

## Examples - Exercise of Maine Municipalities' Permitting Authority to Ensure Consistency with State Policies

### I. General Overview/Background

#### A. Municipalities' "Ordinance Power"

- 30-A MRS section 3001  
<http://www.mainelegislature.org/legis/statutes/30-A/title30-Asec3001.html>
- "Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter."
- Legislature has broad authority to confer municipalities authority over development related activities on submerged lands or elsewhere in the State
- There is no express preemption of municipal regulation of ocean energy development on state-owned submerged lands
- 30-A MRS section 3001 directs that its recognition of municipal authority be liberally construed and establishes a rebuttable presumption that an enacted ordinance is valid. The law further directs that state preemption of local authority not be implied "unless the municipal ordinance in question would frustrate the purpose of any state law."

#### B. Municipal boundaries

At its initial meeting, the subcommittee suggested querying counsel in the Attorney General's office regarding the threshold question of whether LURC or DEP has jurisdiction over proposed energy development in a given ocean area in Maine's coastal waters. The following provides the AG's office (Jerry Reid) e-mail response (in italics) to statements summarizing our current understanding of this issue:

- The Legislature sets municipal boundaries by private in special laws enacting or amending municipal charters. *This is at least typically and maybe exclusively true; we're not aware of it being done in any other way.*
- There is not uniformity in how these municipal boundaries over state-owned submerged lands, set in some cases set over wide intervals of time by different legislatures, are articulated; and the boundaries may be ambiguous (subject to differing interpretations) or inconsistent (those of adjacent municipalities or municipalities facing each other over water may be contradictory). *Correct*
- One needs to look at the boundary descriptions in specific charters involved to know the boundaries in a given area. (Note: At SPO's request, the legislative law library has graciously begun to compile charters setting the seaward boundary of each municipality along the coast.) *Correct (the law library project should be very useful in this regard)*

- There is no state statute or law court opinion that creates a general rule of construction re: municipalities' seaward (or lateral/between each other?) boundaries. *That's our understanding. However there is a useful Law Review article covering such rules of construction as they relate to deeds: Donald R. Richards et al., Maine Principles of Ownership Along Water Bodies, 47 Me. Law Rev. 35 (Winter 1995). It is possible that courts may find the principles discussed in the article useful in resolving these municipal boundary questions, but we are not aware of that happening yet.*
- By state law, LURC has jurisdiction over any area not within the boundaries of a municipality and therefore an ocean area in Maine's coastal waters that is outside the boundary of any municipality would be subject to LURC, not DEP, jurisdiction, absent a specific statute dictating otherwise. *It is true that the definition of "unorganized areas" at 12 MRSA 682(1), at least by implication, appears to make the State's offshore territory that is beyond municipal boundaries subject to LURC's jurisdiction. Whether the Legislature intended to do that and whether that result makes sense in light of the current ideas about ocean energy development would seem to be appropriate questions for the Task Force to consider, and perhaps to develop proposed statutory amendments as appropriate (forgive me if I'm stating the obvious here).*

## II. Select Maine Statutes Regarding Exercise of Ordinance Power

- 12 MRS section 6671 (municipal shellfish conservation program);  
<http://www.mainelegislature.org/legis/statutes/12/title12sec6671.html>

Municipality may manage (issue licenses/state authority delegated) intertidal, softshell clam resource if it adopts conservation plan and licensing program that meets state requirements re: fees, standards, process; DMR determines consistency; copy of ordinance filed with state (DMR)

- 12 MRS section 8869(8) (regulation of timber harvesting);  
<http://www.mainelegislature.org/legis/statutes/12/title12sec8869.html>

Mandatory minimum state standards; no preemption or limitation of local authority per se, rather requirement that local ordinance use terms (e.g., definition of clearcut) consistent with those in state law and follow state mandated process for its adoption that includes prior consultation with DOC/Bureau of Forestry (DOC), right for DOC to offer scientific testimony at local hearing, and notice to affected landowners. Appeal of ordinance under "arbitrary, capricious" standard. Local ordinance must be filed with DOC which maintains central repository.

- 7 MRS section 155 (agriculture; best management practices);  
<http://www.mainelegislature.org/legis/statutes/7/title7sec155.html>

No preemption of local authority to enact ordinances regulating agricultural activities (e.g., manure management), rather requirement that DOA be provided a copy 90 days before enactment and advise re: compatibility with state best management practices for agriculture (BMPs). Law provides that a farm operation may not be considered a public nuisance or in violation of a local ordinance if, as determined by DOA, the operation meets state BMPs

- 38 MRS section 1310-U (commercial landfill siting);  
<http://www.mainelegislature.org/legis/statutes/38/title38sec1310-U.html>

State preemption of stricter local standards, with express reference to local ordinance power (see above). References (non-exclusive list) specific areas of municipal regulation where stricter local standards are disallowed. Requires ordinances to use definitions consistent with those in state law. DEP to be provided copy of proposed ordinance 30 days before it's considered for adoption.

- 38 MRS section 2173 (state or regional landfill siting);  
<http://www.mainelegislature.org/legis/statutes/38/title38sec2173.html>

Provision for local adoption and enforcement of DEP permit terms and conditions, plus other locally imposed conditions of approval not in the DEP order that do not "unreasonably restrict the operation of the facility." Local requirements must be imposed with 90 days of the DEP licensing order.

- 38 MRS section 1305 (9); (coordinated state-local application review; sludge spreading)  
<http://www.mainelegislature.org/legis/statutes/38/title38sec1305.html>

DEP directed to coordinate with municipality by providing notice of application, sharing test results, and consulting and soliciting recommendations prior to its decision. DEP must make written, explanatory findings re: any municipal recommendation not adopted.

### **III. Proposed Wind Power-Related Legislation**

- LD 199 (An Act to Facilitate Wind Power Siting);  
<http://janus.state.me.us/legis/LawMakerWeb/summary.asp?ID=280030625>

". . . a governmental entity, other than a wind power siting authority [DEP or LURC], may not require any approval, consent, permit, certificate or other condition for the construction or initial operation of a wind energy development that is authorized by a certificate or permit issued by a wind power siting authority in accordance with this chapter."

### **IV. Model Ordinance**

At times, the State has prepared a model ordinance for municipalities' voluntary use, in their discretion, to regulate certain development activities. In its final report, the Governor's Wind Energy Development Task Force recommended that the State Planning Office (SPO) develop a model wind energy development siting ordinance by May 2009. SPO is working on this model and anticipates its timely completion.