

Municipal Code Enforcement Officers Training and Certification Manual



Zoning and Land Use Regulations

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The work of Kenneth H. Young, editor of Anderson's American Law of Zoning, 4th edition, is recognized. This work is cited in the text.

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This training manual contains excerpts of other training manuals of the Code Enforcement Training and Certification Program. *Legal Issues and Basic Enforcement Techniques for Municipal Code Enforcement Officers* originally prepared by Rebecca Warren Seel, Senior Staff Attorney of Maine Municipal Association (MMA) and updated by Durward Parkinson, Esq.

Rebecca Seel also reviewed drafts of the model ordinances contained in this manual dealing with junkyards and automobile graveyards and recycling facilities and excavation pits. The Code Enforcement Program greatly appreciates the training and legal support received from Maine Municipal Association.

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William Butler of the Maine Department of Environmental Protection prepared the Solid Waste Decision Tree contained in the Appendix.

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EDUCATIONAL OBJECTIVES

A number of major elements have been identified in this material as those that the reader should understand and retain a working knowledge of. An effort to highlight these elements within the material has been made. The following objectives are based upon these selected elements. They are presented here to help the reader organize his or her study of the topic and to assist the applicant for Basic Certification in preparation for the examination.

Following completion of the Basic Training Program, each participant should be able to:

1. Define the term "zoning ordinance."
2. Explain the significance of the U.S. Supreme Court case *Ambler Realty v. Village of Euclid*, 1926.
3. Define the concept of Euclidian zoning.
4. Describe the purpose of a comprehensive plan.
5. List and discuss at least six elements of a zoning ordinance.
6. Define the term "special flood hazard area".
7. List the basic requirements of a flood management ordinance that a community must adopt to be eligible for participation in the NFIP.
8. Describe the differences and similarities between a site plan review ordinance and a zoning ordinance.
9. Explain the purpose of the Zoning Board of Appeals.
10. Discuss the criteria that define the limits governing the issuance of variances.
11. List and explain the four hardship tests that must be met prior to the granting of a zoning variance in Maine.
12. Discuss the limits placed upon municipalities by Maine Statute related to zoning manufactured housing.
13. Generally define the procedures and penalties for enforcement of land use laws and ordinances as described in Title 30-A § 4452 of the Maine Revised Statutes.
14. List the location restrictions and minimum standards of operation for a borrow excavation pit less than 5 acres in size imposed by State Statutes and rules.
15. Define the term "subdivision" under the municipal subdivision law.
16. Explain what land transactions allow a parcel of land to be exempt from being counted as a "lot" for purposes of administering and enforcing the municipal subdivision law.
17. Describe when the division of a structure is defined as a subdivision, under the municipal subdivision law.

18. Discuss what action a CEO should take upon learning that a subdivision, as defined by the municipal subdivision law, has been created without municipal approval.
19. Define the term "subdivision" under the Site Location of Development Act.
20. Discuss the permit conditions associated with a municipal permit for the operation of an "automobile recycling business".
21. Discuss the requirements related to the disposal of septage waste on site when generated by a residence.
22. Explain the purpose of the "coastal management policies" established in Title 38 §1801.
23. Discuss the responsibilities imposed on municipal building inspectors by the Maine Human Rights Act regarding accessibility for persons with disabilities.
24. Explain the usefulness of the miscellaneous nuisance law relative to enforcement of municipal land use ordinances.
25. List the activities governed by the NRPA that require a DEP permit when they occur within 100 feet of protected resources.
26. Discuss the general requirements of the State's Erosion and Sedimentation Control Law.
27. Discuss the requirements of the Stormwater Management Law applicable to all projects in lake watersheds that require a permit.
28. Discuss the requirements applicable to construction activity on "submerged lands," as defined by the State of Maine.
29. Explain the notice requirements associated with asbestos related activities.
30. Discuss the concept of "gradual elimination" of nonconformances as it applies generally to zoning ordinances.
31. List and explain at least eight duties of the CEO in connection with a municipal zoning ordinance.
32. Discuss the role of the CEO in relationship to the Planning Board.
33. Discuss the role of the CEO in relationship to the Zoning Board of Appeals.
34. Discuss the role of the CEO in dealing with the public.

TERMS AND ABBREVIATIONS

A.2d or Me. refers to the series of Maine Supreme Judicial Court or Law Court cases reported for this State and court region.

"**A.2d**" means the Atlantic region reports, 2nd series.

"**Me.**" means the Maine reports.

Examples of a State of Maine case cite would be: 111 Me. 119, or 88 A.2d 398(1913)

"**111**" and "**88A**" indicate the volumes of the Maine and Atlantic court reports in which the law will be found; "**119**" and "**398**" reference the pages of those volumes on which the case begins.

An example of a Federal statutory citation would be: 42 U.S.C. § 1983

"**42**" indicates the Title number of federal code;

"**U.S.C.**" means *United States Code*.

An example of a citation from federal regulations would be: 44 CFR Ch.1 § 59.22 (9) (iii)

"**44**" is the volume number; "**CFR**" means *Code of Federal Regulations*;

"**59.22**" is the section number of the chapter; "**(9)**" is the subsection number;

"**(iii)**" is the paragraph number.

Et seq. means "and following sections."

MRSA means the **Maine Revised Statutes Annotated**. An example of a reference to the Maine statutes would be: 30-A MRSA § 4401.

"**30-A**" refers to Title 30-A;

§ 4401 refers to section 4401 of Title 30-A;

"**Maine Statutes**" are the laws that have been adopted by the Maine Legislature. The books in which they are bound are called the "Maine Revised Statutes Annotated".

Annotated means that the publisher has added information regarding legislative history and relevant court case.

Ordinance means a law adopted by the municipality, usually through an act of its legislative body.

INTRODUCTION

Over 450 Maine cities and towns have enacted shoreland zoning ordinances, 288 have additional separate zoning or other land use ordinances. More than 300 municipalities have adopted comprehensive plans that support their ordinances. Many Maine municipalities may have enacted zoning ordinances without realizing it when they entered the National Flood Insurance Program. As a requirement of participation, each town enacted an ordinance that identifies the flood hazard area within the town, effectively dividing the town into two zones, one requiring special standards to prevent flood damage and a second, the rest of the town. The flood hazard zone both restricts development and/or requires certain building practices to be followed in the flood hazard area. This is zoning.

In 1971, the Maine legislature required all Maine municipalities to restrict the use of land bordering their water bodies and wetlands through zoning. A few municipalities have a shoreland zoning ordinance that was not enacted at town meeting or by their council, but was "imposed" by the state, in conformance with the Mandatory Shoreland Zoning Act. Though not locally enacted, the ordinance must still be administered and enforced by the municipality.

This manual is designed to explain the basics of zoning, the theory behind zoning ordinances and describe the common features of zoning administration among municipalities, regardless of the specific requirements of their ordinances. There are other land use tools that a municipality may employ that are not zoning. These include subdivision review, minimum lot size ordinances, and site review. These land use tools are discussed separately.

Beyond local zoning, State and federal regulations impact both municipalities and individual projects that may be proposed. The reader will find in this manual an expanded synopsis of laws and regulations that may affect land use projects. The information presented for each topic is not exhaustive, but rather an overview and guide to more information. Greater emphasis has been placed on projects that may come under more than one jurisdiction. Decision trees for permitting have been prepared for several State laws and regulations. These may be used as models to prepare similar decision trees for local ordinances. Local ordinances may be added to the applicability guide of regulations that can be found in the Appendix.

The reader is encouraged to use this manual in conjunction with the *Legal Issues and Enforcement Techniques* manual of the code enforcement program that covers land use issues as well. This manual references other manuals for more in-depth discussion of some topics. See Section VIII for a complete listing of other manuals available through the program.

I. Understanding Zoning

A. WHAT ZONING IS

Conventional zoning is the division of a municipality into districts for the purpose of regulating the use of private land. A zoning ordinance consists of a text and a map or a series of maps. The text establishes the districts, the land uses allowed in each district, and the standards that are applicable to each of the districts. Administration, enforcement, and appeal procedures, as well as procedures that govern proposals for changes to both the text and the map are established by the ordinance. The differences between the standards established for each district should reflect the decisions of the community with regard to land use and will resultantly affect the way land is used, i.e., the permitted size of a new lot, or the placement of a structure on a lot.

Zoning is an exercise of a municipality's "police powers" to protect the public health, safety, and welfare. These powers are granted to municipalities by the State as an extension of its powers. It is this same set of powers that allow government to set speed limits on highways, require drivers of automobiles to be licensed and prohibit the use of flammable celluloid film in movie theaters. As described below, the concept of the public's health, safety, and general welfare has expanded since the adoption of early zoning ordinances.

The regulations within a zoning ordinance take two basic forms:

- a) the districting of the town according to uses, space and bulk standards; and
- b) performance standards that describe a set of criteria each use must meet.

Among the variety of use districts designated by zoning ordinances, there may be several types of residential zones based upon dwelling type and minimum lot sizes.

Commercial zones have been more narrowly defined over the years in reaction to the impact different types of commercial uses create. Ordinances may draw distinctions between neighborhood businesses, highway-oriented businesses, central business districts, and warehouse and heavy-commercial districts.

Conventional zoning is increasingly criticized for its lack of flexibility reflecting a new thinking about acceptable mixed uses. New techniques are being implemented to control negative impacts on neighboring uses, which do not rely upon strictly applied geographic separation of uses.

B. HISTORICAL DEVELOPMENT OF ZONING

The concept of zoning was developed in the early twentieth century in response to industrialization and the increasing number of private nuisance claims resulting from urbanization and population growth. Prior to local regulation of land use, it fell upon an injured property owner to press his claim against the alleged perpetrator in a private civil suit. With rising industrialization, the number of private injury claims grew to the point that government chose to act rather than rely on individual private remedies.

As early as the 1750s, the royal English government took action against the owners of a factory making acid spirit of sulphur, oil of vitriol, and oil of aqua fortis to remove the nuisance of "the fires of sea-coal and other things, which sent forth abundance of noisome, offensive and stinking smoke; and made great quantities of noisome, offensive, stinking liquors ... whereby ... the air was impregnated with noisome and offensive stinks and smells to the common nuisance of all the King's liege subjects..." *Rex v. White and Ward* 97 Eng. Rep. 338 (K.B. 1757). A nuisance activity that affected enough people became a public nuisance.

A further step in the evolution of land use controls was the government's attempt to prevent public nuisances rather than to provide for mitigation or prosecution once the nuisance was created. Fearing the rapid spread of fire, the Philadelphia City Council, in 1795, enacted what was, perhaps, one of the first zoning ordinances in the newly created United States. Philadelphia prohibited the erection any "wooden mansion house, shop, ware house, store, carriage house, or stable within such part of the city of Philadelphia as lies to the eastward of Tenth street from the river Delaware," *Act of 18th April 1795*.

New York City is credited with enacting the first comprehensive citywide zoning ordinance in 1916. This was done to ease the conflict between the increasing number of factories and commercial shops vying for space and creating pollution and congestion near where people lived. It had the support of reformers interested in the concept of planning. New York City's ordinance later inspired the passage of the U. S. Department of Commerce's *Standard State Zoning Enabling Act* in 1926. This act cited the benefits of reducing congestion, threat of fire spread and panic, and provided for adequate light and air, transportation, water sewerage, schools, parks, and other public requirements. Thus, it would serve the public interest by providing for the health and general welfare of all.

The first constitutional challenge to zoning to reach the U.S. Supreme Court was made in the case of *Ambler Realty v. Village of Euclid*, 1926, in which the authority of the village to enact zoning (primarily to protect a predominately residential village from the encroaching development and industrialization from nearby Cleveland) was upheld. The Court, in its findings, clearly put its stamp of approval on comprehensive zoning. Only two years later, the Maine courts upheld the constitutionality of zoning in *York Harbor v. Libby*.

Justice Sutherland's opinion in *Euclid* succinctly puts the relationship between nuisance prevention and zoning into perspective. "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." The purpose of zoning is to keep the livestock in the barn, rather than repair the china after their stroll through the parlor. The decision also went on for a full paragraph describing the need to protect single-family housing from apartment buildings and industrial uses.

What came to be known as "Euclidian zoning" rested on the vision of protecting residential uses from the adverse impacts of tenement apartments and industrial and commercial development. The "highest" use of land was seen as the neighborhood of single-family houses, untainted by incompatible uses. Euclidian zoning established a system whereby all the uses permitted in "Zone A" were permitted in "Zone B", including some additional uses; all the uses in "Zone B" were allowed in "Zone C" with some additional uses and so on. The notion that residential areas should be sharply set apart from non-residential areas is due in

large part to the landscape architects of the time that wanted to bring together the disparities in lifestyle between the city and the country.

C. THE PURPOSES OF ZONING

Zoning progressed from the protection of single family homes from intrusion by factories and tenements, to the regulation of the size of lots, the density of development, the size of buildings and their placement on a lot, and other matters related to protecting the public health, safety and welfare. The concept of what constitutes the "public health, safety, and welfare" has gradually expanded. Supreme Court Justice Sutherland, in the *Euclid* decision, cited a few documented purposes in the mid-1920s. Some of these may still apply today.

[T]he segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders and preserve a more favorable environment in which to rear children, etc.

Today the concept of a public nuisance and the general health safety and welfare of the public encompasses a variety of issues beyond Justice Sutherland's and other early zoning researchers' conclusions. As zoning has become more widespread, its scope has been expanded to meet the needs of suburban and rural communities. Ordinances have been adopted to protect natural resources such as water quality, wildlife habitat, and important farmland; to preserve historic sites or buildings; to minimize the fiscal impacts of development on municipal government; and to control the appearance of certain neighborhoods, among other purposes.

The primary reasons a community enacts a zoning ordinance remain fairly constant:

1. Direct the Growth of a Community

The amount of land where commercial uses are allowed, the type of uses permitted, the lot sizes required, the allowed height of buildings and the required separation between buildings all answer the question of what a community wants to become. By varying the lot sizes in parts of town, a town can direct the level of growth and encourage development in various sections.

2. Minimize Financial Impacts of Growth on the Community

Virtually all new growth results in a cost of providing municipal services greater than the new tax revenues generated by that development. While growth cannot be prohibited or prevented for fiscal reasons, the controls placed on it can limit the fiscal impacts on the municipality. Compact growth close to an existing village center will be less expensive to service with police, fire, school bussing, sewer, and water than new development spread about the countryside. The mix of residential and commercial or industrial growth that occurs will also affect the fiscal impacts.

3. Neighborhood Stabilization

The degree of noise, activity, traffic, and other potential nuisance conditions generated depend primarily on the type of land uses present. Separating incompatible land uses, and grouping those that are compatible can reduce problems. Differing density requirements or lot sizes will maintain a rural character or promote an urban feeling of an area as it develops.

4. Safe Traffic Movement

The growing importance of the automobile and the increase in automobile ownership in America has resulted in parking and traffic regulations being incorporated into zoning ordinances. Typically, off-street parking is required, with the number and design of parking areas specified by the ordinance. Development density is controlled to limit traffic on certain streets. Design requirements for entrances onto existing streets are frequently included. Deep front yard setbacks may allow for future widening of narrow or crowded streets.

5. Protection of Significant Cultural, Historical, or Natural Areas

The heavy reliance in Maine on tourism and the importance of the visual character of the landscape result in a high concern over protection of traditional village centers, archeological, historic or other culturally important buildings or sites, and natural areas. Protection of public drinking water supplies, shoreland areas, important wildlife habitat, and scenic views all fall under this purpose. Design requirements or provisions to direct development away from significant or sensitive areas can maintain these characteristics.

NOTES

II. The Relationship Between Planning and Zoning

Zoning is regulation. It is not planning. Zoning is one of a variety of tools that implement a municipality's comprehensive plan. Planning must take place before the adoption of land use regulations. A municipality's comprehensive plan is the basis for the development of a zoning ordinance and other municipal land use controls that guide the physical and fiscal development of the municipality. Title 30-A, § 4352 (2) states that a zoning ordinance must be "pursuant to and consistent" with a comprehensive plan. The schedule for municipal compliance and the planning process are discussed in Section IV of this manual.

Conceptually, a municipal comprehensive plan is similar to a business plan, a family's vacation plan, or any other type of plan. Planning, any planning, is an assessment of where we are today, where we would like to be at some point in the future, and a discussion of how to reach our identified goals. It is accomplished by first creating an inventory of all current and pertinent information regarding the community. This is followed by an analysis of the potential problems and issues. Goals for the development of the community and resolution of perceived problems and issues are discussed. From these discussions, alternative solutions are weighed before establishing policies for achieving the goals. Finally, the desired steps required to implement the policies are identified.

One of the most important achievements of the comprehensive planning process is the land use plan. Since 1988, Maine law has specified the subject matter that a comprehensive plan must include and the issues that must be addressed in its articulation of policies and goals for the future. It is the land use plan with which a zoning ordinance must be most closely linked. A comprehensive plan must contain policies regarding the provision or extension of municipal services, economic development, protection of important natural, historical, and cultural resources, transportation, and housing. All of these policies are reflected in the drafting of a land use plan, and therefore provide guidance on the types of provisions that should be in a zoning ordinance.

By linking the regulations in a zoning ordinance with the inventory, analysis and policy development in a comprehensive plan, the Legislature has taken a step to ensure that a community has well thought out reasons for the restrictions it places on private property.

NOTES

III. The Zoning Ordinance

A. FORM AND STRUCTURE OF THE ZONING ORDINANCE

A zoning ordinance consists of two parts: the text of the ordinance, and a map that shows the locations of the districts. The text specifies the requirements that apply to each proposed use. To satisfy legal standards, a land use ordinance must contain certain provisions, although the order of their presentation within the document may vary. Taking it a step farther, the more explicit the language of the ordinance, the more efficiently and effectively it will do what its creators intended. It is not a CEO's role to make policy decisions regarding the content of an ordinance. However, a CEO can contribute a great deal toward clarification and effectiveness. With an understanding of the intent of an ordinance, a CEO should make the planning board aware of ordinance language that could be improved, or issues that are not adequately dealt with in the ordinance. Working with the planning board to improve an ordinance, will make administration and enforcement an easier task for all involved.

The essential provisions of a zoning ordinance include:

- title;
- legal provisions, including a reference to the State statutes from which legal authority for enactment is derived;
- a statement of purpose;
- general provisions regarding the application of the ordinance;
- text describing the boundaries of land use districts, with clearly expressed language describing appropriate uses, lot sizes, and other standards that apply for each;
- delineation of land use districts on a map;
- performance standards against which proposals for land use in a district must be compared;
- procedures for the administration and enforcement of the ordinance and penalties; and
- a list of definitions for terms used in the ordinance;

Title

The ordinance must have a name for reference that describes the content.

Legal Provisions

Although not necessary, a reference to the statutes that authorize or direct the adoption of zoning is generally included in the ordinance. Other legal provisions include statements which detail the geographic area governed by the ordinance, the effective date, management of conflicts between the ordinance and other ordinances, laws, or regulations, and "separability." Separability deals with any situation where one provision is found

unconstitutional or unenforceable by a court. When this occurs, a statement of separability ensures that the remainder of the ordinance is unaffected. The procedure for amendment of the ordinance should also be included.

Purpose

An ordinance will usually open with a statement of its purpose. The applicable purposes for zoning have been discussed in Section I. These and others a municipality may have in mind, as well as a reference to the comprehensive plan upon which the ordinance is based, are typically identified in an opening statement.

General Provisions

The general provisions section presents the overall requirements for conformance with the ordinance including permit review and approval procedures, and explains how existing properties which do not meet the standards established by the ordinance are treated.

Though few ordinances do, some current ordinances distinguish between the different types of permits that may be required. Included may be a permit to allow the establishment of a use on vacant land, a permit to authorize the construction of a building, and another that allows the use of an existing structure. Other permits required may include those for erection of signs or the establishment of a home occupation. In communities with a building code, the relationship between a permit required by that code and one required by the zoning ordinance should be made clear in the zoning ordinance.

As mentioned earlier, zoning is a tool to prevent problems, not remedy them. Therefore, generally, properties that do not meet the standards of an ordinance at the time of their adoption are permitted to remain. The ordinance needs to define these "nonconformities" and address how they are to be treated, *i.e.*, continuation or termination. If they are allowed to continue, what, if any, improvements or changes will be allowed? If a nonconforming structure is destroyed or partially destroyed by fire, flood, or other natural hazard, what, if any, improvements or changes will be allowed?

Older, simpler ordinances frequently refer only to "nonconforming uses" in addressing nonconformities. However, in addition to uses that are not allowed where they are located, there also will be lots that do not meet the dimensional requirements, and buildings that are too close to a property line or body of water. It is best that the ordinance distinguish between nonconforming lots, structures, and uses, treating each separately.

Nonconforming structures or uses are those that have been targeted for gradual elimination. Ordinance provisions that allow for the continuation of these structures or uses should be strictly interpreted, while provisions limiting nonconforming uses should be liberally interpreted. That is, the continued existence of nonconforming structures or uses, as they existed at the time of enactment or amendment of the ordinance, is guaranteed. However, this guarantee only applies as they initially were. No changes that expand or "improve" the use or structure are generally allowed by the ordinance. The common allowance for nonconforming structures is to permit their repair and maintenance, but prohibit any enlargement or replacement, unless the addition somehow makes the structure less nonconforming. The structure cannot be made more nonconforming. Similarly,

nonconforming uses are usually prohibited from expanding in size or changing the nature or purpose of the use to be more nonconforming. Some permitted use can usually be found for existing vacant lots that do not meet the dimensional requirements of the ordinance. If a person owns two or more adjacent, vacant nonconforming lots, most ordinances require they be combined to the extent necessary to meet the lot size or frontage requirements.

The imposition of requirements that prohibit the expansion of a use or building or that require a number of lots to be combined may, at first, seem unfair. However, it must be remembered that these are properties that do not conform to a community's vision of its future development. To allow their expansion or the development of individual nonconforming lots would contradict the purposes of the zoning ordinance and slow the evolution of the development of the town toward its goals.

Establishment of Districts

Because zoning is the division of a town into various parts (districts) with differing standards, a way of identifying the districts must be included in the ordinance. Maine law requires that a map be drafted and incorporated into the ordinance. It is best to also provide a written description of district boundaries, especially where district boundaries follow a natural feature of the land (such as a wetland) that cannot be precisely designated on the map. It is advisable to incorporate language into the ordinance that provides for final determination by on-site inspection by a designated local official. This provides for clear resolution of conflicts between the map and a written description, while the written description generally prevails (Title 30-A § 4352). A brief discussion of various zoning districts commonly found in many zoning ordinances follows later in this section.

District Regulations

With the establishment of districts, the ordinance must spell out the uses, standards, and regulations applicable to each. These typically take the form of two tables: one establishing the uses permitted in each district and the other presenting the dimensional requirements. Most land use tables present a list of various land uses in one column and a series of columns represent the districts with an indication whether the use is permitted, permitted after some type of review process, or not permitted. Some ordinances provide this information separately for each district. The dimensional features typically regulated by zoning are minimum lot size, minimum street frontage or lot width, building setbacks or yards, maximum building height, and maximum portion of the lot allowed to be built upon.

Performance Standards

Early zoning ordinances merely divided the town up into use and density districts. This was known as Euclidian Zoning, discussed in Section I. It later became apparent that additional standards were necessary to address some of the problems zoning sought to prevent. Eventually, standards were incorporated into ordinances that provided further protection for neighboring property. These standards included such things as landscaping requirements, requirements for off-street parking, and control of noise, dust, odor, and glare.

Most zoning ordinances today contain two types of performance standards:

- 1) general performance standards, i.e., those that all uses must meet; and
- 2) specific performance standards, sometimes called design criteria that apply only to particular uses, such as gravel pits, mobile home parks and campgrounds. Common performance standards are discussed in more detail later in this section.

Procedures

The ordinance must define the procedures for its administration and enforcement. This section should designate the parties responsible to make decisions on applications and who enforces the ordinance. One should find answers to questions related to interpretation of the ordinance: who does this and what is the process for seeking an interpretation?

When a permit is necessary, the ordinance must describe how it is obtained, any associated inspection requirements, and how to obtain review for those uses permitted only after a review process. Fees or permits and penalties for non-compliance with the ordinance should be referenced.

In addition, Maine law requires that every zoning ordinance provide for an appeal process by which individuals may challenge the administrator's decisions or ask for relief from the standards of the ordinance (Title 30-A § 4353). The ordinance must describe this process. For example, what decisions are appealable, with whom an appeal should be filed and within what time frame? Administration and procedures are discussed further in Section VII.

Definitions

Ordinance drafters make use of particular words and phrases that must be assigned a specific meaning for proper interpretation of the ordinance. These definitions may differ from the common meaning of a word or term, or it may be desirable to specify the exact meaning where there could be some doubt. Therefore, zoning ordinances contain a list of definitions. Reference to the definitions of these terms will help resolve conflict over the meaning of a sentence or requirement. For the code enforcement officer, it is important that definitions and standards are clear: clear to read and understand, and clear to direct enforcement action.

B. COMMON ZONING DISTRICTS

The number and variety of zoning districts provided for by an ordinance depends upon the size of the community and the extent of existing development. Larger cities such as Lewiston or Bangor have a need for a greater number and variety of zoning districts than rural communities such as Etna or Sebago. However, there is commonality between these ordinances.

Larger communities most often divide the town or city into residential, industrial, and commercial areas, and have more than one of each of these. Small, rural communities may have only village and rural zones. Many small towns do not perceive the need to separate uses because of the larger lot sizes required when public water or sewer systems are not available. They allow mixed uses in most zoning districts, but direct the location of growth

by requiring different lot sizes for the same use in different districts. This alters the density of development.

