AMOUNT OF \$5,000 BE REJECTED AND THAT THE TOWN MANAGER BE INSTRUCTED TO NEGOTIATE THE HIGHEST POSSIBLE PRICE FOR THE SALE OF THE 1982 FIRE LADDER TRUCK AND REPORT BACK TO THE COUNCIL. **ROLL CALL VOTE** (Councilors Soley & Mann) (6 Ayes) (1 Excused-Bishop)

ITEM #134-97 TO CONSIDER ACTION RELATIVE TO PROPOSED AMENDMENTS TO THE SOLID WASTE DISPOSAL ORDINANCE CONCERNING LICENSES (CHAPTER 28).

BE IT ORDERED: THAT A PUBLIC HEARING BE SCHEDULED FOR JULY 15, 1997 AT 7:00 P.M. IN THE TOWN HALL COUNCIL CHAMBERS TO DISCUSS PROPOSED AMENDMENTS TO THE SOLID WASTE DISPOSAL ORDINANCE.

BE IT FURTHER ORDERED: THAT 30 COPIES BE DISTRIBUTED EQUALLY BETWEEN THE TOWN CLERK'S OFFICE AND THE B.H. BARTOL LIBRARY FOR INSPECTION BY CITIZENS. (Councilors Soule & Hindley)

Manager Olmstead explained the transferability of licenses. The new company has agreed to purchase a license for last year and the current year. He added that the Committee is requesting an amendment to the Solid Waste Ordinance.

Discussion followed re: co-mingling residential and commercial trash being illegal per the Ordinance, current practices, language for public hearing, etc.

ROLL CALL VOTE (6 Ayes) (1 Excused-Bishop)

ITEM #135-97 TO CONSIDER ACTION RELATIVE TO AWARDS FROM THE DR. GOULD TRUST FUND.

BE IT ORDERED: THAT EIGHT INDIVIDUALS RECEIVE AWARDS TOTALING \$1,389.83 FROM THE DR. GOULD TRUST FUND PROVIDING FOR PAYMENT OF MEDICAL EXPENSES.

NOTE: All recipients have qualified with the General Assistance Office.

ROLL CALL VOTE (Councilors Campbell & Soule) (6 Ayes) (1 Excused-Bishop)

OTHER BUSINESS:

1. Update on Rescue Services to the Town of Durham.
Chairperson Beaulieu reviewed the efforts to date; as of August 1, 1997, the Town of Durham will not have service from the Freeport Rescue.

Manager Olmstead explained Durham's and Pownal's responses, need to resolve this issue, etc.

Councilor Campbell stated that it is very unfortunate that we have to come to this, but we cannot continue to subsidize Durham.

Manager Olmstead recounted the lack of communication from the Durham Town Officials to date.

Miscellaneous discussion followed re: coverage for Durham, resolved agreement with Pownal, etc.

2. Road Turnback Update.

Chairperson Beaulieu described the ceremonial signing of the LD 1225.

Manager Olmstead stated that the Town has received a letter from the State, stating that the Town will get back this year 4.67 miles of road. What was agreed

upon was some of this, but not all. He called Roger Gobeil and Alan Stearn, Deputy Director, with concerns. With the change in the Statute, a new notice is required. The Town needs proper notice for budget purposes. Mr. Stearn stated that they will meet and can negotiate this. Buxton and Standish received different letters from Freeport's. We have asked to meet with Ms. Lincoln; the 4.67 miles of road still do not meet the definition of "good repair".

Councilor Mann cited a location that needs repair and culvert replacement. JJ

Councilor Soley stated that we should take a hard view with the State.

Manager Olmstead stated that when he first talked with Mr. Stearn, he was told that Senator Amara would be making the decision, as Chair of that Committee.

2. Letter from Manager Olmstead re: Design review Board and offer from Clifford Goodall.

Manager Olmstead stated that the Town Attorney felt that Mr. Goodall's offer was a bad idea; there should be some time-frame between Mr. Goodall's conducting the workshop and coming before the Town to represent anyone.

Councilor Soley asked if the Town Attorney provides workshops. He stated he has concerns with this offer, and Mr. Goodall's qualifications to do the training.

Councilor Mann stated he prefers our attorney to do the training. He suggested that the Manager write a letter to Mr. Goodall, thanking him for his offer, but declining his offer, with a copy to Margaret Morfit.

Discussion followed re: combined workshops, time constraints, etc.

