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## The Long-Standing Requirement That Delegations of Land Use Control Power Contain "Meaningful" Standards to Restrain and Guide Decision-Makers Should Not Be Weakened

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I. INTRODUCTION

Some forty years ago, a leading land use scholar noted that "it has always been recognized that it is an essential part of the judicial function to watch over the parochial and exclusionist attitudes and policies of local governments, and to see to it that these do not run counter to national policy and the general welfare."<sup>1</sup> Maine courts by and large have discharged this judicial function by consistently striking down unauthorized and overreaching local governmental land use decisions.<sup>2</sup> The Maine Supreme Judicial Court, sitting as the Law Court, issued a stern warning over twenty years ago in *Barnard v. Zoning Board of Appeals of Yarmouth*:<sup>3</sup>

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1. Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 318 (1955). Justice Hall of the New Jersey Supreme Court quoted this passage in his dissenting opinion in *Vickers v. Township Comm. of Gloucester Township*, 181 A.2d 129, 141 (N.J. 1962) (Hall, J., dissenting). In *Vickers* the majority upheld a zoning ordinance amendment that barred the construction of mobile home parks throughout the municipality. *Id.* at 140. Over a decade later Justice Hall authored the majority opinion in *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), an oft-cited decision invalidating a system of land use regulation that made providing low and moderate income housing within Township boundaries virtually impossible. *Id.* at 729-30. The *Mount Laurel* majority concluded that municipalities have a presumptive obligation to provide an opportunity for a variety of housing, including low and moderate cost housing, through their land use regulations. *Id.* at 728.

2. See Orlando E. Delogu, A Final Note on *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 311 n.3 (1980) (citing numerous decisions of the Maine Supreme Judicial Court warning municipalities about exclusion or invalidating exclusionary land use control measures).

3. 313 A.2d 741 (Me. 1974).

[W]e are mindful that zoning has been used frequently for ends which while ostensibly within the traditional objectives of zoning—protection of health, safety, morals and general welfare—are in *fact* unrelated to those purposes.

....

Recognizing this potential for abuse inhering in the zoning power, both federal and state courts have in recent years ordered modifications in zoning plans on equal protection and due process grounds.<sup>4</sup>

Developing this principle, a line of cases beginning with *Waterville Hotel Corp. v. Board of Zoning Appeals*,<sup>5</sup> and including *Cope v. Inhabitants of Brunswick*<sup>6</sup> and *Wakelin v. Town of Yarmouth*,<sup>7</sup> exemplifies the type of modifications ordered by courts to address constitutional infirmities in land use ordinances. Within this line of cases the Law Court has articulated and reiterated the proposition that delegations of decision-making power must contain adequate, legislatively-fashioned standards to be constitutionally permissible.<sup>8</sup> The *Waterville Hotel* court tersely noted:

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4. *Id.* at 745. See also *Grondin v. Inhabitants of Eliot*, Civil #975-A (Me. Super. Ct., Yor. Cty., Apr. 30, 1969) (Webber, J.). In *Grondin* the Town of Eliot enacted an ordinance prohibiting trailers and mobile homes within town boundaries. In adjudicating the validity of the ordinance, the court observed that the legislature had granted to municipalities the power to adopt "reasonable regulations . . . designed to promote the public 'health, safety and general welfare.'" *Id.* at 1-2 (citing ME. REV. STAT. ANN. tit. 30, § 2151). The court then noted that "[n]othing contained [within the statute] even remotely suggests that a municipality is empowered to exclude all trailers and mobile homes from any and every location therein. . . . [I]t was beyond the scope of the authority of the Town of Eliot to adopt this ordinance." *Id.* at 2.

5. 241 A.2d 50 (Me. 1968).

6. 464 A.2d 223 (Me. 1983).

7. 523 A.2d 575 (Me. 1987).

8. Other cases within the *Waterville Hotel*, *Cope*, *Wakelin* line include: *Phillips Petroleum Co. v. Zoning Bd. of Appeals*, 260 A.2d 434, 435 (Me. 1970) (observing that the lack of specific guidelines in a zoning ordinance that allows the Zoning Board of Appeals to deny a conditional use permit where the "building and/or use [would be] detrimental or injurious to the neighborhood" encourages discriminatory action by the Board); *Stucki v. Plavin*, 291 A.2d 508 (Me. 1972) (holding invalid a zoning ordinance bestowing unlimited discretion upon the Board of Zoning Appeals to approve the extension of regulations applicable to a less restrictive portion of a parcel into a more restricted area where the zoning district boundary line divides the parcel); *Town of Windham v. LaPointe*, 308 A.2d 286 (Me. 1973) (striking down a municipal ordinance for failure to provide sufficient standards where the ordinance forbids the establishment of house trailer parks without the approval of the Selectmen and Planning Board); *Fitanides v. Crowley*, 467 A.2d 168, 172 (Me. 1983) (holding unconstitutional for failure to provide adequate standards a zoning ordinance authorizing the Board of Zoning Appeals to deny a special exception permit for the construction of a campground where the use would not promote "the public health, safety, welfare, moral order, comfort, convenience, appearance, prosperity, or general welfare"); *Chandler v. Town of Pittsfield*, 496 A.2d 1058 (Me. 1985) (invalidating a provision in a zoning ordinance directing the Planning Board and Board of Appeals to evaluate a variety of detailed factors in considering a special exception

The legislative body [City Council] may specify conditions under which certain uses may exist and may delegate to the Board [of Zoning Appeals] discretion in determining whether or not the conditions have been met. The legislative body cannot, however, delegate to the Board a discretion which is not limited by legislative standards. It cannot give the Board discretionary authority to approve or disapprove applications for permits as the Board thinks best serves the public interest without establishing standards to limit and guide the Board.<sup>9</sup>

In *Cope* the court said, "The delegation is *improper* if the Board is permitted to decide . . . without specific guidelines . . . what unique or distinctive characteristics of a particular apartment building will render it detrimental or injurious to the neighborhood."<sup>10</sup> In *Wake-*

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permit without providing guidance as to the weight or effect to be attached to each factor).

9. *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d at 52. The landowner in *Waterville Hotel* applied for a permit to construct a filling station on property located within a commercial zoning district. *Id.* at 50. The ordinance stated that "all major changes of uses of land, buildings or structures in this [commercial] zone shall be subject to the approval of the Board of Zoning Appeals." *Id.* at 51 (quoting *Waterville, Me., Zoning Ordinance* § IV-G). The Board denied the landowner's application upon a finding that the proposed use would create a traffic hazard. *Id.* The court observed that the ordinance failed to provide any standards to limit and guide the Board in issuing permits. *Id.* at 53. Not only did the lack of standards raise equal protection and due process questions, but it also constituted an improper and unconstitutional delegation of power to the Board. *Id.* at 52-54. The court therefore invalidated the ordinance. *Id.* at 54.

10. *Cope v. Inhabitants of Brunswick*, 464 A.2d at 227 (emphasis added). In *Cope* the Zoning Board of Appeals denied developers a special exception permit to build several multi-unit apartment buildings. *Id.* at 224-25. (Note that "[t]he terms 'special exception' and 'conditional use' are used interchangeably. Special exceptions are considered by the legislative body to be essentially desirable uses, but uses that by their nature create special problems which require the imposition of restrictions or conditions." *Chandler v. Town of Pittsfield*, 496 A.2d 1058, 1060-61 (Me. 1985)). The superior court affirmed the permit denial, and the developers appealed to the Law Court. The Law Court held that the zoning ordinance was an improper delegation of legislative authority to the Board and was therefore unconstitutional on its face. *Cope v. Inhabitants of Brunswick*, 464 A.2d at 225, 227. The ordinance directed the Board to deny a permit application where the proposed use would "adversely affect the health, safety, or general welfare of the public" or where it would "alter the essential characteristics of the surrounding property." *Id.* at 224-25 (quoting *Brunswick, Me., Zoning Ordinance* § 1107(2), (4)). The court explained that "[t]hose standards refer only to the same general considerations which the legislative body was required to address and resolve in enacting the ordinance." *Id.* at 227. It is the responsibility of the Board in granting special exception permits to determine whether a *specific* location is unsuitable for a proposed use because of *unique* characteristics that render the legislative determination of general suitability inapplicable. *Id.* In making this determination the Board should not have unfettered discretion but instead must be guided by specific standards within the ordinance. *Id.* An ordinance that allows the Board to decide whether certain uses are generally compatible with a zone allows the Board to decide the legislative question anew and is therefore improper. *Id.* The court in *Cope* recognized, as it did in *Waterville Hotel*, that the failure to provide adequate standards within a zoning ordi-

*lin*, a case in which the town's ordinance lamely attempted to fashion standards, the Law Court found the standards unconstitutionally vague.<sup>11</sup> There was no basis upon which the critical terms "intensity of use . . . and density of development"<sup>12</sup> could be defined and applied. The court observed:

Absent specific standards giving content to the term "intensity of use," whether that term means "two persons per acre" or "twenty persons per acre," or something else entirely, is a matter of conjecture. Similarly, absent specific standards giving content to the term "density of development," whether that term signifies a ratio of built-upon acreage to unbuilt-upon acreage, or the number of structures on a particular lot, or something else entirely, is also a matter of conjecture. . . . *Such uncertainty is impermissible.*<sup>13</sup>

Several recent cases, however, cast doubt on the Law Court's continuing commitment to guard against the parochial instincts of local land use decision-makers.<sup>14</sup> There is speculation as to whether the *Waterville Hotel* line of cases retains the vitality it once had. It is the purpose of this Article to show the utility of, and the underlying legal theories that support, these twenty-five years of case law. The Authors will argue that both public and private interests, as well as fundamental principles of "ordered government," are best served by a strong and substantive reaffirmation of the principles and lessons of *Waterville Hotel*, *Cope*, and *Wakelin*. In the area of land use, judicial watchfulness over the parochial instincts of local governments is needed today no less than it was more than twenty-five years ago when the warnings were first sounded.

