Exhaustion of Remedies

If a statute or ordinance requires appeals to be heard first by the board of appeals, a court generally will refuse to decide an appeal which has been filed directly with the court and will remand the case (send it back) to the board of appeals to hold a hearing, create a record, prepare findings and conclusions, and make a decision. If a board has been legally established by the municipality but no members have been appointed or if the board does not have enough members serving to take legal action, the court will order the municipality to make the necessary appointments. The same is true where a municipality is legally required to have a local appeals board by State law to hear certain kinds of appeals (e.g., zoning appeals), but has failed to establish one; the court will order the municipality to take the necessary legislative action to create the board and then appoint the necessary people to fill the positions on the board. The legal concept involved here is called "exhaustion of administrative remedies." *Fletcher v. Feeney,* 400 A.2d 1084 *(*Me. 1979); *Noyes v. City of Bangor,* 540 A.2d 1110 *(*Me. 1988); *Freeman v. Town of Southport*, 568 A.2d 826 (Me. 1990); *Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991). A planning board decision made under a local zoning ordinance must be appealed first to the local board of appeals, unless the ordinance expressly authorizes a direct appeal to court. This is also true for a site plan review decision where the site plan review is part of a zoning ordinance and not a separate ordinance. *Hodson v. Town of Hermon*, 2000 ME 181, 760 A.2d 221; *Thomas v. City of South Portland*, 2001 ME 50, 768 A.2d 595.

Standing

The test for standing to appeal as established by the courts is a two-part test, described below. It applies both to local appeals and to appeals filed with a court. A municipality probably has home rule ordinance authority under 30-A M.R.S.A. § 3001 to modify this test.

"Particularized Injury" Test

When a person can demonstrate that he or she has suffered or will suffer a "particularized injury" as a result of a decision by the planning board or CEO, he/she has met one part of the general test for "standing" to file an appeal with the board of appeals, if the board has jurisdiction to hear the appeal by ordinance or statute. To meet the "particularized injury" test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. *Brooks v. Cumberland Farms, Inc*., 1997 ME 203, 703 A.2d 844; *Christy's Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d

535 (Me. 1991); *Anderson v. Swanson,* 534 A.2d 1286 (Me. 1987); *New England Herald Development Group v. Town of Falmouth,* 521 A.2d 693 (Me. 1987); *Leadbetter v. Ferris,* 485 A.2d 225 *(*Me. 1984); *Lakes Environmental Association v. Town of Naples,* 486 A.2d 91 (Me. 1984); *Harrington v. Town of Kennebunk,* 459 A.2d 557 (Me. 1983). The court has held that "particularized injury for abutting landowners can be satisfied by a showing of 'the proximate location of the abutter's property, together with a relatively minor adverse consequence if the requested variance were granted'." *Fryeburg Water Co. v. Town of Fryeburg*, 2006 ME 31, 893 A.2d 618; *Norris Family Associates, LLC v. Town of Phippsburg*, 2005 ME 102, 879 A.2d 1007; *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673. See also, *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266 (defining "abutter" to include "close proximity"); and *Drinkwater v. Town of Milford*, AP-02-08 (Me. Super. Ct., Pen. Cty., April 18, 2003) (son of landowners whose property abutted the applicants' and who worked on his parents' land failed to document that he had a future interest in his parents' land sufficient to give him standing to appeal as an abutter). A person who can show that he/she owns property in the same neighborhood as the applicant's property, even if not an abutter, generally will be deemed to have a particularized injury. *Singal v. City of Bangor*, 440 A.2d 1048 (Me. 1982). Where a person claims that a project will cause him potential harm because he drives by the site daily and will be exposed to greater safety risks due to traffic generated by the project, the court has held that such harm is not distinct from that which will be experienced by many other members of the driving public and therefore was not sufficient for the purposes of the "particularized injury" test. *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735. See also *Nelson v. Bayroot, LLC,* 2008 ME 91, 953 A.2d 378 for a case involving the lessee of a lot in an approved subdivision and standing to appeal a subdivision plan amendment related to an undeveloped area of the subdivision.

If an appeal is brought by a citizens' group or some other organization, the test for the organization's standing to appeal is whether it can show that "any one of its members would have standing in his/her own right and that the interests at stake are germane to the organization's purpose." *Pride's Corner Concerned Citizens Assn. v. Westbrook Board of Zoning Appeals*, 398 A.2d 415 (Me. 1979); *Widewaters Stillwater Co., LLC v. City of Bangor*, AP-01-16 (Me. Super. Ct., Pen. Cty., May 30, 2001; *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978); *Penobscot Area Housing Development Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981); *Conservation Law Foundation Inc. v. Town of Lincolnville*, AP-00-3 (Me. Super. Ct., Waldo Cty., February 26, 2001); *Friends of Lincoln Lakes v. Board of Environmental Protection*, 2010 ME 18, 989 A.2d 1128.

Actual Participation in Proceedings Required

Anyone wishing to appeal from a planning board decision to the board of appeals or a board of appeals decision to Superior Court under Rule 80B must also be able to show actual participation for the record in the applicable local hearing process. It is not enough for a person to express his/her concerns to board members or other officials outside the setting of the public hearing or to speak at a preliminary meeting of the board regarding the appeal. Participation must be at the official hearing in person or through someone there acting as the person's official agent or by submitting written comments for the official hearing record. *Jaeger v. Sheehy,* 551 A.2d 841 (Me. 1989); *Lucarelli v. City of South Portland*, 1998 ME 239, 719 A.2d 534; *Wells v. Portland Yacht Club*, 2001 ME 20, 771 A.2d 371. Under 30-A M.R.S.A. § 4353, the municipal officers and the planning board are automatically made "parties" to the appeals board proceedings, so they would not have to meet the test outlined above in order to file an appeal in Superior Court from an appeals board decision. *Crosby v. Town of Belgrade,* 562 A.2d 1228 (Me. 1989). The same is not true for other officials, like the code enforcement officer, who want to appeal the board of appeals' decision; since those other officials are not statutory parties, they would have to satisfy the two-part test for standing. *Tremblay v. Inhabitants of Town of York*, CV-84-859 (Me. Super. Ct., York Cty., Oct. 3, 1985); *Department of Environmental Protection v. Town of Otis*, 1998 ME 214, 716 A.2d 1023.

Appeal by Permit Holder

If the person wishing to appeal is the person who applied for approval from the planning board, that person has automatic standing to appeal, whether or not he/she attended or otherwise participated in the proceedings of the planning board or the appeals board; the written application for the permit or the appeal is sufficient participation. *Rancourt v. Town of Glenburn*, 635 A.2d 964 (Me. 1993). However, where applicants had allowed their purchase and sale agreement to lapse before filing an appeal, the court held that they had no standing to appeal a denial of their permit application. *Madore v. Land Use Regulation Commission*, 1998 ME 178, 715 A.2d 157.

Appeal by Municipality

See *City of Bangor v. O'Brian*, 1998 ME 130, 712 A.2d 517, and *Town of Minot v. Starbird*, 2012 ME 25, 39 A.3d 897, for an example of a case where the municipality challenged a board of appeals decision in Superior Court.