3. Councilor Hindley raised concerns re: Memo from Chief Schofield of June 18, 1997.

Manager Olmstead stated that the School Department received some grant funds to support the new police position, which will necessitate the use of a cruiser.

Councilor Hindley stated he does not favor this.

Manager Olmstead stated that Councilors need to raise their concerns with the School Department.

Miscellaneous discussion regarding this followed. This will be put in the July 15, 1997 agenda for further discussion.

4. Councilor Hindley requested more workshops and discussions be held in order to make agenda items go more smoothly.

Chairperson Beaulieu stated that per the summer schedule, no workshops are scheduled and the majority of the Council does not feel these workshops have been productive.

COMMITTEE REPORTS:

- I. **Municipal Facilities Committee - Report and Recommendations.**
Councilor Campbell reported on the tax acquired property list. Many accounts have been cleared up. The Town will continue to pursue taxes in arrears per the policy established. The Ring property has fallen into the hands of the Town and needs to be pursued.

Manager Olmstead reviewed the efforts to date regarding the new policy. He detailed numerous notices sent to delinquent taxpayers, ample chances for response, liquidation of tax acquired properties, commercial property policy, obligation to treat all fairly, etc.

Councilor Mann raised concern for people who could lose their homes; if no action is taken this evening, these people will be out of their homes.

Manager Olmstead stated that the Town will work with these individuals.

MOVED AND SECONDED: TO MOVE AN ITEM NOT ON THE PRINTED AGENDA. (Councilors Soley & Soule (5 Ayes) (1 Nay-Mann) (1 Excused-Bishop)

BE IT ORDERED: THAT THE TAX ACQUIRED PROPERTY LOCATED AT FREEPORT MAP 9 LOT 16A BE RETAINED BY THE TOWN PURSUANT TO ARTICLE 4 OF THE TOWN OF FREEPORT DISPOSITION OF TAX ACQUIRED PROPERTY POLICY, IN THAT IT IS IN THE BEST INTEREST OF THE TOWN TO USE THIS PROPERTY AS A PUBLIC FACILITY FOR TOUR BUS AND OTHER PARKING.

BE IT FURTHER ORDERED: THAT THE TOWN COUNCIL PURSUE AN ACTION FOR EQUITABLE RELIEF IN ACCORDANCE WITH THE PROVISIONS OF TITLE 36 M.R.S.A SECTION 946, AND THAT THE TOWN COUNCIL CAUSE THIS PROPERTY TO BE RETAINED AND MANAGED AND INSURED AS IT WOULD ANY OTHER MUNICIPAL PROPERTY.
(Councilors Soley & Campbell)

Councilor Soley explained that the property is already tax acquired for non-payment of taxes; instead of selling it, we propose to retain it.

Discussion followed re: at least two liens have matured; concern for taking the property, current policy, Committee preferring to retain this property, the public bid process, legal eviction process, many people who have addressed their arrearages with the Town, need to get fair market value on property to be sold, etc.

Councilor Mann explained his vote. He stated that he does not favor the proposed use for this property, i.e., tour bus parking and raised concern for lack of public input.

Councilor Hindley suggested separating proposed tour bus use from this action.

Manager Olmstead stated that we have already raised the local match for the lot and State funds have been approved by the State; the only thing left to do would be to go through a site plan approval process.

Councilor Soley stated that the vote is not to take the property because it has already been taken.

COUNCIL MEETING #16-97
JULY 1, 1997

ROLL CALL VOTE (4 Ayes) (2 Nays-Mann, Hindley) (1 Excused-Bishop)

MOVED AND SECONDED: THAT THE MEETING BE ADJOURNED AT
10:10 P.M. (Councilors Campbell & Hindley) (6 Ayes) (1 Excused-Bishop)

Respectfully submitted,

Pat Goodwin, Recording Secretary

JJ

CLIFFORD H. GOODALL

**6 INDIAN RIDGE ROAD
FREEPORT, MAINE 04032**

TEL. (207) 865-1984

TEL. (207) 622-3893

FAX (207) 622-4417

March 12, 1997

**Perry Bradley
Design Review Board
Town of Freeport
5 Indian Ridge Road
Freeport, ME 04032**

**Philip Wagner
Design Review Board
Town of Freeport
14 Royal Avenue
Freeport, ME 04032**

**Don Chappell
Design Review Board
Town of Freeport
1 Percy Street
Freeport, ME 04032**

**Jim Hendry
Design Review Board
Town of Freeport
PO Box 36
South Freeport, ME 04078**

**Sandy Williams
Design Review Board
Town of Freeport
17 Maple Avenue
Freeport, ME 04032**

**Margaret Morfit
Design Review Board
Town of Freeport
PO Box 402
South Freeport, ME 04078**

**Cuyler Feagles
Design Review Board
Town of Freeport
89 Webster Road
South Freeport, ME 04032**

Dear Design Review Members:

The Design Review Board and the ordinances that it implements have contributed significantly and positively to the well-being of the Town of Freeport. As current members of the Board you have the opportunity to take steps to assure that that positive contribution continues into the future.