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nance raises equal protection, due process, and separation of powers issues. *Id.* at 225-26.

11. *Wakelin v. Town of Yarmouth*, 523 A.2d at 577. The landowner in *Wakelin* applied to the Zoning Board of Appeals for a special exception permit to install three apartments within his barn. *Id.* at 576. The ordinance required that the "proposed use . . . be compatible with existing uses in the neighborhood, with respect to physical size, visual impact, intensity of use, proximity to other structures and density of development." *Id.* (quoting Yarmouth, Me., Zoning Ordinance art. VII, § 101.4(4)(e)). The Board denied the request because the proposed use did not satisfy the "intensity of use" and "density of development" requirements. *Id.* at 576-77. The court held the ordinance unconstitutional because the two standards were insufficient to guide the Board in determining whether the proposed use was compatible with existing uses in the neighborhood. *Id.* at 577.

12. *Id.* at 576 (quoting Yarmouth, Me., Zoning Ordinance art. VII, § 101.4(4)(e)).

13. *Id.* at 577 (emphasis added).

14. See *infra* part III (discussing the dissenting opinion in *Bass v. Town of Wilton*, 512 A.2d 309, 311 (Me. 1986) (Scolnik, J., dissenting), and the majority opinions in *McCallum v. City of Biddeford*, 551 A.2d 452 (Me. 1988), *Lentine v. Town of St. George*, 599 A.2d 76 (Me. 1991), *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1993), and *Town of Pownal v. Emerson*, 639 A.2d 619 (Me. 1994)).

## II. LEGAL THEORIES UNDERLYING A "MEANINGFUL" STANDARDS REQUIREMENT

The first and perhaps the most obvious reason for a "meaningful" standards requirement, when decision-making power is delegated by a legislative body to executive or administrative officers of government, is that basic "separation of powers" principles require it. The *Cope* court reminded us that "local zoning boards . . . have no inherent authority to regulate the use of private property."<sup>15</sup> What power they have is delegated, and the delegation is sustainable only when accompanied by defining and limiting standards fashioned by the legislative delegator. As the Law Court noted in *Stucki v. Plavin*:<sup>16</sup>

The governing rule, constitutionally mandated, may be simply stated as that in delegating power to an administrative agency, the legislative body must spell out its policies in sufficient detail to furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and so that the determination of those rights will not be left to the purely arbitrary discretion of the administrator.<sup>17</sup>

The *Stucki* court cited *Waterville Hotel*.<sup>18</sup> *Cope* in turn cited both of these decisions,<sup>19</sup> and others in the line of cases previously noted,<sup>20</sup> to sustain the fundamental principle that administrative bodies (planning boards and zoning boards of appeal) do not make law, they merely carry out the law pursuant to delegations of power appropriately bounded by the aforementioned, and absolutely necessary, standards.

A second rationale or legal theory underlying the "meaningful" standards requirement is the duty under both the federal and Maine Constitutions to afford property owners, developers, and applicants under all land use control laws "equal protection" or equal treatment under the law. Almost all of the decisions in the noted twenty-five year line of cases elaborate on this point. For example, the *Waterville Hotel* court stated:

The reasons for requiring that standards be prescribed can clearly be seen. While the plaintiff's use of its land is subject to reasonable regulation by the City in the exercise of its police power, such regulation must be in accordance with a

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15. *Cope v. Inhabitants of Brunswick*, 464 A.2d 223, 225 (Me. 1983).

16. 291 A.2d 508 (Me. 1972).

17. *Id.* at 510.

18. *Id.* at 510-11.

19. *Cope v. Inhabitants of Brunswick*, 464 A.2d at 225-27.

20. *Id.* (citing *Town of Windham v. LaPointe*, 308 A.2d 286 (Me. 1973), and *Phillips Petroleum Co. v. Zoning Bd. of Appeals*, 260 A.2d 434 (Me. 1970)). See *supra* note 8.

proper rule or standard which must be applied alike to all persons similarly situated.<sup>21</sup>

The court then quoted approvingly from a Michigan case,<sup>22</sup> "Without definite standards an ordinance becomes an open door to favoritism and discrimination, a ready tool for the suppression of competition through the granting of authority to one and the withholding from another."<sup>23</sup> This is equal protection language, reasoning, and analysis. The *Wakelin* court was even more succinct, "[T]he absence of specific standards in zoning ordinances results in a denial of equal protection of the laws to the property owner . . . ."<sup>24</sup> *Phillips Petroleum Co. v. Zoning Board of Appeals*,<sup>25</sup> *Town of Windham v. LaPointe*,<sup>26</sup> and *Cope* all contain similar reasoning as part of the basis for the court's holdings.<sup>27</sup> In short, these cases hold that the absence of "meaningful" standards in land use control ordinances invites, if it does not in fact produce, unequal treatment. The ordinances are thus unconstitutional.

A third rationale for requiring "meaningful" standards is found in the concept of "due process," which encompasses those rights and protections that must be afforded all property owners or developers in their dealings with governmental bodies and regulatory controls.<sup>28</sup> Aside from the right to a hearing and to have their applications for development processed in an orderly and timely fashion,<sup>29</sup> developers, within the concept of due process, are entitled to know with reasonable clarity what they must do to obtain under state or local land use control laws the permits or approvals they seek. In

21. *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968).

22. *Osius v. City of St. Clair Shores*, 75 N.W.2d 25 (Mich. 1956).

23. *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d at 53 (quoting *Osius v. City of St. Clair Shores*, 75 N.W.2d at 28).

24. *Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987).

25. 260 A.2d 434 (Me. 1970).

26. 308 A.2d 286 (Me. 1973).

27. See *Phillips Petroleum Co. v. Zoning Bd. of Appeals*, 260 A.2d at 435 ("The danger is that broad policy statements unaccompanied by any specific standards will not effectively curtail the power to discriminate."); *Town of Windham v. LaPointe*, 308 A.2d at 293 ("The ordinance delegates to the Selectmen and the Planning Board an unbridled discretion in their decision, thus clothing such agencies with an unconstitutional power to discriminate in its enforcement."); *Cope v. Inhabitants of Town of Brunswick*, 464 A.2d at 226 ("Such broad delegation of power breeds selectivity in the enforcement of the law. When no standards are provided to guide the discretion of the enforcement authority, the fact that the law might be applied in a discriminatory manner settles its constitutionality." (quoting *Town of Windham v. LaPointe*, 308 A.2d at 293)).

28. See Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77, 77 (1948-1949) (due process requirements of definiteness in legislative enactments serve to guide the judge in adjudicating rights and duties, and the individual in planning his or her future conduct).

29. Cf. *Randall v. Patch*, 118 Me. 303, 305, 108 A. 97, 98 (1919) ("Notice and opportunity for hearing are of the essence of due process of law.").



other words, "meaningful" standards help avoid the fatal due process defect of vagueness.<sup>30</sup> Maine's highest court has noted that "[a] statute is void for vagueness when it sets guidelines which would force men of general intelligence to guess at its meaning, leaving them without assurance that their behavior complies with legal requirements and forcing courts to be uncertain in their interpretation of the law."<sup>31</sup> *Waterville Hotel, Stucki, Cope, and Wakelin* all reinforce this point. Portions of the critical language in *Wakelin* and *Stucki* pertaining to vagueness have already been cited.<sup>32</sup> In striking down the vague standards of the Yarmouth Zoning Ordinance, the *Wakelin* court also noted, "From the ordinance an applicant cannot even tell whether compatibility with his project's surroundings requires the same intensity of use and density of development, or less, or more."<sup>33</sup> This uncertainty violates the due process rights of the landowner and as such is constitutionally impermissible, as the court held.<sup>34</sup> The *Waterville Hotel* court, quoting approvingly from a Wisconsin case, stated:

Standards were needed . . . not only to guide the board but also to inform . . . [the applicant] and any other parties hoping to build filling stations of what was required of them and what factors were to be considered by the board in disposing of each application for a filling station permit.<sup>35</sup>

The court then observed, "The failure to spell out standards reduces the property owner to a state of total uncertainty and amounts to depriving him of the use of his property."<sup>36</sup> Vagueness, uncertainty as to meaning, and uncertainty as to how to fashion an approvable application, all brought about by the absence of "meaningful" standards, violate the due process rights of property owners.

In sum, the justification for a "meaningful" standards requirement arises on any one of several grounds: separation of powers, equal protection, or due process. These supporting rationale, though separated here for discussion purposes, are often intertwined. The Maine cases cited evidence this fact. The *Wakelin* court, for example, after stating that the absence of specific standards denies equal

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30. See *infra* text accompanying note 101.

31. *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 253 (Me. 1974).

32. See *supra* text accompanying notes 13 and 17.

33. *Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987).