Within any given district, there may be further segregation of land uses based upon building types and density or lot size. There may also be a distinction made between the nonresidential uses that are permitted. Large urban communities, and occasionally rural communities, will separate single-family dwellings from other dwelling types within a district. In most Maine zoning ordinances, districting of residential areas will be accomplished by specifying densities or lot sizes alone, rather than the type of dwelling.

Commercial zones are typically found within or around village centers, or in larger communities, within the central business district, and along major traffic routes. Commercial zones may differ from each other according to the types of uses permitted, dimensional requirements, and some performance standards. Frequently, automobile oriented businesses and businesses that require a significant amount of land such as garages, drive-ins, building supply stores, and vehicle sales, are allowed only outside of the downtown or village center area. Manufacturing and other industrial uses are often segregated into their own districts, depending upon the size of the municipality and the sophistication of the ordinance.

The relationship between zones has been evolving for as long as the concept of zoning has been with us. There is an obvious difference in the number and type of zoning districts needed in an ordinance that governs a large urban area as opposed to a small town with scattered development surrounding a village center. Early urban ordinances, such as Euclid's, created a hierarchy of uses that permitted "higher" uses in "lower" districts. Later, it was realized that there were valid reasons to segregate uses to a greater extent, protecting, in essence, the "lower" use districts from those who might later complain about their operations or to prevent congestion of otherwise exclusive truck routes. Just as industrial uses need to be kept separate from residential areas, industrial areas were not considered appropriate places for residences.

While this convention generally remains, modifications have resulted from changes in lifestyles and marketing demands. Residences, shops, and offices in the same area, and in the same building are appearing with greater frequency. More recently, zoning ordinances, in general, have been allowing a greater mixing of uses. This has been done to bring vitality to commercial areas that became empty after 5:00PM, and to reduce traffic and energy consumption.

C. SHORELAND ZONING

As a result of the Mandatory Shoreland Zoning Act (Title 38 § 435-449), all Maine municipalities must adopt, administer, and enforce zoning ordinances that regulate land use activities within a 250-foot wide buffer along all tidal waters, great ponds, rivers, non-forested freshwater wetlands of ten acres or more, and coastal wetlands, and within 75 feet of certain streams. Rivers are free-flowing water bodies that drain a watershed of 25 square miles or more. Great ponds are water bodies with a natural surface area of ten acres or more or an artificially created surface area of 30 acres or more. A stream is defined as the outlet of a great pond or a water body shown on a U.S.G.S. topographic map as the confluence of two perennial streams.

The statute provides for the Board of Environmental Protection (BEP) to adopt a set of minimum standards that a municipal ordinance must meet. These minimum standards are published as guidelines for municipal ordinances. Failure of a municipality to enact a local ordinance that meets these minimum requirements, or to provide adequate justification supporting a conclusion that the minimum requirements are not appropriate, will result in the adoption of the necessary ordinance or ordinance provisions by the Board of Environmental Protection "on behalf of" the municipality. An ordinance adopted by the Board must be administered and enforced by the municipality.

The guidelines, adopted by the BEP in 1990, with subsequent revisions, suggest the establishment of as many as six different districts in the ordinance that recognize the differing levels of existing development and value of natural resource features. There is an extensive set of performance standards designed to protect water quality, wildlife habitat, and waterfront aesthetics. A copy of the guidelines may be obtained from the DEP or downloaded from the internet at <http://www.maine.gov/dep/blwq/docstand/szpage.htm>.

Incorporation of the shoreland zoning provisions into a town's overall zoning ordinance will facilitate administration and enforcement. However many towns have enacted two separate ordinances.

D. FLOODPLAIN MANAGEMENT

In the earlier years of the twentieth century, it was common for communities to allow and even at times encourage development along their rivers in areas we know today as floodplains. Millions of dollars were spent developing flood control structures that often resulted in encouraging more development. When the area flooded, millions of dollars more were spent on disaster assistance. In 1968, Congress adopted a program to reduce the cost of flooding to the taxpayers and to break this cycle of flood, damage, repair, flood, damage, and repair. That program is known as the National Flood Insurance Program (NFIP). It offers flood insurance in return for regulation of development in these high-risk areas. Flood insurance is not available in communities that do not participate in the NFIP. In order for property owners to be eligible for insurance coverage for flood damage, the community must agree to adopt and enforce an ordinance regulating development within its 100-year floodplain, otherwise known as the *Special Flood Hazard Area* (SFHA). This ordinance typically does not control lot sizes or use, but establishes performance standards designed to minimize flood damage from all development that occurs in the SFHA.

Communities are provided with a Flood Insurance Rate Map (FIRM) prepared by the Federal Emergency Management Agency (FEMA). These maps come in two basic formats. In communities with low potential risk or with little development and low potential for development, the level of mapping is basic. FEMA usually provides what is commonly known as "Flat Maps" without base flood elevations on them. These are typically based on intuitive and local knowledge of flooding in the community. The Special Flood Hazard Areas are identified as "Unnumbered A Zones."

In communities with more risk or a greater potential for development in the high risk areas, FEMA has provided a detailed Flood Insurance Study (FIS) with accompanying Flood

Insurance Rate Maps, often referred to as "Z-fold" maps, with base flood elevations (100-year flood height). These elevations are given in a uniform national vertical datum such as National Geodetic Vertical Datum (NGVD 1929) or the newer maps in North American Vertical Datum (NAVD 1988). Many equate the measurement to the more common term, mean sea level (msl) which is similar but not as exacting.

The 100-year flood is the term commonly used to describe the average return frequency of a 100-year flooding event. However, the term, *100-year flood*, does not mean that it will happen only once in 100 years. It is a statistical representation of a flood having a 1% chance of occurring in any given year. The Flood of 1987 in many parts of Maine was a 100-year event, but it could happen again at any time. Other "100-year storms" have occurred in Maine in 1991, 1993, 1996, 1997, and 1998. In the mapped areas on a community's FIRM, there is a high probability of flooding. In a 30-year period, there is a 26% chance that an area identified as the 100-year floodplain will flood. However the lower the property's elevation in a SFHA, the higher the risk. The flooding potential or return frequency increases as the ground elevation decreases from the upland edge of the floodplain and gets closer to the water's edge.

The Floodplain Management Ordinance that the community must adopt in order to participate must meet the minimum requirement of the NFIP as well as the State's additional standards. The basic requirements of the ordinance are that it:

- a) Adopt the most current Flood Insurance Rate Map (FIRM) provided by FEMA.
- b) Require permits for all "development" in the Special Flood Hazard Area.
- c) Severely limit activities in a floodway due to high velocities and greater depths.
- d) Require that the "lowest floor", including basement, of any structure built anywhere in the floodplain be one foot above the expected 100-year flood elevation.
- e) Establish standards for open foundation construction in coastal areas where there is significant wave action.

There are additional standards accompanying these requirements that are intended to reduce damages to buildings and any other development established in high-risk areas. This ordinance must be adopted by the community's legislative body, typically at town meeting or by the city council. The Maine State Planning Office has developed a model Floodplain Management Ordinance, which incorporates all of the minimum federal and state requirements, and is available through the Maine Floodplain Management Program in the State Planning Office. It can be downloaded from the internet at <http://www.state.me.us/spo/flood/ordinance%20page.htm>. However, there are several versions of the model and a community must make sure it obtains the correct version.

Flood Insurance Rate Maps are needed not only for the administration of a community's Floodplain Management Ordinance, but are also important for property owners when looking to buy or sell real estate. Insurance agents rely on the map for determining what premium rate will apply when writing flood insurance policies and federal law requires lenders to determine if a structure is in or out of the floodplain when making a loan. Placing the maps in an area for public viewing is very important to the success of the community's local program. The FIRMs are available for viewing and printing via the Maine Floodplain

Management website at <http://www.sate.me.us/spo/flood/map/> and click on FEMA Map Service Center in the center section of the screen or at the following FEMA website: <http://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1>.

The ability to determine if a subject property is in or out of the shaded flood zone is critical to the proper administration of the ordinance. An engineer's scale is essential in making these determinations. An additional tool that is helpful is a hand level or "pop" level. This is handy in making general observations in the field. The ordinance requires that new structures or substantially improved structures built in the floodplain have an Elevation Certificate completed by a Professional Land Surveyor, Engineer, or Architect. This certificate is designed to verify the "as-built" elevation of the lowest floor.

Because the ordinance and accompanying maps establish different zones within the mapped high-risk areas and provides for regulations unique to these zones, it is a zoning ordinance. The State Planning Office publishes a manual, *Maine Floodplain Management Handbook*, on the administration of floodplain management ordinances. This manual and/or the Office should be consulted for additional assistance. This handbook is also available online at <http://www.state.me.us/spo/flood/handbook/>.

Participation in the NFIP is considered voluntary. However, if a town does not choose to enter the Program, there are some ramifications that should be thoroughly considered. For example, if there is a Presidentially declared disaster, the amount of assistance the community receives could be severely limited. Individuals with structures in the floodplain in that community cannot purchase flood insurance and therefore may not be able to secure financing to buy or improve their property. Federal grant programs are also limited in availability to a town that does not participate. The Small Business Administration, Farmers Home Administration and other federally-backed grant and loan programs are not able to provide assistance if flood insurance is not available. The community would also be ineligible for other Mitigation grants for planning or projects unless it has an approved mitigation plan. This became a requirement of the Flood Insurance Reform Act of 2004.

E. OVERLAY ZONES

There are times when it is desirable to impose an additional set of regulations beyond the basic district regulations on a portion of one or more districts, yet also continue to recognize the original provisions. For instance, a town may be interested in maintaining the architectural character of a section of town that is in both business and residential zoning districts. Instead of creating two additional zoning districts, a historic preservation business district and a historic preservation residential district, an historic preservation "overlay" district can be created. With an overlay district, the provisions of the "underlying district," business or residential, continue to apply regarding use and dimensional requirements. Overlaid on these regulations are those that affect the architecture and design of buildings.

Overlay districts are frequently used for historic and natural resource preservation, floodplain, shoreland, or wildlife protection. They are best used when seeking a particular objective, *i.e.*, preservation of habitat or continuity of building design. This can be accomplished without regard to the use, lot size, or other requirements otherwise in place.

Overlay districts may also be used to place specific restrictions on a portion of the underlying zone.

F. COMMON PERFORMANCE STANDARDS

Dividing a town up into different use districts will still not prevent one use from having adverse impacts upon another, or upon public resources or facilities. There would also remain no way of ensuring that overriding state requirements are incorporated where appropriate. For these reasons, ordinances contain performance standards or design criteria that are enforced to minimize off-site impacts or achieve some other community goal. The State Planning Office generally recommends a number of town-wide standards for inclusion in land use ordinances. Others, which regulate more unique land use activities, are less uniformly incorporated into zoning ordinances.

General performance standards help a community to achieve its planning goals. For example, a community interested in safe and orderly movement of traffic along its streets will probably include some standards on road access and driveways. An interest in protecting the integrity of each of the different zoning districts created might result in buffering requirements for properties developed along the boundary of another district. Provisions for preventing the deterioration of common resources, such as water, storage of certain materials, and handling of wastes generated through use of land would be considered general performance standards. A method to identify land area suitable for development will usually be included. Provisions for dealing in a consistent way with uses that require special review and approval, such as cluster developments, industrial, or recreational facilities, will commonly be a part of land use ordinances.

As a way of showing how land use concerns are translated into performance standards, several examples are provided below. These standards require a great deal of thought and foresight.

Off-Street Parking and Loading

Parking and loading requirements are included in an ordinance to lessen street congestion and provide adequate maneuvering space. Parking and loading requirements are generally broken into two parts: 1) the number of parking spaces and loading bays required on the site, and 2) the design of parking areas.

Parking space requirements are usually based upon the size of the facility and the number of employees or dwelling units. There are a variety of guides available regarding the demand for parking spaces created by various uses, however many of these guides recognize there is a wide variation in parking demand. An area served by public transit will have less need for off-street parking spaces than one that is not. A shopping center of ten small retail stores will need to meet less demand than the aggregate of ten individual stores on their own lots.

Judging whether a numerical standard is met may be difficult for uses served by a gravel-surfaced parking area, as there is no pavement to be striped. Where gravel surfaced parking areas are common, parking requirements should reflect a minimum square footage of parking area per space as an alternative to counting spaces. Allowing 300 square feet of

parking area per space will provide enough room for the parking space and aisles between spaces.

Recent changes in state and federal laws to assure equal services be available to disabled citizens now require a number of spaces be designated as reserved for handicapped individuals. Maine law requires owners of private parking areas to arrange for enforcement of "handicapped only" parking provisions. This arrangement may include an agreement with the municipal police department or county sheriff. See Title 30-A MRSA § 3009, sub §1, paragraph D.

Parking lot design standards usually dictate minimum parking space width and lengths, as well as, a minimum aisle width. The dimensions of a parking space change with the angle between the space and aisle.

Ordinances sometimes permit the off-street parking for an approved use to be a limited distance away from the location of the use. Concern over the binding arrangements for continued availability should be addressed. Increasingly, ordinances are providing opportunities to meet parking standards with shared facilities.

Signs

The degree to which communities control signs varies significantly. Communities control signs for three basic purposes: 1) traffic safety, 2) control of lighting levels, and 3) general community aesthetics. An uncontrolled collection of signs along a highway can be distracting to motorists and make the search for a particular establishment difficult. Without controls, signs can block a motorist's vision of traffic control signs or signals, or could imitate official traffic control signs creating a safety hazard. Associated with traffic safety is the brightness, direction, and type of lighting used in signs. Unshielded bulbs can create a disturbing glare to motorists. Additionally, uncontrolled lighting can "spill over" onto neighboring properties. Finally, some communities attempting to create or maintain visual aesthetics may establish specific standards for the design of signs or the materials from which they are made.

Sign controls usually address issues such as size, placement, height, and lighting. Frequently, the permissible size of signs will differ depending upon the use and the district in which they are located. Lighting is included to control glare and safeguard travel. Some communities may also prohibit internally lit signs or dictate their color patterns in order to limit lighting impacts.

State law prohibits signs from advertising goods or services not available on the premises. The law establishes a system of Official Business Directory Signs so businesses can let travelers know of their location. State law also prohibits signs with moving or flashing lights or moving parts, and signs taller than 20 feet. (Title 23 § 1914)

Accessory Uses and Home Occupations

An accessory use could be considered an addition to an existing use. It is a use that typically would not be permitted in a district without the principal use to which it is appended. A grocery store or gaming house may not be permitted in a zoning district, but when these

uses are accessory to a permitted campground, they are allowed. Most ordinances contain a definition that requires that accessory uses be incidental to the principal use and, in the aggregate, not subordinate the principal use.

Most early zoning ordinances did not permit any business activity to take place in a residential district. A strict interpretation of these regulations prohibited a plumber or electrician from operating their business out of their home, though the business activity took place elsewhere. It also prohibited craftsmen, artisans, and professionals from carrying on their trade within the home. Ordinances were amended to allow limited business activities within the home.

The intent of most home occupation regulations is to allow those business activities within a dwelling unit that can be conducted without the average passerby knowing it. Usually the number of employees who are not residents of the dwelling is limited, modification to the dwelling in a manner not customary to residential buildings is prohibited, and the outside display, sales, or storage of products or materials is banned. Usually the retail sale of items not made on the premises is prohibited, as well.

In recent times, establishing a home occupation has become an important means for individuals to start their own businesses. The ability to establish a business without the need for additional rent or facility costs can make the difference between having work and being unemployed. Many rural communities see home occupations as an important aspect in their economic development strategies. As successful businesses grow, they can afford the move out of the home or garage and into a business-oriented environment.

G. SITE PLAN REVIEW

Many municipalities, either in addition to or instead of a zoning ordinance, have enacted a Site Plan Review Ordinance. This ordinance is not a zoning ordinance, in that it does not divide the municipality into various districts or specify what uses are allowed, but it does prescribe a set of performance standards for certain types of development and establishes a review procedure to determine if these standards are met. While the procedure may be similar to a conditional use or special exception review, site review focuses on the impacts of that use on the site and surrounding properties.

Typically, the planning board acts as the review body, although some municipalities have established separate site review boards and may have staff level review for small projects. The ordinance must define the types of developments needing review. In many ordinances, multifamily developments and all commercial and industrial uses must be reviewed; everything except a single-family house. The ordinance must also define when a change or expansion to an existing use must be reviewed. It is very important that this type of ordinance contain specific standards of review.

NOTES

IV. State Laws Affecting Municipal Zoning

Previous sections generally mentioned some of the constraints on local zoning placed by the Legislature. This section provides a more detailed description of the statutory framework into which municipal zoning must fit. This section has been divided into two subsections:

A. *Planning and Land Use Regulation Statutes of Chapter 187* describes Chapter 187 of Title 30-A. It is within this subchapter of law that the Legislature has established the parameters for local growth management, including comprehensive planning and zoning.

B. *Other Statutes Affecting Municipal Zoning* covers other state laws that place a constraint on local zoning ordinances.

In later reading, Sections V and VI describe still other state laws which have impacts on municipal land use controls other than zoning ordinances, and state and federal land use controls of which CEOs should be aware, yet do not necessarily have a direct involvement in the administration or enforcement.

A. PLANNING AND LAND USE REGULATION STATUTES OF CHAPTER 187

The majority of the state laws concerning municipal land use regulation can be found in Chapter 187 of Title 30-A. This chapter is divided into six subchapters, four of which are summarized below. Subchapters IV, *Subdivisions*, and VI, *Municipal Regulation of Water Levels and Minimum Flows*, are discussed in Section V of this manual.

SUBCHAPTER I GENERAL PROVISIONS

This subchapter contains a list of definitions for terms used in the Chapter 187. Its second section declares violations of municipal land use ordinances to be a nuisance for purposes of prosecution. It is here that a zoning ordinance is defined as "a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district."

SUBCHAPTER II GROWTH MANAGEMENT PROGRAMS

This subchapter, sections 4312 to 4349, was enacted in 1988 and substantially revised in 1991, 1992, 1994, and again in 2001. Additional amendments were adopted in 2002. It is here that the requirements for comprehensive planning are found. According to the *Comprehensive Planning and Land Use Regulation Act*, a zoning ordinance must be enacted "pursuant to and consistent with" a comprehensive plan. Consistency means that the provisions of the zoning ordinance such as districting, permitted uses, and lot sizes support and reflect the future land use plan.

The State Planning Office's Community Planning and Investment Program has adopted rules that provide for the process by which it will review a municipality's zoning ordinance for

consistency with a comprehensive plan. These rules may be obtained from the Office or downloaded from the internet at <http://www.maine.gov/sos/cec/rcn/apa/07/chaps07.htm> and clicking on Ch. 203. The Program provides grants to municipalities to assist with implementation of adopted comprehensive plans. A municipality that accepts an implementation grant must then submit its zoning ordinance to the Office for review. In this case, the ordinance either may be in draft form, or already adopted by the municipal governing body.

The 2001 amendments to the Act changed the requirements for municipalities to ensure zoning ordinances are consistent with local plans:

- must be consistent with the plan ***within 24 months of the plan's adoption***. Any portion of a shoreland zoning ordinance, which regulates land use beyond the area required by the *Mandatory Shoreland Zoning Act*, not consistent with a comprehensive plan is no longer in effect 24 months after adoption of the plan.
- Any zoning ordinance other than a shoreland ordinance, must be consistent with a consistent comprehensive plan ***by January 1, 2003***, unless:
 - a) The municipality has contract with the SPO to prepare a comprehensive plan or implementation program, in which case the ordinance remains valid for up to 4 years after the first payment of its planning assistance grant or 2 years after receipt of the first payment of the implementation grant, whichever comes first;
 - b) The ordinance conflicts with a newly adopted comprehensive plan or plan amendment, in which case the ordinance remains in effect for a period of up to 24 months immediately following adoption of the plan or plan amendment; or
 - c) The municipality had applied to the SPO for financial assistance for its first planning assistance or implementation assistance grant and been denied due to the lack of state funds on before January 1, 2003.

The provisions also apply to building permit limitation ordinances and to impact fee ordinances. However, with the enactment of the 2001 amendments, the requirements that other land use ordinances, such as site review and subdivision regulations, be consistent with a comprehensive plan has been repealed.

The 2002 amendments mostly were intended to encourage more than one municipality to work together to develop growth management programs.

The *Act* also establishes a system whereby municipal planning programs may be certified by the State Planning Office as consistent with state law. Certification of consistency is a voluntary program available at the discretion of the municipality. A community planning program consists of both the municipality's comprehensive plan and the implementation strategies for achieving the policies contained in the plan. A zoning ordinance is typically the primary vehicle for implementing the land use plan. A municipal program may be submitted for voluntary certification after adoption of the plan and enactment of the zoning ordinance or amendments, as well as, other implementation strategies called for in the plan.

Any plan, zoning ordinance, or other land use regulation adopted under previous statutes is allowed to remain in effect until amended or repealed in accordance with the new time limit provisions.

As discussed in Section II, a comprehensive plan lays out the foundation for the improvement of municipal services and facilities and the day-to-day operation of local government, as well as the land use regulations. Section 4326 of the law sets out the requirements for the content of the plan. A plan consists of three different sections, 1) an inventory and analysis of existing conditions, resources, facilities, and services, 2) the development of policies for the future, and 3) strategies for implementing these policies.

The Legislature has established subject areas that must be included in the inventory section of the plan. These areas include economic and demographic data, natural and historic resources, transportation, housing, land use, and public facilities and services. Based upon an analysis of the information gathered, the plan should present a set of policies that reflect the ten goals of the law. The law contains nine guidelines for the development of the implementation strategy. These implementation strategies develop the basis for the zoning ordinance and other land use regulations, as well as lay the foundation for the town's major spending decisions.

SUBCHAPTER III *LAND USE REGULATION*

Section 4351 states that subchapter III is an express limitation on a municipality's home rule authority. Therefore, the remainder of the subchapter clearly places limitations on how a municipality may regulate land use.

Zoning

Section 4352 contains more specific requirements for zoning ordinance enactment than the requirement for consistency with a comprehensive plan. The statute contains the requirements for hearings prior to enactment of the ordinance and any subsequent amendments. Until October 1994, the statute contained a provision that indicated that zoning ordinances were applicable to local and county government but not the State. Since that time, zoning ordinances consistent with a comprehensive plan which met statutory requirements must be adhered to by state agencies seeking to develop land for any building, parking facility, or other structure. The statute does contain a provision allowing the state to find that overriding state concerns require certain zoning restrictions be waived. All ordinances must include a map showing the zoning district boundaries.

The statute allows an ordinance to require the posting of bonds upon request, for zoning amendments, and establishes (contract and conditional zoning) procedures that allow a municipality to rezone individual pieces of property after negotiation of specific terms with the property owner.

State law contains some procedural provisions regarding the enactment of zoning ordinances that are more specific than those controlling the adoption of other ordinances. In 1991, a requirement that a hearing be held prior to the adoption or amendment of a zoning ordinance was added by the Legislature. (Title 30-A § 4352, sub §§ 9, 10) Subsection 9 now specifies that notice of the hearing be posted in the municipal office at

least 13 days in advance of the hearing and be published in a newspaper at least twice. If the zoning amendment rezones property in a manner that permits industrial or commercial uses where not previously permitted or prohibits these uses where previously permitted, Subsection 10 requires the owners of the affected property must be notified of the hearing by mail. This subsection should be checked carefully for each amendment to see if the requirements to notify property owners by mail are applicable.

Zoning Adjustment

Title 30-A § 4353 requires that a board of appeals be established in any municipality that enacts a zoning ordinance. This statute contains provisions regarding the jurisdiction, procedures, and powers of the board. The board is responsible to hear and take action upon variance appeals or administrative appeals. A variance appeal seeks relief from the strict application of a zoning ordinance. An administrative appeal seeks relief from any action or failure to act of an official or board responsible for administration of a zoning ordinance. An administrative appeal may be made when an applicant for a permit or other affected local citizen alleges that the CEO or planning board has misinterpreted or made an error in administering the zoning ordinance, or has failed to act under the ordinance. If the appellant believes that, in its turn, the Board of Appeals has also misinterpreted the ordinance or that justice has not been done, then the appellant may appeal the decision made by the board of appeals to the Superior Court.

However, when an appeal involves an enforcement decision by a CEO, rather than an administrative decision, the board of appeals will not have jurisdiction, **unless an ordinance specifically states otherwise**. The municipality may choose not to have the appeals board hear administrative appeals and provide for **only** a direct appeal to Superior Court through their ordinance.

A board of appeals is granted three powers by statute: (1) The board may interpret the provisions of an ordinance when there is question; (2) The board is authorized to approve special exceptions or conditional uses when the local ordinance also provides for that authority. Where the board of appeals is not authorized to make such approvals, the statute authorizes it to hear appeals of the actions of the board that is; and (3) The Board is authorized to grant variances. Where there is no appeals board established, an appeal may be taken directly to Superior Court.

If a CEO cannot interpret the language of an ordinance clearly, the board of appeals is the body from which to seek clarification.

To try to prevent an illegal action from continuing during an appeal process, first check the procedure for dealing with violations in your ordinance. (see also the training manual, *Legal Issues and Basic Enforcement Techniques*) Whatever work continues during an appeal will be subject to removal pending the outcome of the appeal. The violator should be made aware of this. If the continued work creates an "irreparable harm," i.e., an immediate harm that cannot be corrected by the type of relief a court can provide, an injunction may be sought from District Court. See the *Legal Issues* manual for more information on this issue.

State law restricts the authority of an appeals board to grant variances, with the intention that it be very difficult for an applicant to secure a variance (MRSA 30-A § 4353). The

variance may only be granted if the applicant's appeal meets all of the following four tests of hardship:

- i. That the land in question cannot yield a reasonable return unless a variance is granted;
- ii. That the need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- iii. That the granting of a variance will not alter the essential character of the locality; and
- iv. That the hardship is not the result of action taken by the applicant or a prior owner.