I am supportive of and agree with the concept for a design review board and the need for such a board. It is with that supportive position and a desire to be of assistance to the Board that I write this letter.

My concern is that the Design Review Board in the past has been comprised of members who for whatever reasons were not sensitive to or aware of the legal limitations and procedures which need to be followed in order to protect the Town, applicants, general public and Board members

themselves. As a result, in the past the Design Review Board has been criticized by many Freeport residents. This criticism is not limited to a few individuals, but rather is widespread throughout the Town, its neighborhoods, as well as the various economic tiers and within Town government. In short, the reputation universally within the Town of Freeport of the Design Review Board is negative in spite of its good end results. I was surprised five years ago when I first learned of this negative reputation when I served on the Comprehensive Plan Advisory Committee and later as the Chairman of that Committee. I have also had the opportunity of observing the Board working on a number of occasions on a number of different projects.

Recent changes in the membership of the Board suggests that it now consists of members who would have both the desire and ability to make changes which will improve the Board's performance, comply with legal requirements and actually make it easier on the Board members as well as applicants and the general public.

It is because of this membership change that I would like to offer my services to have a workshop with the Board to discuss and then assist the Board in reforming its procedures and implementation of the ordinances. This is critical and the opportunity is now to take some positive steps.

The manner in which the Board has operated in the past makes it wide open for a legal challenge which could void the entire Design Review Ordinance. Fortunately to date, there has been no applicant who has been sufficiently irritated to spend the time and the money to challenge the entire validity of your Design Review Ordinance which challenge would probably be successful. However, just because applicants bend to the will of the Board, no matter how arbitrary or capricious, does not mean that it is working well and indeed it is that arrangement which has caused the widespread negative response to the Design Review Board.

Because I am supportive of the Board and its ordinances I offer to work with the Board at one or more workshops during which time we would discuss the procedures required in the law and the ordinance for decision making, the criteria that have to be used to make decisions, how to make a decision, how to conduct a public hearing without violating due process rights, how to develop guidelines to be used in reviewing applications or for applicants to use before making applications, and possible amendments to the ordinance for clarification and elimination of vagueness.

Some of you may not know of my involvement in these types of issues so let me explain briefly that for the past 26 years my practice of law throughout the entire State of Maine has been limited to land use, environmental and zoning issues. That is all I specialize in and as a result I have appeared before many planning boards, boards of appeal and design-type review boards throughout the State of Maine. I also represent a number of towns some of which also have design review ordinances. I have also been hired by various towns to conduct training sessions for their planning boards and boards of appeal. I have litigated these issues in court and conducted seminars for other lawyers. It is with this experience and background that I make this offer because I think I can make a positive contribution to the Town and to the Board members. I

March 12, 1997

Page 3

also want to stress that it should also make your job easier. Other things that I would like to discuss would include conflicts of interest, when a member must be excused, how to condition approvals and the requirements for written decisions. The need for these types of issues to be discussed has been observed by me in the past when the Board has clearly violated legal standards which could have gotten them into trouble if anyone had pursued judicial review.

I have no clients with anything pending in front of your Board now and I have none that I know of that are going to be pending in the near future. It is for that reason that at this time that I make this offer. In addition as stated above I make this offer because I believe the current membership of the Board would be receptive to this offer and are actually desirous of doing the right and proper thing. I also think some of the past problems clearly have been created by the lack of training and understanding of the legal context and requirements for this type of board. I would be happy to attend and conduct such a workshop at your convenience. I will bring written materials and request that you set aside a block of three hours. Enclosed are some examples of written materials that may be helpful.

I will provide this service without charge and I will not be creating an attorney client relationship with the Board or the Town. I will give no advice on any pending or future applications and no substantive review or comment on any applications or past approvals. By doing this the Board and Town must agree that this will not create a conflict for my future representations of clients before the Board. These discussions must be in an open public meeting and you may wish to seek input from others as well.