34. *Id.* ("The determinative issue . . . is whether the terms 'intensity of use' and 'density of development' are sufficiently specific standards to guide both an applicant in presenting his case . . . and the Board in examining the proposed use . . . . We conclude that they do not come up to the level of specificity required to pass constitutional muster.").

35. *Waterville Hotel Corp. v. Board of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968) (quoting *State ex rel. Humble Oil & Refining Co. v. Wahner*, 130 N.W.2d 304, 309 (Wis. 1964)).

36. *Id.*

protection,<sup>37</sup> observed in the very next sentence that "[t]he lack of specific standards in the Yarmouth ordinance permits the Board to go beyond its proper quasi-judicial function. . . . [T]he Board can roam at large in policy-making."<sup>38</sup> This is separation of powers reasoning and was in and of itself a sufficient basis for striking down the ordinance. The point being made is that Maine courts reviewing local land use control ordinances have held consistently that without "meaningful" standards important constitutional values are violated or at risk. These constitutional rights and duties can be safeguarded by requiring that ordinances contain such standards. Only "specific" standards have the capacity to guide and limit the discretionary power of land use decision-makers. That has been the law in Maine. The rationale for this view is as valid today as it was twenty-five years ago when *Waterville Hotel* was decided. It follows then, that a "meaningful" standards requirement should remain the law in Maine.<sup>39</sup>

### III. SOME TROUBLING RECENT CASES

As far back as 1986 the first faint signs of departure from the *Waterville Hotel*, *Cope*, *Wakelin* line of cases can be detected in the reasoning of some of the Law Court justices. In the dissenting opin-

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37. See *supra* text accompanying note 24.

38. *Wakelin v. Town of Yarmouth*, 523 A.2d at 577.

39. Courts throughout the country recognize the importance of the "meaningful" standards requirement. See, e.g., *Citizens United for Free Speech v. Long Beach Township Bd.*, 802 F. Supp. 1223, 1238 n.16 (D. N.J. 1992) (noting that an ordinance categorizing exempt, prohibited, and permitted signs delegates "a degree of discretion over citizens' rights of expression that may not withstand void-for-vagueness analysis"); *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311, 313 (Fla. Dist. Ct. App. 1987) (observing that an ordinance requiring that "'traffic generated and its access and flow to the proposed use shall not adversely impact adjoining properties and the general public's safety' . . . can lead to an inequitable exercise of governmental zoning power due to the vague standards contained therein" (quoting Port Orange, Fla., Zoning Ordinance)), *review denied*, 528 So. 2d 1181 (Fla. 1988); *Halfway House v. City of Waukegan*, 641 N.E.2d 1005, 1009-10 (Ill. App. Ct. 1994) (invalidating a condition in an ordinance as "too vague to be enforceable" where the condition prohibits halfway houses "from accepting any 'individual known to be a rapist or adjudged guilty of an offense involving activity of a sexual nature' " and where the ordinance does not provide any standards to guide the zoning authorities (quoting Waukegan, Ill., Zoning Ordinance 93-0-147, § 2.10(b) (Aug. 2, 1993))); *Union Nat'l Bank & Trust Co. v. New Lenox*, 505 N.E.2d 1, 3 (Ill. App. Ct. 1987) (invalidating zoning ordinance as unconstitutionally vague where list of permitted and prohibited uses in ordinance is incomplete and where ordinance fails to provide standards for determining whether proposed use is permitted or prohibited), *appeal denied*, 515 N.E.2d 128 (Ill. 1987), *and cert. denied*, 485 U.S. 906 (1988); *Asbury Apartments, JV RPS Management v. Dayton Bd. of Zoning Appeals*, No. 15109, 1995 Ohio App. LEXIS 4800, at \*1 (Ohio Ct. App. Oct. 25, 1995) (*per curiam*) (holding void for vagueness a zoning ordinance allowing " '[h]ousing for the elderly' " as a conditional use (quoting Dayton, Ohio, Zoning Ordinance R.C.G.O. 150.128(E))).

ion in *Bass v. Town of Wilton*,<sup>40</sup> an opinion that later became critically important,<sup>41</sup> one member of the court was prepared to allow the Wilton Zoning Board of Appeals to deny a conditional use permit if the proposed use would "devalue adjacent property."<sup>42</sup> This pivotal standard was not defined specifically by the zoning ordinance, by municipal regulations,<sup>43</sup> or by the dissenting justice. Neither the ordinance or regulations, nor the dissenting justice made clear whether the devaluation must be significant or if a de minimis loss of value would support a denial.<sup>44</sup> In the same vein,

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40. 512 A.2d 309 (Me. 1986) (Scolnik, J., dissenting). In *Bass* a developer applied to the local Planning Board for a permit to build multi-family dwellings on a parcel that straddled two zoning districts within the town. *Id.* at 309. One district allowed the proposed use, the other district classified it as a conditional use, thus requiring the applicant to meet specified conditions within the ordinance before receiving Board approval. *Id.* The Planning Board found that the proposal met the necessary conditions and approved the project. *Id.* Adjacent property owners appealed the decision to the Zoning Board of Appeals, which upheld the decision of the Planning Board. *Id.* The challengers then appealed to the superior court. *Id.* They argued that the project failed to meet a general requirement in the ordinance that there be "no structure or construction that will cause blight or devalue adjacent property." *Id.* at 310 n.1 (citing Wilton, Me., Zoning Ordinance § 13.16). The superior court remanded to the Board of Appeals for additional findings regarding the devaluation of adjacent property. *Id.* at 310. The Board found that the proposed use would cause devaluation, and the superior court entered a decision for the neighboring landowners. *Id.*

On appeal, the Law Court held that the decision of the Board of Appeals to deny approval was based upon evidence that the proposed "use" would cause devaluation, and not upon evidence that the "structure or construction" would cause devaluation. *Id.* at 311. Because the ordinance allowed the Board to deny approval only if the "structure or construction" caused devaluation, the Board could not deny approval for a "use" already determined to be appropriate by the local legislative body. *Id.* The court affirmed the original decision of the Board of Appeals to grant the permit. *Id.* The dissent contended that the "obvious intent" of the Wilton Zoning Ordinance was to authorize the denial of a conditional use permit if the proposed "use" would cause devaluation of adjacent property. *Id.* (Scolnik, J., dissenting). The dissent further observed that the decision to deny the permit was based upon sufficient evidence of devaluation and should therefore be upheld. *Id.* at 312.

41. The majority in *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1993), relied heavily on the *Bass* dissent in an opinion that sharply calls into question the vitality of the "meaningful" standards requirement in Maine land use law. *Id.* at 901.

42. *Bass v. Town of Wilton*, 512 A.2d at 311 (Scolnik, J., dissenting).

43. Cf. ME. REV. STAT. ANN. tit. 30-A, § 4403(2) (West Supp. 1995-1996) (giving municipalities the power to adopt reasonable regulations governing subdivisions). Definitions provided in subdivision regulations may be applied by analogy to clarify standards found in zoning ordinances.

44. A number of courts have held, assumed, or noted in dicta that standards forbidding the devaluation of property include an additional requirement that the diminution in value be *substantial*, *serious*, or *significant*. See, e.g., *Vasilopoulos v. Zoning Bd. of Appeals*, 340 N.E.2d 19, 21 (Ill. App. Ct. 1975) (upholding the denial of a special use application where the proposed project "could cause *substantial* injury to the value of other property in the neighborhood" (emphasis added)); *Board of County Comm'rs v. Holbrook*, 550 A.2d 664, 666 (Md. 1988) (affirming the denial

there was nothing in the ordinance or regulations suggesting the

of an application for a special exception where the proposed use would " 'substantially diminish adjacent property values' " (quoting findings of Cecil County Board of Appeals) (emphasis added)); *Video Microwave, Inc. v. Zoning Bd. of Appeals*, 354 N.Y.S.2d 817, 825 (N.Y. App. Div. 1974) (allowing the denial of an application for a special permit where the proposed use "would seriously reduce the property value of [neighboring] homes" (emphasis added)); *Families Against Reilly/Morgan Sites v. Butler County Bd. of Zoning Appeals*, 564 N.E.2d 1113, 1122 (Ohio Ct. App. 1989) (upholding the issuance of a conditional use permit where the Zoning Board of Appeals found that proposed " 'use would not unduly adversely affect the property values' " (quoting findings of Butler County Zoning Board of Appeals) (emphasis added)); *Soble Constr. Co. v. Zoning Hearing Bd.*, 329 A.2d 912, 917 (Pa. Commw. Ct. 1974) (holding that the denial of a special use application is invalid where "[t]he record . . . merely indicates that some injury might be cause [sic] to the value of neighboring properties if the use is permitted, and there is no evidence the injury will be substantial" (emphasis added)); *Pease Hill Community Group v. County of Spokane*, 816 P.2d 37, 42 (Wash. Ct. App. 1991) (upholding the approval of a conditional use permit where "[t]he record does not support the contention that the project, as mitigated, will have significant detrimental effect on [the value of] the surrounding property" (emphasis added)).

The Law Court has expressed a similar sentiment in a related but not identical context. See *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973). In *Spring Valley* the owner of a 92-acre tract of land began to develop the property into a residential subdivision without seeking approval under the Site Location of Development Law. ME. REV. STAT. ANN. tit. 38, §§ 481-490 (West 1989 & Supp. 1995-1996). The State Environmental Improvement Commission ordered the owner to cease development. *In re Spring Valley Dev.*, 300 A.2d at 739, 741. The property owner appealed to the Law Court, challenging inter alia the constitutionality of the Act on vagueness grounds. *Id.* at 741, 749. The Act mandated approval of a proposed project if the project " 'will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.' " *Id.* at 741 n.3 (quoting title 38, § 484(3)).