A certificate of variance must be recorded at the local registry of deeds within 90 days of the date of final written approval of the variance, or the variance is void.

Within the shoreland zone, there are additional criteria for securing a variance. These criteria are included in **Section 16** of the D.E.P.'s *Guidelines*, and include:

- 1) Variances may only be granted from strict application of dimensional requirements such as for lot width, setback from lot lines, height of structures or perceived lot coverage.
- 2) A use variance is not permitted. No variances may be granted for starting a use that is prohibited by the shoreland ordinance.
- 3) However, the *Guidelines* do allow the board of appeals to grant a variance for the purpose of making a property accessible to a person with a disability who is living at the property. The variance may be only for physical equipment and facilities to aid the disabled person's movement to, from, and within the property, i.e., for someone in a wheelchair.

Generally, the only times that variance appeals should come up is when a landowner wants to develop an old "grandfathered" lot that pre-dates the adoption of the shoreland ordinance. Such a lot would characteristically be "substandard," i.e., smaller than required by the shoreland ordinance or have a dimension too short such as lot depth. Even then, a variance should only be granted if the proposed structure could meet all other provisions of the shoreland zoning ordinance except for the one nonconformity for which the variance is being sought. A board of appeals must send a copy of any variance granted within the shoreland zone to the DEP.

Several times during the 1990s, the Legislature has amended section 4353 to relax the requirements for a variance. A board of appeals is authorized to grant a variance to allow a dwelling to become accessible to a person with a disability who is living in or regularly visits the dwelling without the need for a showing of hardship. The board may impose conditions on the variance, such as limiting the variance to the duration of the disability or to the time the disabled person lives on the property.

The statute also allows an ordinance to provide for granting a variance from the dimensional requirements for a single family dwelling that is the primary residence of the applicant with a relaxed definition of "hardship." Under this provision, there is no need to demonstrate the

lack of any economic use of the property without the variance. The variance is limited to no more than 20% of the required setback. The applicant must demonstrate that request is based on a need, not mere convenience, and that there is no feasible alternative. The statute now allows the 20% limit to be exceeded with the written permission of the abutting landowner. A zoning ordinance must contain a provision authorizing these relaxed terms for a dimensional variance.

In 1997, a provision was added that provides another opportunity for municipalities to relax the standards for obtaining a variance. This provision is not limited to single-family dwellings and may be used for any use or structure except in the shoreland zone. Rather than setting a standard of “undue hardship,” this provision allows an ordinance to permit a variance to a dimensional requirement if the applicant shows “practical difficulty.” Practical difficulty is defined to mean that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the applicant. In addition to showing there is practical difficulty, the applicant must also demonstrate that the need for a variance is due to the unique circumstances of the property; granting of a variance will not produce an undesirable change in the character of the neighborhood and will not detrimentally affect the use or market value of abutting properties; the practical difficulty is not the result of action taken by the applicant or a prior owner; and that no other feasible alternative to a variance is available to the petitioner. Again, an ordinance must contain these provisions in order for a board of appeals to grant a variance under these terms.

A 2003 amendment clarified that municipal ordinance may allow the Planning Board to reduce the size of lots in a subdivision in exchange for the preservation of open space without that reduction being considered a variance.

Community Living Arrangements

In response to legislative policy to deinstitutionalize the mentally handicapped and developmentally disabled, while facing municipal and neighborhood opposition to the establishment of community facilities for these persons, the Legislature established a requirement to permit these facilities in residentially zoned areas. In accordance with the Federal Fair Housing Act, the statute was amended in 1997 to require that a housing facility for eight or fewer mentally handicapped or developmentally disabled persons be considered a single-family use.

Regulation of Manufactured Housing

Concerned that municipalities were not providing an adequate opportunity for the establishment of mobile homes in communities, the Legislature has placed restrictions on a town's ability to regulate the placement of manufactured housing. Prior to passage of the first statute in 1983, many municipalities either did not allow manufactured housing at all, or placed substantially greater restrictions on manufactured housing than on site-built housing. The Legislature responded by requiring that municipalities permit manufactured housing to be placed on individual lots in a number of locations where site-built housing is permitted, subject to similar restrictions. Municipalities were permitted to require the exterior of the housing look like site-built housing and that it be placed on a foundation. The protection extended by the original law did not apply to units built prior to 1976, when federal safety,

design, and construction standards went into place. In 1983, the law was amended. Now, municipalities may not prohibit manufactured housing units built prior to 1976 solely because of the date of manufacture and towns must allow older units to be moved within the town. In 1995, the statute was amended again to require that municipalities allow modular housing that meet state construction standards where other single-family homes are permitted.

In response to municipal restrictions on the development of mobile home parks, the statute was expanded to restrict zoning regulation of parks, as well. The statute requires towns to permit the development of parks and the expansion of existing parks in a number of suitable areas and limits the lot size or density restrictions that may be placed on parks. There are additional limitations placed on the extent to which zoning can control the design of parks.

Finally, code enforcement officers are prohibited from issuing a permit for the placement of new manufactured housing, unless the applicant has provided evidence that sales tax has been paid. The law further states that any local permit required for the manufactured housing is deemed invalid until payment of the tax has been certified.

State standards related to the installation of manufactured housing may be obtained from the Department of Professional and Financial Regulation, Board of Manufactured Housing. They may be reached at 624-8612.

Rate of growth ordinances

A “rate of growth ordinance” is an ordinance that limits the number of building or development permits issued by a municipality over a designated time frame. State law now requires that any municipality that enacts a rate of growth ordinance must review and update the ordinance at least every 3 years to determine whether the ordinance is still necessary and how the ordinance should be adjusted to meet current conditions. The statute also states that a municipality may enact rate of growth ordinances that set different limits on the number of building or development permits that are permitted in designated rural areas and designated growth areas within the municipality.

SUBCHAPTER V ENFORCEMENT OF LAND USE REGULATIONS

Effective January 1, 1993, a municipality may not employ a code enforcement officer who is not certified by the State Planning Office. The law does allow an individual a grace period of up to 12 months from the date of employment to become certified, except that local plumbing inspectors must be certified prior to appointment. The Office may grant an extension of this grace period if it can be proven that certification imposes a hardship on the municipality (30-A MRSA § 4451).

In response to concerns regarding the length of time and the expense involved with prosecution of land use violations in Superior Court, the Legislature authorized the District Courts to provide equitable relief in addition to the assessment of fines. Section 4452 was enacted to establish the procedures and penalties for enforcement of land use laws and ordinances. Specifically, the law:

- Establishes firm guidelines and minimums to govern fines for violations; and

- Establishes the code enforcement officer's rights to enter property at reasonable hours or with the consent of the owner to make inspections; to issue a summons to alleged violators; and to represent the municipality in District Court, if authorized by the municipal officers to do so.

Not only is a property owner responsible for violations, but also the owner's agent or contractor is liable for the penalties set forth in the statute.

Prior to the passage of section 4452, municipalities were frequently faced with the prospect of paying significant attorney's fees for the prosecution of a zoning violation that resulted in a nominal fine and permission for the violation to continue. Now, prosecution in District Court can take as little as several weeks. With the proper training and certification, the code enforcement officer can represent the town before the court. The District Court judge can order the removal of the violation, as well as assess a fine, and the town will be awarded its attorney fees and other costs, if it prevails. In addition, a minimum fine of \$100 is established with a maximum of \$2,500. These fines may be assessed on a per day basis and be increased up to \$25,000, when the same party has been previously convicted within the past two years.

This section authorizes the municipality to enforce the terms and conditions of a permit issued by the Department of Environmental Protection for septage land disposal or storage. When authorized by the municipality, a code enforcement officer may also enforce the provisions of the Natural Resources Protection Act.

B. OTHER STATUTES AFFECTING MUNICIPAL ZONING

SHORELAND ZONING

The Mandatory Shoreland Zoning Act is located in Title 38, Sections 435 to 449. All municipalities are required to institute zoning controls within 250 feet of rivers, great ponds, tidal waters, freshwater and coastal wetlands, and within 75 feet of certain streams. The Department of Environmental Protection established a set of minimum standards, and is authorized to enact those standards for towns that fail to do so themselves. These minimum standards are known as the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*. The guidelines contain all of the provisions found in any zoning ordinance: the delineation of districts, the listing of permitted uses in each district, the specifications for minimum lot sizes and other dimensional requirements, and a number of other performance standards that are designed to protect water quality and wildlife habitat and maintain aesthetics.

The municipality, through the code enforcement officer, has the responsibility to administer and enforce shoreland zoning whether the ordinance has been adopted by the municipality or by the Board of Environmental Protection on behalf of the municipality. There are several provisions of the State statute that take precedence over any less restrictive provision in a local ordinance. **Regardless of whether these provisions appear in a local ordinance, the municipality must enforce them.**

- The statute requires that all "substantial expansions" to a nonconforming structure meet the setback requirement. A substantial expansion is one that expands the

structure by 30% or more in either floor area or volume. A CEO may not issue a permit to allow a structure that does not meet the setback requirement to be expanded by 30% or more. Note however that a municipality may adopt an alternative method for limiting expansions of structures that do not meet the water or wetland setback requirement. The alternative, which must be adopted into the local ordinance before it may be used, bases allowable expansions on the height of the structure and establishes maximum floor areas, depending on the distance the structure is from the water or wetland.

- Except for the establishment of water-dependent uses, new cleared openings are prohibited within a strip extending 75 feet inland from the normal high-water line.
- In areas designated as a resource protection district adjacent to a great pond, timber harvesting is prohibited within 75 feet of the water, unless the municipality, by ordinance, permits limited harvesting. The limitations on harvesting must include the following:
 1. The ground is frozen;
 2. There is no resultant soil disturbance;
 3. Wheeled or tracked equipment is not permitted in the 75-foot strip along the shore;
 4. Cutting is limited to no more than 30% of the volume of trees six inches or more in diameter in a ten year period; and
 5. The trees must be marked by a licensed professional forester.
- An amendment to a zoning provision that affects the shoreland zone must be sent to the DEP for review and is not effective until approved, or 45 days after its receipt if no response is received. However, permit applications received prior to the effective date shall be reviewed as if the ordinance was in effect. If an amendment is one that may be interpreted as weakening the provisions, a code enforcement officer should keep in mind that it may not survive DEP review, and warn any applicant of that fact in issuing a permit prior to receiving approval from the DEP.
- The statute identifies a number of rivers throughout the State that are labeled "significant river segments." Along these river segments, special setback and other provisions apply. Most of these river segments are in the northern and eastern part of the state. The identification of these rivers and the special provisions governing development along their shores are the result of an in-depth study of the State's rivers in the early 1980s. The river segments are those identified in the study as undeveloped stretches of rivers with values of statewide importance.

A set of model forms for the administration of shoreland zoning ordinances is available by contacting the DEP or the State Planning Office. A guide to reviewing shoreland permits has been prepared for shoreland ordinances, based upon the minimum State-required standards. A copy of the guide is contained in the Appendix. This guide should be modified for consistency with particular local requirements.

Title 38, section 441(3) lists the following duties for shoreland zoning code enforcement officers:

- Enforce the local shoreland zoning ordinance in accordance with the procedures contained in the ordinance
- Collect a fee, if authorized by the municipality, for every shoreland permit issued. The amount of any fee shall be set by the municipality. The fee shall be remitted to the municipality.
- Keep a complete record of all actions of the office, including applications submitted, permits granted or denied, variances granted or denied, revocation actions, revocation of permits, appeals, court actions, violations investigated, violations found and fees collected. **On a biennial basis, a summary of this record is to be submitted to the Director of the Division of Land Resource Regulation of the Department of Environmental Protection.**
- Investigate complaints of alleged violations of local land use laws.

Title 38 § 444-A authorizes the State to take enforcement action against a municipality that fails to enforce its shoreland zoning ordinance either by ignoring violations or by approving applications that do not comply with the ordinance. Therefore, it is very important for the CEO to be diligent about enforcement and to seek advice from qualified professionals (e.g., lawyer or planner) when any questions arise.

It should also be noted that a board of appeals **must** send a copy of any variance granted within the shoreland zone to the DEP.

EXCAVATION PITS

Title 30-A § 3105 places minimum standards on municipal regulation of gravel pits that are less than five acres in size, and therefore not within the jurisdiction of DEP. If a municipality regulates gravel or sand pits which are not subject to the jurisdiction of the Department of Environmental Protection, the ordinance must, at a minimum, require:

- the top of the cut bank to be no closer than ten feet from the property line and 25 feet to graveyards (13 MRSA § 1371-A); and
- the slope from a point ten feet from the property line to the bottom of the cut bank may not exceed a ratio of two (horizontal) to one (vertical).

A town may adopt standards that are more stringent. If a pit is not subject to any other control, the above standards apply by virtue of the statute. In addition, the statute establishes a procedure for enforcement and requires the municipal officers to conduct an inspection upon the request of an abutting property owner. The Maine Department of Transportation is required to conduct the inspection if requested by the municipality.

Chapter VI of the Manual contains further discussion of the regulations of excavation activities by the Department of Environmental Protection.

V. State Laws with Impacts on Other Municipal Land Use Controls

A. LAWS WHICH MANDATE OR RESTRICT MUNICIPAL ACTION

MUNICIPAL SUBDIVISION LAW

A subdivision, as defined by State statute, must be reviewed and approved by a municipal reviewing authority. Title 30-A § 4301 defines the municipal reviewing authority as the planning board, agency or office if one exists, or the municipal officers where there is no planning board. It is a code enforcement officer's responsibility to identify a proposed development as a subdivision, in order to avoid prohibited issuance of permits.

Sections 4401-4407 provide the framework and content of the municipal subdivision statute. Section 4401 defines a subdivision as **the division of a parcel of land into three or more lots within a five-year period**. There are, however, a number of exceptions and exemptions to be considered. A complete definition of a subdivision appears below.

In 2001 and 2002, the Legislature amended many of the exemptions in the law. The 2001 amendments became effective on September 21, 2001 and the 2002 amendments became effective on July 25, 2002. Any transactions for which the deed has been signed after these dates should be looked at in light of these new restrictions.

A subdivision is the division of a parcel of land into three or more lots within a five year period (beginning on or after September 23, 1971) whether accomplished by sale, lease, development, buildings, or "otherwise." The first division of a parcel creates the first two lots and the next division of either of the first two lots, by whomever, creates the third lot *unless*:

- 1) both divisions are accomplished by someone who has retained one of the lots for their own use as their principal residence for at least five years immediately prior the second dividing. That is, the subdivider must **have lived** in the "homestead" for **the five-year period immediately preceding the creation of the third lot**. In addition, **both** divisions must be accomplished by the person who has lived in the homestead for five years. If the owner of the homestead sells one lot, the buyer of that lot cannot then divide it within five years without creating a subdivision. After five years, the lot sold is no longer part of the original parcel and further division would be possible without triggering subdivision review.
- 2) the division of the tract or parcel is otherwise exempt.

Lots created by the following transactions are exempt from being counted in determining whether three lots are created in a five-year period unless the intent of the transfer is to avoid review under the law:

- **any division created by devise** (left in a will);
- **condemnation** (taken through eminent domain proceedings);
- **order of a court (divorce settlement, bankruptcy);**

- **gift to a person related to the donor by blood, marriage, or adoption** provided the property has been owned by the donor for at least five years prior to the gift. The 2001 amendments added five-year ownership restrictions and two other restrictions to the gift exemption. The recipient of the gift must be within the second degree of relation (that is a spouse, parent, grandparent, brother, sister, child or grandchild). In order to define what constitutes a gift, the law now stipulates that there may be no consideration in excess of 50% of the assessed value of the lot. The statute rescinds the exempt status of any lot transferred to someone not related to the original owner, if the transfer takes place within 5 years.
- **gift to a municipality;** or
- **transfer of any interest in land to the owner of land abutting that land provided a new lot is not created.** The law now forbids the abutter from reselling the land transferred within five years without it being considered a lot. The transfer to an abutter, to be exempt, must be to the abutter(s) only. That is, only those whose names currently appear on the deed to the property abutting may have their name appear on the deed to the property transferred.

Prior to July 25, 2002 lots 40 or more acres in size were not counted as lots *unless* the lot or the original parcel was located, in whole or in part in a shoreland zone, or the municipality had adopted a more restrictive ordinance and decided to count all 40-acre (or larger) lots. Amendments to the Subdivision Law took effect on July 25, 2002 to exclude 40-acre lots from exemption. As of this date a lot of 40 or more acres **must** be counted as a lot, except when a municipality has, by ordinance, or the municipal reviewing authority has, by regulation, elected not to count lots of 40 or more acres as lots when the parcel of land being divided is located entirely outside any shoreland area as defined in Title 38, section 435 or a municipality's shoreland zoning ordinance. **Code enforcement officers should be familiar with the municipality's subdivision ordinance to know whether 40-acre lots are exempt or not.**

A *subdivision* also includes the division of a new structure or structures on a parcel of land into 3 or more dwelling units within a 5-year period, the construction or placement of 3 or more dwelling units on a single parcel, and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. Under the statutory definition, the division of a new structure into three or more commercial or industrial uses is not a subdivision. A "new structure" is any structure or portion of a structure for which construction began on or after September 23, 1988.

As part of the 2001 amendments to the statute, municipalities were prohibited from expanding the definition of subdivision to include any divisions other than specifically listed in the statute until October 1, 2002. The State Planning Office has been charged with conducting a study on the adoption of definitions that expand what is considered a subdivision and report back to the Legislature. It is possible that as a result of that study that the Legislature will either extend the prohibition permanently or repeal it and give municipalities greater flexibility.

The effective date of the Subdivision Law was September 23, 1971. Subdivisions created prior to that date are exempt from review. These include:

- 1) subdivisions previously approved in accordance with the laws then in effect. Prior to 1971 Maine law required municipalities to review plans only when they were going to be recorded in a registry of deeds, but not otherwise. Thus, municipal ordinances often provided for review, but did not require it, making this a difficult exemption to prove;
- 2) previously existing subdivisions that did not require approval under the law (previously existing means the lots were actually surveyed and marked by steel pins or regular markers and numbered, *State ex rel Brennan v. R.D. Realty Corporation*); and
- 3) subdivisions for which a plan was legally recorded in the proper registry of deeds before September 23, 1971.

The Subdivision Law also exempts a subdivision created at any airport with an airport layout plan that has received final approval from the airport sponsor, the Department of Transportation and the Federal Aviation Administration.

The final exemption in the law is for a subdivision created in violation of the law that has been in existence for 20 years or more. The exception does not apply to a subdivision that has been enjoined pursuant enforcement action; for which approval was expressly denied by the municipal reviewing authority, and record of the denial was recorded in the appropriate registry of deeds; for which a lot owner was denied a building permit under section 4406, and record of the denial was recorded in the appropriate registry of deeds; or that has been the subject of an enforcement action or order, and record of the action or order was recorded in the appropriate registry of deeds.

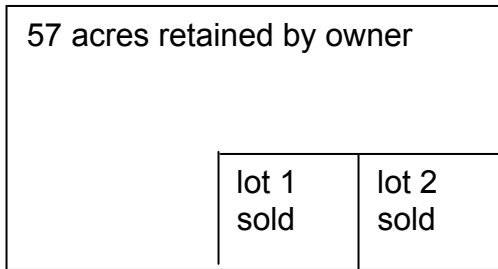
Code enforcement officers must be familiar with the definition of subdivision. Section 4406 prohibits a CEO from issuing a building or use permit for a lot in a subdivision that has not received municipal approval. The CEO, in the review of applications for permits, should routinely determine when a lot was created and whether other lots have been created from the same parcel within five years. Permit application forms should ask the question: *was the lot for which a permit is being requested created by division from another lot in the past five years?* One way to resolve the issue of whether the proposed structure or use will be in an older unapproved subdivision is for the CEO to require that the applicant provide either a title attorney's opinion or a notarized statement of his or her own. This shifts the burden of making a determination with certainty away from the CEO who otherwise would be forced to conduct his or her own records search.

A number of examples of land transactions and whether they constitute subdivisions are on pages 33 and 34. For the purpose of these examples, assume that all transactions take place within a five-year period.

Through their reception of newly recorded deeds each month and plotting new lots on the tax maps, the municipal assessor(s) is (are) usually in the best position to alert the code enforcement officer or the planning board that a subdivision may have been created. Open communication between the assessor, the CEO, and the planning board will help with

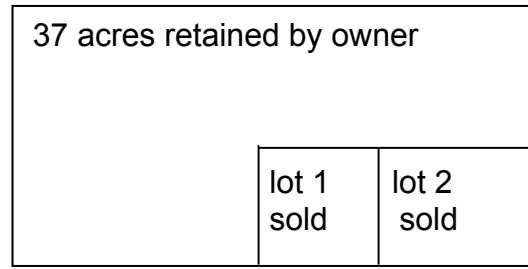
A number of examples of land transactions and whether they constitute subdivision follow. For the purpose of these examples, assume that all transactions take place within a 5 year period.

EXAMPLE A



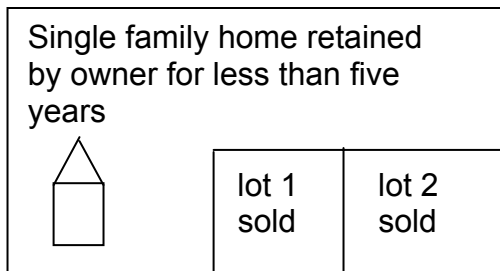
Is a subdivision unless the town has adopted the 40 acre lot exemption.

EXAMPLE B



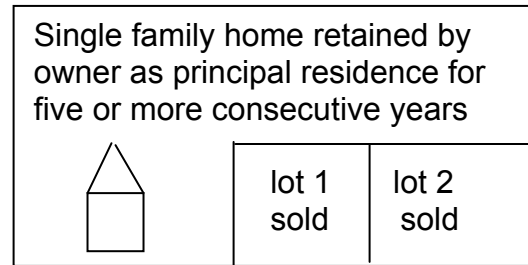
Is a subdivision because the remaining land is less than 40 acres.

EXAMPLE C



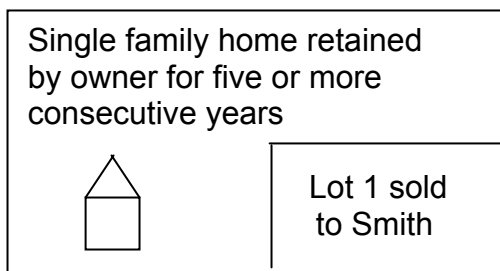
Is a subdivision because owner had not lived in the house for 5 years prior to the second lot being sold

EXAMPLE D

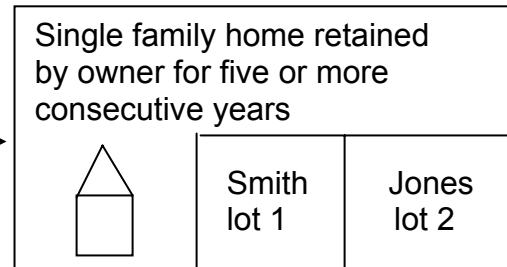


Not a subdivision because both lots sold by a person living in the house for the 5 years immediately preceding the second lot being sold.

EXAMPLE E

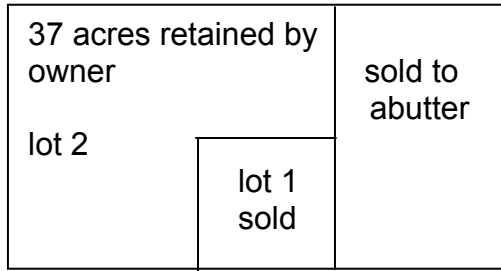


Not a subdivision because only two lots.



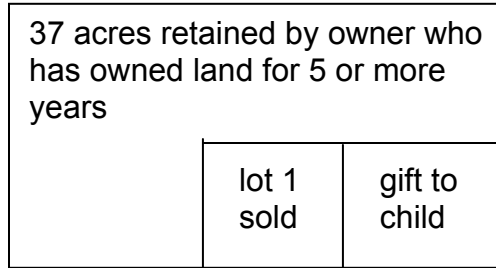
Is a subdivision because both lots were not created by original owner.

EXAMPLE F



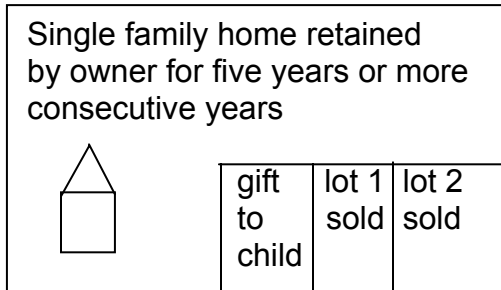
Not a subdivision because lot sold to abutter is exempt

EXAMPLE G



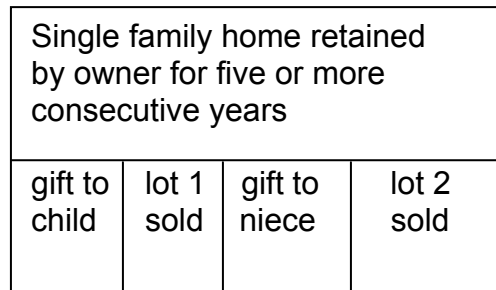
Not a subdivision because gifts to certain relatives are exempt provided donor has owned land for 5 or more years

EXAMPLE H



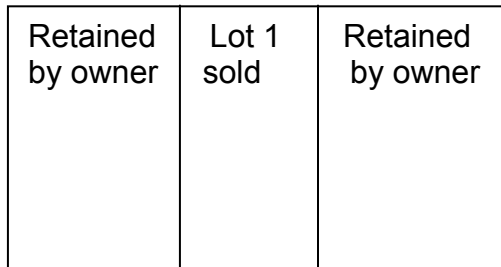
Not a subdivision because owner has lived on property for 5 or more years and gift to child is exempt.