I will not be shy, but I will be supportive and hopefully helpful.

Best regards,



CLIFFORD H. GOODALL

CHG:jrs

Enclosure

cc: Dale Olmstead, Town Manager
Fred Reeder, CEO

How to conduct a Public Hearing

By Clifford H. Goodall, Esq.

Editor's Note: The author is a partner in the Augusta law firm of Lund and Goodall and is a member of the MMA Advisory Committee.

Every conscientious town official will, sooner or later, be involved in a public hearing. The laws and liabilities regarding public hearings are changing and as a result every councilman, selectman, planning board member, fire chief, conservation commissioner, town manager, road commissioner, school board member, building inspectors and others must be aware of the basics in this increasingly used legal mechanism. If the basics are not understood, then every town official may cause considerable confusion and invite costly court cases. All of this can be avoided with a fairly simple understanding of the public hearing concept and purpose.

Two Types

The first determination that needs to be made before a public hearing is announced is whether it is to have a legislative or quasi-judicial function. All levels of government use both types but each is clearly different with different purposes and legal requirements. The fact that both types are called public hearings is unfortunate and a source of confusion.

The Legislative Public Hearing

Whenever any government body is considering the adoption of a law, ordinance, rule, or regulation and calls a public hearing to consider the proposal, a legislative type public hearing will result. Examples are when the selectmen call a public meeting to discuss a proposed ordinance for road construction standards or the planning board calls a public meeting to discuss proposed subdivision regulations. Each of these are legislative because they will have a general application through-

out the town. The purpose is to get public reaction to a proposal which will restrict and regulate whoever may be affected by the proposal in the future.

The legislative public hearing, until recently, has been the most common. It is generally an informal affair with all of the proponents having their say and then all of the opponents. Speakers can say just about what they want and usually do even if it is not terribly relevant. There are very few procedural rules for the conduct of this type of hearing. Generally, notices are published in a newspaper and posted in town. Since the purpose is to get public input, an effort should be made to get as much reaction as possible from as many people as possible. Therefore, the more people who know about it, the better. The legislative

public hearing is most efficient when multiple copies of a clear and written proposal is widely distributed for discussion. Every degree of vagueness increases in proportion the chaos this type of hearing can sometimes cause. Most Mainers have the healthy attitude that if we can't understand it, we don't like it.

Every government unit and agency will from time to time hold a legislative public hearing. The goals are the greatest possible public input, broadest public notice, a clear proposal, and a simple procedure.

The Quasi-Judicial Public Hearing

The quasi-judicial public hearing is in sharp contrast to a legislative public hearing. It is a formal affair, restricted by clear legal restraints, and if not properly conducted, can result in



costly litigation for the town, individuals, and town officials. This type of hearing is becoming much more common and is now required as a matter of law in many circumstances.

The key to understanding this type of hearing is in its name: quasi-judicial. In other words, it is like a court case and those involved usually have a lot to lose or gain. For example, when the selectmen hold a public hearing for Joe Smith's junkyard license, it must be a quasi-judicial hearing. When a planning board holds a public hearing for John Doe's real estate subdivision, it must be a quasi-judicial public hearing.

Constitutional Rights

Every quasi-judicial public hearing has constitutional limitations and the participants have rights that are very important. These set the goals for how the hearing should proceed.

The Fourteenth Amendment requires that every government unit and agency not "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The 'due process' requirement mandates that every decision and hearing be based on fair and reasonable written ordinances and regulations that correspond to the facts at issue. In other words, each town unit should have written rules for conducting these public hearings; the ordinances or laws that are the subject of the hearing must be reasonable and written; and the evidence at the hearing must relate to the purpose and criteria of the relevant law or ordinance.

The 'equal protection' requirement mandates that everyone affected by the particular ordinance or law be treated in a similar fashion. The key here is the 'treatment' which must be the same. It does not mean that the outcome or decision must be the same. All rules, regulations, ordinances, and laws must be applied equally to different facts. Because the facts are always different, the outcome is almost always different to some degree.

Rules Of Procedure

Every unit of town government which may hold a quasi-judicial public hearing and does not now have written rules of procedure is in for potential trouble.

Do it now and keep them simple!