The Law Court began its analysis by reading a "reasonableness" requirement into the provision:

While most such developments may be expected to "affect" the environment adversely to the extent that they add to the demands already made upon it, it is the *unreasonable* effect upon existing uses, scenic character and natural resources which the Legislature seeks to avoid by empowering the Commission to measure the nature and extent of the proposed use against the environment's capacity to tolerate the use.

*Id.* at 751. The court proceeded to strike down the portion of the standard forbidding an adverse effect on property values. *Id.* This aspect of the opinion is of particular importance in light of the Law Court's holding in *Gorham*. See *infra* note 66. The *Spring Valley* court explained:

For reasons not known to us the Act recites that *property values* also must not be (unreasonably) affected. In our opinion, the effect of developments upon property values is outside the scope and purposes of the Act and the Commission would be impermissibly applying the force of the State's police power in the enforcement of this Act if it denied approval of a development because of failure of proof that property values would not be adversely affected. We consider the addition of this dubious criterion constitutionally barred and void.

*In re Spring Valley Dev.*, 300 A.2d at 751. The court concluded that the property value provision was severable and did not affect the validity of the remainder of the Act. *Id.*

type of evidence or evidentiary standard that would be sufficient to discharge the burden of showing that there will be no future devaluation of adjacent property. The dissenting justice would allow the Board to hear competing expert appraisers and anecdotal testimony as to value.<sup>45</sup> The Board could decide whom it believes, and then presumably, if the devaluation is as little as one dollar, the Board could deny the special exception.<sup>46</sup> The totality of this standard and evidentiary testimony, according to the dissenting justice, would not be "unfettered discretion"<sup>47</sup> and would "not constitute an improper delegation of legislative authority to the Board of Appeals."<sup>48</sup>

Fortunately, the *Bass* majority did not support the weakening of the "meaningful" standards concept that the dissent's line of reasoning portends. The majority interpreted the ordinance as not authorizing the Zoning Board of Appeals to deny a permitted conditional "use" on generalized devaluation grounds.<sup>49</sup> Only devaluation arising from a particular or unique characteristic of the "structure or construction" could be the basis for a denial.<sup>50</sup> Because the oppo-

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Although the *Spring Valley* decision concerns the Site Location of Development Law, the purposes of the state enactment are similar, if not identical, to the purposes of local zoning ordinances. Section 481 of the Site Location of Development Law states that the purpose of the Act is "to insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment within the development sites and of their surroundings and protect the health, safety and general welfare of the people." Title 38, § 481. Similarly, the primary purpose of municipal zoning ordinances is "to serve or promote the health, safety, morals, or welfare of the community." 1 ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* 3D § 7.04, at 695 (1986). See also *Toulouse v. Board of Zoning Adjustment*, 147 Me. 387, 393, 87 A.2d 670, 673 (1952) ("The justification for the restrictions imposed by zoning statutes and ordinances is given as 'in the interest of health, safety, or the general welfare.'" (citing R.S. ch. 80, §§ 84-87 (1944))).

In upholding the Act the court observed that "[t]he standards here [other than the property devaluation standard] are much more explicit than those which we found to be insufficient in *Waterville Hotel Corp. v. Board of Zoning Appeals* . . ." *In re Spring Valley Dev.*, 300 A.2d at 751. By comparing the standards in the Site Location of Development Law with those in the *Waterville Hotel* zoning ordinance, the Law Court's reasoning demonstrates that there is no difference between an analysis of the adequacy of standards within a state land use statute and an analysis of the adequacy of standards within a local zoning ordinance. It follows then, that if a state administrative body cannot consider the adverse effect on property values because that standard is unconstitutionally vague, then a local administrative body cannot use a similar standard. These issues unfortunately were not raised or discussed in *Gorham*.

45. *Bass v. Town of Wilton*, 512 A.2d at 312 (Scolnik, J., dissenting).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 311.

50. *Id.* This is the same line of reasoning originally developed by the Law Court in *Phillips Petroleum Co. v. Zoning Bd. of Appeals*, 260 A.2d 434 (Me. 1970). In *Phillips Petroleum* the court observed that there must be "unique or distinctive characteristics" about a proposed structure before a Board of Zoning Appeals can deny

nents of the project did not present any evidence on this point, the denial was improper.<sup>51</sup>

conditional use approval. *Id.* at 435. The ordinance in *Phillips Petroleum* provided that gasoline service stations were allowed “only upon approval of the Zoning Board of Appeals.” *Id.* at 434 (quoting Bangor, Me., Zoning Ordinance). The court noted that the ordinance lacked *specific* standards governing the approval process. *Id.* at 436. Although the court did not ultimately decide the case based upon the adequacy or inadequacy of standards, it did observe that

the ordinance by permitting the construction and operation of a gasoline service station as a conditional use within the zone constitutes a *legislative determination that such stations are not ordinarily detrimental or injurious to the neighborhood within the zone*. What appear to be lacking are guidelines by which a board can determine what *unique or distinctive characteristics of a particular station* will render it detrimental or injurious to the neighborhood when other stations in the zone are not.

*Id.* at 435 (emphasis added). In short, the Board cannot prohibit a project based upon adverse effects thought to be caused by a permitted conditional use because the legislative body has already determined that the use is generally appropriate in the zoning district. The Board can only deny a permitted conditional use if the specific structure has unique or distinctive characteristics described and forbidden in the ordinance.

The majority in *Bass* adopted this rationale fully. Its conclusions were strengthened by the fact that the Wilton Ordinance specifically forbade “*structure[s] or construction* that will cause blight or devalue adjacent property.” *Bass v. Town of Wilton*, 512 A.2d at 310 n.1 (citing Wilton, Me., Zoning Ordinance § 13.16) (emphasis added). The court held that the ordinance did not and could not authorize the Zoning Board of Appeals to deny a permit for a “use” generally permitted in the zone. *Id.* at 311. That would allow the Board to exclude a use that the local legislative body previously determined to be appropriate. *Id.*

In the context of special exceptions or conditional uses, where the legislative body has determined that a particular use is ordinarily acceptable in a particular zone, the legislative body cannot absolutely empower an administrative board to reject an individual application for that use. The legislative body must instead specify conditions that would permit a rejection.

*Id.* at 310 (citing Waterville Hotel Corp. v. Board of Zoning Appeals, 241 A.2d 50, 52 (Me. 1968)). As *Phillips Petroleum* suggests, the most the Board in *Bass* could be authorized to do is deny an otherwise approvable conditional use because of a unique characteristic of the “structure or construction.” No evidence to this effect was presented. Thus the Board’s decision in *Bass* was inappropriate. Although both *Phillips Petroleum* and *Bass* recognized and approved the distinction between legislatively permitted uses, which a board cannot reexamine, and violations of standards arising from unique characteristics of particular structures, which may lead to a board denial, the majority in *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1993), completely ignored this distinction. See *infra* notes 76-78 and accompanying text. In doing so it disregarded important separation of powers principles.

51. *Bass v. Town of Wilton*, 512 A.2d at 311. The court explained:

Our review of the Board’s findings reveals that any devaluation of adjacent property found by the Board was based upon the proposed *use* and not upon the *structure or construction* proposed. Indeed the evidence offered by the plaintiffs on the issue of devaluation focused upon . . . factors relating to the use of the property for multi-family dwellings. The nature of the structures themselves played no part in the determination of devaluation.

*Id.*

A second troubling case arose in 1988, *McCallum v. City of Biddeford*.<sup>52</sup> The issue in *McCallum* was the adequacy of a zoning ordinance standard that required appeals from decisions of the building inspector to be taken within thirty days, "except that the board, upon a showing of *good cause*, may waive the 30 day requirement."<sup>53</sup> The ordinance did not define or give examples of what would constitute "good cause." No regulations defined the term in words or by example. The court in its holding did not define the term or aver to any body of law that delineated or limited the phrase.<sup>54</sup> In conclusory fashion the court noted, "We hold that

52. 551 A.2d 452 (Me. 1988).

53. *Id.* at 453 (quoting Biddeford, Me., Zoning Ordinance art. XVI, § 6(A)(1)) (emphasis added). The landowners in *McCallum* applied for a building permit, which the building inspector issued on October 2, 1986. *Id.* On October 27 the inspector ordered construction to cease. *Id.* He withdrew that order on February 20, 1987. *Id.* On February 25 an abutting neighbor filed an appeal, opposing the October 2 issuance of the building permit. *Id.* Despite the fact that the ordinance required appeals to be taken within 30 days of the decision appealed from, the Board allowed the abutting landowner to appeal the issuance of the permit. *Id.* The Board explained that because of the intervening order to cease construction, the abutter had "good cause" for not meeting the 30-day deadline, which commenced to run on October 2. *Id.* The permit applicants appealed the decision. *Id.* They argued that the "good cause" provision of the ordinance was unconstitutionally vague and that because the abutters had not appealed the issuance of the permit within 30 days following October 2, their appeal should be denied. *Id.* The Law Court upheld the constitutionality of the "good cause" standard and affirmed the Board's decision to allow the appeal of the permit issuance. *Id.*

54. See, e.g., *Maine Real Estate Comm'n v. Kelby*, 360 A.2d 528 (Me. 1976). In *Kelby* a real estate broker challenged the constitutionality of standards in a statute regulating the conduct of brokers. The statutory provision in question allowed for the suspension or revocation of a broker's license where the broker demonstrated "bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings." *Id.* at 529-30 n.3 (quoting ME. REV. STAT. ANN. tit. 32, § 4056(1)(N) [prior to amendments effective October 1, 1975]). The broker argued that the provision was unconstitutionally vague. *Id.* at 531. The court upheld the statute, explaining:

Subsection N proscribes "bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings," not in the abstract, but *on the part of real estate brokers and salesmen*. Subsection N is, in effect, a codification of the normative standards which guide the conduct of the members of the real estate profession. Subsection N is sufficiently definite to apprise those in the profession of the line between permissible and forbidden conduct.

