Municipal Code Enforcement Officers Training and Certification Manual

Zoning and Land Use Regulations

State Planning Office
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Zoning and Land Use Regulations

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CONTENTS

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. The following objectives are presented here to help the reader organize his or her study of the topic and to assist the applicant for basic certification with preparing for the examination:

1. Define the concept of Euclidian zoning.

2. Explain the purpose of zoning.

3. Understand the purpose of a comprehensive plan.

4. Understand how zoning may contribute to sprawl and increase municipal costs.

5. Understand the nine elements of a zoning ordinance.

6. Know the differences and similarities between a site plan review ordinance and a zoning ordinance.

7. Explain the purpose of the zoning board of appeals.

8. List and explain the four hardship tests that must be met prior to the granting of a zoning variance in Maine.

9. 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.

10. Understand how municipal zoning ordinances are impacted by a wide variety of state laws.

11. Understand CEO responsibilities under the Mandatory Shoreland Zoning Act.

12. List the basic requirements of a flood management ordinance that a community must adopt to be eligible for participation in the National Flood Insurance Program.

13. Recognize the purpose of the "coastal management policies" established in Title 38 §1801.

14. Define the term "subdivision" under the municipal subdivision law.

15. 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.

16. Understand when the division of a structure is defined as a subdivision, under the municipal subdivision law.

17. Understand what action a CEO should take upon learning that a subdivision, as defined by the municipal subdivision law, has been created without municipal approval.

18. 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.

19. Know the permit conditions associated with a municipal permit for the operation of an "automobile recycling business".

20. Understand the limits placed upon municipalities by Maine statute related to zoning manufactured housing.

21. Understand the requirements related to the disposal of septage waste on site when generated by a residence.

22. Understand the requirements applicable to construction activity on “submerged lands,” as defined by the State of Maine.

23. Understand the signs regulated by Maine law.

24. Understand the general requirements of the State’s Erosion and Sedimentation Control Law.

25. Understand the requirements of the Stormwater Management Law applicable to all projects in lake watersheds that require a permit.

26. List the resources protected by the Natural Resources Protection Act.

27. Know the term “subdivision” under the Site Location of Development Act.

28. Recognize the projects that must be reviewed under the Site Location of Development Law.

29. Understand the notice requirements associated with asbestos related activities.

30. Understand the concept of concurrent jurisdiction.

31. Know the five duties of the CEO in connection with a municipal zoning ordinance.

32. Know the role of the CEO in relationship to the planning board.

33. Know the role of the CEO in relationship to the zoning board of appeals.

34. Know the role of the CEO in dealing with the public.

Terms and Abbreviations

CEO means code enforcement officer.

DEP means Department of Environmental Protection.

LPI mean local plumbing inspector.

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 **M**aine **R**evised **S**tatutes **A**nnotated. 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, site review, road design and traffic management, easements, rate of growth ordinances, and impact fees. These land use tools are also discussed.

Beyond local zoning, state and federal regulations impact both municipalities and individual development projects. The reader will find in this manual a 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.

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.

Section X provides a listing of other manuals and resources for further reading.

Finally, Appendix A contains an applicability guide that indicates which laws and rules apply to different types of projects. Local ordinances may be added to this applicability guide.

I. Understanding Zoning

A. WHAT ZONING IS

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.

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 map establishes the districts; the text, 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 and how the community grows.

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 are: residential, commercial, industrial, village, rural, resource protection, etc. 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. These may be called mixed-use zoning or form-based zoning.

B. HISTORICAL DEVELOPMENT OF ZONING

The concept of zoning was developed in the early 20th 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…"which sent forth abundance of noisome, 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 and 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 the case of *Ambler Realty v. Village of Euclid*, 1926, in which the authority of the village to enact zoning (primarily to protect a 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 are:

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 these requirements in parts of town, a town can direct the level of growth and encourage development in various sections.

Smaller lot sizes can foster development in downtowns, urban areas, and traditional neighborhoods, where large lot sizes in these areas may contribute to sprawl by pushing development outwards. While large lot sizes will not necessarily retain a town’s rural character, it is a tool to direct more development into some areas and less into other areas.

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 prevent sprawl and be less expensive to service with police, fire, school bussing, sewer, and water than new development spread about the countryside.

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, while allowing an appropriate mix of uses will promote walkable, traditional neighborhoods. More compact density provisions or smaller lot sizes will promote an urban feeling. Preserving open space and protecting working lands will maintain a rural character 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. Road layout can slow the speed of traffic or provide for efficient movement of traffic as desired by the land use it supports. 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.

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.

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. The standards for comprehensive planning are discussed in section V 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 future land use plan that identifies where and how the community wants to grow. A comprehensive plan contains policies for how a municipality wants its housing stock, transportation routes, economic development, natural, historical, and cultural resources, and municipal services to look in the future. All of these policies help the town determine where in the community it wants to foster growth and where it does not. These policies then are the basis of the of a future land use plan, which delineates the community's growth areas and therefore provides guidance on the types of provisions that should be in a zoning ordinance in order to accomplish the type and location of growth the community desires. It is the future land use plan with which a zoning ordinance must be most closely linked.