EXAMPLE I



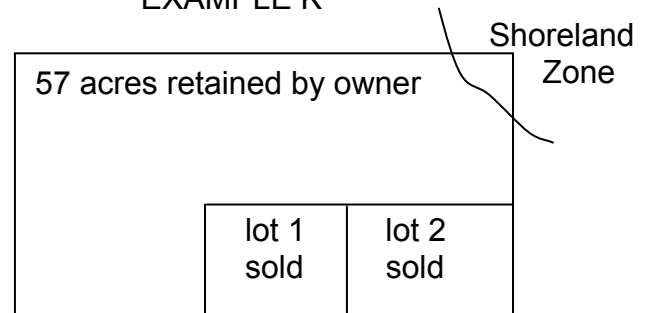
Is a subdivision because as of Sept. 21, 2001 gift to niece is not exempt.

EXAMPLE J



Not a subdivision. A 1994 court Decision indicated that lots are created When interest is transferred though the sale created two separate lots, they are Not counted if both are retained.

EXAMPLE K



Is a subdivision because the original parcel is partially within the shoreland zone. Even if the town has a 40 acre lot exemption.

enforcement of the subdivision law. The assessors receive copies of all deeds recorded at the registry and real estate transfer tax forms on a monthly basis. The deeds and the tax forms will be helpful in researching the history of transactions.

Upon learning that a subdivision has been created without municipal approval, the CEO should notify the seller, the buyer (if applicable), and the planning board. An application for a permit on a lot in an unapproved subdivision must be denied. The applicant should be informed of the reason and be instructed to proceed to the reviewing authority (planning board) for subdivision approval. The planning board should receive a copy of the letter to the applicant. By local ordinance or by established procedure, some CEOs are required to attend all of the board's meetings. In some way, the CEO should participate in planning board review, assisting where necessary.

Other than the prohibition on the issuance of a permit in unapproved subdivisions, the code enforcement officer is not specifically mentioned in the statute. The authority to enforce the subdivision law is usually delegated to the CEO, either by ordinance or by vote of the municipal officers. The determination of whether a subdivision has been created can be a complicated issue. Seeking assistance from an attorney, the regional council, the State Planning Office, or other CEOs is recommended. Please see the discussion of subdivision in Chapter VI in the Site Location of Development Law discussion. There is substantial overlap.

Under the Subdivision Law, it becomes incumbent upon the subdivider to ensure that the subdivision is developed consistent with the approved plans. It is incumbent upon all utilities that may install service to a lot or dwelling unit in a subdivision to require a "written authorization" that all permits were appropriately issued by local officials and remain valid and current. Following the installation, the utility provider must send the written authorization to the municipal officials having jurisdiction that the installation has been completed. 30-A MRSA § 4406 (3).

MAINE ENDANGERED SPECIES ACT

The Maine Endangered Species Act is found in Title 12 MRSA §§ 12801-12809. The Act prohibits state agencies or municipal governments from permitting, licensing, funding or carrying out projects that will significantly alter the habitat of any animal species designated as threatened or endangered or violate the protection guidelines established by the Department of Inland Fisheries and Wildlife (DIF&W). **Projects require DIF&W evaluation when occurring within a designated essential habitat.** However, to date essential habitat has been designated for only four species. CEOs should be aware of these habitats and check for them when reviewing a permit application. Any land use activity that requires a municipal permit must be reviewed by the DIF&W if it takes places within designated essential habitat. Projects requiring DIF&W evaluation include, but are not limited to:

- subdivision of land;
- construction or alteration of buildings, waste water systems, or utilities;
- conversion of seasonal dwellings to year round;

- exemption to minimum lot size requirements;
- construction or relocation of roads;
- exploration or extraction of minerals;
- alteration to wetlands, submerged bottomlands, or shoreland areas;
- and installation of docks, moorings, or aquaculture facilities.

Examples of projects that are exempt from DIF&W evaluation include:

- emergency repairs to existing structures and utilities;
- emergency activities necessary for public health and safety;
- interior repairs and construction; and
- any project not requiring a permit or license from, or funded or carried out by a state agency or municipality.

The DIF&W has identified and designated areas as essential habitat for the conservation of endangered and threatened species, specifically four species to date. Maps of designated areas are published in an *Atlas of Essential Wildlife Habitats for Maine's Endangered and Threatened Species*. This atlas is intended to be updated annually. **The Office has prepared a decision tree for determining when review is necessary for proposed projects. A copy of this can be found in the Appendix.**

PLUMBING LAWS

Title 30-A, section 4221 provides a list of general duties for plumbing inspectors:

- Inspect all plumbing for which permits are granted to assure compliance with State and municipal regulations and investigate all construction or work covered by those regulations;
- Condemn and reject all work done or being done or material used or being used which does not comply with the provisions of State and municipal regulations, and order changes necessary to obtain compliance;
- Issue a certificate of approval for any work approved;
- Keep an accurate account of all fees collected, and transfer the fees to the municipal treasurer;
- Keep a complete record of all essential transactions of the office;
- Perform other duties as provided by municipal ordinance; and
- Investigate complaints of alleged violations relating to plumbing or subsurface waste water disposal and take appropriate action.

Title 30-A § 4211(3) requires any person erecting a structure requiring subsurface disposal to provide documentation to the municipal officers that the system can be constructed in accordance with the *State of Maine Subsurface Waste Water Disposal Rules* (most recent amendment effective August 1, 2005 and can be downloaded from the internet at <http://www.maine.gov/sos/cec/rcn/apa/10/chaps10.htm> and clicking on Ch. 241). Any person expanding a structure using subsurface disposal must provide documentation that a legal replacement system can be installed in the event of a future malfunction. Notice of

that documentation must be recorded in the Registry of Deeds with copies sent to all abutters. Abutters are then prohibited from installing a well in a location that would prevent installation of the replacement system. The landowner also is prohibited from erecting a structure or conducting an activity that would prevent installation of the replacement system.

A common enforcement question is whether the State Plumbing Rules (can be downloaded from the internet at <http://www.maine.gov/sos/cec/rcn/apa/10/chaps10.htm> and clicking on Ch. 238) or other State law requires a residence to have an internal plumbing system with running water and be connected to a legal subsurface disposal system or similar system. The answer is "no." If internal plumbing is installed, the Plumbing Rules then require that it be connected to a potable water supply. If the owner/occupant will be disposing of human waste and gray water on the premises, he or she must do so in accordance with the Waste Water Disposal Rules. But absent a local ordinance to the contrary, it is legal for a person to carry water in and out, carry waste in and out, or use someone else's facilities on a different piece of property.

SEASONAL CONVERSION

Title 30-A § 4215(2) requires a permit from the local plumbing inspector before a seasonal dwelling can be converted to a year-round dwelling in the shoreland zone, if the disposal system is located within the shoreland zone. A "seasonal dwelling" is defined in Title 30-A § 4201(4) as "a dwelling which existed on December 31, 1981, and which was not used as a principal or year-round dwelling during the period from 1977 to 1981." Listing that dwelling as the occupant's legal residence for the purposes of voting, payment of income tax, or automobile registration or living there for more than seven months in any calendar year is evidence of use as a principal or year-round dwelling. Before issuing a conversion permit, the LPI must find that either

- A. There is a certificate of approval indicating that the dwelling's waste water disposal system substantially complies with the subsurface waste water disposal rules and applicable municipal ordinances;
- B. A replacement for an existing wastewater disposal system has been constructed so that it substantially complies with the rules and applicable municipal ordinances; or
- C. The dwelling unit is connected to an approved sanitary sewer system.

MALFUNCTIONING SEWAGE DISPOSAL SYSTEMS

Title 30-A § 3428 authorizes the municipal officers to correct malfunctioning sewage disposal units after providing notice to the owner or occupant of the property. This process is an alternative to treating the malfunction as a violation of the State's Subsurface Waste Water Disposal Rules. While a violation of the Waste Water Disposal Rules is clearly something that the LPI is empowered to handle, only the municipal officers may authorize corrective action or send notices, unless the LPI or CEO has been delegated that authority either by ordinance or by vote of the municipal officers. This authorization should be recorded in writing. Consult the training manual, *Basic Legal Issues and Enforcement Techniques for Code Enforcement Officers* for more information and forms to be used in the

enforcement of §3428 (available on the web at <http://www.maine.gov/spo/ceo.htm>) from the CEO Training and Certification Program).

JUNKYARDS/AUTOMOBILE GRAVEYARDS

Title 30-A §§ 3751-3760 impose an obligation on municipalities to license "junkyards," and "automobile graveyards," and automobile recycling businesses and to enforce the law. The statute requires the issuance of annual permit from the municipal officers for any junkyard or graveyard. Although the law does not expressly name the CEO as being responsible for enforcement, generally the municipal officers in a community that has a CEO will delegate enforcement responsibilities to him or her. In 2003, the Legislature substantially rewrote the statute changing the definition of automobile graveyard and amending the standards these businesses must meet in order to receive a municipal permit.

For the purposes of this law a junkyard is defined as follows:

a yard, field, or other area used to store, dismantle or otherwise handle:

- A. Discarded, worn-out or junked plumbing, heating supplies, electronic or industrial equipment, household appliances and furniture;
- B. Discarded, scrap, and junked lumber; and
- 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 automobile graveyard means:

a yard, field or other area used as a place of storage for 3 or more unregistered or uninspected motor vehicles as defined in Title 29, section 1, subsection 7, or parts thereof. An automobile graveyard includes an area used for automobile dismantling, salvage and recycling operations. The law now includes a number of exclusions for operations not considered an auto graveyard. They are:

- An area used for temporary storage of vehicles or vehicle parts by vehicle repair business. In order for a vehicle's storage to be considered temporary, it must be removed from the site within 180 calendar days of its receipt;
- An area used by an automobile hobbyist to store, organize, restore or display antique or classic vehicles. A hobbyist is a person who is not primarily engaged in the business of selling any of those vehicles or parts from those vehicles;
- An area used for the parking or storage of vehicles, vehicle parts or equipment intended for use by a governmental agency;
- An area used for the storage of operational farm tractors and related farm equipment, log skidders, logging tractors, etc;
- An area used for the parking or storage of vehicles or equipment being offered for sale by a dealer or auction business;
- An area used for temporary storage of vehicles by an establishment or place of business that is primarily engaged in business as an insurance salvage pool.
- An area used for the parking or storage of operational commercial motor vehicles,

special equipment or special mobile equipment that is temporarily out of service but is expected to be used by the vehicle or equipment owner or by an operator designated by the owner.

It is important to note that the 2003 law changed the definition for an automobile graveyard from including worn-out, unserviceable vehicles to including any unregistered or uninspected vehicles, regardless of condition.

The limitations on the issuance of a permit for a junkyard or auto graveyard have been expanded in the 2003 amendments. Highlights of the changes include an increase in the distance any area used or handling materials must be from a drinking water well from 100 feet to 300 feet, a separation distance from public buildings, operating standards to decrease the likelihood of contamination of ground or surface waters, and a requirement that the auto graveyard or junkyard be part of a viable business.

2005 amendments to the statute placed additional operational requirements on automobile graveyards. The restrictions include requirements that:

- A log be maintained of all motor vehicles handled that includes the date each vehicle was acquired, a copy of the vehicle's title or bill of sale and the date or dates upon which all fluids, refrigerant, batteries and mercury switches were removed;
- All fluids, refrigerant, batteries and mercury switches must be removed from motor vehicles that lack engines or other parts that render the vehicles incapable of being driven, appliances and other items within 180 days of acquisition. Motor vehicles, appliances and other items acquired by and on the premises of a junkyard or automobile graveyard prior to October 1, 2005 must have all fluids, refrigerant, batteries and mercury switches removed by January 1, 2007.
- Storage, recycling or disposal of all fluids, refrigerant, batteries and mercury switches must comply with all applicable federal and state laws, rules and regulations;
- Fluids, refrigerant, batteries and mercury switches must be removed from motor vehicles, appliances and other items before crushing or shredding.

Junked motor vehicles are also addressed in another state law that can be enforced locally through the CEO if so authorized, Title 17 § 2802, dealing with miscellaneous nuisances.

The State Planning Office has developed a model junkyard/auto recycling ordinance. This model may be obtained by contacting the State Planning Office at 207-287-3261.

Automobile graveyards and junkyards also are regulated by the DEP under the *Site Location of Development Act* (Title 38 § 481 *et seq.*) and the *Hazardous Waste, Septage and Solid Waste Management Act* (Title 38 §1301 *et seq.*). Automobile graveyards and junkyard handling sites which are equal to or greater than 3 acres in size, located on a 100-year floodplain, or within 300 feet of a classified body of water or on a sand and gravel aquifer may require a license from the DEP.

In 1993 the Legislature established a new category of facility, known as an "automobile recycling business," defined in Title 30-A § 3752(1-A) as a business which purchases or acquires salvage vehicles for the purpose of reselling the vehicles or component parts, and/or rebuilding or repairing salvage vehicles for resale. Section 3753 prohibits the establishment or operation of either a junkyard or recycling facility without first obtaining a permit from the municipality. Statutory limitations include a requirement for screening a minimum of six feet in height along all roads, a separation of 100 feet between any an vehicle with an engine and a body of water or wetland and a separation of 500 feet between a vehicle dismantling operation or storage and a public park or playground, school, church, or cemetery and 300 feet from a well. A permit issued to an automobile recycling business is valid for five years. However, the permit holder must, on an annual basis, provide a sworn statement that the facility complies with the standards of operation. The standards of operation for an automobile recycling business are found in § 3755-A.

Automobile dismantling and salvage operations with handling sites of less than 3 acres are exempt under DEP regulation provided that:

- a. A system of containment will be (is) utilized to collect, recycle, or properly dispose in a licensed facility of all liquid wastes including: oil, transmission, brake, and coolant fluids and all spilled battery acids;
- b. There is no open burning of any substances;
- c. There is no disposal or release to the environment of any solid, special or hazardous wastes; and
- d. The handling site is not located on a 100-year floodplain, within 300 feet of a classified body of water or on a sand and gravel aquifer.

Operations that are in violation of these standards should be reported to the DEP.

FARMLAND

Title 7 § 56 generally prohibits a municipal official from issuing a building or use permit which would allow "inconsistent development" on land of more than one acre if the development will be within 100 feet of "farmland" which is registered with the municipality.

Another statute, 17 M.R.S.A. § 2805, protects a commercial farm from being prosecuted by a municipality as a public nuisance if it is operated in conformity with generally accepted agricultural practices as defined by the Maine Department of Agriculture, Food and Rural Resources. It also cannot be considered a nuisance if it existed before a change in land use within one mile of the farm and was not a nuisance before the change in land use.

SOLID WASTE

Each municipality is responsible for provision of solid waste disposal services for domestic and solid waste generated within the municipality and may provide these services for industrial wastes and sewage treatment plant sludge.

Municipalities are prohibited from enacting stricter standards "governing the hydrogeologic criteria for siting or designing solid waste disposal facilities or governing the engineering

criteria related to waste handling and disposal areas of a solid waste disposal facility" than those contained in Title 38 and in the DEP solid waste management rules. Local ordinances regulating solid waste facilities may include reasonable standards regarding other issues such as: "conformance with state and federal rules; fire safety; traffic safety; levels of noise that can be heard outside the facility; distance from existing residential, commercial or institutional uses; ground water protection; and compatibility of the facility with local zoning and land use controls, provided the standards are not more strict than those contained in Title 38, chapter 13 (solid waste law) and the Natural Resources Protection Act and Site Location Act and the rules adopted thereunder." Local ordinances must use definitions consistent with those adopted by DEP. Municipal authority to regulate State and regionally owned solid waste facilities is also restricted. Any ordinance adopted by a municipality regulating solid waste facilities must be filed with the DEP within 30 days of adoption (Title 38 § 1310-U).

The Office has prepared a decision tree to assist Code Enforcement Officers determine which rules apply to solid waste operations based upon the DEP's Solid Waste Management Regulations, Chapters 400-409. See the Appendix. For questions regarding solid waste issues, contact the Bureau of Remediation and Waste Management of the MDEP at (207) 287-2651.

SEPTAGE

Municipalities must also provide for the disposal of refuse, effluent, sludge and any other materials from all septic tanks and cesspools located within the town. Any person may provide a site for disposal of septage. Municipal approval of such a site must be obtained in writing before the landowner makes an application to the DEP for approval. Municipalities must approve such a site, if it complies with local zoning and land use controls. 38 MRSA §1306 allows an individual to dispose of septage generated at a residence on the property where generated, a maximum of 2 times a year "provided that the septage is placed at least 300 feet from property boundaries, fresh surface waters, tidal waters, water supplies, streets, highways and permanently or seasonally inhabited residential structures." Municipalities may recover all costs, including attorney's fees, from a septage pumping contractor and/or homeowner who violates these provisions. (Title 38 MRSA §1305) A municipality may enforce the terms and conditions of a septage land disposal or storage site permit issued by DEP. (Title 30-A § 4452)

PESTICIDE USE

Title 22 § 1571-U requires a municipality to give notice and a copy of the proposed ordinance to the State Board of Pesticide Control at least seven days prior to the date of the meeting at which the adoption of an ordinance regulating pesticide storage, use or distribution will be considered. Once adopted, the clerk has 30 days to notify the Board of that fact. Ordinances already in existence also must be filed with the Board. Failure to file and/or comply with the notice requirements makes the ordinance invalid to the extent that it regulates the storage, distribution, and use of pesticides.

FOREST HARVESTING

Any municipality attempting to regulate timber harvesting activities must use definitions of forestry terms in their ordinances that are consistent with those adopted by the Commissioner of the Department of Conservation. Municipal timber harvesting ordinances adopted before September 1, 1990 must have met this standard of compliance with definitions no later than January 1, 2001. A municipality may not adopt an ordinance that is less stringent than the minimum standards established by state law. A municipality may not adopt a timber harvesting ordinance unless a professional forester participates in the development the ordinance. In addition, a meeting must take place in the municipality during the development or amendment of the ordinance between representatives of the Department of Conservation and the municipal officers and officials involved in developing the ordinance. Notice of the hearing on the proposed ordinance must be mailed at least 14 days before the hearing to all landowners in the municipality. There are exceptions to this notice requirement in the statute. In addition, the clerk must notify the department of the public hearing and provide the department with a copy of the proposed ordinance at least 30 days prior to the hearing and file a copy of the ordinance with the department within 30 days of its adoption (Title 12 § 8869).

COASTAL MANAGEMENT POLICIES

According to Title 38 §1801, all coastal municipalities, in regulating, planning, developing, or managing coastal resources, are required to "conduct their activities affecting the coastal area consistent with the following policies to:

- 1) **Port and harbor development.** Promote the maintenance, development, and revitalization of the State's ports and harbors for fishing, transportation, and recreation;
- 2) **Marine resource management.** Manage the marine environment and its related resources to preserve and improve the ecological integrity and diversity of marine communities and habitats, to expand our understanding of the productivity of the Gulf of Maine and coastal waters and to enhance the economic value of the State's renewable marine resources;
- 3) **Shoreline management and access.** Support shoreline management that gives preference to water-dependent uses over other uses, that promotes public access to the shoreline and that considers the cumulative effects of development on coastal resources;
- 4) **Hazard area development.** Discourage growth and new development in coastal areas where, because of coastal storms, flooding, landslides, or sea-level rise, it is hazardous to human health and safety;
- 5) **State and local cooperative management.** Encourage and support cooperative state and municipal management of coastal resources;
- 6) **Scenic and natural areas protection.** Protect and manage critical habitat and natural areas of state and national significance and maintain the scenic beauty and character of the coast even in areas where development occurs;
- 7) **Recreation and tourism.** Expand the opportunities for outdoor recreation and encourage appropriate coastal tourist activities and development;

- 8) **Water quality.** Restore and maintain the quality of our fresh, marine and estuarine waters to allow for the broadest possible diversity of public and private uses; and
- 9) **Air quality.** Restore and maintain coastal air quality to protect the health of citizens and visitors and to protect enjoyment of the natural beauty and maritime characteristics of the Maine coast."

This means that local ordinances affecting land use in coastal areas must contain review standards that will promote these coastal policies.

BUILDING INSPECTION AND REGULATION

Title 30-A §§ 4101-4104 establish a number of requirements affecting ordinances regulating building construction, alteration, demolition or improvement. Section 4103 states that the building inspector is the licensing authority under such an ordinance unless otherwise provided. The building inspector must issue a written notice of his or her decision on a building permit application to the applicant within 30 days of filing; failure to do so constitutes a denial. This section contains four provisions that override any local ordinance:

- The building inspector cannot issue a permit for any building required to have an overboard discharge license from DEP under Title 38 § 413, until that license has been obtained.
- The building inspector is prohibited from issuing a permit for a building or use in a subdivision that has not received the approval required under Title 30-A, § 4401 *et. seq.* This situation may arise when offering lots for sale one at a time intentionally or unintentionally creates a subdivision.
- The licensing authority may not issue a permit for installation of a mobile home previously installed in another municipality until the mobile home owner provides proof of payment of all property taxes on that mobile home in the municipality where the home was formerly located.
- The licensing authority may not issue a permit for a building or use for which the applicant is required to obtain a driveway or entrance or traffic movement permit under Title 23, section 704 or 704-A until the applicant has obtained that permit from the Department of Transportation.

Title 25 § 2353 requires a building inspector to inspect each new building during construction to ensure that "all proper safeguards against the catching or spreading of fire are used, that the chimneys and flues are made safe, and that proper cutoffs are placed between the timbers in the walls and floorings where fire would be likely to spread." The statute authorizes the building inspector to give appropriate written direction to the owner or contractor concerning these fire prevention matters.

Section 2354 requires the building inspector to exercise similar authority regarding building repairs. Section 2357 requires a building inspector to certify all new buildings as being built in accordance with section 2353 before such a building may be occupied. Building inspectors also have the authority to inspect buildings under section 2360 for the purpose of

determining whether the building is dangerous due to the presence of combustible materials or flammable conditions on the premises, or heating fixtures or apparatus which are dangerous due to their construction. If such conditions exist, the building inspector can order their correction or removal. Violation of these laws may be prosecuted by the Code Enforcement Officer/Building Inspector, or fire chief.

ACCESS BY HANDICAPPED PERSONS

The Maine Human Rights Act imposes a number of inspection duties on municipalities with respect to construction of "multi-family housing" and "public accommodations." Subchapter IV of the Act is concerned with Fair Housing Accommodations. Title 5 § 4582-B requires the builder of certain multi-family housing to obtain certification from a design professional that the plans for the building comply with the standards for accessibility by handicapped persons adopted as part of this law. That certification must be submitted to the municipal authority that reviews plans for the municipality for that type of construction (or, if none, to the municipal officers). If the municipality has an official whose duties include the inspection of buildings for compliance with construction standards, then that official must also inspect for compliance with the accessibility standards of this law; if the building is not in compliance, then the municipality may not allow it to be occupied. "Multi-family housing" is defined as "buildings consisting of 4 or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of 4 or more units."

Subchapter V of the Act is concerned with public accommodations. Title 5 §§ 4594 through 4594-F establish similar certification and inspection requirements in connection with the construction, remodeling and enlargement of "a public place of accommodation" as are imposed on multi-family housing. Generally, the term "public place of accommodation" includes any place that is open to the public.

Section 4594 applies to public accommodations and places of employment constructed, remodeled or enlarged after January 1, 1982. Section 4594-A applies to public accommodations constructed, remodeled, or enlarged after January 1, 1984. Section 4594-B applies to public accommodations that are constructed after January 1, 1988. It also applies to existing buildings that are reconstructed, remodeled, or enlarged after January 1, 1988 if the estimated total cost exceeds \$150,000 and the work "will substantially affect that portion of the building accessible to the public. Section 4594-C applies to those activities when they occur after September 1, 1988." The requirements of § 4594-C are triggered for new construction or when the estimated total cost of reconstruction, remodeling or enlargement exceeds \$100,000.

Section 4594-D takes a somewhat similar approach for public accommodations and places of employment that are constructed after January 1, 1991. This section also applies to buildings that are reconstructed, remodeled, or enlarged after that date if the estimated total cost of renovations is \$100,000 or more. The builder involved must provide to the municipality and to the State Fire Marshal's Office a certification from a design professional that the plans meet the standards of construction required by this section. If the building is a restaurant; motel, hotel, or inn; state, municipal or county buildings; and elementary and secondary schools the plans must also be submitted to the Fire Marshal's Office for review. For these types of buildings, a local official may not issue a building permit unless the application is accompanied by either a statement from the State Fire Marshal's Office

certifying that the plan meets the standards of this section or an attestation by the builder that the plans met the requirements of this section, in a case where the plan has been submitted to the State Fire Marshal but that Office has failed to issue its decision within 2 weeks of the submission of the plan.

In a municipality that has officials designated to inspect buildings for compliance with building standards, those officials must also inspect for compliance with the certified plans. Those officials may not allow the building to be occupied if they determine that it does not comply with the standards.

Title 5, Section 4594-F requires that places of public accommodation and commercial facilities that are constructed or altered after January 1, 1996 comply with the provisions of the *Americans with Disabilities Act Accessibility Guidelines* [ADAAG].

Builders of the following eight types of public buildings must submit plans to the State Fire Marshal's Office for approval.

- 1) State, municipal or county buildings;
- 2) Education;
- 3) Health Care Facilities;
- 4) Buildings or facilities used for Public Assembly;
- 5) Hotels, motels, or inns;
- 6) Restaurants;
- 7) Business occupancies; or
- 8) Mercantile establishments occupying more than 3,000 square feet.

For these types of buildings a local official is may not issue a building permit unless the application bears either a statement by the State Fire Marshal's Office certifying that the plan meets the standards or if the Office has not replied within two weeks and the builder submits certification from a design professional that the plans meet the standards.

In a municipality that has officials designated to inspect buildings for compliance with building standards, those officials must also inspect restaurants, motels, hotels, inns, governmental buildings or elementary or secondary schools for compliance with the standards. The inspection must take place prior to allowing the building to be occupied.

