BERN
STEIN
SHUR

Bernstein, Shur,
Sawyer & Nelson, P.A.
100 Middle Street
PO Box 9729
Portland, ME 04104-5029

T (207) 774 - 1200
F (207) 774 - 1127

Philip R. Saucier
(207) 228-7160 direct
psaucier@bernsteinshur.com

VIA EMAIL

October 18, 2024

Mark Waltz, Town Manager
Town of Topsham
100 Main Street
Topsham, ME 04086

Re: Recode Topsham

Dear Mark,

You have asked me to review the draft Recode Topsham Zoning Ordinance Update (last dated April 2024) and provide a high-level review. I also plan to attend the Planning Board's meeting on October 24, 2024, to further discuss the project. I take no position on the various land use policy considerations and regulations embedded in the Recode, but instead will highlight some questions and concerns.

Waivers.

The Recode includes a number of provisions that would allow the Planning Board to waive certain standards through the site plan review process under Chapter 175. For example, the waiver authority is found in the following sections:

> 2.40.4.G (courtyards), 2.40.9(A) (trash, recycling, refuse locations), 2.60.6(B) (building height), 2.60.7 (large format spaces), 6.40.7(10)(wind generator- although it appears this subsection is mistakenly labeled as waivers and modifications and should instead be labeled review process), 6.70.4(B)(1)(b)(iii) (drive-through facilities), 7.40.4(D)(parking structures), 7.60.4(C) (fuel pumps), 8.10.3 (building design regulations), 9.50.4 (electric vehicle charging stations), 9.70 (generally related to parking, mobility and access standards), 12.30.9 (site plan review waiver authority – this provision contradicts other provisions, and should be removed and moved only to Chapter 175), and 15-13 (definition of "roof-pitched").

As a general rule, planning boards do not have the authority to grant variances or waivers from zoning ordinance provisions. *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58; *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172, *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106 (A zoning ordinance that gives a Planning Board waiver authority is preempted by 30–A M.R.S. § 4353 if the waiver "is in reality the power to grant a variance."). That is because under Maine law, variances and waivers from regulations in a zoning ordinance can only be granted by a board of appeals. 30-A M.R.S. § 4353(2). A zoning ordinance is described as a specific type of land use ordinance that "divides a municipality into districts and that prescribes and reasonable applies different regulations in each district." 30-A M.R.S. 4301(15-A). On the other hand, municipal land use ordinances that regulate "in a general and uniform" town-wide manner such as a building code or site review ordinance do not qualify as zoning. *Bragdon v. Town of Vassalboro*, 2001 ME 137, ¶¶ 8 & 9, 780 A. 2d 299, 302. In this case, the Recode contains both zoning and non-zoning provisions including certain town-wide performance standards and site plan review provisions.

The Maine Law Court has distinguished the granting of waivers of zoning provisions from a planning board's authority to grant waivers from non-zoning provisions such as site plan review and subdivision standards. In the *York* case cited above, the Court upheld the ability of a planning board to grant four waivers from subdivision standards while overturning a waiver of a zoning ordinance provision (street width requirement). *See also Bodack v. Town of Ogunquit,* 2006 ME 127 909 A.2d 620. In the *Sawyer* case, the Court further clarified that a planning board may be given authority to waive municipal ordinance provisions only if the waiver does not in effect grant a variance from zoning standards that otherwise govern a zone.

In the Recode, parking and EV charging station performance standards, for example, are not limited to any particular zone and apply to projects that require site plan review. It is thus reasonable to interpret such performance standards as non-zoning standards that may be waived by the Board in its discretion. On the other hand, the building height provisions found in Section 2.60.6 are dimensional standards that apply only in the Topsham Center Zones and can only be modified through a variance from the Board of Appeals. Although this is not the only conclusion that could be reached on these issues, they are reasonable ones considering the above noted cases. The Planning Board should review each of the applicable waiver provisions in light of this analysis, and I would be happy to discuss this further during the Planning Board meeting.

I also offer general comments on the following provisions:

- Section 1.10.2 Authority. Could add a more specific citation to 30-A M.R.S. §§ 3001 and 4353.
- Section 1.20.1(C). Add year of edition of Webster's dictionary.
- Section 1.40.2. Should be amended to add qualification that ordinances that are adopted with retroactivity provisions will apply to pending applications.

- Section 2.140.2(A)(1), Specific Waivers related to MPD. This provision is overbroad and seemingly allows the Planning Board to waive any regulation. This should be qualified based on the guidance above related to waivers.
- Section 4.60.3, Affordable Housing density bonus. As drafted this provision would allow for a 60% density bonus, while the statute requires at least a 2 ½ time base density bonus under 30-A M.R.S. § 4364(2) that meet the applicable requirements. Additionally, the definitions in 4.60.2 should be updated to include reference to the definitions in Section 4364(1) related to 51% or more of the units.
- Section 5.20.3 Prohibition on Manufactured Housing Units in the Historic District. Under 30-A M.R.S. § 4358(2) manufactured housing must be allowed in all zones where other single-family dwellings are allowed. Municipalities can establish design criteria, however, for manufactured homes.
- Table 6-4. References to marijuana should be changed to cannabis to conform with state law, and clarify whether it applies to adult use, medical, or both.
- Section 7.20.8. Add in "30-A" prior to MRSA citation.
- Section 12.20.7(B). In the absence of a charter provision to the contrary, referendum questions (including amendments to Recode) are determined by a majority votes cast, not a two-thirds super-majority vote.
- Section 12.40.1. Add in "30-A" prior to MRSA citation.
- Section 15.10.6(F)(2). This "administrative exception" that would allow the CEO to waive setbacks should be struck per the analysis above.
- Section 15.10.14(A)(1). This administrative exception for the maximum number of stories should be struck or tied to specific allowable criteria.
- Section 15.10, Definition of "Household." This provision should be amended to remove the distinction between related and unrelated persons.
- Section 15.10, definition

I hope this is helpful, and please let me know if you have any further questions.

Sincerely,

Philip R. Saucier