Through a well thought-out comprehensive plan that guides effective zoning provisions, a municipality can encourage orderly growth and development in areas that it deems appropriate. It can hold the line on taxes for public services. It can preserve rural land and promote attractive neighborhoods. It can conserve water and air quality, open space, and wildlife habitat. It can preserve community character and the social capital that binds a community together.

What's more, by linking the regulations in a zoning ordinance with the policies 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.

III. The Zoning Ordinance

A. FORM AND STRUCTURE OF THE ZONING ORDINANCE

A zoning ordinance consists of two parts: 1) the text of the ordinance, and 2) 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 easier for all involved.

The essential provisions of a zoning ordinance include:

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

1. Title

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

2. Legal Provisions

Although not necessary, a reference to the statutes that authorizes or directs 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.

3. 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.

4. 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 that enforce Maine's Uniform Building and Energy 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.

5. 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 in Part B of this section.

6. 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.

7. 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.

8. 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 the State Planning Office's manual, *Legal Issues and Basic Enforcement Techniques*.

9. 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 may 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.

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 and smaller lot sizes in downtown and village neighborhood areas. This has been done to bring vitality to commercial areas that became empty after 5:00PM, to reduce traffic and energy consumption, and to foster traditional residential neighborhoods where people can walk to get basic services.

1. Shoreland Zoning

A zoning ordinance must identify the areas in the community within the shoreland under the Mandatory Shoreland Zoning Act (Title 38 § 435-449). Guidelines adopted by the BEP in 1990 with subsequent revisions suggest the establishment of as many as seven

different districts with performance standards in a zoning ordinance that recognize the differing levels of existing development and value of natural resource features.

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. More detailed information about the Mandatory Shoreland Zoning Act is contained in Chapter IV.

2. Floodplains

In order to participate in the National Flood Insurance Program, municipalities must regulate development within any 100-year floodplains, otherwise known as the *Special Flood Hazard Area*. Flood insurance is not available in communities that do not participate in the National Flood Insurance Program. Communities are provided with a Flood Insurance Rate Map that identifies the flood areas for which specific performance standards must be adopted. More detailed information about floodplain management is contained in Chapter IV.

3. Traditional Neighborhoods

Ordinances might also designate neighborhood districts that accommodate a greater diversity and range of uses than is typically found in residential subdivisions. This diversity includes different kinds of houses and apartments, different lot layouts, different building designs, and multiple uses and activities within or close by the neighborhood. In addition, the neighborhood may include some nonresidential activities –a community center, daycare, or a home business in appropriate locations. This variety provides the diversity of uses within walking distance that are the essence of a traditional neighborhood.

C. 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 preservation, traditional neighborhood development, natural resource preservation, or 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.

D. COMMON PERFORMANCE STANDARDS

Dividing a town 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 to ensure that overriding safety 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.

General performance standards help a community 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.

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

1. 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.

To reduce sprawl and encourage business development in downtown areas, ordinances sometimes permit the off-street parking for an approved use to be a limited distance away from the location of the use. Increasingly, ordinances are also providing opportunities to meet parking standards with shared facilities.

2. 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) except for certain changeable signs listed in Title 23 §1914, sub 11.

3. 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.

E. FORM-BASED CODES

Some communities are looking at design of development, rather than types of uses to shape the look and feel of their neighborhoods and districts.

This is accomplished through form-based codes. Form-based codes are community-driven design regulations that control the physical form of the built environment to create a certain type of ‘place’. Form-based codes create that specific form by using dimensional standards to shape the spaces between buildings and to control how buildings relate to each other, to streets, and to other public spaces. As compared to traditional single-use zoning, form-based codes focus more on the size, form, and placement of buildings and parking, and less on land use (residential vs. commercial) and density (housing units per acre).

Form-based codes can be used in many different settings. They are frequently used for village centers, mixed-use downtowns, and traditional neighborhood developments. The strength of using form-based codes is the ability to define the character of a particular area.

For more information, visit the State Planning Office’s web site on form-based codes.

IV. Other Land Use Tools

A municipality may manage land use in other ways besides zoning. Where zoning specifically divides a municipality into districts and restricts various uses in them, a municipality can control safety, environmental impacts, and types and rate of development through performance standards, road design and traffic management, easements, and growth caps and impact fees. Another non-zoning tool, subdivision review, is discussed separately in section VI.

A. 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.

The State Planning Office offers a *Site Plan Review Handbook: A Guide to Developing A Site Plan Review System*, 1997, available on-line at: http://www.maine.gov/spo/landuse/docs/publications.htm.

B. ROAD DESIGN AND TRAFFIC MANAGEMENT

Municipalities may design roads, regulate traffic speeds, parking, and access rights, and install traffic calming improvements on local roads in ways that control the amount and location of development. MaineDOT controls these measures on state roads.

Local road design standards can support the type of village, suburban, or rural land use patterns that the town wants. If done properly, road construction and maintenance can reduce environmental degradation and preserve designated scenic, historic, or cultural resources. Low speeds and pedestrian improvements can also impact growth. The requirement of on-site parking standards can inadvertently drive growth to outlying areas.