If you do not have any written rules, it is difficult to provide adequate due process. In addition, procedural rules help everyone, especially the chairman. Rules, if they are clear and simple, can prevent the process from turning into a circus and shouting match. Without rules the final decision may be challenged in court. Maine law requires that these rules be adopted before anyone needs a public hearing. Once anyone has filed an application for a permit, license, etc., it's too late to start worrying about rules of procedure. Therefore, adopt them now!

Evidence

In this type of hearing, as in a court, there needs to be limitations on the type of evidence that is presented and considered.

The most important factor is relevancy. The test is a fairly simple one compared to the test used in court trials. Generally, any evidence should be allowed to be presented which will be helpful and which has some reliability. Emotional and speculative presentations should be discouraged, but they never can be completely avoided. These hearings are frequently emotional so the chairman should conduct the hearing with both compassion and fairness. This is a task which is sometimes almost impossible, but the effort is worth it.

At the very beginning of the hearing the chairman should explain the procedural rules and read the criteria of the law or ordinance that applies. He should make it very clear that only evidence that relates to those criteria can be considered. That is the best test of relevancy: does it relate to the criteria of the law or ordinance which is being applied? For example, evidence and discussions about more

school age children is generally irrelevant in a subdivision hearing before a planning board because the state law requiring the subdivision license does not list this factor as one of the criteria. Unless it has been clearly included in a locally adopted ordinance or regulation, it cannot be considered.

Any person presenting evidence at this type of hearing should be available to answer questions from town officials and others. In other words, anyone who testifies should be subject to cross-examination.

Whenever a quasi-judicial hearing is used another crucial limitation automatically results: the decision must be based only on information and evidence gathered at the hearing.

This is an important point. Just one year ago, the Maine Supreme Judicial Court reviewed the results of this type of hearing in South Portland and threw out the decision of the city council in a license case for a self-service gasoline station. The city did this because the council based its decision on evidence not presented at the public hearing. In its decision, the court said:

"While an administrative agency of government does possess a broad area of discretion, it is . . . requires, that a decision be based upon substantial evidence rather than the visceral reaction of its members. When, as in the instant case, the application was supported by uncontradicted evidence that the proposed operation did not pose a threat to the public safety, the Council may not base its adverse decision, however well motivated, solely upon the personal opinion of one of its members, particularly where the reservations expressed were purely speculative."

The Decision

Once the hearing is over, a decision must be made within a reasonable period of time. Check the law or ordinance governing each case because some set clear time limitations.

The final decision must be in writing and must state the reasons for the decision. This is a requirement of state law and also of general fairness. The best form is the listing of the facts that were relied upon for reaching this final decision. A convenient form will be in two parts. The first is a 'Finding of Facts' and the second is a 'Decision.' The decision generally can be either approval, approval with conditions or denial. If conditions are included, they must be listed.

Caution

There is a clear trend to give more control to municipalities. Because of this, there will be an increase in public hearings of both types. They are a useful and important tool, but a word of caution is needed in conclusion. Always consult the law governing the specific issue and hearing. When in doubt, seek legal assistance. What appear to be minor errors can result in costly litigation and can damage the interests of private individuals as well as the town.

Due Process and Municipal Boards

By Christina Schultz

The right to procedural due process is guaranteed by both the state and federal constitutions and yet is not defined by either document. In recent years, the number of procedural due process challenges to municipal board action has increased, giving the courts an opportunity to articulate more fully the components of this doctrine.

Maine's highest court, the Law Court, has observed that procedural due process "does not restrict the State to any particular mode or procedure." *Green v. State*, 247 A.2d 117, 121 (Me. 1968). Instead, procedural due process is satisfied if individual rights are protected from arbitrary and unfair governmental action through appropriate procedural safeguards. *Driscoll v. Gheewella*, 441 A.2d 1023, 1026 (Me. 1983).

The Law Court has held that decisions of a municipal board based upon fact-finding and affecting property rights "satisfy procedural due process when the applicant is given notice of and an opportunity to be heard at proceedings in which his [or her] property rights are at stake." *Pelkey v. City of Presque Isle*, 577 A.2d 341, 343 (Me. 1990).

Maine court decisions in the municipal arena, however, have not been confined merely to inquiring whether the applicant received notice and a chance to be heard. Instead, several recent Law Court and Superior Court decisions have probed into the more specific requirements of procedural due process and, in several instances, have reversed or remanded a municipal board's decision exclusively on procedural due process grounds.

This article focuses upon four components of procedural due process — board member bias, board member attendance, ex parte communications, and participation in board hearings — to assist municipal boards in identifying practices, policies and procedures which may jeopardize procedural due process rights.