*Id.* at 532. Although the *McCallum* court cited *Kelby* as support for its finding of constitutionality, see *infra* note 55 and accompanying text, *McCallum* differs from *Kelby* in that the *Kelby* standards are sustained only because they are defined and limited by normative standards within the real estate profession. In *McCallum*, however, there is no existing body of law or customary conduct that defines "good cause" as that term is used in the Biddeford Zoning Ordinance.

Similarly, the arguably vague terms in variance provisions of zoning statutes and ordinances are upheld because similar if not identical provisions are utilized by municipalities throughout the country. This has allowed a body of case law to develop that defines and gives meaning to the critical terms, thus precluding discriminatory

'good cause' is a reasonable and intelligible standard that does not force people of general intelligence to guess at its meaning and therefore it is not 'void for vagueness.'"<sup>55</sup> Beyond this case, however, in which the city's own actions caused the delay in filing the appeal, "guess" is precisely what one must do to determine what other circumstances will allow the thirty-day appeal period to be waived. Does "manifest unfairness," "hardship," or "honest mistake" constitute "good cause?" Do principles of "tolling" apply?<sup>56</sup> Must some type of "estoppel" factor be present?<sup>57</sup> The *Waterville Hotel* line of cases would suggest that a standard so uncertain is no standard at all.

The 1991 case *Lentine v. Town of St. George*<sup>58</sup> raises some of the same questions. Plaintiffs, the owners of shorefront property, sought to build a dock (a common undertaking in Downeast Maine) extending into Teel Cove in Port Clyde Harbor. The Planning Board denied approval of the project, and the Zoning Board of Appeals affirmed. The denial was predicated on the Lentines' failure to show, as required by the ordinance, that the dock would "be *no larger in dimension than necessary* to carry on the activity and be *consistent with existing conditions*, use, and character of the area."<sup>59</sup> These two critical terms were not defined by the ordinance, by regu-

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action by local land use boards. See *Barnard v. Zoning Bd. of Appeals of Yarmouth*, 313 A.2d 741, 748 (Me. 1974) (holding that the "broadly stated criterion" of "undue hardship" in a variance provision of a local ordinance "is sufficient to guide the Board in granting or denying variances"). Standards in conditional use provisions vary from municipality to municipality and encompass a wide variety of topics. Because of this variety it is difficult for a body of case law to develop that will sufficiently constrain municipal boards in applying conditional use standards.

55. *McCallum v. City of Biddeford*, 551 A.2d at 453 (citing *Maine Real Estate Comm'n v. Kelby*, 360 A.2d 528, 531 (Me. 1976)).

56. The court in *McCallum* almost certainly reached a proper result, but its allowance of a right of appeal, predicated as it was on the adequacy of the standard, is troublesome. Alternative rationale were readily available. For example, under the doctrine of equitable tolling "the statute of limitations is tolled when strict application of the statute of limitations would be inequitable." *Dasha v. Maine Medical Ctr.*, 665 A.2d 993, 996 n.2 (Me. 1995). The *McCallum* court could have held that the order to cease construction tolled the 30-day requirement and that the withdrawal of the order recommenced its running. This would have allowed the abutting landowner additional days to appeal the issuance of the permit.

57. The court in *McCallum* could have upheld the decision of the Zoning Board of Appeals to waive the 30-day requirement based upon the doctrine of equitable estoppel. Under this theory the Town would be estopped from denying the appeal of the abutting landowner because the Town's agent, by issuing an order to cease work, was the cause of the confusion regarding the 30-day deadline. The court should have invalidated the "good cause" standard as unconstitutionally vague, or it should have declined to reach the question. The application of equitable estoppel would not have helped the permit applicants, but it would have prevented the Board and the court from relying upon a vague standard to achieve a justified end result.

58. 599 A.2d 76 (Me. 1991).

59. *Id.* at 78 n.2 (quoting *St. George, Me., Shoreland Zoning Ordinance* § 13(F)(4)) (emphasis added).



lation, or by the court. The court, however, sustained the ordinance, dismissing as unfounded plaintiffs' assertions that the standards were unconstitutionally vague.<sup>60</sup>

Yet the standards are vague. For example, does the "dimension" standard mean "minimally necessary" or "ideally necessary?" Is the allowable dimension a function of the boat owned by the applicant at the moment, the average sized boat in use in the area, or a smaller boat for which the applicant could settle? Does the "consistent with" standard mean the same color, materials, or type of construction? Does it refer to the purposes for which the boats and dock spaces in the cove are used (fishing activities as opposed to pleasure boating)? Or, as the court suggested, is the "consistent with" criterion "merely a second criterion for judging the allowable size of a proposed wharf."<sup>61</sup> Do the first dock builders in a cove establish the pattern with which all who follow must be consistent? To ask these questions is to see how impossibly vague these standards are and how much "unfettered discretion" is left in the hands of the Zoning Board.

One wonders why the reasoning and the holding in *Wakelin* are not controlling. By substituting the *Lentine* standards and hypothetical factors into a previously cited *Wakelin* passage,<sup>62</sup> one sees in *Lentine* the same defects found unconstitutional in *Wakelin*:

Absent specific standards giving content to the term ["no larger in dimension than necessary"], whether that term means

60. *Id.* at 78.

61. *Id.* at 79 (emphasis added). Even if this questionable reasoning of the court is accepted, the constitutional problem does not go away. In an effort to clarify its reasoning, the court noted:

[A]s applied here, section 13(F)(4) provides that the Lentine's wharf may not be either (1) "larger in dimension than necessary to carry on the activity" of deep water access for the Lentine's pleasure boat, or (2) "larger in dimension than . . . [will] be consistent with existing conditions, use, and character of the area." . . . [T]he second dimensional requirement . . . is that the proposed wharf may not be so large that it conflicts or interferes with existing conditions, use, and character of the area that would be affected by the wharf.

*Id.* Did the court literally mean what it said? Is the allowable dimension of a wharf a function of the size of the boat the Lentine's happen to own? One would hope not. The court construed "consistent with" to mean "not conflicting or interfering with," *id.*, but even if viewed only in a dimensional sense the latter phrase is as imprecise as the one it replaced. Is wharf size and non-interference to be measured at low-tide, high-tide, or half-tide? Can the Lentine's or any other applicant build whatever size wharf they want as long as it does not interfere with a wharf already in use? Again, one would hope not. What size wharf does the "character of the area" allow? These questions and the questions posed in the text of this Article suggest that the ordinance as written and the court's reformulation of the 13(F)(4) standards are both unconstitutionally vague. Under either approach the Zoning Board of Appeals may approve or deny what it will. Applicants like the Lentine's have no idea what size wharf is permitted or what they must show to gain Board approval.

62. See *supra* text accompanying note 13.

[50 feet or 500 feet] or something else entirely, is a matter of conjecture. Similarly, absent specific standards giving content to the term ["consistent with existing conditions"], whether that term signifies [color, type of construction, purposes for which the dock is built, size] or something else entirely, is also a matter of conjecture. . . . Such uncertainty is impermissible.<sup>63</sup>

The uncertainties in *Lentine* are as impermissible as the uncertainties in *Wakelin*. The *Wakelin* court, commenting on the unconstitutionality standards in the ordinance before it, noted, "The ordinance fails to articulate the quantitative standards necessary to transform the unmeasured qualities 'intensity of use' and 'density of development' into specific criteria objectively usable by both the Board and the applicant in gauging the compatibility of a proposed use with existing uses in the surrounding area."<sup>64</sup> This reasoning and the finding of unconstitutionality should apply with equal force in *Lentine*. The *Lentine* standards are as unmeasured and vague as those found wanting and struck down in *Wakelin*.

The most troubling recent case, *Gorham v. Town of Cape Elizabeth*,<sup>65</sup> came down in 1993.<sup>66</sup> This decision is the most troubling because a majority of the court now accepts the mischievous dissenting rationale of *Bass*.<sup>67</sup> The rationale of the *Bass* majority was not overruled, it was simply ignored without comment. Troubling too is the fact that the *Gorham* court, unlike the courts in *McCallum* and *Lentine*, had its attention focused on the *Waterville Hotel*, *Cope*, *Wakelin* line of cases.<sup>68</sup> It purported to follow this body of case law. In reality, the court ignored the substance of these prior holdings, leaving them weakened at best, implicitly overruled at worst.

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63. *Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987).

64. *Id.*

65. 625 A.2d 898 (Me. 1993).