Title 25 §§ 2701-2704 also require municipalities to inspect certain buildings for compliance with certain standards of accessibility for handicapped persons and to deny permit applications for buildings that do not conform. A "building" governed by this law is defined as:

- a structure to which the public customarily has access and utilizes and which is constructed using State or municipal money; or

- a structure specifically intended as a place where 5 persons or more will be employed or as public housing that is constructed using either State or federal money.

The State Planning Office's Code Enforcement Training and Certification Program has prepared a separate training manual on accessibility and life safety standards. Consult this manual for additional detail regarding the standards and procedures under the Maine Human Rights Act, the federal Americans with Disabilities Act, and other statutes relative to access issues.

For compliance and regulatory information, contact the Maine Human Rights Commission at 207-624-6050 or the Maine State Fire Marshal's Office at 207-624-8744.

For technical, design, or compliance information and assistance, contact any Alpha One office in Augusta @ 800-499-2357, Brewer @ 800-300-6016, Presque Isle @ 800-974-6466, or South Portland @ 800-640-7200.

B. LAWS THAT AUTHORIZE MUNICIPAL ACTION

HEALTH LAWS

While each municipality is required to appoint a health officer, there is no statutory mandate for action on behalf of that individual. The local health officer is empowered to enforce the provisions of Title 22 §§ 454-462 and §1561. The most frequently used health statute in connection with land use violations is §1561, which provides:

When any source of filth whether or not the cause of sickness is found on private property and deemed to be potentially injurious to health, the owner or occupant thereof shall, within 24 hours after notice from the local health officer, at his own expense, remove or discontinue it.

PROTECTION OF PUBLIC WATER SOURCE

Title 22 § 2647 authorizes local and state health inspectors or officers to enter upon land and conduct an inspection where the land is either within 1,000 feet of a public water source or is used for commercial or industrial purposes and there is a facility, structure or system on the land which is draining or suspected of flowing or seeping into a public water source. This right of entry and inspection cannot be exercised until the official has made a "reasonable effort" to obtain permission from the landowner. (If permission is denied or the owner cannot be reached, the official probably should obtain an administrative warrant before entering the land or buildings to conduct an inspection, even though the statute implies that this is not necessary.) Following an inspection, the official may order the owner to take action to stop further contamination and to clean up any existing contamination (if that is possible).

A new law enacted in 2000 prohibits the installation of a new underground oil storage facility within the source water protection area of a public drinking water supply, or within 1,000 feet of a public water supply, which is greater. (See Title 38 MRSA, §563-C) Maps showing the location of all public drinking water supplies are available from the Department of Health

and Human Services. Maps showing the location of public drinking water supplies and their source water protection areas may be viewed and printed from the internet at [www.http://musashi.ogis.state.me.us/dhs/html/wellsmap.htm](http://musashi.ogis.state.me.us/dhs/html/wellsmap.htm) and entering the name of municipality. Prior to the issuance of any permit for a new underground oil storage tank, the CEO should consult these maps and make sure that the location is not within the prohibited area. The statute does contain some exemptions for replacement tanks and allows the DEP to issue variances in certain circumstances.

Title 30-A 4358-A requires that if any a proposed land use project is within the source water protection area of a public water supply; and is reviewed by a municipal reviewing authority the public water supply operator must be notified of the application.

DANGEROUS BUILDINGS

Title 17 §§ 2851-2859 authorizes the *municipal officers* to determine that a building or structure is "dangerous" and to order appropriate corrective action either by the owner or by the town in the event that the owner does nothing. Other than in the case of a building that is so dangerous that immediate court action is required, there is no express authority given to the Code Enforcement Officer to act under this statute. However, the CEO often will be asked to assist the municipal officers, and typically it is the CEO who brings the situation to the attention of the municipal officers. Buildings or structures that can be dealt with under this statute must fit within one of the following categories:

- structurally unsafe;
- unstable;
- unsanitary;
- constitutes a fire hazard;
- is unsuitable or improper for the use or occupancy to which it is put;
- constitutes a hazard to health or safety because of inadequate maintenance, dilapidation, obsolescence, or abandonment or is otherwise dangerous to life or property.

MISCELLANEOUS NUISANCE LAW

Title 17 § 2802 defines a variety of activities as "public nuisances" which can be prosecuted by a municipality:

"The erection, continuance or use of any building or place for the exercise of a trade, employment or manufacture which, by noxious exhalations, offensive smells or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals, or of the public; causing or permitting abandoned wells or tin mining shafts to remain unfilled or uncovered to the injury or prejudice of others; causing or suffering any offal, filth or noisome substance to collect, or to remain in any place to the prejudice of others; obstructing or impeding, without legal authority, the passage of any navigable river, harbor or collection of water; corrupting or rendering unwholesome or impure the water of a river, stream, pond or aquifer; unlawfully diverting it from its natural course or state, to the injury or prejudice of others; and the obstructing or encumbering by fences, buildings or otherwise, of highways, private

ways, streets, alleys, commons, common landing places or burying grounds are nuisances within the limitations and exceptions mentioned. Any places where one or more old, discarded, worn out or junked motor vehicles as defined in Title 29, section 1, subsection 7, or parts thereof, are gathered together, kept, deposited or allowed to accumulate, in such manner or in such location or situation, either within or without the limits of any highway, as to be unsightly, detracting from the natural scenery or injury to the comfort and happiness of individuals and the public, and injurious to property rights, are declared to be public nuisances."

Although the CEO is not expressly authorized by this statute to enforce it, the municipal officers usually delegate that power to the CEO when necessary to deal with a land use violation.

GROUNDWATER PROTECTION

Title 38 § 401 expressly acknowledges municipal home rule authority to "enact ordinances to protect and conserve the quality and quantity of groundwater."

OVERBOARD DISCHARGES

Title 38, § 464 generally prohibits the issuance of new overboard discharge licenses. It also establishes stricter standards for the renewal or expansion of existing licenses by DEP. Title 38 § 413 authorizes municipalities to assume DEP's responsibility for licensing, inspecting, and enforcing overboard discharges by adopting an ordinance which conforms to minimum requirements established by DEP. A model ordinance is available from DEP's Division of Water Resource Regulation.

FIRE CODES

Title 25 § 2361 states that fire chiefs or their designees, and code enforcement officers/building inspectors, all have the discretionary authority to prosecute violations of the following State fire laws:

- Title 25 §§ 2 351-2360: Municipal Inspection of Buildings;
- Title 25 § 2396: regulations of the Commissioner of Public Safety pertaining to explosives, fire alarms, fire escapes, exits (Life Safety Code No. 101);
- Title 25 §§ 2441, 2447-B, 2448, 2452, 2463, 2464, and 2465: explosives and flammables, foam plastic insulation standards, public building construction, exits, sprinklers and smoke detectors, chimney, fireplace, and wood stove installation;
- Title 22 §§ 7904-A (boarding care), 8305 (home baby-sitting service) and 8605 (adult day care) require inspections for fire safety before the Department of Health and Human Services may license these boarding care and day care facilities. The local officials mentioned above are among those who may conduct these inspections.

HAZARDOUS WASTE

Title 38 §1319-P authorizes municipal ordinances regulating hazardous waste disposal, storage, and generation as long as those ordinances are not less restrictive than or duplicative of State law.

MUNICIPAL REGULATION OF WATER LEVELS AND FLOWS

Pursuant to Title 30-A §§ 4454-4457, "a municipality may adopt an ordinance under its home rule authority to regulate water level regimes and minimum flow requirements for impounded bodies of water and dams that are entirely within its corporate boundary." Certain substantive provisions must be contained within the ordinance. The adopted ordinance must be submitted to the Commissioner of the DEP for review with state law and approval. Where approved, DEP will no longer have water level authority in that town or city. Some dams are not subject to municipal authority. For more information, review the above pertinent sections of Title 30-A and Title 38 § 817-843 and contact the DEP.

VI. State and Federal Laws of which CEOs should be aware but Require no Municipal Involvement

The CEO should be familiar with the jurisdictional requirements of state and federal land use laws in order to be able to inform property owners of any potential requirement to obtain state or federal permits. The CEO has no formal jurisdiction in the enforcement or administration of these laws; nor should he/she suggest an outcome to any application made to another agency of jurisdiction. However, a cooperative effort between the CEO and the agency of jurisdiction will promote the enforcement of these laws and establish a support network that benefits all enforcement jurisdictions. The CEO may receive an application for a permit for an activity that also comes under the jurisdiction of these laws, or may become aware of an activity that does even though no local permit is required. In this case, the CEO should suggest the property owner, applicant or contractor, contact the state or federal agency of jurisdiction; then notify the appropriate state or federal agency of the activity. There are some local land use ordinances that require acquisition of a state or federal permit as a prerequisite for obtaining the municipal permit.

A. STATE LAWS

SITE LOCATION OF DEVELOPMENT LAW

This law was substantially altered in 1996 with some changes becoming effective July 4, 1996 and others on July 1, 1997. The purpose of this law was also altered and is now to regulate the location of developments of state or regional significance that may substantially affect the environment. Municipalities are assuming responsibility for permitting some projects, while the State Department of Environmental Protection, Division of Land Resource Regulation reviews other project applications, based upon established thresholds. The law recognizes the shoreland zone created by the mandatory Shoreland Zoning Act, as well as, wetlands under the NRPA.

A proposed project must be reviewed if it meets the definition of a "development" as defined by the law. Effective July 1, 1997, a "development" is any federal, state, municipal, quasi-municipal, educational, charitable, residential, commercial, or industrial development of the following nature:

a) Large Area Projects occupying a land or water area in excess of 20 acres.

b) Metallic Mineral Mining or Advanced Exploration Activity.

c) Subdivisions of five lots or more on more than twenty acres (including lots, roads, common areas, easement areas other parcels in which rights and interests will be offered) if the lots are for a use other than single-family, detached residential housing and 15 or more lots on more than 30 acres if the lots are for single-family, detached residential housing. Lots must be offered for sale or lease to the general public during a five-year period in order to be counted. Many of the same exemptions that are in the municipal subdivision law apply here, as well.

d) Structures shall include buildings and/or areas which will not be revegetated, such as

junkyards, auto recycling facilities, parking lots, wharves, and paved areas which cause a complete project to occupy a ground area greater than 3 acres. Areas to be revegetated within one calendar year do not count toward the 3 acres. Three acres are cumulatively calculated from October 1, 1975.

The Legislature has exempted some of these projects in municipalities that have the “capacity” to review medium-sized projects. A municipality is determined to have capacity when that municipality has an adopted site plan review ordinance, adopted subdivision regulations, and has the technical ability to complete the review. A list of those municipalities has been published by the Department and is available upon request.

There are two types of **subdivisions**, commercial and residential. DEP will review and permit, as appropriate, all commercial subdivisions. Since July 1, 1997, the threshold for DEP review in municipalities deemed to have capacity has been 15 or more lots on 100 acres for a single-family lot subdivision. In a municipality with capacity, the size of a **structure** must be seven acres in order to come under the jurisdiction of the Site Law.

A subdivision’s location within a shoreland zone does not by itself trigger Site Law jurisdiction for any project. The Site Law does prohibit the use of an exemption under the subdivision definition for projects that lie wholly or partly with the shoreland zone. Lots 40 acres or more are exempt, provided that no part of the proposed subdivision is located in the shoreland zone. Assistance with the Site Law may be obtained from the DEP Division of Land Resource Regulation.

The Site Law contains a homestead provision similar to subdivision law. 38 MRSA § 482 (D) states, “ five years after a subdivider established a single-family residence for that subdivider’s own use on a parcel and actually uses all or part of the parcel for that purpose during that period, a lot containing that residence may not be counted as a lot.”

Compared to the subdivision law, the Site Law is different in exempting gifts, particularly after the 2001 amendments to the gift exemptions in the subdivision law. Unlike the subdivision law, the sale or lease (not just gift) of lots to certain relatives is exempt under the Site Law. Sale or lease of lots to a “spouse, child, parent, grandparent, or sibling of the developer” are exempt, but only if “those lots are not further divided or transferred to a person not so related to the developer within a five-year period...” 38 MRSA § 482(5)(E)(1).

The Site law allows subdividers to avoid review by taking advantage of an option to create lots with conservation easements that allow them to keep the number of lots below the applicable threshold or the total area below the acreage threshold. However, specific language requires that the developer make the DEP a “party” to the easement and also requires that the easement be maintained in perpetuity, otherwise the exemption no longer applies and review becomes required.

State highways, state aid highways and borrow pits for sand, fill or gravel of less than five acres, or borrow pits regulated by the Department of Transportation are not under the jurisdiction of the Site Law. Neither are activities located within the area under the jurisdiction of the Land Use Regulation Commission.

Mining activities involving borrow, clay, topsoil or silt will be regulated under a new statute, 38 MRSA §490 *et. seq.*, entitled *Performance Standards for Excavations for Borrow, Clay, Topsoil or Silt*. Mining activities involving the quarrying of rock, which is defined to exclude metallic mineral materials, will be regulated under another new statute, 38 MRSA §§ 490-W *et. seq.*, entitled *Performance Standards for Quarries*.

The Office has prepared a decision tree for determining Site Law applicability to proposed projects. A copy of this can be found in the Appendix.

DRIVEWAY PERMITS

Title 23 §704 requires a permit from the Department of Transportation or from the municipal officers for new entrances on a State or State-aid highway. The permit is issued by the municipal officers if the driveway will be in the "compact" area, which means an area where structures adjoining the highway are less than 150 feet apart for at least 1/4 mile (Title 29 §1252).

Effective December 11, 2001 the MDOT has enacted final rules establishing the procedures and standards for driveway and entrances on state highway system. Since the spring of 2001, the MDOT had been regulating new and expanded driveways and entrances under provisionally adopted rules. These rules may be downloaded from the internet at <http://www.state.me.us/sos/cec/rcn/apa/17/chaps17.htm> and clicking on Ch. 299. Permits for new or modified driveways or entrances must be obtained from the Division offices of the Department. The MDOT has brochures explaining the permit process that CEOs may find useful to distribute to applicants.

A 2003 amendment to the law prohibits a Code Enforcement Officer from issuing a local permit for a building or development that requires a highway entrance permit until such a permit has been received from the Department of Transportation.

TRAFFIC MOVEMENT PERMIT

In 1999, the authority to regulate development projects that generate significant amounts of traffic was shifted from the Department of Environmental Protection to the Department of Transportation. Any development that will generate more than 100 vehicle trips in its peak hour must be reviewed by the MDOT under the Traffic Movement Permit statute. The applicant must show that any traffic increase attributable to the proposed project will not result in unreasonable congestion or unsafe conditions on a road in the vicinity of the proposed project.

A 2003 amendment to the law prohibits a Code Enforcement Officer from issuing a local permit for a building or development that requires a traffic movement permit until such a permit has been received from the Department of Transportation.

NATURAL RESOURCES PROTECTION ACT

The Natural Resources Protection Act (Title 38 § 480-A *et seq.*) identifies certain natural resources that have "state significance due to their recreational, historical and environmental value to present and future generations." The Act seeks to prevent the

degradation and destruction of these resources and to enhance them. The protected resources are:

Rivers, Streams and Brooks, which are channels between defined banks created by the action of surface water and have two or more of the following characteristics:

- A. It is depicted as a solid or broken blue line on the most recent edition of the U.S. Geological Survey 7.5-minute series topographic map or, if that is not available, a 15-minute series topographic map.
- B. It contains or is known to contain flowing water continuously for a period of at least 3 months of the year in most years.
- C. The channel bed is primarily composed of mineral material such as sand and gravel, parent material or bedrock that has been deposited or scoured by water.
- D. The channel contains aquatic animals such as fish, aquatic insects or mollusks in the water or, if no surface water is present, within the streambed.
- E. The channel contains aquatic vegetation and is essentially devoid of upland vegetation.

River, Stream, and Brook does not mean a ditch or other drainage way constructed and maintained solely for the purpose of draining storm water or a grassy swale.

Great ponds, which are inland bodies of water with a surface area in excess of ten acres in their natural state, or manmade ponds of 30 acres or more;

Fragile Mountain Areas above the elevation of 2,700 feet;

Freshwater Wetlands;

Coastal Wetlands;

Significant Wildlife Habitat mapped by the Department of Inland Fisheries and Wildlife including habitat for endangered or threatened species, high and moderate value deer wintering areas and travel corridors, high and moderate value waterfowl and wading bird habitats, critical spawning and nursery areas for Atlantic sea run salmon, and shoreland nesting, feeding and staging areas, seabird nesting islands; and

Sand Dunes, where any activity, whether a soil disturbance or construction, may require a permit from the DEP.

Rules administered by the DEP establish a permit review process governing certain activities that applicants want to conduct in, on, or over a protected resource, as well as activities on land adjacent to any freshwater wetland, great pond, river, stream or brook that could cause material to be washed into a resource. Generally, the law requires activities within 75 feet of the protected resources to obtain a permit from the DEP. These activities include:

- dredging, bulldozing, removing or displacing soil, sand, vegetation or other materials;
- draining or otherwise dewatering;
- filling; or

- constructing, repairing, or altering any permanent structure (fixed location more than 7 months of the year).

The DEP has established a permit-by-rule (PBR) procedure for many activities in which notification to the Department of intent to begin an activity and an assurance of compliance with standards substitutes for the normal review process. Towns should receive a copy of all PBR notifications submitted to the DEP for activities planned to occur within that town. The town tax map and lot number should appear on the form where the activity will take place. CEOs may choose to monitor these activities.

Local officials are not required to enforce the NRPA. However, there are many instances of overlapping jurisdiction regarding activities that take place within the shoreland zone. Cooperation between code enforcement officers and the DEP in the law's administration and enforcement may compliment local enforcement efforts. When reviewing or issuing a local permit for a project which may be in the jurisdiction of the NRPA, the CEO should make sure the applicant is aware of the state law and notify the regional DEP office that a local permit has been issued. Any suspected violation of state standards should be reported to the appropriate regional office of DEP.

Title 30-A § 4452 allows code enforcement officers who have been authorized by the municipal officers and certified by the State Planning Office as familiar with court procedures to enforce violations of the NRPA in District Court. Code enforcement officers should check with their municipal officers to make sure they have this authority before proceeding with enforcement action.

The town may choose to provide PBR forms and standards to applicants. These may be obtained from the DEP Land Resource staff. It is very important that copies of the standards be provided with the notification form. Do not issue the form without the standards. As the forms and standards are supplied, the DEP suggests stressing to applicants the importance of filling out the form completely and supplying all of the information required.

The State Planning Office has prepared a decision tree for determining NRPA applicability to proposed projects. A copy of this can be found in the Appendix.

EROSION AND SEDIMENTATION CONTROL LAW

As a result of the changes in the jurisdiction of the Site Location Law, as well as recognition that projects not large enough to come under the purview of the Site Law or within jurisdiction of the NRPA have the potential to have adverse impacts, Maine has two additional laws that regulate development. The Erosion and Sedimentation Control Law, (Title 38 § 420-C and the Stormwater Management Law, (Title 38 § 420-D) were enacted during 1996 and took effect on July 1, 1997. Title 30-A MRSA § 4452(7) has been amended to allow CEOs certified in rules of the district courts (Rule 80K) to enforce the new erosion control law, under and on behalf of, the authority of the municipality that they represent. The Erosion and Sedimentation Control Law does not require a permit from any agency but states,

A person who conducts, or causes to be conducted, an activity that involves filling, displacing or exposing soil or other earthen materials shall take measures to prevent unreasonable erosion of soil or sediment beyond the project site or into a protected natural resource as defined in section 480-B. Erosion control measures must be in place before the activity begins. Measures must remain in place and functional until the site is permanently stabilized. Adequate and timely temporary and permanent stabilization measures must be taken.

Agricultural and forest management activities are exempt.

STORMWATER MANAGEMENT LAW

The Stormwater Law requires a permit from the DEP prior to the construction of a project that includes 20,000 square feet or more of impervious area or 5 acres or more of disturbed area in the direct watershed of a body of water most at risk from new development, or one acre or more of impervious area or 5 acres or more of disturbed area elsewhere.

The DEP has developed stormwater quality and quantity standards, and identified those water bodies most at risk. **It is important to note that the rules require all projects in lake watersheds to meet a basic stabilization standard. This standard requires that “the design, construction, and maintenance of ditches, swales, gravel roads and other facilities [must be] in accordance with erosion and sedimentation control best management practices.”** (Note: references the *Maine Erosion and Sediment Control Handbook for Construction; Best Management Practices*. Cumberland County SWCD and MDEP, March 1991.)

To determine what projects need a permit, consider the size thresholds and the project's location. Where:

Total impervious area < 20,000 square feet and total disturbed area < 5 Acres (217,800 sq. ft.) = no permit needed, but must meet the basic stabilization standard under the Erosion and Sedimentation Control Law.

Total impervious area > 20,000 sq. ft. but < 1A and total disturbed area < 5A *and* the project is located in an area draining directly to one of the “most at risk” waterbodies = permit required.

Total impervious area ≥ 1A (43,560 sq. ft.) or total disturbed area ≥ 5A = permit required.

There are two permitting categories, permit by rule and individual.

“Small projects” where there will be less than one acre of impervious area, no site location of development permit is required, and it is not in the watershed of a severely blooming lake, would qualify for permit by rule. Conditions that must be met relative to the project include: at least 90% of the impervious area must drain overland or via a level spreader in an unconcentrated and unchannelized manner to a 75 foot wooded buffer or a 125 foot non-wooded buffer as measured by the direction of flow. Discharge in a wellhead protection area would require pretreatment.

In the watershed of a coastal wetland, river, stream or brook most at risk, one additional PBR condition requires that the impervious area cover less than half of the parcel area. The required buffer depth is reduced to 50 feet wooded and 100 feet non-wooded.

Small projects in a sensitive or threatened watershed that will create less than 3 acres of impervious area and less than 5 acres of disturbed area on a parcel and does not require a Site Law permit qualify for PBR with the condition that all water conveyances such as ditches and channels, and roads be constructed and maintained in accordance with best management practices for erosion and sedimentation control. Discharge to a wellhead protection area would require pretreatment.

Exempted from stormwater permit requirements are normal farming activities, forestry management activities including road construction and maintenance, activities in municipalities where a local ordinance meets or exceeds the provisions of the stormwater law where those municipalities have the resources to enforce the ordinances, in areas that have a stormwater management plan such as a water district, construction at industrial sites that are subject to a federal stormwater permit, construction or expansion of a single-family home on a parcel, and activities where stormwater is addressed through other permits (e.g., landfills).

All other project types require an individual permit under the law. **The Office has prepared a decision tree for determining Stormwater Management Law applicability to proposed projects. A copy of this can be found in the Appendix.**

Work performed by a contractor or subcontractor pursuant to a stormwater permit may “not begin before the contractor or subcontractor has been shown a copy of the approval with the conditions by the developer and the owner and each contractor and subcontractor has certified, on a form provided by the department, that the approval and conditions have been received and read, and that the work will be carried out in accordance with the approval and conditions.” The forms must be forwarded to the DEP.

SUBMERGED LANDS

Most of the land in Maine that is covered with water is publicly owned. These lands are reserved in public trust. That is, everyone has access rights and the right to use them for recreation and navigation. Piers and other structures located on submerged lands may be privately owned; the land and water beneath them are not. Construction activity on submerged lands requires a lease or easement. The Bureau of Public Lands in the Department of Conservation is responsible for the management of state-owned Public Reserve Lands, coastal islands, and submerged lands.

In Title 12 M.R.S.A. § 558-A the State of Maine defines publicly owned submerged lands as:

- f) *Coastal region (including islands)*: All land from the mean low water mark out to the three-mile territorial limit. Where intertidal flats are extensive, the shoreward boundary begins 1,650 feet seaward from the mean high-water mark.
- g) *Tidal Rivers*: All land below the mean low-water mark of tidal rivers upstream to the farthest natural reaches of the tides.

- h) *Great Ponds*: All land below the natural low-water mark of ponds that in their natural state are 10 or more acres in size.
- i) *Boundary Rivers*: Land lying below the low-water mark of rivers that form Maine's border with Canada.

State ownership does not include beaches or other shoreland that is covered only at high tide, land that has been flooded by dams, land beneath ponds that are less than 10 acres in size, or land beneath non-tidal rivers that do not border Canada. Some of these areas have been acquired for public parks and other uses, but they are administered separately.

Leases and Easements

Structures located on submerged lands require a lease or easement when:

- the existing use is being changed;
- the size of an existing structure is being changed;
- a new structure will be permanent; or
- a seasonal structure will be larger than 2,000 sq. ft. and used for commercial fishing-related purposes, or will be larger than 500 sq. ft. for any other purpose.

Leases or easements are also required for pipelines, utility cables, outfall/intake pipes, and dredging.

The size and nature of the project determine whether a lease (which requires an annual rental fee) or an easement (which requires processing and a registration fee) is needed. To qualify for a lease or easement, a proposed use cannot have adverse impacts on access to or over the waters of the State, public trust rights, fishing, waterfowl hunting, navigation, recreation and/or services and facilities for commercial marine activities. The application review for a lease or easement generally takes from 30-60 days. The Bureau will usually not approve leases or easements for filling submerged land or for activities that could take place on the upland such as offices, restaurants, parking space, or residences. The Bureau may place special conditions on the terms of a lease or easement when traditional and customary public uses are diminished. Projects may be required to include public amenities or facilities.

DEP/LURC Permits

Before a DEP or LURC permit can be issued for an activity on or over submerged lands, an applicant must obtain a lease or easement from the Bureau of Public Lands. Even when an activity does not require a permit, a lease or easement may still be required.

Constructive Easements

Structures that were in place prior to October 1, 1975 were granted constructive easements and do not require a lease. All constructive easements end on September 30, 2005; at

which time a new lease or easement will be required. Changing the use or size of a structure removes it from constructive easement status.