Board Member Bias

Maine courts have repeatedly recognized

About The Author

Christina Schultz is an attorney with the Portland firm of Perkins, Thompson, Hinckley & Keddy, who practices primarily in the area of land use law.

that the constitutional guarantee of procedural due process presupposes a fair and impartial decisionmaker.

For example, in *Mutton Hill Estates, Inc. v. Town of Oakland*, 468 A.2d 989 (Me. 1983), the Law Court held that a planning board violated a developer's procedural due process rights when it invited the developer's opponents to assist in making factual findings sufficient to support the denial of the developer's proposal, without giving the developer notice or permitting the developer's representative to attend the meeting. The Law Court agreed with the Superior Court that "the findings of the Planning Board were irreversibly tainted by this procedural impropriety" and echoed the Superior Court's grave doubts that the developer could ever get "a fair, impartial, and expeditious hearing and decision from the Planning Board." Because of the irreversible bias, the Law Court removed the decision of whether to approve the developer's application from the Planning Board and authorized the Superior Court to make that decision for the board. *Mutton Hill* thus stands for the proposition that board member bias can so affect the fairness and impartiality of a municipal proceeding that a procedural due process violation results.

The Superior Court in *Burns v. Town of Harpswell*, No. CV-90-1083 (Me. Super. Ct. Cum. Cty., July 10, 1991) approached the issue of board member bias and procedural due process from a slightly different angle. In that case, a group of abutters successfully challenged a ZBA's action approving a special exception as violative of procedural due process by pointing out that one of the members of the ZBA was both an abutter and a friend of the applicant. Prior to the hearing, the board member's husband had written a letter in support of the special exception which was entered into the record. Although the board member abstained from voting, she participated in the ZBA's discussion of the application which was ultimately approved. The court found her abstention from voting insufficient to overcome the procedural due process error. It noted that "[g]enerally, due process requires neutrality of the decision-makers" and held that "[w]here a member's bias or conflict of interest is of sufficient magnitude to disqualify that person from voting, the member should not participate in debate or advocacy of the

matter." The court therefore sustained the appeal on procedural due process grounds.

A similar result was reached in *Seuligny v. City of Biddeford*, 344 A.2d 34 (Me. 1975). There, the Law Court held that procedural due process was violated by the participation of the mayor, as the presiding officer, in a city council hearing regarding the dismissal of another city official. The Law Court noted that because of his interest the mayor could not approach his duties with the "requisite freedom from bias and prejudice."

These cases demonstrate that a fair and impartial decisionmaker is an integral component of procedural due process and that a decision made in the absence of this component may be constitutionally deficient.

Board Member Attendance

Board member attendance is another essential element of procedural due process.

In *Pelkey v. City of Presque Isle*, 577 A.2d 541 (Me. 1990), the Law Court held that a ZBA violated an applicant's procedural due process rights when it issued findings and conclusions based upon evidence presented at hearings attended by only two members of the ZBA.

The board member attendance problem in *Pelkey* was created when the appointed ZBA underwent a significant change in membership during the interim between the ZBA's hearing upon the *Pelkey* application and its rendering of findings of fact, conclusions and ultimate disposition of the application. The change in the ZBA's composition was such that only two of the five board members had actually heard the evidence upon which the ZBA's findings of fact, conclusions and decision were based. Moreover, one of the ZBA's new members had been a vocal opponent of the *Pelkey* application prior to his membership in the ZBA, thereby raising the spectre of board member bias.

The court found that the mere fact that the composition of the ZBA had changed did not obviate the need for a decisionmaker who had heard all the evidence upon which its decision was based. The Law Court noted that a municipal board "acts in a quasi-judicial capacity if it affects an interest which is constitutionally protected." Accordingly, "procedural due process assumes that Board findings will be made only by those members who have heard the evidence and assessed

the credibility of the witnesses." Concluding that this requirement had not been met, the Law Court remanded the decision back to the ZBA for a new hearing on the property owner's application and ordered that the hearing be held before only those ZBA members who, before their appointment to the ZBA, had neither opposed nor supported the property owner's application at the previous meetings.