66. In *Gorham* the owner of a single family residence filed an application for a conditional use permit to add an apartment within his home. *Id.* at 899. Despite the fact that there would be no changes to the exterior of the residence or to the parking area, the Cape Elizabeth Zoning Board of Appeals denied the permit. *Id.* The Board found that the addition would "'adversely affect the value of adjacent properties.'" *Id.* (quoting Cape Elizabeth, Me., Zoning Ordinance § 19-4-7(b)(4)). The landowner appealed, arguing, inter alia, that the Ordinance failed to provide sufficient standards and therefore impermissibly delegated legislative authority to the Board. *Id.* at 899-900. The superior court entered a judgment for the Town and the landowner appealed to the Law Court. *Id.* at 900. Quoting the *Bass* dissent as supporting rationale, the Law Court held that the devaluation standard was "sufficiently specific to be constitutional." *Id.* at 901.

67. See *supra* notes 40-48 and accompanying text.

68. *Gorham v. Town of Cape Elizabeth*, 625 A.2d at 900-02 (citing *Wakelin v. Town of Yarmouth*, 523 A.2d 575 (Me. 1987); *Bass v. Town of Wilton*, 512 A.2d 309 (Me. 1986); *Cope v. Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Stucki v. Plavin*, 291 A.2d 508 (Me. 1972)).

Perhaps the most disturbing aspect of *Gorham*, however, is that it is already being followed by lower courts in Maine in land use settings where planning boards purposefully have used vague standards to keep out unwanted development activities. For example, in the recent case of *Pharos House v. City of Portland*,<sup>69</sup> the superior court held that two of the City's zoning ordinance standards in a three-pronged test<sup>70</sup> were either inapplicable or unconstitutional.<sup>71</sup> The court went on to note, "However, the third prong is sufficiently specific under the Law Court's most recent case on this issue, *Gorham v. Town of Cape Elizabeth*. . . . The third prong of the Portland ordinance offers at least as much guidance as the provision interpreted in *Gorham*."<sup>72</sup> The fact that this case is under appeal and may or may not be affirmed misses the point. The point is that the *Bass* dissent, and the majority opinions in *McCallum*, *Lentine*, and now *Gorham* have sent an unfortunate signal—broad standards conferring almost "unfettered discretion" will be sustained. As *Pharos House* indicates, planning boards and lower courts will be quick to follow the Law Court's direction to the detriment of the "meaningful" standards doctrine and the constitutional values that the doctrine seeks to protect. The historical requirement of "meaningful" standards, standards that guide and restrain unelected land use decision-makers, seems to have been abandoned or at least significantly relaxed.

Returning to the analytical weaknesses of the *Gorham* opinion, it is clear that all of the reservations expressed above with respect to the *Bass* dissent apply in *Gorham*. The critical phrase "will not adversely affect the value of adjacent properties"<sup>73</sup> was not defined by the ordinance, by regulation, or by the reviewing court. Here, too, there was no indication as to whether a significant or unreasonable

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69. CV-93-1228 (Me. Super. Ct., Cum. Cty., Oct. 17, 1994) (Brennan, J.). In *Pharos House* the applicant, a Maine corporation that provides housing and transition services to pre-release prisoners and parolees, applied for conditional use and site plan approval to build a pre-release facility in the City of Portland. *Id.* at 1. The Planning Board denied the approvals, and *Pharos House* appealed. *Id.* The superior court affirmed. *Id.*

70. The three-pronged test of the Portland Zoning Ordinance states:

Upon a showing that a proposed use is a conditional use under this article, a conditional use permit shall be granted unless the board determines that:

- a. There are unique or distinctive characteristics or effects associated with the proposed conditional use;
- b. There will be an adverse impact upon the health, safety, or welfare of the public or the surrounding area; and
- c. Such impact differs substantially from the impact which would normally occur from such a use in that zone.

*Id.* at 2 n.2 (quoting Portland, Me., Zoning Ordinance § 14-474).

71. *Id.* at 2-3.

72. *Id.* at 3.

73. *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 901 n.3 (Me. 1993) (quoting *Cape Elizabeth*, Me., Zoning Ordinance § 19-4-7(b)(4)).

"adverse affect" must be avoided or if a de minimis loss of value would sustain a denial.<sup>74</sup> In addition, the "will not adversely affect" standard embraced in *Gorham* requires the applicant to prove a negative. This negative involves future events the proof or disproof of which can only be both subjective and speculative. Moreover, the future value of adjacent properties is determined by the combined effect of a wide variety of economic, neighborhood, community, and market factors. The developer's proposed activity is only a relatively minor factor. Its independent effect on the value of adjacent properties is impossible to distinguish or predict. Given these facts, imposing a standard that requires the developer to demonstrate that the proposed use will not have an adverse effect on the value of adjacent properties seems to create an almost impossible burden, an unconstitutionally vague burden.<sup>75</sup>

Finally, as the dissent in *Gorham* pointed out, the majority's reasoning, which accepted *generalized* evidence that multi-family units in a neighborhood adversely affect the value of single family homes, allowed the Zoning Board of Appeals to reexamine, reconsider, and reject the legislative judgment that such housing is a permitted conditional use in the zone.<sup>76</sup> This approach flies in the face of the majority's reasoning in *Bass*; it ignores *Phillips Petroleum*; and it seems to overrule *Cope*. The latter case, directly on point, noted:

Whether the use will generally comply with the health, safety and welfare of the public and the essential character of the

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74. See *supra* note 44 and accompanying text.

75. The burden is further heightened because the standard leaves additional critical questions unresolved. What is the time frame for measuring whether there will be an adverse effect? Must the applicant show that there will be no adverse effect by the completion date of the proposed project, one year later, or five years later? Which parcels qualify as the "adjacent properties" that must not be adversely affected? Do they include properties that abut the developer's property, are within one block, or are less than one mile away? The failure of the ordinance and the court to suggest any parameters to these dimensions of the standard gives the Board of Zoning Appeals latitude to apply any criteria it chooses.

76. The dissent observed:

The evidence [offered by the opponents of the project] . . . did not explain what there was about Gorham's particular proposal that made it harmful to the value of adjacent properties. Rather, all the opponents' comments were addressed to the more general idea that multi-family units adversely affect the value of single family homes.

Because the Town of Cape Elizabeth had already made a legislative determination that multi-family units would not ordinarily affect the value of surrounding properties, it was beyond the powers of the Board to accept evidence contrary to that determination. In fact, the Board's adoption of the theory that multi-family units devalue surrounding property effectively precludes approval of any plan proposing a multi-family unit, clearly contravening legislative intent.

*Gorham v. Town of Cape Elizabeth*, 625 A.2d at 904 (Roberts, J., with whom Rudman, J., joins, dissenting). This is precisely the reasoning of the *Bass* and *Phillips Petroleum* courts. See *supra* notes 49-50 and accompanying text.

area is a legislative question. The delegation is improper if the Board is permitted to decide that same legislative question anew, without specific guidelines which permit the Board to determine what unique or distinctive characteristics of a particular apartment building will render it detrimental or injurious to the neighborhood.<sup>77</sup>

In *Gorham* there were no "specific guidelines" and there was no "unique or distinctive" evidence showing an adverse effect on the value of adjacent properties.<sup>78</sup> The Planning Board considered "anew" and rejected the legislative judgment of the Selectmen of Cape Elizabeth. Case law from *Waterville Hotel* to *Wakelin* says that this cannot happen, that such actions are unconstitutional. Yet *Gorham* inexplicably sanctions such conduct.

The last and most recent case in this troubling line is *Town of Pownal v. Emerson*.<sup>79</sup> In *Emerson* the district court fined the defendant for maintaining an unlicensed "automobile graveyard" and "junkyard" as defined by Maine statutes.<sup>80</sup> The court also ordered the defendant to clean up the property or face additional fines and enforcement fees.<sup>81</sup> In his defense, Emerson first asserted that the boards, barrels, car parts, pipes, wheelbarrows, etc., were all useful items to him, and that he had every right to own and store these items on his property against the day when he would use or dispose of them as he saw fit.<sup>82</sup>

Second and more important, Emerson argued that the statutory definitions of "automobile graveyard" and "junkyard" are inherently vague and thus unconstitutional.<sup>83</sup> He further asserted that the statutory terms "unserviceable," "discarded," "worn-out," and

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77. *Cope v. Inhabitants of Brunswick*, 464 A.2d 223, 227 (Me. 1983) (footnote omitted).

78. *See supra* note 76.

79. 639 A.2d 619 (Me. 1994).

80. *Id.* at 620. *See* ME. REV. STAT. ANN. tit. 30-A, § 3753 (West Pamph. 1995-1996) ("No person may establish, operate or maintain an automobile graveyard, automobile recycling business or junkyard without first obtaining a nontransferable permit . . ."). The statute defines "automobile graveyard" as "a yard, field or other area used to store 3 or more unserviceable, discarded, worn-out or junked motor vehicles . . ." *Id.* § 3752(1). The statute defines "junkyard" as:

4. [A] yard, field or other area used to store:

A. Discarded, worn-out or junked plumbing, heating supplies, household appliances and furniture;

B. Discarded, scrap and junked lumber;

C. Old or scrap copper, brass, rope, rags, batteries, paper trash, rubber debris, waste and all scrap iron, steel and other scrap ferrous or nonferrous material; and

D. Garbage dumps, waste dumps and sanitary fills.

*Id.* § 3752(4)(A-D).

81. *Town of Pownal v. Emerson*, 639 A.2d at 620.

