

June 28, 2021

VIA EMAIL AND USPS

Leah B. Rachin, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
lrachin@dwmlaw.com

RE: Rockport Hotel ZBA Appeal

Dear Leah,

In the pending appeal of the Code Enforcement Officer's issuance of a building permit for the Rockport Harbor Hotel, the Appellants have included claims that the permit should not have been granted because petitioned Land Use Ordinance (LUO) amendments approved in August 2020 should have been applied to the application. The CEO and Town have maintained (both in the permit and in pending litigation) that the petitioned amendments cannot be applied due to restrictions on retroactivity set forth in 30-A M.R.S. § 3007(6). The CEO and Town assert that the petitioned amendments are not valid as applied to this project due to the claimed applicability of Section 3007(6). Appellants have countered in the pending court action that Section 3007(6) as applied to this application would be unconstitutional, and that the amendments by their terms must be applied to the building permit application notwithstanding Section 3007(6). This case therefore implicates questions of whether two separate legislative enactments – the petitioned LUO amendments and Section 3007(6) itself – are valid.

You have asked for briefing on the issue of whether the Rockport Zoning Board of Appeals has jurisdiction to consider whether 30-A M.R.S. § 3007(6) applies to have barred the petitioned LUO ordinance from being applied to the building permit. For the reasons stated below, the Rockport ZBA does not have jurisdiction to decide this issue.

First, as you acknowledge, the case law is clear that ZBAs lack authority to rule on the constitutional validity of a statute. "A zoning board of appeals does not have the statutory authority to determine the validity of a legislative enactment." *Minster v. Town of Gray*, 584 A.2d 646, 648 (Me. 1990). *See* 30-A M.R.S.A. § 4353 (setting forth powers of a zoning board of appeals). This is a full stop: there are no qualifications to this lack of authority. Further, under no circumstances does a ZBA ever have authority to decide constitutional issues. *See Sawyer Environmental Recovery Facilities, Inc. v. Inhabitants of Town of Hampden*, PEN AP-99-52 ("Litigants do not have to raise constitutional issues before an administrative body when that body does not have jurisdiction to decide the meaning of a statute or determine its constitutionality. 30-A M.R.S.A. § 4353.") This lack of authority is further evident by 14 M.R.S.A. § 5954, which provides petitioners an independent civil cause of action for a declaratory judgment on the validity or construction of a statute without petitioner having to first

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avail himself of the administrative process. *Annable v. Board of Envtl. Protection*, 507 A.2d 592, 595 (Me.1986). Ultimately, the inquiry should end here.

Further, the fact that the ordinance authorizes the ZBA to “hear and decide where it is alleged that there is an error in any order, requirement, decision, or determination made by the Code Enforcement Officer” without the qualification that the error was interpreting “this ordinance” is of no consequence. The parameters of a ZBA’s appeal jurisdiction as set forth in 30-A M.R.S.A. § 4353 are an express limitation on municipal home rule authority. 30-A M.R.S.A. § 4351. Therefore, even if the Land Use Ordinance intended to broaden the ZBA’s jurisdiction beyond the statute, the statutory constraints would still apply to limit it.

Even if the LUO could broaden the ZBA’s jurisdiction beyond 30-A M.R.S.A. § 4353, the language of the LUO is not sufficient to do so. The jurisdiction of a municipal board of appeals is a question of law that must be ascertained from an interpretation of statutes and local ordinances. *Sanborn v. Town of Sebago*, 2007 ME 60, ¶ 6, 924 A.2d 1061, 1063. Title 30-A, section 2691(4) states: “No board may assert jurisdiction over any matter unless the municipality has by ordinance or charter *specified the precise subject matter* that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board.” (emphasis added). Regardless of the fact that the LUO does not limit appeals to errors made by the Code Enforcement Officer in interpreting *this ordinance*, jurisdiction to evaluate the legality of either ordinance provisions or statutory provisions is not specifically provided in the LUO or Town Charter and therefore the Rockport ZBA does not have jurisdiction.

It is clear that this issue is beyond the jurisdiction of Rockport Zoning Board of Appeals and must be decided by a court of law.

Sincerely



Kristin M. Collins

KMC:amm

cc: Andre Duchette, Esq. *(via email only)*
Philip Saucier, Esq. *(via email only)*
Daniel Murphy, Esq. *(via email only)*
Mark Coursey, Esq. *(via email only)*
Benjamin Plante, Esq. *(via email only)*