Pelkey not only stands for the proposition that procedural due process requires unbiased factfinders and decisionmakers, but it also appears to mandate board member attendance at the evidentiary portion of any hearing upon which the board members' decision will be based. The Law Court in *Pelkey* took pains to point out that hearing evidence and assessing witness credibility is not "an impersonal obligation" but a "duty akin to that of a judge." It is therefore arguable that procedural due process is not satisfied when a board member merely reviews the record and questions his or her fellow board members regarding the events of a prior proceeding which the board member did not attend. Instead, as the United States Supreme Court has stated, "[t]he one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481 (1936), cited in *Pelkey*, 577 A.2d at 343.

Ex parte Communications

Ex parte communications have also been a recent focus of Maine court decisions addressing procedural due process challenges to municipal board action. An ex parte communication is a written or oral communication regarding the subject matter of a proceeding which occurs between the decisionmaker and one party to the proceeding without the other party's presence or notice.

For example, an ex parte communication occurs if a planning board member and a property owner encounter each other in a grocery store and briefly discuss the merits of the property owner's pending application.

Similarly, an ex parte communication occurs when an abutter writes to a municipal board and states her objection to the granting of a variance to her neighbor and the neighbor is never provided with a copy of the abutter's letter or an opportunity to address its contents.

Although municipal hearings are not structured in the same manner as adversarial judicial proceedings before a judge or jury, it is clear that the courts are increasingly importing the ethical and procedural rules that govern those proceedings into the municipal arena. Both *Mutton Hill* and *White v. Town of Hollis*, 589 A.2d 46 (Me. 1991) are recent examples of that phenomenon and in each the plaintiff asserted an ex parte communication as a component of a procedural due process challenge.

In *Mutton Hill*, the developer successfully argued that an ex parte communication ris-

ing to the level of a due process violation occurred when the planning board held meetings with the developer's opponents from which the developer was excluded. Similarly, in *White v. Town of Hollis*, the plaintiff argued that she did not receive a fundamentally fair hearing on her request for a variance for a number of reasons, including because there had been ex parte communications with the Board. The Law Court agreed, observing that the "overarching principle of procedure in any board action is the right to a minimum of procedural due process: the Board needs to apply the proper law in an evenhanded way, not arbitrarily and capriciously." *White*, 589 A.2d at 48. Applying this standard, the court found that the Board manifested "blatant disregard of the law" by, among other things, permitting an ex parte communication regarding the land use violation. The court observed that, pursuant to 30-A M.R.S.A. sec. 2691, "every party ... [has] the right to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts."

An ex parte communication interferes with these rights because it deprives the party of the opportunity to address all the evidence which the board has considered in rendering a decision. Nevertheless, as *White* demonstrates, even upon finding an egregious procedural due process violation, a court will not require a municipal board to grant a variance if the evidence supporting the variance request is insufficient. Accordingly, a due process violation may not in every instance prompt the reversal of an otherwise appropriate decision.

Participation in Board Hearings

In striving to satisfy the requirements of procedural due process, a municipal board may be confronted with the difficult task of deciding how much process is enough.

Although ZBA's are governed by the procedural requirements of 30-A M.R.S.A. Sec-

tion 2691(3), other municipal boards that engage in factfinding may profit from reviewing not only that statute, but also certain provisions of the Maine Administrative Procedure Act ("the APA"). Although the APA expressly does not apply to municipalities (5 M.R.S.A. Section 8002(2)), its provisions for adjudicatory proceedings (see 5 M.R.S.A. Sections 9052 through 9059 and 9061 through 9063) may constitute useful guidance.

Both Section 2691 of Title 30-A and the APA guarantee to a "party," in addition to notice and the opportunity to be heard, the right to introduce oral or written testimony, to cross-examine, and the right to present as well as to confront evidence and arguments on all the issues. At least one court has held that these rights, as set out in the Administrative Procedures Act, cannot be circumvented, even if to do so would spare the state agency concerned considerable time and expense that the agency could ill afford to devote to the matter. See *Fichter v. Maine Board of Environmental Protection*, No. CV 90-624 (Me. Super. Ct., York Cty., Sept. 18, 1991). This is presumably true as well of the procedural rights set out in Section 2691 for parties to ZBA proceedings.