For more information about submerge lands, Public Reserved Lands, or state-owned coastal islands contact the Bureau of Public Lands, Maine Department of Conservation at (207) 287-3061.

FUEL STORAGE TANKS

All underground oil storage tanks and facilities must be registered with the DEP Bureau of Remediation and Waste Management and are subject to regulation, regardless of whether the tanks and facilities are in service or out of service. Any person intending to install new or replacement tanks or facilities must file registration materials with DEP, and provide a copy to the local fire department before installation. Underground tanks, as well as underground piping for above ground tanks, must be installed by a person who is licensed by the Board of Underground Storage Tank Installers. The installation and operation of an underground tank is regulated by the DEP. Once installed, a log of annual tank system inspections must be maintained. Any evidence of a possible leak or discharge of oil, a spill, or overfill must be reported to the DEP within 24 hours of discovery to avoid fines or civil penalties. Report a spill by calling 1-800-482-0777. Title 38 MRSA §561 *et seq.* A list of locations of tanks installed within a municipality is available from the Bureau of Remediation and Waste Management.

Aboveground tanks are regulated by the State Fire Marshal (207-626-3870) under NFPA 30, regulations for flammable and combustible liquids. A special policy for installing one above-ground tank of combustible fuel 660 U.S. gallons or less requires that the owner register the tank with the State Fire Marshal's Office and meet the standards of the policy.

The installation of solid fuel burner equipment must be made by a person licensed by the Oil and Solid Fuel Board of the Department of Professional and Financial Regulation (207-624-8603). The installation must conform to the standards and requirements of the Board. Title 32 §§2311-2406.

The Maine State Housing Authority (MSHA) and the Finance Authority of Maine (FAME), both administer grant and loan programs for the removal of underground storage tanks that represent a hazard to the environment. For residential needs, contact MSHA at 1-800-452-4668. For commercial needs, contact FAME at 207-623-3263.

The Office has prepared a decision tree for fuel storage tanks which can be found in the Appendix with information about Spill Prevention, Control and Countermeasure Plans required by the USEPA for storage in excess of 660 gallons of fuel in a single tank or 1,320 gallons in total.

ROAD SETBACKS

Title 23 § 1401 requires structures on land adjoining a State or State-aid highway to meet certain setback requirements from the centerline or edge of the right-of-way. Structures are prohibited

- j) Within the full width of the right of way of any highway

- k) Within 33 feet of the centerline of any highway.
- l) Within 20 feet from the outside edge of the paved portion of a highway having more than 2 travel lanes and having a total paved portion in excess of 24 feet in width.

The minimum right of way width for state roads is 33 feet. Technically, there is no upper limit and there is a great deal of variation. If you have questions regarding a particular road, contact the Right of Way Division of MDOT at 624-3300.

DITCHING/ROAD SAND ACCEPTANCE AGREEMENT

The Maine DOT requires landowners willing to receive inert fill material to sign an acceptance agreement. The agreement is a contract between DOT and a property owner. The inert material is from ditching operations and/or sand from winter sand cleanup and may include rocks, brush, roots or roadside debris. The agreement requires the property owner to obtain any necessary permits, the location of deposit, stabilization and erosion control, and prevents relocation, holding DOT harmless for any of the above.

SWIMMING POOLS

Title 22 §§ 1631 and 1632 establish a fencing requirement for swimming pools. The law does not clearly state who is responsible for its enforcement.

MINIMUM LOT SIZE

Title 12 § 4807 *et seq.* establishes a statewide minimum lot size for land use activities that will dispose of waste by means of a subsurface waste water disposal system. Section 4307-A requires a minimum lot size for new single-family residential units (including mobile homes and seasonal homes) of 20,000 square feet. For multi-unit housing and other land use activities, a proportionately greater lot size is required based on a statutory formula. Any lot created legally prior to January 1, 1970 is exempt from this requirement, but multiple adjacent lots in the same ownership after 1974 must be combined in order to meet the minimum size. Municipalities may establish larger minimum lot sizes by ordinance.

A 2003 amendment to the statute shifts the authority from allowing development on lots smaller than 20,000 square feet from the Department of Health and Human Services to local plumbing inspectors. A lot smaller than otherwise required by the statute may now be used with a subsurface wastewater system if the system is not an engineered system, the system meets the Subsurface Wastewater Disposal Rules for a first time system and the applicant has a current application.

COMMERCIAL TIMBER HARVESTING

Title 12 § 8883 requires landowners or their agents to provide written notice to the State Bureau of Forestry before commencing commercial timber harvesting operations and to report harvest information to the Bureau upon completion of the harvest. The necessary forms are available from the Maine Forest Service. Although the CEO is not responsible for enforcing this law in any way, a CEO may want to remind landowners of this requirement if they are seeking approval from the town for timber harvesting under a local ordinance. The

Forest Service typically sends a form to the municipality when they receive a notification of intent to harvest.

SIGNS

Maine law regulates both off-premise signs and signs advertising goods and services located on the premises. All off-premises signs must meet the provisions of the Travelers Information Services Act. This law prohibits "billboards," and requires any off-premise advertising to conform to a Department of Transportation controlled Official Business Directory Sign format. Municipalities that want to regulate off-premise signs must comply with minimum guidelines administered by the Department of Transportation under Title 23, §1901 *et seq.* Signs for farm stands and political campaigns are exempt from some provisions of the regulations. Section 1914 regulates the number, size and placement of on-premise business signs. No more than ten signs are permitted on any one property for each business establishment. Signs must be located within 1,000 feet of the principal building where the business is located. Signs may not be placed within 33 feet of the centerline of any public way. No sign may include or be illuminated by flashing, intermittent or moving lights. The maximum permitted height of a sign is 25 feet above the ground or ten feet above the roof, if attached to a building. No sign may have any animated or moving parts, except for certain changeable signs as listed in Title 23 §1914, sub §11. The Department of Transportation has enforcement responsibilities for this statute, except within an urban compact zone, where the municipality has the responsibility. Code enforcement officers who are aware of violations outside of the compact zone should contact the Department.

B. FEDERAL STATUTES AND REGULATIONS

ASBESTOS

Asbestos is regulated by several state and federal agencies. These regulations focus on the safety of individuals removing asbestos and appropriate storage and disposal. The Maine DEP regulates **all** asbestos activities including removal, repair, enclosure, and demolition **greater than 3 linear or 3 square feet of asbestos-containing material**. The DEP must be notified of any activity at least 10 days prior to the starting date. DEP regulations also require the licensing of companies offering services related to asbestos and requires their employees to be trained and certified. DEP regulations govern removal procedures, storage, and disposal of removed materials.

Regulations promulgated by the U.S. Environmental Protection Agency pursuant to the Clean Air Act require prior written notice to EPA before 260 linear feet or 160 square feet of material is removed during renovation. **Notice of all demolitions must be provided to the DEP and EPA, whether any amount of asbestos is present.** The DEP and EPA have asked CEOs for assistance with informing applicants for demolition and renovation permits of these requirements. Contact the DEP for more information or with questions about these regulations.

FAIR HOUSING ACT

Title 42 §§ 3600-3620 of the United States Code arguably preempt State and local use regulations that discriminate based on handicap or family status. Local ordinances that attempt to regulate group homes for people with physical or other handicaps in a manner different from single-family homes may be in violation of this federal law.

CLEAN WATER ACT/WETLANDS PERMITTING

Under the federal Clean Water Act, all discharges into the waters of the United States must receive a permit from the Environmental Protection Agency. The EPA and Army Corps of Engineers have executed a memorandum of agreement that gives the Corps authority for routine administration of the regulatory program according to mutually agreed upon policies. The EPA serves as an oversight agency and will support and assist the Corps review and enforcement actions. The EPA maintains a veto authority over the Corps' decisions. Generally, the jurisdiction of the Corps encompasses all "*waters of the United States*", including wetlands. Therefore, a permit is required prior to the placement of fill in a wetland. There is no minimum size of wetland recognized under this jurisdiction.

The Corps has primary responsibility for permit application review for any of the following activities:

- Dams and dikes in navigable waters of the United States;
- Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States;
- Activities that alter or modify the course, condition, location, or physical capacity of a navigable water of the United States;
- Construction of fixed structures and artificial islands on the outer continental shelf;
- Discharges of dredged or fill material into the waters of the United States; and
- The transportation of dredged material for the purpose of dumping it in ocean waters.

General permits use to be issued for activities that the Corps determined were essentially alike in nature and caused only *minimal* environmental impact, both individually and cumulatively. These general permits were known as Nationwide and Regional permits. In Maine, all general permits were replaced by the State of Maine Program General Permit (SPGP). Under this permit, the State and Corps are in agreement regarding threshold standards for review and will, in most cases, jointly authorize or deny permits for activities. In order to facilitate this agreement, the State's Natural Resources Protection Act (NRPA) was amended. These changes create consistency in wetlands regulation and permitting between the State and federal governments. Effective September 29, 1995, activities for which the DEP (under NRPA) and the Corps both had jurisdiction and which were separately permitted, are now for the most part jointly reviewed and permitted under the *SPGP*.

Application need be made only to the DEP if the activity is regulated by DEP, and involves impacting (filling, draining, flooding, and clearing) greater than 4,300 sq. ft. of fresh water wetlands. Review is conducted jointly by the DEP and Corps for all applications that will impact greater than 15,000 sq. ft. Application is made only to the Corps if an activity is not regulated by DEP, but is regulated by the Corps. Application must be made **separately** to both if an activity involves **greater than 3 acres of freshwater wetlands or involves only tidal waters**. Projects that modify a hydroelectric dam require separate application to the Corps. When application is made to DEP for joint review under the *SPGP*, only DEP will respond to the applicant. Whenever an application is made directly to the Corps, the Corps will respond.

FEDERAL STORMWATER PERMIT

Since 1992, discharges of stormwater from industrial activities into any waterbody must receive a permit from the EPA. The EPA regulations include construction activities disturbing five acres or more of land area as industrial activities. Permits are required for positive collection and conveyance system that culminates in a point source discharge to the "waters of United States." Code enforcement officers should direct affected property owners to the Boston office of EPA.

C. CONCURRENT JURISDICTION OF LOCAL, STATE AND FEDERAL REGULATIONS

In many instances, a land use activity that violates a local ordinance also violates a State or federal statutory provision. When that is the case, the CEO may wish to contact the State or federal agency responsible for administering and enforcing the statute. By combining forces with an agency, the CEO might have greater success in persuading a violator to comply with the local ordinance voluntarily. In addition, if the agency decides to take the violator to court and wins, the municipality could benefit from the outcome of the agency's lawsuit without spending its own time and money on legal action. Some of the areas in which this overlap between ordinances and statutes may occur are discussed in the following examples:

- Mr. A proposes to build a **house and sea wall** on a 1/4 acre of land that includes **sand dunes and salt marsh** and that is within **250 feet of a tidal river**. The property is in a **flood plain** and is not serviced by a public sewer.

This project would require permits pursuant to the following ordinance and statutes: local Shoreland Zoning Ordinance, Natural Resource Protection Act, Minimum Lot Size Law, the State Plumbing Code, and possibly a local flood hazard ordinance and the federal wetlands program administered by the Corps of Engineers under § 404 of the Clean Water Act.

- Company B wants to build a **paper mill building 260,000 square feet** in size, on land that it owns in a shoreland district adjacent to a **stream**. The **zoning ordinance** permits paper mills as a **special exception** in that part of town, with approval of the board of appeals. The company wants to **discharge some of its waste into the stream and some into the air**. It also wants to **pile leftover bark on the bank** of the stream.

The following laws probably would apply to this project: local zoning ordinance, local Shoreland Zoning Ordinance, Protection of Waters Act, Site Location Act, Protection and Improvement of Air Act, and Natural Resource Protection Act.

- Construction Company plans to develop a **40-acre parcel** of land into a **20-lot subdivision**. The local **zoning** ordinance establishes a **three-acre minimum lot size** for that area of town. The developer proposes to **relocate the course of a small stream** that crosses the property and to **fill a large freshwater bog area**. Each lot will be served by an **individual septic system**.

The laws which apply in this situation are: zoning ordinance, State Plumbing Code, Municipal Subdivision Law (administered locally); Site Location Act and Natural Resource Protection Act (administered by State agencies); and Clean Water Act, section 404 (administered by the U.S. Army Corps of Engineers).

VII. COMMON CONTROVERSIAL ISSUES IN ZONING ADMINISTRATION

This manual cannot adequately present every situation that a code enforcement officer could conceivably face. There are however, a number of situations for which guidance regarding general principles of law can be provided. This section discusses topics that may be of universal application. The resolution of these issues must always be found in the ordinance that is in place in a particular municipality. There are few universal answers that apply across the board.

NONCONFORMING ("Grandfathered") USES, LOTS, AND STRUCTURES

Provisions dealing with nonconforming uses, lots, and structures must be included in a zoning ordinance in order to avoid constitutional problems with the ordinance. Such provisions commonly are called "grandfather clauses." They typically define a "nonconforming use or structure" as a use or structure which was legally in existence when the ordinance took effect but which does not conform to one or more requirements of the new ordinance. The mere issuance of a permit under a prior ordinance generally does not confer "grandfathered" status by itself. Ordinances generally allow such uses and structures to continue and be maintained, repaired, and improved; however, the ordinance usually contains language limiting expansion or replacement.

"Nonconforming lots" generally are defined in an ordinance to mean lots which were legal when the ordinance took effect and for which a deed or plan was on record in the Registry of Deeds at that time. Such lots generally do not meet the lot size or frontage requirements, or both, of the new ordinance. However, the new ordinance generally allows them to be used as long as other requirements can be met. Most ordinances require multiple nonconforming lots in the same ownership to be combined to the extent necessary to meet the new standards.

Careful attention should be paid to distinguish between uses, structures, and lots regarding nonconformance in drafting an ordinance. Merging these together in the same definition or one set of standards can create ambiguities.

The court in Maine has established the following rules relating to nonconforming uses, structures, and lots. **These court-made rules must be read in light of the specific language of the nonconforming use provision of a given ordinance in order to determine whether the court decisions cited below have any bearing on a nonconforming use in a given municipality.** Because the court rules on the specifics of the case before it, including the specific ordinance provision, the principles outlined in these cases cannot always be applied to every ordinance or situation. For each situation, the manual includes one or more quotes from court decisions and cites cases where the principle explained can be found.

Gradual Elimination

"The spirit of zoning ordinances is to restrict rather than to increase any non-conforming uses and to secure their gradual elimination. Accordingly, provisions of a zoning regulation

for the continuation of such uses should be strictly construed and provisions limiting nonconforming uses should be liberally construed. The right to continue a nonconforming use is not a perpetual easement to make a use of one's property detrimental to his neighbors and forbidden to them, and nonconforming uses will not be permitted to multiply when they are harmful or improper." *Lovely v. Zoning Board of Appeals of City of Presque Isle; Shackford and Gooch, Inc. v. Town of Kennebunk; Total Quality Inc. v. Town of Scarborough; Chase v. Town of Wells.*

Phased Out Within Legislative Standards

"Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. Nevertheless, the rights of the parties necessitate that this policy be carried out within legislative standards and municipal regulations." *Lovely; Frost v. Lucey*

Constitutionality

Nonconforming use provisions are included in zoning ordinances "because of hardship and the doubtful constitutionality of compelling immediate cessation" of a nonconforming use. *Inhabitants of the Town of Windham v. Sprague*

Expansion of Use

"Where the original nature and purpose of an existing nonconforming use remain the same, and the nonconforming use is not changed in character, mere increase in the amount or intensity of the nonconforming use within the same area does not constitute an improper expansion or enlargement of a nonconforming use, where the language of the ordinance prohibits the extension or enlargement of a nonconforming use or the change of that use to a dissimilar use." *Frost supra; Boivin v. Town of Sanford.*

However, the courts recognized a limit where an industrial use expanded the volume of its trade so much that it was found to constitute a change in the character of the use. *City of Auburn v. Eastern Die Co.* The court's decisions turn on measurement of "substantial change" and "change in character" of a use. An increase in volume or intensity resulting from natural growth of business is a right protected from an uncompensated public taking. In *Frost v. Lucey*, the court concluded that allowing a seasonal hotel with incidental dining room service to operate year round did not constitute an "extension or enlargement" as prohibited by local ordinance. The court reasoned that year-round operation would not have a "greater adverse and depressant effect" upon the value of nearby residential properties. In addition, had the hotel sought to use its dining service as a public restaurant or catering service for more than twenty-five non-hotel guests, it would be an impermissible **change** in the use and therefore an unlawful enlargement. The parameters of "substantial change" and "change in character" can and should be defined by local ordinance. The courts allow local boards considerable discretion in determining what activities are within the scope of a permitted nonconforming use. *Boivin v. Town of Sanford.* The property owner has the burden of proof, with regard to the board, that the proposed use is not a change in a nonconforming use. *Total Quality Inc. V. Town of Scarborough.* Where there is reasonable evidence in a board's record to support its conclusions, the court will uphold its decision. Even where there is evidence that could have allowed a different conclusion.

To evaluate whether a new use is consistent with the existing grandfathered nonconforming use, the courts will apply the following tests:

1. Does the use reflect the 'nature and purpose' of the use established when the zoning ordinance took effect;
2. Is there a use created that is different in quality or character, as well as in degree, from the original use; or
3. Is the current use different in kind in its effect on the neighborhood?

In cases where boards properly concluded a finding based upon evidence resulting from the application of these tests, the court was not willing to substitute its judgement for the boards'.

Expansion of Structure

Structural expansions are somewhat more clear-cut, easing decision-making. The physical dimensions of a nonconforming structure may not be enlarged or expanded without express allowance in the governing ordinance. "Any significant alteration of a nonconforming structure is an extension or expansion. When an ordinance prohibits enlargement of a nonconforming building, a landowner cannot as a matter of right alter the structure, even if the alteration does not increase the nonconformity." *Shackford*. "Any modification of or addition to a building that would increase the square footage of nonconforming space within the building, even if it would not increase the linear extent of nonconformance, does make the building more nonconforming." *Patricia Lewis v. Town Of Rockport et al.*

While zoning policy does not necessarily prohibit an intensification of a nonconforming use, it generally prohibits expansion of the physical dimensions of a nonconforming use, unless specific exceptions are provided in the zoning ordinance. **For any specific case, it is important to carefully identify what is nonconforming, the use or the structure or perhaps both.** The courts found that where a use was nonconforming, and not the structure, the board erred by refusing to allow a restaurant to build a permanent canopy over an existing deck, as there was no evidence of a violation with the ordinance's dimensional requirements. *WLH Management Corp. V. Town of Kittery*. Due to the construction of an ordinance, the distinction between structures and uses can become blurred, even for the courts. The court found that a residence located in a resource protection zone as designated by a shoreland ordinance where the only permitted *structures* were "temporary piers, docks, wharves and *uses* projecting into water bodies", was a nonconforming *use* and the *construction of a deck* on the third floor was an expansion of a nonconforming *use*, expressly prohibited by the town's zoning ordinance. *Bailey v. Town of Kennebunk*.

The court found that an owner of a "split lot" (parts of the same lot in two different zoning districts), residentially zoned on one side, and commercially zoned on the other was entitled to enlargement of its commercial structure. To do otherwise would extend the zone beyond its boundary. Moreover, in the same case, the court found that modernization of facilities connected with a nonconforming use is normally permissible maintenance rather than expansion. *Gagne v. Lewiston Crushed Stone Co., Inc.*

Replacement

There is no inherent right on the part of a landowner to replace an existing nonconforming structure with a newer one of the same or larger dimensions. That right hinges on whether the ordinance expressly allows it. This is true even where the original building was destroyed by fire or natural disaster. *Inhabitants of Town of Windham v. Sprague* In 1993, the Superior Court found that even demolition of a number of nonconformities on a structure and replacement with less nonconformity to the setback constituted an impermissible expansion. *Janosco v. Town of Monmouth*. Yet, where an expansion did not alter the exterior dimensions of the structure; in fact reduced the floor area, but increased the cubic volume of space within the structure by raising a dormer, the court found that there was no impermissible extension or expansion of a nonconforming residential use and upheld the zoning board of appeals decision to permit it. (*Pearson v. Town of Kennebunk*).

Discontinuance/Abandonment

Zoning ordinances generally attempt to prohibit a person from reactivating a nonconforming use if it has been "abandoned" or "discontinued" for a certain period of time, usually one or two years. Absent language in an ordinance to the contrary the word "abandonment" generally is interpreted by the courts on the basis of whether the intent of the landowner was to give up his or her legal right to continue the existing nonconforming use. The owner's intent is generally judged based on "some overt act, or some failure to act, which carries the implication that (the) owner neither claims nor retains any interest in the subject matter of the abandonment." (Anderson, *American Law of Zoning* 3d § 6.65.) Although "discontinuance" or cessation of the use for the period stated in the ordinance does not automatically constitute abandonment, it may be evidence of an intent to abandon if accompanied by other circumstances relating to the use or non-use of the property, such as the removal of advertising signs, removal of equipment, using the property for a conforming use, changing from one nonconforming use to another, or allowing the building formerly occupied by the use to become dilapidated.

If the ordinance regulates the reactivation of a "discontinued" nonconforming use rather than an "abandonment" of such a use, an analysis of the owner's intent is not necessary. Cessation of the use for the period of time stated in the ordinance is enough. *Mayberry v. Town of Old Orchard Beach* When a landlord voluntarily removes a nonconforming structure and thereby returns the use of the property to a permitted use, a replacement structure may not later be returned to the property if the town's zoning ordinance prohibits resumption of a nonconforming use once a nonconforming use has been superseded by a permitted use. This is true even though the ordinance also has a provision establishing a stated period of time after which a discontinued nonconforming use may not be resumed. *Chase v. Town of Wells*

Nonconforming lots

Issues with nonconforming unimproved lots are always scrutinized because concerns of "takings" rank highly. Thus, an ordinance must address the issue by some means other than to entirely prohibit any development. Where an ordinance contained no grandfathering provision, the court ruled that the ordinance should be interpreted so as not to apply to pre-existing lots of record in order to avoid a finding that the ordinance caused an

unconstitutional taking. *Clardy v. Town of Livermore*. A lot can only be legally nonconforming when it is a lot "of record." This means that the dimensions of a lot must have been recorded in the appropriate registry of deeds at some time prior to the enactment of an ordinance.

Merger of Lots

Where two or more pre-recorded, unimproved nonconforming lots are adjacent and owned by the same person, the State Minimum Lot Size Law (12 M.R.S.A. § 4801) and many zoning ordinances require that those lots be merged and considered as one for the purposes of development to the extent necessary to eliminate the non-conformity. In order to require the merger of a developed and undeveloped lot of record that are contiguous and in the same ownership, the Maine courts have said that the ordinance must expressly require such a merger. *Moody v. Town of Wells* (For other nonconforming lot cases, see *Farley v. Town of Lyman* and *Robertson v. Town of York*.)

If a zoning ordinance establishes a local minimum lot size that is different from and more restrictive than the State's, then the question of merger will be controlled by the ordinance. Where an ordinance requires the merger of lots in the same ownership that have "contiguous frontage" with each other, the court in Maine has held that such a provision does not apply to corner lots. *Lapointe v. City of Saco*

As a general rule, in order for a nonconforming lot to be conveyed and retain its "grandfathered" status, it must be conveyed with the same boundaries as it had when the ordinance took effect. Otherwise, it must be treated as a newly created illegal lot. (For a discussion of the meaning of "lot of record," see *Camplin v. Town of York*.)

Where a single parcel of land had been developed with a number of buildings prior to the effective date of the ordinance and the buildings had all been used for distinct and separate uses prior to that date, the Maine court has held that the buildings could be sold separately on nonconforming lots, finding that the land had already been functionally divided. *Keith v. Saco River Corridor Commission*. To prevent such a result, a local ordinance must expressly prohibit such conveyances unless they conform to current lot size requirements.

When the issue of merger arises, it is advisable for the code enforcement officer to seek the opinion of an attorney regarding the specific language in the town's ordinance and how a court would interpret it.

Creation of Land Locked Lots

There is no State law forbidding the creation of land locked lots. In some cases, these lots are created when a town abandons a road. In the process of abandonment, the town must compensate landowners for the resulting devaluation of their property. Land occupied by the right of way becomes the property of the abutters.

Change of Use

The test to be applied in determining whether a proposed use fits within the scope of an existing nonconforming use or whether it constitutes a change of use is: "1) whether the use

reflects the 'nature and purpose' of the use prevailing when the zoning ordinance took effect; 2) whether there is created a use different in quality or character, as well as in degree, from the original use; or 3) whether the current use is different in kind in its effect on the neighborhood." *Total Quality Inc. v. Town of Scarborough; Boivin v. Town of Sanford; Keith v. Saco River Corridor Commission.*

ACCESSORY USES

Zoning ordinances generally allow for accessory uses and structures. The adopted definition of accessory uses and structures is prevailing in deciding what is and what is not intended to be permissible under any given ordinance. A definition might be: "A use or structure which is *customarily both incidental and subordinate* to the principal use or structure on the same lot only. The term "incidental" in reference to the principal use or structure shall mean both a) subordinate and minor in significance to the principal use or structure, and b) attendant (following as a result) to the principal use or structure. Such accessory uses, when aggregated, shall not subordinate the alleged principal use of the lot."

An addition to a principal structure is not an accessory structure. Where ordinance language prohibits erecting structures in required yard space, the only means to obtaining a garage may be to attach the garage to the principal structure, whereby the garage becomes an addition to the principal structure and not accessory. However, a garage is often a typical accessory use incidental to a principal residential structure. Garages and other large accessory buildings can become problematic when zoning ordinances prohibit more than one principal structure on a lot, and conversions of accessory structures are completed without a necessary variance. A garage may not be considered accessory where it is to be used for servicing vehicles as a business. In this case, it may not be considered incidental unless the ordinance definition of home occupations is inclusive of such uses and associated structures.