82. Brief for Appellant at 21, *Town of Pownal v. Emerson*, 639 A.2d 619 (Me. 1994) (No. CUM-93-511).

83. *Id.* at 22.

"junked" are similarly defective.<sup>84</sup> None of these terms were defined by the statute or by any implementing state regulations. Nor had the Town in any local ordinance or regulation defined these terms or precisely delineated what is prohibited and what is permitted regarding non-commercial storage of used materials on private property. The majority opinion also failed to give adequate meaning to these terms<sup>85</sup> or to the dividing line between permissible and impermissible, legal and illegal conduct.

Instead, the majority, after viewing photographs of the Emerson property and no doubt subscribing to the maxims "I know it when I see it" and "one picture is worth a thousand words,"<sup>86</sup> simply pronounced the statute "not unconstitutionally vague"<sup>87</sup> and affirmed the decision of the lower court. That is not judicial reasoning. It is judicial fiat, a fiat that ignores without comment the reasoning of the *Waterville Hotel, Cope, Wakelin* line of cases, which Emerson's counsel and the dissenting justices sought to press upon the major-

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84. *Id.* at 24. Emerson argued that the defects in the statute could have been avoided if the legislature had defined the terms using "objective criteria such as a vehicle's age, registration status, or inspection status . . . ." *Id.* In fact, at least one state has attempted to avoid the vagueness problem by defining a "junk motor vehicle" as "a discarded, dismantled, wrecked, scrapped or ruined motor vehicle or parts thereof, . . . which is allowed to remain *unregistered* for a period of ninety days from the date of discovery." VT. STAT. ANN. tit. 24, § 2241(6) (1992) (emphasis added).

85. The majority did not address the terms "discarded," "worm-out," and "junked." It discussed only the term "unserviceable." *Town of Pownal v. Emerson*, 639 A.2d at 621. It observed that despite the lack of a definition in the statute, "a dictionary in common use defines 'serviceable' as 'that can be of service, ready for use, useful, useable . . .'" *Id.* (quoting WEBSTER'S NEW WORLD DICTIONARY 1301 (2d College ed. 1978)) (emphasis omitted). The majority concluded that "an unserviceable vehicle is one not ready for use or not presently useable." *Id.* But surely not all such vehicles are "junk," capable of triggering enforcement of the junkyard and automobile graveyard statute against a private landowner whose motor vehicles are not *immediately* ready for use. The court's definition is simply too broad.

86. The dissenting justices recognized the weaknesses of such an approach. They accurately stated that the standards in the junkyard and automobile graveyard statute are inherently subjective. "[T]he municipal officers in this case [are not] provided with any guide other than their aesthetic reaction to the appearance of another's yard." *Id.* at 622 (Dana, J., with whom Glassman, J., joins, dissenting). The dissent further observed:

Emerson's predicament calls to mind the sage observation of his putative ancestor that "one man's beauty is another's ugliness." What was junk to the selectmen is valuable personal property to Emerson. The statute provides no help in discerning which is which. In the instant case, it created a roving band of aestheticians who found violations based not on any set of objective criteria but rather on arbitrary, personal predilections.

*Id.* (citing RALPH WALDO EMERSON, CIRCLES IN ESSAYS: FIRST SERIES 247, 259 (1841)). The majority's approach opens the door to arbitrary enforcement and leaves landowners guessing as to the meaning of the statute. *Id.*

87. *Id.* at 621.

ity.<sup>88</sup> The dissent in *Emerson* was correct in observing that the critical terms of the statute are not self-defining; that there is something of a circular character to the dictionary definitions of these terms;<sup>89</sup> and that there is a highly subjective element to these terms as they are used within the statute.

More important, the dissent was correct when it asserted that these uncertainties as to statutory meaning, this vagueness, this subjectivity, have been found unconstitutional in a long line of Maine cases.<sup>90</sup> The dissent would strike down the statute in question and Emerson's liability under it.<sup>91</sup> In support of their view, the dissenting justices offered numerous case law citations that are very much on point and that bear out their analysis and reasoning. Ignoring this case law does nothing to enhance the majority's reasoning. The majority in *Emerson* did not clarify the law with respect to "meaningful" standards, but only added to what this Article has characterized as "some troubling recent cases."<sup>92</sup>

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88. See Appellant's Brief at 22-26, *Town of Pownal v. Emerson* (No. CUM-93-511) (discussing the equal protection and due process implications of vague standards); *Town of Pownal v. Emerson*, 639 A.2d at 622 (Dana, J., with whom Glassman, J., joins, dissenting) (citing *Cope*, *Waterville Hotel*, *Chandler*, *Stucki*, and *Wakelin*).

89. The dissent explained:

According to *Webster's New Twentieth Century Dictionary* (2d ed. 1974), to abandon means "to forsake entirely"; to discard means "to get rid of as no longer valuable or useful"; and to junk means "to throw away as worthless." Each word is a synonym of the other two. For something to be worn-out, it must be "used until no longer effective, usable, or serviceable." For something to be unserviceable, it must no longer "give good service," or be "beneficial, profitable or helpful."

*Town of Pownal v. Emerson*, 639 A.2d at 622 (Dana, J., with whom Glassman, J., joins, dissenting). The dissent recognized that standards that define themselves by circular definition are inadequate and unconstitutional.

90. See *supra* notes 5-8 and accompanying text.

91. *Town of Pownal v. Emerson*, 639 A.2d at 622 (Dana, J., with whom Glassman, J., joins, dissenting).

92. The troubling aspect of *Emerson* is not that the majority reached an incorrect result, but that it did so in an injurious manner. The purpose of the junkyard and automobile graveyard statute is to eliminate nuisances that interfere with the health, safety, and general welfare of the public. See ME. REV. STAT. ANN. tit. 30-A, § 3751 (West Supp. 1995-1996). Arguably, the material stored on Emerson's property did constitute a nuisance. Thus in upholding Emerson's liability the Law Court probably acted in a manner consistent with legislative intent. But laudable ends cannot be achieved through impermissible means. By validating the statutory standards the court encourages legislative bodies to adopt ambiguous laws and regulatory standards. The court sends a message that vague enactments are sufficient and thereby jeopardizes the constitutional values protected by the "meaningful" standards requirement.

## IV. RECONCILING TWO CONFLICTING LINES OF CASE LAW

Some may be tempted to say that there is nothing to reconcile, that the dissenting opinion in *Bass* and the majority views in *McCallum*, *Lentine*, *Gorham*, and *Emerson* constitute a new line of cases setting out the Law Court's present thinking with respect to land use standards. It follows that the court has implicitly overruled, or at least significantly modified, the *Waterville Hotel*, *Cope*, *Wakelin* line of cases. This reasoning fails to take into account several important factors. To begin, a dissenting opinion and four other court opinions, two that contain strong dissents,<sup>93</sup> and two that do not meaningfully address the *Waterville Hotel*, *Cope*, *Wakelin* reasoning,<sup>94</sup> do not yet rise to the level of a "line of cases" sufficient to dispose of over twenty-five years of unanimously decided land use case law.<sup>95</sup>

More important, however, is the fact that in *Gorham*, perhaps the most significant case in this asserted "new" line of cases, the majority purported to be following, not repudiating, the reasoning of *Wa-*

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93. See *Town of Pownal v. Emerson*, 639 A.2d 619 (Me. 1994) (Dana, J., with whom Glassman, J., joins, dissenting); *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898 (Me. 1993) (Roberts, J., with whom Rudman, J., joins, dissenting).

94. See *Lentine v. Town of St. George*, 599 A.2d 76 (Me. 1991); *McCallum v. City of Biddeford*, 551 A.2d 452 (Me. 1988).

95. The Law Court also has recognized the importance of "meaningful" standards in non-land use settings. See, e.g., *City of Portland v. Jacobsky*, 496 A.2d 646, 648 (Me. 1985) (rejecting a challenge that an obscenity ordinance is so vague that it violates due process where the ordinance is patterned after a definition of obscenity upheld by the United States Supreme Court); *State v. Boyajian*, 344 A.2d 410, 412-13 (Me. 1975) (upholding a statute that gives the Board of Commissioners of the Profession of Pharmacy the right to designate certain drugs as "potent medicinal substances" where the statute "contains limitations, readily understandable by experienced pharmacists, on the type of materials to be designated as 'potent medicinal substances'" (quoting ME. REV. STAT. ANN. tit. 22, § 2210)); *Swed v. Inhabitants of Bar Harbor*, 158 Me. 220, 225, 227, 182 A.2d 664, 667-69 (1962) (holding "vague, violative of due process of law and therefore unconstitutional" provisions in a statute and ordinance authorizing municipal officers to regulate the licensing of "bric-a-brac, linen stores" where the term "bric-a-brac" is undefined, "incalculably anomalous and . . . not satisfactorily amenable to classification or explanation"); *Kovack v. Licensing Bd. of Waterville*, 157 Me. 411, 420, 173 A.2d 554, 558 (1961) (holding that a statute authorizing the revocation of a victualer's license provides sufficient standards where the statute includes procedural safeguards that prevent the licensing board from acting arbitrarily); *Opinion of the Justices*, 155 Me. 30, 48-49, 152 A.2d 81, 90 (1959) (declaring that a proposed statute would be unconstitutional as an improper delegation of legislative power where the statute gives various powers to the Commissioner of Inland Fisheries and Game without making reference to existing fish or game laws or administrative standards, and without setting forth the duties imposed on the Commissioner or the ministerial acts authorized for the performance of those duties); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 153 Me. 265, 272, 136 A.2d 542, 547 (1957) (observing that if the court were to hold that the Unfair Sales Act applies to producers and manufacturers, the statute would be "too vague, uncertain and conjectural when so applied to satisfy the constitutional requirements of due process of law").