Moreover, the courts have been generous in conferring party status to any individual that makes the following twofold showing: The person must participate in the proceedings and must demonstrate that he or she may suffer a particularized injury different in kind or intensity from that experienced by the general population. See *Jaeger v. Sheehy*, 551 A.2d 841, 842 (Me. 1988). "The requirement of 'particularized injury' is met when the judgment adversely and directly affects the party's property, pecuniary or personal rights." *Anderson v. Swanson*, 534 A.2d 1286, 1288 (Me. 1987). It is well established that the courts have not required a high degree of proof of a particularized injury. *Anderson*, 534 A.2d at 1288. Accordingly, not only does procedural due process guarantee a wide array of

K KOCH

KOCH MATERIALS COMPANY

Manufacturers of Asphalt Products for Highway Maintenance

5 Central Avenue
South Portland, Maine 04106
(207) 767-2161

58 Bennett Street
Bangor, Maine 04401
(207) 947-8624

evidentiary rights, it guarantees them to a wide range of individuals.

The right to participate in board hearings does not, however, extend into the decision-making function itself. In *Cunningham v. Kittery Planning Bd.*, 400A.2d 1070 (Me. 1979), the Law Court held that property owners who were permitted to present their testimony to the planning board at a public hearing and who were provided with ample opportunity to draw the planning board's attention to any fact and information they had with regard to a proposed subdivision, were not deprived of procedural due process when the planning board closed the public hearing portion of the proceeding and adjourned to deliberate in private. The Law Court pointed out that the public hearing called by the planning board was discretionary and that procedural due process guaranteed only a fundamentally fair hearing, not participation in the actual decisionmaking function.

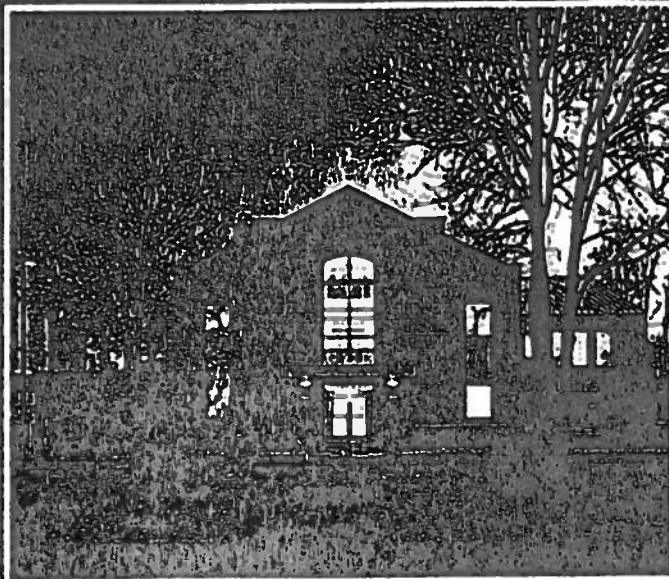
Judicial Approach to Minor Procedural Due Process Violations

Finally, while it is true that Maine courts have repeatedly recognized that procedural due process is a critical component of municipal board proceedings, it is nonetheless clear that the court will not allow the concept to be trivialized.

For example, in *Philric Associates v. City of South Portland*, 595 A.2d 1061 (Me. 1991), the plaintiff argued that its rights to procedural due process were violated when it was initially told that its application was complete and then, after the application was circulated to various city departments for comment, told that its application was seriously deficient. The Law Court characterized these facts as "far from [those] in *Mutton Hill*" and observed that there was no evidence of *ex parte* contacts or other improper conduct by the board or planning staff. Accordingly, finding no procedural due process violation, the Law Court concluded that the plaintiff's appeal was premature and that no harm would result from allowing the board to complete its review of the plaintiff's application in due course. *Philric Associates* thus stands for the proposition that minor inconveniences and inconsistencies in municipal procedure do not automatically give rise to a procedural due process violation.

Conclusion

This article has addressed just a few of the components of procedural due process in order to assist municipal boards in identifying practices that may be constitutionally suspect. The judicial decisions addressing the issue of procedural due process are numerous and municipal board members may want to review this area of law more thoroughly in order to ensure fundamentally fair proceedings.



Brick

SERVING FORM AND FUNCTION
WITH
ELEGANCE AND STYLE

morin Lachance
BRICK COMPANY BRICK COMPANY

brooks
BRICK COMPANY

Manufacturers and distributors of
Waterstruck, Molded and Extruded Face Brick
for new, renovation, matching or restoration projects

Morin Brick • P.O. Box 36 • Danville, ME 04223 • (207) 784-9375
Lachance Brick • So. Windham Road • Gorham, ME 04038 • (207) 539-3301
Brooks Brick • Maple Street Extension • Brewer, ME 04412 • (207) 959-3318

Photo: Brian Vandem Bink • Westbrook College Gym • Sasaki Associates