Tennis courts and swimming pools are usually held to be accessory. A horse stable may be an accessory use, depending upon whether there are other nearby landowners who maintain such uses or others who object to it.

The word "customary" is often used in definitions of accessory uses or structures. This has left the courts to determine, case by case, what customary means. Difficult issues, such as amateur radio antennas and assembly of racing cars related to hobbies of residents have been found to be and not to be accessory by different courts in different states. A Pennsylvania court found that parking commercial vehicles was not accessory in a residential district, unless screened or garaged. Similarly, in New Jersey, camp trailers were not considered accessory because the courts recognized that neighborhood aesthetics "integrally bound to property values" were relevant considerations for purposes of the zoning ordinance.

Accessory uses and structures related to commercial enterprises are equally difficult. Parking areas are usually an acceptable incidental use of property related to businesses. Where parking facilities are not clearly defined as accessory to commercial uses, parking facilities are generally favored because they often lessen congestion of the roadways, which has been a fundamental purpose of zoning since its origins. However, in cases where a lot was separated from that where the main building is located, additional parking area on such

a lot was found not to be accessory by the courts of several states. Absent specific ordinance language, these cases will be decided one by one in the courts. From these instances, it has been found that,

A toilet is said to be a use accessory to a camping ground. A heliport may be maintained as an accessory to a construction business. A restaurant is a permitted accessory use to a bowling alley. A crematorium is an accessory use to a cemetery. A used car lot is not an appropriate accessory to an authorized repair shop, nor is a restaurant that serves liquor a permitted accessory to an office facility. Provision of sleeping accommodations for employees is not a use customarily incidental to a restaurant. The shredding and storage of aluminum cans is not a use accessory to a wholesale beer business. Truck storage is not a use customarily incidental to a contracting business. Tire storage is not an accessory use to a retail tire store; gasoline pumps are not accessory to a dairy store. A pharmacy is not a use accessory to a physician's office. A billboard placed on top of a garage is not a use accessory to the operation of the garage. A heliopad on the roof of a department store is not an appropriate accessory use. In New York, the rental of trucks and trailers is not a use accessory to a gasoline station, absent an express provision in the ordinance. A different result obtains in Nebraska, largely on the basis of the almost exclusive operation of trailer rentals by gasoline station dealers." (*Anderson's American Law of Zoning, 4th ed.*, 1996, Revised by Kenneth H. Young).

Accessory uses and structures are a difficult subject to discuss because there are no generalizations that can be made. What is accessory in one municipality may not be in another, even for the same user. This is an area of zoning which demands close attention to ordinance language. Some direction may be gleaned from the above case examples. For more information on accessory uses and structures, consult Anderson's *American Law of Zoning, 4th ed.*, 1996, Revised by Kenneth H. Young.

LOTS SPLIT BY A ZONING DISTRICT BOUNDARY

Absent a provision in a zoning ordinance to the contrary, the requirements of the ordinance for a particular zone apply only to that part of the lot that is located in that zone. *Town of Kittery v. White*. Frequently, ordinances specify that where a lot extends into another district no more than "X" feet, the first district or more restrictive district requirements apply. Other ordinances have provisions that lots under a certain size shall be treated as if the entire lot is in the district that constitutes the majority of the lot.

UNCERTAINTY OF ZONING DISTRICT BOUNDARIES

Zoning boundary maps must be incorporated into and adopted with a local zoning ordinance. It has been generally accepted that where ambiguity in mapping zoning districts occurs, clearly written ordinance language supersedes the map. However, where the text of the zoning ordinance, or the text taken together with the map make it impossible to define with certainty the location of boundaries of the zoning districts, the ordinance will be held invalid for uncertainty. See Anderson, *American Law of Zoning*.

Where boundaries are fixed by ordinance (and map) adoption, administrators including the code enforcement officer may not "fine tune" the map on a case-by-case basis, unless ordinance language clearly identifies the zoning map as subordinate to the determination of a zone by an on-site inspection. The drawing of boundary lines is a legislative not an

administrative function, despite clear ordinance language to support such interpretation of map boundaries. *Veerman v. Town of China*.

DEFINITION OF DWELLING UNIT

The conversion of seasonal cabins rented on a nightly basis, each with separate heating and electrical systems, bathroom, and kitchen, to condominium ownership has been held by the court as constituting the creation of individual dwelling units which must satisfy the applicable minimum lot size. *Oman v. Town of Lincolnville*.

The court also has upheld a determination by a local code enforcement officer and board of appeals that a detached garage with its own water, heat, septic system, full bathroom, kitchen sink, and refrigerator constituted a "dwelling unit" for the purposes of the town's lot size requirement. *Golden v. Town of Lovell*. See also *Wickenden v. Luboshutz* and *Moyer v. Board of Zoning Appeals*.

BOARD OF APPEALS AUTHORITY IN DETERMINING "SIMILAR USES"

The board of appeals has the ultimate authority to interpret the provisions of a zoning ordinance under Title 30-A § 4353. Even in the absence of a provision in a zoning ordinance authorizing "uses similar to permitted uses" or words to that effect, the court has held that a zoning appeals board has the inherent authority under Title 30-A § 4353 to interpret whether a proposed use that is not expressly authorized is "similar to" a use which is expressly addressed in the ordinance. In doing so, the board must act reasonably and base its decision on the facts in the record and the provisions of the ordinance. *Your Home, Inc. v. City of Portland* The code enforcement officer should approach the board of appeals or direct an applicant to file an interpretive appeal with the board when faced with a situation when the CEO cannot determine whether a proposed use is listed as a permitted use. Note that the planning board does not have the authority to make such decisions. *Oeste v. Town of Camden*.

STANDING/WHO MAY APPLY FOR A PERMIT

In order to apply for a permit, a person must have legal "standing." Absent a provision in an ordinance, regulation, or statute to the contrary, the CEO may issue a permit to any applicant who has some "title, right, or interest" in the property, because such an applicant would meet the test for "standing." *Walsh v. City of Brewer* For example, a person who is a joint owner of property with one or more people may receive a permit even though the other owners are not parties to the application. *Losick v. Binda*, (N.J.) A written leasehold interest or a written option to purchase also would constitute a sufficient "right, title, or interest." *Murray v. Town of Lincolnville*

DISPUTE BETWEEN CO-OWNERS; DEED RESTRICTIONS; OTHER VIOLATIONS ON THE SAME PROPERTY; CONSTITUTIONAL ISSUES

The existence of a dispute between the co-owners of property over the proposed use would not be grounds for denial of a permit. Nor would the fact that the proposed use would violate a private deed restriction. See Rathkopf, *The Law of Zoning and Planning*, Ch. 74; *Whiting v. Seavey*.

The court has said that it is not appropriate for a local official to attempt to resolve a title problem as part of a decision to grant or deny a permit. If an applicant has submitted reasonable evidence of ownership or boundary location, it is not up to a CEO to resolve a dispute between the applicant and an abutter or some other party as to who has legal title or where the property line is located. These battles must be fought by those people in court through separate civil suits. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises Inc.*

Even if the property is already violating an ordinance or statute, that fact cannot be used to deny a permit application unless authorized by the ordinance under which the application was filed. *Town of Gorham v. Bauer*

Likewise, the CEO is powerless to resolve a constitutional problem with an ordinance that is raised by an applicant. *Minster v. Town of Gray* Nor may a CEO refuse to act upon or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*

MUNICIPAL AUTHORITY OVER STATE AND FEDERAL PROJECTS

Title 5 § 1742-8 requires a municipality to notify the State Bureau of Public Improvements if the municipality intends to require State compliance with its building code. If so requested, the State must comply if the local code is as stringent as or more stringent than the State's building code. However, according to Title 30-A § 4352, zoning ordinances are only advisory with respect to State projects unless the zoning ordinance was adopted pursuant to a comprehensive plan which the State Planning Office has found to be consistent with the Planning and Land Use Regulation Act.

According to Title 40 § 619 of the United States Code, federal agencies proposing to construct or alter a building are required "to consider" the requirements of local zoning and other building ordinances and "consult" with the appropriate local officials. They also are required to submit plans for review by local officials and permit local inspections. However, municipalities are prohibited from prosecuting a federal agency for failing to comply with local ordinances or failing to follow local recommendations.

CONDOMINIUM PROJECTS

Generally, residential condominium projects now must be reviewed as subdivisions under the Municipal Subdivision Law (30-A § 4401 *et seq.*). Nonresidential condominiums are not subdivisions as defined by State statute. However, a municipality may expand the definition of subdivision in its ordinance to include the division of a structure for commercial or industrial use. Any local ordinance regulating condominiums must not conflict with the Maine Condominium Act (Title 33, Chapter 31). However, the Act deals primarily with how condominiums are created and managed, provides certain protection for purchasers, and establishes rules for the conversion of existing buildings to condominiums. Local ordinances may not prohibit the condominium form of ownership.

NOTES

VIII. Role of the CEO in Zoning Administration

Once an ordinance is drafted and enacted by the municipal governing body, the code enforcement officer (CEO) is critical to its function. Ordinances may assign responsibility for administration to an individual, the Planning Board, or another review committee, or split these responsibilities among different parties. A CEO plays a number of roles in the administration of zoning and other land use ordinances. These roles may range from clerical to technical and from being an assistant to property owners to enforcement agent. The State Planning Office's manual *Legal Issues and Basic Enforcement Techniques for Municipal Code Enforcement Officers* provides additional detail on the issues that are introduced here and should be consulted, particularly for application review, permitting, and enforcement procedures.

A. DUTIES OF THE CEO

ADMINISTRATOR

Administration may be best performed by splitting responsibilities among different participants who work individually to achieve a level of expertise with the tasks they perform and collectively to achieve an effective process. The task of administration involves the following activities:

Technical assistance. The CEO is the resource that is most available to the public and therefore, this task is best performed by him or her. The code enforcement officer then, assumes the first steps in the process of administration. He or she should provide information to the public about the appropriate land use ordinances such as procedures for application, review, and permit issuance.

Review and Permitting. The code enforcement officer should serve as the coordinator in the review and permitting process. Applications should be scanned for completeness, and then reviewed for compliance with the many ordinances and codes governing development at the local level (State and local). If other municipal staff has responsibility for other applicable codes, perhaps a fire prevention specialist and/or public works official, the application should be circulated to them for review, as well. If the application involves an activity that is allowed with no further review in the land use ordinance, the CEO should issue a permit, provided all applicable standards are met. If the application is for an activity that is considered a conditional use, the planning board or designated board should be given an opportunity to review the application and make a determination regarding approval with or without conditions. This decision should be rendered to the CEO, who makes a decision to issue the permit with whatever conditions are required to allow the use to meet the objectives and provisions of the ordinances and codes adopted, or to deny the permit.

Compliance. The code enforcement officer should visit the site, at least once, and perhaps several times depending upon the activity permitted to ensure that nothing more than what the permit allowed is taking place on the site, and that construction, if any, is proceeding according to approved plans.

Detecting and Acting Upon Violations. The code enforcement officer must respond to complaints, perform windshield inspections to observe violations, and work with a landowner to achieve compliance.

Record keeping. This is an essential part of a CEO's duties with respect to administration of ordinances. A record of every lot in the municipality and activities permitted and inspections performed there must be maintained along with copies of any correspondence related to the activities.

As the individual chiefly responsible for the administration of a zoning or other land use ordinance, the CEO has a number of responsibilities. These will range from answering general questions about the ordinance over the phone to inspection of properties following issuance of a permit. The most important aspect to keep in mind at all times is that the CEO, whether part-time or full time, is a public employee. As a public employee, maintenance of the appearance of impartiality and fairness to all with whom contact is made is of utmost importance.

The duties of a CEO depend largely on the statute, ordinance, or charter provision creating the position and the statutes and ordinances being enforced by that person. Before assuming that he or she has the authority to issue a permit or take action in connection with a violation, the CEO should check the relevant state and local laws and determine exactly what they say can be done and by whom. If a CEO acts without authority, it could lead to possible liability for him or her later on. When there is any doubt about the extent of the CEO's power to act, the CEO should seek legal advice. Any questions regarding the CEO's authority which arise because of an ambiguous ordinance provision or total lack of an ordinance provision are best resolved by having the legislative body amend the ordinance.

It cannot be emphasized enough that the CEO should be extremely familiar with the provisions of the ordinances and statutes that he or she must enforce or assist in enforcing. A good working knowledge of the laws will put the CEO in a better position to spot violations and to advise applicants about what laws apply to a proposed activity. When the CEO receives an application for a project governed by a State law or local ordinance that the CEO is responsible for administering, the CEO should always review the ordinance or statute before making a decision rather than relying on his or her memory of what it says. No matter how often an ordinance or statute is used, each situation usually has its own peculiarities. A particular project might require a new interpretation of an ordinance provision or might involve a provision not usually applicable to other projects. Checking first can save time, headaches, embarrassment and possible legal costs later on.

Whenever and to the extent possible, the CEO should assist State and federal agencies by attempting to ensure that local projects comply with any relevant State and federal statutes and regulations. By performing this function, the CEO can help minimize any harmful or costly effects on the community that would result from a violation of a State or federal law. At a minimum, the CEO should be familiar with State and federal regulations that would allow him/her to suggest to an applicant that the project being proposed may fall under State or federal jurisdiction and encourage them to consult with these regulatory agencies, for example, the State Department of Environmental Protection, or the U.S. Army Corps, for permitting and other information. However, the CEO is not legally required to do so. If the CEO is unsure about other State or federal laws, it may be best to say nothing in order to

avoid misleading the applicant with incorrect information or to say only that the applicant may wish to check with State and federal agencies to be safe. (See generally, *Hall v. Board of Environmental Protection*).

ENFORCER

The second major role of the code enforcement officer is to take action when apparent violations of the ordinance have been reported or are suspected. Violations will range from starting construction without a permit to establishment of uses not permitted in their location. It has been suggested that the most difficult and crucial element of enforcement is the manner in which the violation is handled.

The CEO is the individual to investigate and, if necessary, initiate court action to prevent or halt zoning violations. The ordinance should always be checked to determine the specific procedures that may be required during enforcement efforts.

The CEO will become aware of potential zoning violations under different circumstances. As routine inspections are made, an eye should be kept open for violations during travel. Citizen complaints are another frequent way the CEO receives information about potential violations.

ASSISTANT TO TOWN BOARDS

The CEO has important roles to play as the assistant to various municipal boards or committees. The two boards with whom the CEO will have the most contact will be the planning board and the board of appeals.

It is usually the planning board's responsibility to write and draft amendments to the zoning ordinance. The CEO should maintain communication with the planning board to inform them of portions of the ordinance that are difficult to administer or interpret.

In many ordinances, there a number of land uses which need to be reviewed by the planning board prior to the CEO issuing a permit. These uses are referred to variously as conditional uses, special exceptions or special permits in different ordinances. In some communities, these uses are reviewed by the board of appeals rather than the planning board. The CEO should participate in the review process by reviewing the application and advising the planning board as to whether the objective standards of the ordinance are met. This determination should be communicated to the board in writing to be part of the board's record.

The CEO should provide the necessary information to the board of appeals to make sure they understand the provision of the ordinance that is the subject of the appeal. The CEO's understandings of the facts regarding the case should also be provided. The CEO should also point out any other relevant sections of the ordinance.

PUBLIC RELATIONS AGENT

As the individual with whom most of the public will have the most contact in regards the zoning ordinance, the code enforcement officer plays a very important role in determining

public perception of the ordinance. Regardless of the specific provisions of the ordinance, and how they may affect a piece of property, the property owner's perception of the ordinance will often be colored by how they learn of the provisions more than the provisions themselves. Administration and enforcement of the ordinance in an open and fair manner is most likely the most important thing the CEO can do to create a positive perception. See the *Legal Issues and Enforcement Techniques* manual for further discussion.

CEO AS STAFF

In addition to the role of assistant to the planning board and appeals board, in many communities the code enforcement officer is expected to play other functions as staff to these boards, the manager, or the selectmen/council. It may be the CEO's responsibility to maintain and publish the agendas for the planning board or appeals board and make sure the proper notices are published or mailed. Some communities may expect the CEO to be available to meet with prospective applicants for conditional use permits or subdivision approval and discuss the planning board's policies and concerns regarding certain issues. These duties, outside the strict definition of the CEO's role as mentioned in most zoning ordinances, are left to be worked out in each community as the needs arise.

VIII. FURTHER READING

An interested Code Enforcement Officer will find the following publications useful and informative reading. Some of the publications may be available on loan from regional councils or libraries, some are sold by the Maine Municipal Association or bookstores, and others are published by the State Planning Office.

Planning and Zoning Theory

The Citizens' Guide to Zoning, Herbert H. Smith, Planners Press, Chicago, 1983. A 250 page introduction to basic zoning theory and technique. A chapter each is devoted to zoning ordinance construction and zoning administration.

Rural and Small Town Planning, Judith Getzels and Charles Thurow, Ed., Planners Press, Chicago, 1980. An excellent introduction to planning concepts and practice and land use regulation in rural areas and small towns. Although geared to planners, code enforcement officers should find it interesting and useful.

The Zoning Board Manual, Frederick H. Bair, Jr., Planners Press, Chicago, 1984. A 130 page book written about and for boards of appeals. After reading this the CEO will want to make sure the board reads it as well.

How to Prepare a Land Use Ordinance, State Planning Office, 1993. This manual, prepared for planning committees and planning boards, contains several useful models and an in depth discussion on procedure and contents when drafting land use ordinances.

Site Plan Review Handbook, a guide to developing s site plan review system, 1998. Maine State Planning Office.

Zoning Law and Regulations:

Model Subdivision Regulations for use by Maine Planning Boards, 11th ed. December 1996. Maine State Planning Office.

Maine's Mobile Home Park Law, 1989. Maine State Planning Office.

Anderson's American Law of Zoning 4th ed. Kenneth H. Young 1996. Libraries.

Land Use Law Update in Maine, 1997,1998. National Business Institute, Inc. P.O. Box 3067 Eau Claire, WI. 54720 (715) 835-7909.

Manuals from the Maine Municipal Association:

Handbook for Local Appeals Boards: A Legal Perspective, Rebecca Warren Seel. An in depth discussion of the role and function of the board of appeals. Substantial material regarding the criteria for granting variances. Contains copies of court decisions, model forms.

Handbook for Local Planning Boards: A Legal Perspective, Rebecca Warren Seel. An in-depth discussion of the role and function of the planning board. Contains copies of court decisions and model forms.

Code Enforcement Training Program Publications/Videos:

The Program has developed and maintains several training manuals, an information booklet, and a web site www.maine.gov/spo/ for use in delivering training and information. This material is made available at no charge to municipally employed code enforcement officers. To other municipal officials and the general public, we must recover our costs for printed material. Cost for each publication is listed on our publication order form. The program information booklet is free of charge to all.

Legal Issues

Legal Issues and Basic Enforcement Techniques (Rev. Jan. 05)

Maine Rules of Civil Procedure for Enforcement of Land Use Regulations (Jan. 06)

Shoreland Zoning and Land Use

Shoreland Zoning with Incorporation of Best Management Practices (Rev. Feb. 02, next update 06)

Forestry in the Shoreland Zone (Oct. 98)

Maine Wetlands and Their Boundaries (published text rev. June 94)

Supplement to Maine Wetlands and Their Boundaries (Rev. July 02)

Zoning and Land Use Regulations (Rev. Feb. 06)

Floodplain Management and the NFIP (Rev. March 05)

Subsurface Wastewater Disposal in Maine (August 04)

Building Standards:

Introduction to Building Standards and the Use of Building Codes (Rev. Oct. 98)

Basic 1 and 2 Family Electrical Installation and Inspection (Rev. 2004)

Maine Energy Efficiency Building Standards (Rev. 2000, update expected 06)

Life Safety and Accessibility Standards (Rev. 2005)

Information:

Municipal Code Enforcement Officers Certification Information (Rev. Jan 05)

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APPENDIX

DECISION TREES FOR THE APPLICATION OF ENVIRONMENTAL AND LAND USE STATUTES

Local Ordinance and State Statute and Rule Applicability Guide for Land Use Projects

Note: This guide includes those land use-related state statutes that may be more commonly encountered during the review of development proposals by a municipal Code Enforcement Officer. For a more comprehensive listing of state statutes and rules, refer to the Zoning and Land Use Regulations manual.

Note: **Highlighted** items are attached in a decision tree that will guide the reader through a determination of the applicability of the statute.

Note: Other local ordinances that are not listed should be added as applicable.

1. Project is a division of land:

- Subdivision Ordinance or Regulations
- Zoning Ordinance or Minimum Lot Size Ordinance
- **Stormwater Management Law**
- **Site Location of Development Law**
-
-

2. Project consists of new construction or reconstruction of existing structure:

- Zoning Ordinance
- Site Plan Review Ordinance
- Local Sewer/Water Connection Regulations
- Local Driveway Opening Ordinance or Regulations
- State Driveway Opening Permit for State and State-Aid Highways
- Local Historic Preservation Ordinance or Regulations
- Farmland Adjacency Act
- Erosion and Sediment Control Law
- **Site Location of Development Law**
- **Endangered Species Act**
- **Stormwater Management Law**
- Handicap Accessibility Statute
- Erosion and Sedimentation Control Law
-
-

3. Project is on, over or at or adjacent to a water body, protected natural resource:

- Local Floodplain Management Ordinance
- **Shoreland Zoning**
- **Natural Resources Protection Act**
- **Endangered Species Act**
- Erosion and Sedimentation Control Law
- Submerged Lands Statute
-
-

4. Project is a mobile home park:

- Local Mobile Home Park Ordinance
- Local Zoning Ordinance or Minimum Lot Size Ordinance

- Maine Manufactured Housing Board Regulations for Mobile Home Parks and Manufactured Housing Statute
- State Rules Relating to Drinking Water
- State Driveway Opening Permit for State and State-Aid Highways
- **Endangered Species Act**

..... Site

- **Location of Development Law**
- Stormwater Management Law
- Erosion and Sedimentation Control Law
-
-

5. Project includes a fuel storage tank:

- Local Groundwater Protection Ordinance
- **Fuel Storage Tank Regulations**
- Maine Hazardous Waste Management Rules
-
-

6. Project includes generation, storage use, recycling, transfer or disposal of solid waste or residuals:

- Local Waste Disposal Ordinance
- **State Solid Waste Management Regulations**
- Maine Hazardous Waste Management Rules
-
-

7. Project is a campground:

- Local Driveway Opening Ordinance or Regulations
 - State Driveway Opening Permit for State and State-Aid Highways
 - Zoning Ordinance
 - Site Plan Review Ordinance
 - State Rules Relating to Drinking Water
 - **Stormwater Management Law**
 - **Site Location of Development Law**
 - **Endangered Species Act**
 - Erosion and Sedimentation Control Law
 -
 -

8. Project is a Gravel Pit or Mineral Extraction Operation:

- Local Groundwater Protection Ordinance
- Local Gravel Pit/Mineral Extraction Ordinance
- Local Driveway Opening Ordinance or Regulations
 - State Driveway Opening Permit for State and State-Aid Highways
 - **Stormwater Management Law**
 - State Performance Standards for Excavations for Borrow, Clay, Topsoil or Silt
 - State Performance Standards for Quarries

- State Regulations for Metallic Mineral Exploration, Advanced Exploration and Mining
- State Small Borrow Pit Statute
- Erosion and Sedimentation Control Law
- **State Solid Waste Management Rules**
-
-

9. Project is an Automobile Graveyard, Junkyard or Automobile Recycling Business:

- Zoning Ordinance or Minimum Lot Size Ordinance
- Site Plan Review Ordinance
- **Stormwater Management Law**
- Local Driveway Opening Ordinance or Regulations
- State Driveway Opening Permit for State and State-Aid Highways
- State Junkyards and Automobile Graveyards Law
- Maine Hazardous Waste Management Rules
- Erosion and Sedimentation Control Law
-
-

Natural Resources Protection Act Decision Tree

Definitions

Coastal sand dune systems. "Coastal sand dune systems" means sand deposits within a marine beach system, including, but not limited to, beach berms, frontal dunes, dune ridges, back dunes and other sand areas deposited by wave or wind action. Coastal sand dunes may extend into the coastal wetlands.

Coastal wetlands. "Coastal wetlands" means all tidal and subtidal lands, including all areas below any identifiable debris line left by tidal action; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland which is subject to tidal action during the maximum spring tide level as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.

Forested wetland. "Forested wetland" means a freshwater wetland dominated by woody vegetation that is 6 meters tall, or taller.

Floodplain wetland. "Floodplain wetland" means lands adjacent to a river, stream or brook that are inundated with floodwater during a 100-year flood event and that under normal circumstances support a prevalence of wetland vegetation typically adapted for life in saturated soils.

Fragile mountain areas. "Fragile mountain areas" means areas above 2,700 feet in elevation from mean sea level.

Freshwater wetlands. "Freshwater wetlands" means freshwater swamps, marshes, bogs and similar areas that are:

1. Inundated or saturated by surface or groundwater at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils; and
2. Not considered part of a great pond, coastal wetland, river, stream or brook.

Great ponds. "Great ponds" means any inland bodies of water which in a natural state have a surface area in excess of 10 acres and any inland bodies of water artificially formed or increased which have a surface area in excess of 30 acres.

Protected natural resource. "Protected natural resource" means coastal sand dune system, coastal wetlands, significant wildlife habitat, fragile mountain areas, freshwater wetlands, great ponds or rivers, streams or brooks, as these terms are defined in this article.

River, stream or brook. "River, stream or brook" means a channel between defined banks. A channel is created by the action of surface water and has 2 or more of the following characteristics.