*terville Hotel, Cope, and Wakelin*.<sup>96</sup> This could be viewed as a good thing. *Waterville Hotel, Cope, and Wakelin* are seemingly alive and well. Delegations of decision-making authority must still contain "meaningful" standards. A more insightful analysis, however, would recognize the mischief in this view of *Gorham* and the related cases. The reasoning in *Gorham* keeps *Waterville Hotel, Cope, and Wakelin* alive in form, but it eviscerates the substance of these cases. It does so quietly; no cases in the *Waterville Hotel* line are overruled but their critical dimension, that standards be "specific" and "meaningful," is no longer the unequivocal rule of law in Maine. The vague, watered-down standards of *McCallum, Lentine, Gorham, and Emerson* are now adequate. Twenty-five years of existing case law to the contrary does not even get the dignity of a decent burial. The rationale and utility of this body of law and of the "meaningful" standards requirement was never fully addressed, not in *Gorham* or in any other of the troubling cases noted. This is an important and unfortunate change in Maine law.

There are two explanations for this apparent turn of events. The first is more ominous from the perspective of the Authors. It is that the court fully intends this change in the law with respect to delegations of land use control power and standards, and is content not to overrule explicitly a long and contrary line of Maine cases. Instead the court either ignores or distinguishes these cases and, notwithstanding its earlier pronouncements with respect to separation of powers, due process, and equal protection, regards a more relaxed delegation doctrine and standards requirement as appropriate.<sup>97</sup> If this actually is the Law Court's view, it is unlikely that any of the arguments advanced in this Article in support of a "meaningful" standards requirement will change the court's mind. Nothing short of a series of cases in which abuse of discretion, with all of its attendant evils, is shockingly in evidence is likely to move the court back to the *Waterville Hotel, Cope, Wakelin* line of cases.

There is, however, a second, more benign, and more likely explanation for the *McCallum, Lentine, Gorham, and Emerson* holdings. It is, quite simply, that the court in these cases did not intend to, and did not in fact, overrule the *Waterville Hotel* line of cases. The court did not have its attention focused on, and thus saw no inconsistency with, prior case law. It did not have brought home to it the fact that the individual, seemingly simple, cases before it raised important and far-reaching delegation and standards questions that would

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96. See *supra* note 68 and accompanying text.

97. Cf. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 10-11 (1994) (criticizing as unrealistic originalist theories of statutory interpretation that rely on the notion that administrators and judges simply follow given directives, and discussing the inevitability of dynamic statutory interpretation, which allows statutes to "take[] on new meaning in light of subsequent formal, social, and ideological developments").

have to be answered. If this is the more accurate explanation of the troubling recent cases, the court must be encouraged to find a vehicle that will enable it to reiterate the rationale behind the "meaningful" standards requirement, and apply that requirement in such a way as to reaffirm the court's historic position on these issues.

The suggested resolution of the very real conflict that these recent cases have created requires the judiciary to do nothing more than fulfill its constitutional duty to "interpret and administer the laws."<sup>98</sup> Moreover, this approach is not only in accord with longstanding state delegation and standards case law in Maine, but accords with the views of other jurisdictions that have considered these very issues.<sup>99</sup> An Arizona court, for example, has noted pointedly:

The Court recognizes that some writers have advocated the discontinuance of the "adequate standards" rule for testing claimed unconstitutional delegations of legislative power . . . . We find no Arizona decisions adopting this view, and we are not persuaded that it is in reality consonant with the fundamental separation of powers considerations which underlie the prohibition against delegations of power constitutionally vested in the legislature.<sup>100</sup>

This is precisely the view the Authors urge Maine's highest court to take.

## V. CONCLUSION

The late Justice Thurgood Marshall, speaking for a unanimous United States Supreme Court on the issue of standards, stated:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit standards* for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries [and land use control boards] for resolution

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98. *State v. Le Clair*, 86 Me. 522, 531, 30 A. 7, 9 (1894) (citing *Cooley*, Const. Lim. 109; *Merrill v. Sherburne*, 1 N.H. 199).

99. See *supra* note 39.

100. *State Compensation Fund v. De La Fuente*, 501 P.2d 422, 426 (Ariz. Ct. App. 1972) (citation omitted).

on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.<sup>101</sup>

As cited in this Article, the Law Court has embraced all of these rationale for "explicit" standards on many occasions over the last twenty-five years. Although the above reasoning arises in the context of a criminal case, the Supreme Court's analysis suggests that the substance of the points being made extend to civil settings as well. On this issue the Law Court has observed, "Although the void-for-vagueness doctrine receives its commonest application in the criminal law context, 'the doctrine has [also] been applied in instances where one must conform his conduct to a civil regulation.'"<sup>102</sup> In *Barnard* the Law Court recognized disapprovingly that impermissible land use objectives may be advanced under the guise of zoning and community planning.<sup>103</sup> It therefore is not surprising that the Law Court's attack on vagueness, its fashioning of a "specific" standards requirement, was developed and fleshed out in large part in a line of land use cases, cases cited extensively in this Article.

The critical point, however, is that whether the setting is criminal or civil, only "meaningful," "specific," or "explicit" standards can protect the unwary or unpopular individual, cause, or land use. No less important is that such standards protect the fundamental principles of due process, equal protection, and separation of powers. Without "meaningful" standards these values would be too readily compromised by bureaucratic decision-makers looking to bar construction of a dock by a boat owner from away,<sup>104</sup> or the keeping of salvage (someone else's "junk") by a cantankerous landowner,<sup>105</sup> or the building of housing for prisoners in pre-release status.<sup>106</sup>

The handful of recent cases characterized in this Article as "troubling" are so because they merely pay lip service to the idea of standards. The standards embraced in these cases are too vague. They have no substance. They offer no assurance that fundamental constitutional principles will not be compromised. They open the door to abuse, and arbitrary and capricious conduct. They will continue to sow confusion.

Lower courts and planners read between the lines of Law Court case law. If the standards of *Lentine*, *McCallum*, *Gorham*, and *Emerson* suffice, lower courts will ask for nothing more. Planners

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101. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (first emphasis added) (footnotes omitted).

102. *Maine Real Estate Comm'n v. Kelby*, 360 A.2d 528, 531 (Me. 1976) (citing *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n*, 320 A.2d 247, 253 (Me. 1973) (footnote omitted)).

103. See *supra* text accompanying notes 3-4.

104. See *Lentine v. Town of St. George*, 599 A.2d 76 (Me. 1991).

105. See *Town of Pownal v. Emerson*, 639 A.2d 619 (Me. 1994).

106. See *Pharos House v. City of Portland*, CV-93-1228 (Me. Super. Ct., Cum. Cty., Oct. 17, 1994) (Brennan, J.).

and decision-makers will have almost "unfettered discretion" to do what they will. Historically this has not been the law in Maine. *Waterville Hotel, Cope*, and *Wakelin* prohibited such "unfettered discretion" as "facially unconstitutional."<sup>107</sup> As between these two lines of reasoning the latter would seem to be a wiser choice of law.

In the final analysis only the Law Court can resolve the confusion and make a choice. The court must recognize, however, that silence merely prolongs the confusion and gives undue weight to *Lentine*, *McCallum*, *Gorham*, and *Emerson*. If the present Law Court is prepared to embrace the learning of its predecessors, the courts of other jurisdictions, and the wisdom of Justice Marshall, it soon must find a vehicle that will enable it to firmly and meaningfully rehabilitate *Waterville Hotel, Cope*, and *Wakelin*. Maine jurisprudence, in particular its land use law, deserves nothing less.

## VI. POSTSCRIPT

On February 5, 1996, the Maine Supreme Judicial Court handed down its decision in *Halfway House, Inc. v. City of Portland*.<sup>108</sup> The court held that the standards issues raised by the plaintiff in the case had become moot.<sup>109</sup> This decision leaves in place a municipal ordinance and municipal administrative practices that are both arguably unconstitutional. It also leaves unchallenged the trial court's disquieting reliance on the *Gorham* opinion.<sup>110</sup> In short, uncertainty with respect to whether "meaningful" standards are necessary in land use ordinances, and what constitutes such standards, remains. The need for the Law Court to clarify these issues is further underscored.

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107. See, e.g., *Cope v. Inhabitants of Brunswick*, 464 A.2d 223, 227 (Me. 1983) ("We therefore conclude that the relevant portions . . . of the Brunswick zoning ordinance upon which the Board relied in denying the permit . . . are facially unconstitutional.").

108. CUM-95-172 (Me. Feb. 5, 1996), *vacating* *Pharos House v. City of Portland*, CV-93-1228 (Me. Super. Ct., Cum. Cty., Oct. 17, 1994). See *supra* notes 69-72 and accompanying text.

109. *Id.* at 1, 5. On a collateral issue, the Law Court held that the plaintiff had standing to challenge Portland's amended zoning ordinance that barred prisoner pre-release facilities throughout the city. *Id.* at 1, 8. The court vacated the trial court's dismissal of this issue and remanded for further proceedings. *Id.*

110. See *supra* text accompanying note 72.