1. It is depicted as a solid or broken blue line on the most recent edition of the U.S. Geological Survey 7.5-minute series topographic map or, if that is not available, a 15-minute series topographic map.
2. It contains or is known to contain flowing water continuously for a period of at least 3 months of the year in most years.
3. The channel bed is primarily composed of mineral material such as sand and gravel, parent material or bedrock that has been deposited or scoured by water.

4. The channel contains aquatic animals such as fish, aquatic insects or mollusks in the water or, if no surface water is present, within the stream bed.

5. The channel contains aquatic vegetation and is essentially devoid of upland vegetation.

“River, stream or brook” does not mean a ditch or other drainage way constructed and maintained solely for the purpose of draining storm water or a grassy swale.

Significant wildlife habitat. "Significant wildlife habitat" means those areas listed by the Department of Inland Fisheries and Wildlife.

Natural Resources Protection Act Decision Tree

Note: MDEP is the final authority on the applicability of the Natural Resources Protection Act to individual projects. If there is any uncertainty on applicability, the project should be referred to MDEP.

1. **Is the project located in, on, over or within 75 feet of a coastal or freshwater wetland, great pond, river, stream, brook, coastal sand dune, significant wildlife habitat or fragile mountain area?**
 No: NRPA permit not required Yes: Go to 2
2. **Will the project involve disturbance of soil or vegetation, draining or dewatering, filling or adding material to a sand dune or other natural resource, or construction, repair or alteration of a structure?**
 No: NRPA permit not required Yes: Go to 3 or refer project to MDEP
3. **Does the project involve maintenance and repair of a structure in, on, over or within 75 feet of a protected natural resource or maintenance and repair of a private crossing of a river, stream or brook?**
 No: Go to 4 Yes: Project may be exempt from NRPA permit; refer applicant to MDEP
4. **Is the project limited to repair and maintenance of an existing road culvert or replacement of an existing culvert if the replacement culvert is not more than 25% longer than the culvert being replaced and is not longer than 75 feet?**
 No: Go to 5 Yes: Project is exempt from NRPA permit
5. **Is the project limited to emergency repair or normal maintenance and repair of existing public works that affect a protected natural resource except an outstanding river segment as listed in 39 MRSA §480-P?**
 No: Go to 6 Yes: Project is exempt from NRPA permit if erosion control measures are employed to prevent sedimentation of any surface water, the project does not block fish passage in any water course and does not result in any additional intrusion of the public works into the protected natural resource.
6. **Does the project involve normal maintenance and repair or reconstruction of existing access ways in freshwater or coastal wetlands to residential dwellings?**
 No: Go to 7 Yes: Project may be exempt from NRPA permit; refer applicant to MDEP
7. **Does the project involve installation, removal or repair of a subsurface wastewater disposal system?**
 No: Go to 8 Yes: Project is exempt from NRPA permit if system complies with all requirements of the subsurface wastewater disposal rules adopted by the Department of Health and §§Human Services under 22 MRSA §42-3
8. **Does the project involve alteration of a wetland?**
 No: Go to 12 Yes: Go to 9
9. **Does the project involve alteration of freshwater wetlands to cultivate cranberries or alteration of a freshwater, non-tidal stream to create an agricultural irrigation pond?**

No: Go to 10

Yes: The project may qualify for a Cranberry General Permit (38 MRSA §480-U) or an Agricultural Irrigation Pond General Permit (38 MRSA §480-Y); refer applicant to MDEP

10. Does the project impact a coastal wetland or great pond or 4,300 s.f. or more of freshwater wetlands?

No: Project may be exempt from NRPA permit;

Yes: A permit under the Wetland Protection Rules refer applicant to MDEP (38 MRSA §480-X and Chapter 310 of MDEP regulations) is required. A permit may also be required under the Federal Clean Water Act administered by the U.S. Army Corps of Engineers. Refer applicant to MDEP

11. Does the project involve a coastal sand dune?

No. Go to 12

Yes: A permit under Chapter 355, Coastal Sand Dune may be required; refer applicant to MDEP

12. All other projects may require an NRPA permit unless they qualify for a Permit-by-Rule (Chapter 305 of MDEP Regulations). Refer applicant to MDEP.

Site Location of Development Law Decision Tree

Definitions

Borrow pit. “Borrow pit” means a mining operation undertaken primarily to extract and move sand, fill or gravel. Borrow pit does not include any mining operation undertaken primarily to extract or remove rock or clay.

Coastal wetlands. "Coastal wetlands" has the same meaning as in the Natural Resources Protection Act, 38 MRSA § 480-B.

Freshwater wetlands. "Freshwater wetlands" has the same meaning as in the Natural Resources Protection Act, 38 MRSA § 480-B.

Reclamation. “Reclamation” means the rehabilitation of the area of land affected by mining under a plan approved by MDEP, including, but not limited to, the stabilization of slopes and creation of safety benches, the planting of forests, the seeding of grasses and legumes for grazing purposes, the planting of crops for harvest and the enhancement of wildlife and aquatic resources, but not including the filling in of pits and the filling or sealing of shafts and underground workings with solid materials unless necessary for protection of ground water or safety.

River, stream or brook. “River, stream or brook” has the same meaning as in the Natural Resources Protection Act, 38 MRSA § 480-B.

Subdivision. A "subdivision" is the division of a parcel of land into 5 or more lots, other than lots for single-family, detached, residential housing, common areas or open space, to be offered for sale or lease to the general public during any 5-year period, if the aggregate land area includes more than 20 acres; or the division of a parcel of land into 15 or more lots for single-family, detached, residential housing, common areas or open space, to be offered for sale or lease to the general public within any 5-year period, if the aggregate land area includes more than 30 acres. The aggregate land area includes lots to be offered together with the roads, common areas, easement areas and all portions of the parcel of land in which rights or interests, whether express or implied, are to be offered

Structure. A "structure" means: buildings, parking lots, roads, paved areas, wharves or areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 3 acres. Stripped or graded areas that are not revegetated within a calendar year are included in calculating the 3-acre threshold.

Decision Tree

Note: Refer to 38 MRSA §488 for additional information on project applicability and exemptions under the Site Law.

Note: Certain structures and subdivisions regulated under the Site Law may be exempt from MDEP review if located within municipalities determined to have “municipal capacity” pursuant to 38 MRSA §488, sub§19 or authorized to substitute municipal permits for Site Law permits pursuant to 38 MRSA § 489-A, sub§1. (i.e. delegated authority).

Note: MDEP is the final authority on the applicability of the Site Law to individual projects. If there is any uncertainty on applicability, the project should be referred to MDEP.

1. Is the project a subdivision of land into lots?

No:

Yes: Go to 2

2. Will the lots be used for single-family residences or open space?

- No: Go to 6 Yes: Go to 3

3. Will there be 15 or more lots with a combined area of 30 acres or more?

- No: Site Law does not apply Yes: Go to 4

4. Is the subdivision located in a municipality deemed to have “capacity?”

- No: Site Law Permit required; refer applicant to MDEP Yes: Go to 5

5. Is the combined area 100 acres or more?

- No: Site Law does not apply Yes: Site Law permit required; refer applicant to MDEP

6. Do buildings, parking lots, roads, paved areas, wharves and areas to be stripped and graded and not revegetated within a calendar year have a total area of 3 acres or more since October, 1975 or does the land or water area of the development exceed 20 acres?

- No: Go to 10 Yes: go to 7

7. Is the subdivision located in a municipality deemed to have “capacity?”

- No: Site Law Permit required; refer applicant to MDEP Yes: Go to 8

8. Is the “structure area” (see question 6) equal to or exceeding 7 acres?

- No: Site Law does not apply Yes: Site Law permit required; refer applicant to MDEP

9. Will the structure be located in a commercial or industrial subdivision that received a Site Law permit?

- No: Go to 5 Yes: Site Law permit may not be required; refer applicant to MDEP or go to 5

10. Will the development consist of new construction at a manufacturing facility that has previously received a Site Law permit?

- No: Go to 12 Yes: Go to 11

11. Will the new construction result in additional disturbed area not to be revegetated that exceeds 30,000 sq. ft. ground area in any calendar year or 60,000 sq. ft. ground area in total since the Site Permit was originally obtained or was last modified by MDEP?

- No: Site Law permit not required; Yes: Site Law permit may be required; refer applicant to MDEP

12. All other project may require an NRPA permit unless they qualify for a Permit-by-Rule (Chapter 305 of MDEP Regulations). Refer applicant to MDEP.

Storm Water Management Law Decision Tree

Definitions

Disturbed area means all land areas that are stripped, graded, or grubbed at any time during the site preparation for, or construction of, a project unless the areas are returned to a condition with the same drainage patterns and vegetative cover type that existed prior to the disturbance. Both planting conducted to restore the previous cover type and restoration of any altered drainage patterns must occur within one year of disturbance.

"Same cover type" may include hydrologically improved cover type. For example, an area that was previously pasture may be replanted as forest.

"Disturbed area" does not include maintenance or redevelopment of an impervious area within the footprint of that impervious area, but does include new impervious areas. A natural or man-made body is not considered a disturbed area.

Impervious area means the total area of a parcel consisting of buildings and associated constructed facilities or areas that will be covered with a low-permeability material, such as asphalt or concrete, and areas such as gravel roads and unpaved parking areas that will be compacted through design or use to reduce their permeability. Common impervious areas include, but are not limited to, rooftops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and macadam or other surfaces which similarly impede the natural infiltration of stormwater. A natural or man-made water body is not considered an impervious area.

Sensitive or threatened region or watershed means:

1. Direct watersheds of lakes other than those listed in Appendix A of Chapter 502 of MDEP Regulations;
2. For those projects that do not require a Site Law permit, those portions of river, stream or brook watersheds listed in Appendix B(2) that are located at or within 2 miles up-stream of a public water supply intake;
3. For those projects that require a Site Law permit, the watersheds of all rivers, streams and brooks not listed in Appendix B1; or
4. For those projects that require a Site Law permit, the watersheds of a freshwater wetland containing endangered or threatened species and not within the watershed of a "water body most at risk from new development".

Stormwater means the part of precipitation, including runoff from rain or melting ice and snow, that flows across the surface as sheet flow, shallow concentrated flow, or in natural or man-made drainageways.

Water body most at risk means those lakes, coastal wetlands or rivers, streams or brooks listed in Appendices A, B1 or C of Chapter 502 of MDEP Regulations.

Watershed means the land area that drains, via overland flow, natural or man-made drainage systems, water bodies, or wetlands to a given water body or wetland.

Decision Tree

Note: Refer to 38 MRSA § 420-D and Chapters 500 and 502 of MDEP regulations for additional information on project applicability and exemptions under the Stormwater Management Law.

Note: MDEP is the final authority on the applicability of the Stormwater Management Law to individual projects. If there is any uncertainty on applicability, the project should be referred to MDEP.

1. **Does the project consist of impervious and disturbed areas associated with construction or expansion of a single family, detached residence?**

No: Go to 2

Yes Go to 3

2. **Does the development include at least 20,000 sq. ft. of impervious area or 5 acres of disturbed area in the direct watershed of a “water body most at risk” or at least 1 acre of impervious area or 5 acres of disturbed area elsewhere?**

No: Stormwater Management Law permit not required

Yes: Stormwater Management Law permit may be required; refer applicant to MDEP

3. **Does the project consist of disturbed areas of equal to or greater than 1 acre associated with the construction or expansion of a single family, detached residence?**

No: Notice of Intent not required

Yes: Notice of Intent may be required under the National Pollution Discharge Elimination System.

Endangered Species Decision Tree

Note: MDIFW is the final authority on the applicability of the Maine Endangered Species Act to individual projects. If there is any uncertainty on applicability, the project should be referred to MDIFW.

1. Is the project located in the vicinity of “essential habitat for species designated as endangered or threatened”? (See MDIFW Rules, Chapter 8.03, and Atlas of Essential Wildlife Habitats for Maine’s Endangered and Threatened Species.)

No: MDIFW approval not required Yes: Refer applicant to MDIFW for preliminary review; go to 2

2. Does MDIFW confirm that the project is within an area of “essential habitat”?

No: MDIFW approval not required Yes: MDIFW review and approval required before municipality may give final approval or issue any permit for project

Shoreland Zoning Decision Tree

Definitions

Expansion of a structure. “Expansion of a structure” means an increase in the floor area or volume of a structure, including all extensions such as, but not limited to attached: decks, garages, porches and greenhouses.

Expansion of use. “Expansion of use” means the addition of one or more months to a use's operating season; or the use of more floor area or ground area devoted to a particular use.

Floor area. “Floor area” means the sum of the horizontal areas of the floor(s) of a structure enclosed by exterior walls, plus the horizontal area of any unenclosed portions of a structure such as porches and decks.

Foundation. “Foundation” means the supporting substructure of a building or other structure including but not limited to basements, slabs, sills, posts or frostwalls.

Freshwater wetland. “Freshwater wetland” means freshwater swamps, marshes, bogs and similar areas, other than forested wetlands, which are:

1. Of ten or more contiguous acres; or of less than 10 contiguous acres and adjacent to a surface water body, excluding any river, stream or brook, such that in a natural state, the combined surface area is in excess of 10 acres; and
2. Inundated or saturated by surface or ground water at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils.

Freshwater wetlands may contain small stream channels or inclusions of land that do not conform to the criteria of this definition.

Great pond classified GPA. “Great pond classified GPA” means any great pond classified GPA, pursuant to Title 38 Article 4-A Section 465-A. This classification includes some, but not all impoundments of rivers that are defined as great ponds.

Market value. “Market value” means the estimated price a property will bring in the open market and under prevailing market conditions in a sale between a willing seller and a willing buyer, both conversant with the property and with prevailing general price levels.

Non-conforming lot. “Non-conforming lot” means a single lot of record which, at the effective date of adoption or amendment of this Ordinance, does not meet the area, frontage, or width requirements of the district in which it is located.

Non-conforming structure. “Non-conforming structure” means a structure which does not meet any one or more of the following dimensional requirements; setback, height, or lot coverage, but which is allowed solely because it was in lawful existence at the time this Ordinance or subsequent amendments took effect.

Non-conforming use. “Non-conforming use” means use of buildings, structures, premises, land or parts thereof which is not permitted in the district in which it is situated, but which is allowed to remain solely because it was in lawful existence at the time this Ordinance or subsequent amendments took effect.

River. “River” means a free-flowing body of water including its associated flood plain wetlands from that point at which it provides drainage for a watershed of twenty-five (25) square miles to its mouth.

Setback. “Setback” means the nearest horizontal distance from the normal high-water line to the nearest part of a structure, road, parking space or other regulated object or area.

Stream. “Stream” means a free-flowing body of water from the outlet of a great pond or the confluence of two (2) perennial streams as depicted on the most recent edition of a United States Geological Survey 7.5 minute series topographic map, or if not available, a 15-minute series topographic map, to the point where the body of water becomes a river or flows to another water body or wetland within the shoreland area.

Structure. “Structure” means anything built for the support, shelter or enclosure of persons, animals, goods or property of any kind, together with anything constructed or erected with a fixed location on or in the ground, exclusive of fences. The term includes structures temporarily or permanently located, such as decks and satellite dishes.

Decision Tree

Note: The following is based on the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances. To the extent that individual provisions in an approved local ordinance vary from the guidelines, the local ordinance controls.

Note: Approval under NRPA may also be required.

Note: The following projects and situations are those most commonly encountered by a CEO and do not represent the entirety of circumstances covered by the Shoreland Zoning Guidelines or the municipal ordinance.

- 1. Is the project proposed at a location within the municipality's shoreland zone (i.e., within 250 feet of a great pond, river, coastal wetland, freshwater wetland (excluding forested wetland) or tidal water or 75 feet of a stream)?**
 No: Shoreland Zoning permit not required Yes: Record the shoreland district the project is proposed for and go to 2
- 2. Does the project involve a non-conforming structure, use or lot?**
 No: Go to 14 Yes: Approval of the CEO or Planning Board required and must comply with applicable land use standards; go to 3
- 3. Does the project involve a non-conforming structure that is closer than 100 feet to a great pond or a river flowing to a great pond or closer than 75 feet to a freshwater wetland, coastal wetland, tidal water, other river or a stream?**
 No: Go to 8 Yes: Non-conforming portion of structure cannot be expanded by 30% or more in floor area or volume and structure cannot be expanded closer to shoreline; go to 4
- 4. Is the structure proposed to be relocated on the lot?**
 No: Go to 5 Yes: Relocated structure must meet shoreline setback to the greatest practical extent as determined by the planning board and the applicant must demonstrate that septic system meets Subsurface Wastewater Disposal Rules or that a new system can be installed in compliance with the rules; go to 5
- 5. Has the structure been removed, damaged or destroyed by more than 50% of its market value?**
 No: Go to 6 Yes: Reconstructed structure must meet the shoreline setback to the greatest practical extent as determined by the planning board which shall also consider the physical condition and type of present, if any; go to 6
- 6. Is a foundation for the structure to be constructed or enlarged?**
 No: Go to 8 Yes: New or enlarged foundation must meet the shoreline setback to the greatest practical extent as determined by the planning board; go to 7

15. Is the proposed activity listed as an “allowed” use in the shoreland zone?

No: Go to 16

Yes: Shoreland Zoning permit not required but activity must comply with erosion control standards and applicable land use standards of the local ordinance standards of the local ordinance

16. Is the project listed as an activity that requires a permit?

No: Applicant should discuss project with CEO to confirm that permit not required

Yes: Consult the land use standards governing the activity. The following checklist should be used to identify all that may apply. Standard procedures should then be followed for review and issuance of the permit by the planning board, CEO and/or LPI. The activity must comply with erosion control standards and other applicable land use standards of the local ordinance.

Solid Waste Decision Tree

Definitions

DEP/AQC. Department of Environmental Protection, Bureau of Air Quality Control.

DEP/SWFR. Department of Environmental Protection, Bureau of Remediation and Waste Management, Division of Solid Waste Facilities Regulation.

Boundary, solid waste. "Solid waste boundary" means the outermost limit of the solid waste (projected on a horizontal plane) as it would exist at completion of the Department or Board approved waste facility, or the outermost limit of the solid waste at any exempted waste facility.

Construction/Demolition Debris. "Construction/demolition debris" means debris resulting from construction, remodeling, repair, and demolition of structures. It includes but is not limited to building materials, asphalt, wall board, pipes, metal conduits, mattresses, household furniture, fish nets, rope, hose, wire and cable, fencing, carpeting and underlay; it excludes asbestos and other special wastes.

Incineration. "Incineration" means the volume reduction of solid waste by means of controlled combustion. This term does not include cone burners or the practice of open burning.

Inert Fill. "Inert Fill" means clean soil material, rocks, bricks, and cured concrete, which are not mixed with other solid or liquid waste, and which are not derived from an ore mining activity.

Land Clearing Debris. "Land Clearing Debris" means solid wastes resulting from the clearing of land and consisting solely of brush, stumps, soil material, and rocks.

Putrescible Waste. "Putrescible waste" means solid waste that contains organic matter capable of being decomposed by microorganisms and of such a character and proportion as to be capable of attracting or providing food for birds and other animals.

Recycling. "Recycling" means the separating, collecting, and/or reprocessing of manufactured materials or residues for reuse either in the same form or as part of a different product.

Residual. "Residual" means those materials (including but not limited to pulp and paper mill wastewater treatment plant sludge, food and fiber processing wastes, municipal wastewater and sludges, vegetable and fish processing residuals, and ash from wood boilers) generated from municipal, commercial or industrial facilities that are suitable for controlled land application and result in vegetative assimilation, attenuation of the components in the material or improved soil condition.

Solid Waste. "Solid waste" as defined in 38 M.R.S.A. Section 1303 (10) means useless, unwanted or discarded solid material with insufficient liquid content to be free flowing, including by way of example, and not by limitation, rubbish, garbage, refuse derived fuel, scrap materials, junk, refuse, inert fill material, and landscape refuse, but shall not include septic tank sludge, or agricultural wastes.

The fact that a solid waste, or a part or constituent of the waste, may have value or other use or may be sold or exchanged does not exclude it from the definition of "solid waste."

The term includes any residue or material which exists in excess to the owner at the time of such discard or rejection.

Tires. "Tires" means any used, scrap or otherwise discarded rubberized vehicle tires, including whole tires as well as the products derived from the processing of whole tires which may include, but not be limited to, shredded or chipped tires or crumb rubber. The fact that tire products as defined

above may have value or other use or may be sold or exchanged shall not exclude it from the definition of solid waste.

Utilization. "Utilization" means the controlled land application of sludge or residuals at a rate commensurate with the nutritional needs of the crop to be grown and the assimilative capacity of the soil, usually requiring harvesting of the crop to compensate for the added nutrients. Some utilization programs may also have the improvement of soil conditions as a primary goal.

Vegetative Wastes. "Vegetative Wastes" means wastes consisting of plant matter from farms, homes, plant nurseries, and greenhouses. These shall include plant stalks, hulls, leaves, and tree waste processed through a wood chipper.

Waste Facility. "Waste facility" as defined in 38 M.R.S.A. Section 1303 (14) means any land area, structure, location, equipment or combination of them, including dumps, used for handling hazardous or solid waste, sludge or septage. A land area or structure shall not become a waste facility solely because:

1. It is used by its owner for disposing of septage from his residence;
2. It is used to store (for 90 days or less) hazardous wastes generated on the same premises.
3. It is used by individual homeowners or lessees to open burn leaves, brush, deadwood and tree cuttings accrued from normal maintenance of their residential property, when such burning is permitted under section 599, subsection 3; or
4. It is used by its residential owner to burn highly combustible domestic, household trash such as paper, cardboard cartons or wood boxes, when such burning is permitted under section 599, subsection 3.

Woodwastes. "Woodwastes" means brush, stumps, lumber, bark, woodchips, shavings, slabs, edgings, slash, and sawdust, which are not mixed with other solid or liquid waste.

Decision Tree

1. Does the project involve changes to a DEP licensed solid waste facility?

No: Go to 2 Yes: Refer to DEP/SWFR

2. Does the project involve the storage of solid waste?

No: Go to 4 Yes: Go to 3

3. Is the facility a bottle or can redemption center or rubbish collection bins at individual or clusters at residential and nonresidential establishments?

No: Refer to DEP/SWFR Yes: Exempt

4. Does the project involve incineration of solid waste or use of solid waste as a substitute for conventional fossil or biomass fuel for power consumption?

No: Go to 6 Yes: Go to 5

5. Is the project an incinerator for exclusive use of an institutional, commercial or industrial establishment or a lime kiln, bark and hogged fuel boiler, biomass boiler, Kraft recovery boiler, or sulfite recovery boiler which combusts solid waste generated exclusively at the facility or which combusts wood wastes from land clearing or wood from demolition debris?

No: Refer to DEP/SWFR Yes: Refer to DEP/AQC

6. Does the facility propose to dispose inert fill or utilize chipped wood generated from land clearing where the chips are used for fuel, agriculture or landscaping?

No: Go to 7 Yes: Exempt

7. Does the facility propose to dispose construction and demolition debris, land clearing debris, or wood wastes on the same parcel of land where the waste was generated and where the solid waste boundary encloses an area less than one acre and there is no more than one such facility per parcel?

No: Go to 8 Yes: Exempt

8. Does the facility propose to store 1,000 or more used tires or propose to dispose any used tires?

No: Go to 9 Yes: Refer to DEP/SWFR

9. Does the project involve the beneficial use or utilization of solid waste?

No: Go to 10 Yes: Refer to DEP/SWFR

10. Does the project involve home and nursery composting of less than 30 cubic yards of vegetative wastes generated on site or rendering and fishmeal processing plants for the production of blood meal, bone meal, fishmeal or other processed food additives or products?

No: Go to 11 Yes: Exempt

11. Does the project involve the storage and composting of more than 30 cubic yards of vegetative wastes or leaf composting or sludge storage, composting, or spreading?

No: Go to 12 Yes: Refer to DEP/SWFR

12. Does the facility handle putrescible solid waste?

No: Go to 13 Yes: Refer to DEP/SWFR

13. Is the project an automobile dismantling and salvage operation that is subject to 30-A MRS 3751-3760?

No: Go to 14 Yes: Exempt; refer to municipality

14. Does the facility process, reduce the volume or change the physical characteristics of solid waste?

No: Exempt Yes: Go to 15.

15. Does the facility consist of: an indoor compactor, baler or shredder at an industrial plant; the processing or utilization of pre-separated clean scrap materials or; the recycling of solid materials that have been separated from other solid waste prior to receipt?

No: Refer to DEP/SWFR Yes: Exempt

Fuel Storage Tank Decision Tree

1. Will 10% or more of tank be installed below ground?

- No: Above ground storage tank – installation and
- Yes: Underground storage tank; installation equipment regulated by State Fire Marshall and equipment regulated by MDEP(Rules and Regulations for Flammable and Chapter 691(Regulations for Registration, Combustible Liquids) and Oil and Solid Fuel Installation, Operation and Closure of Board (Chapters 100-200); go to 2 Underground Oil Storage Tank Facilities) and Oil and Solid Fuel Board (Chapters 100-200) and by State Fire Marshal (Rules and Regulations for Flammable and Combustible Liquids); go to 3

2. Does aboveground fuel storage exceed 660 gallons in a single tank or 1,320 gallons in total?

- No: Not regulated by USEPA
- Yes: Spill Prevention, Control and Countermeasures (SPCC) Plan required by USEPA – see 40 CFR Part 112; go to 4

3. Does total below ground tank fuel storage exceed 42,000 gallons?

- No: Not regulated by USEPA
- Yes: Spill Prevention, Control and Countermeasures (SPCC) Plan required by USEPA – see 40 CFR Part 112; go to 4

4. Is total fuel storage 63,000 gallons or larger?

- No:Not regulated under the Site Law
- Yes: Regulated under the Site Law as an “Oil Terminal Facility – see 38 MRSA §§ 481-490