Access management is the planned location and design of driveways and entrances to public roads in order to limit traffic conflicts and improve safety and traffic flow. Many municipalities already require driveway applications and control curb cuts. Access management also can prevent unplanned development that impairs traffic safety and requires taxpayers to fund expensive remedies.

By maximizing the efficiency of the transportation system, a municipality can manage land use in a way that enhances livability and complements the community's vision.

The MaineDOT has resources to assist communities with transportation planning:
Access Management web site
Integrating Bicycle and Pedestrian Connections
Sensible Transportation Handbook, June 2008

C. EASEMENTS/PURCHASE OR TRANSFER OF DEVELOPMENT RIGHTS

A municipality can also protect valuable land through legal means. Easements –either conservation easements or working land easements –provide permanently enforceable rights by which a landowner promises to use property only in ways permitted by the easement. Often these restrict certain types of uses or development such as allowing no development to occur or permitting only farming or forestry. Easements may be gifted to municipalities or purchased by them or by, or in conjunction with, local land trusts. Transfer of development rights (TDR) allows a municipality to trade or transfer the development rights of areas to be protected (referred to as "sending areas") to appropriate, community-designated areas ("receiving areas") that can accommodate or is more appropriate for growth.

The town of Unity has a transfer of development rights program for agriculture or, as they call it, a Farmland Protection Incentive Measure. Its aim is to alleviate development pressures on productive farmland, by providing an incentive to locate development on other land. In the town's rural district, all new lots created by dividing a larger parcel must average 120,000 sq. ft. in size. Using the Farmland Protection Incentive Measure, however, a developer may create lots that average 60,000 sq. ft., effectively doubling the density of development and the return on investment. For every new lot created at the higher density, at least 40,000 sq. ft. of productive farmland must be preserved. The preserved productive farmland can be anywhere in the municipality.

For more information:
Introduction to Transfer of Development Rights Programs, State Planning Office, November 2002
Maine Farmland Protection Program, Department of Agriculture, web site
Maine Farmland Preservation Ordinances, State Planning Office, web site
Scenic Assessment Inventory, State Planning Office, October 2008
Land Stewardship Resource Guide, State Planning Office
Regional Landscape Conservation in Maine: Best Practices, State Planning Office, September 2008
Home Rules, Home Tools: Locally Led Conservation Achievements, Maine Association of Conservation Commissions, web site
Land for Maine's Future Program, State Planning Office, web site

D. GROWTH CAPS AND IMPACT FEES

Under certain circumstances and crafted carefully, municipalities may also limit the number of building permits it issues or require the developer to pay for the incremental costs of providing public services to new development. At a minimum these types of controls must be enacted as municipal ordinances and must conform to the town's adopted, consistent comprehensive plan. The state laws governing these types of ordinances are discussed further in section VII.

The State Planning Office offers a Manual for Maine Municipalities on the Design and Calculation of Development Impact Fees available on-line at: http://www.maine.gov/spo/landuse/docs/publications.htm.

V. Municipal Zoning Laws

The previous section described the elements of a typical zoning ordinance. 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:

1. ***Planning and Land Use Regulation Statutes*** 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.

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

A. PLANNING AND LAND USE REGULATION STATUTES

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 five subchapters, four of which are summarized below. The subchapter on *Subdivisions* is discussed in section VI of this manual.

1. 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."

2. Growth Management Programs

The standards for comprehensive planning are found in this subchapter.

Maine law requires that a municipality's zoning ordinance be supported by its adopted comprehensive plan. According to statute, "A zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body (30-A MRSA §4352)." 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, and direct development to those areas where the community desires to grow. Land use ordinances that are not supported by the local comprehensive plan expose the community to potential lawsuits.

The State Planning Office has adopted rules that provide for the process by which it may review a municipality's zoning ordinance for consistency with a comprehensive plan. These rules may be found on-line at http://www.maine.gov/sos/cec/rules/07/chaps07.htm and clicking on Ch. 210. It is not necessary for an ordinance to be reviewed for consistency by the State Planning Office in order to be consistent.

The consistency requirement also applies to rate of growth or building permit limitation ordinances, and impact fee ordinances, but not site review or subdivision regulations.

As discussed in section II, a comprehensive plan is the policy basis for local zoning. It guides the future growth of the municipality as well as laying the foundation for the improvement of municipal services and facilities and the day-to-day operation of local government.

The Legislature, as part of the Growth Management Act (herein after referred to as the Act), established topic areas that must be addressed in the plan. These areas include: population and demographic trends, economy, housing, transportation, recreation, marine resources (if applicable), water resources, critical natural resources, historic and archaeological resources, agricultural and forest resources, public facilities and services, fiscal capacity and capital investment plan, existing land use.

Based upon an analysis of the information gathered, the plan should present a set of policies that are consistent with the ten goals of the Growth Management Act and reflect the nine statutory coastal management policies. The law also lays out guidelines for developing implementation strategies. These implementation strategies are the basis for the zoning ordinance and other land use regulations, as well as for the town's major spending decisions. The State Planning Office determines, based on the criteria in its administrative rule, Chapter 208, whether a municipality's comprehensive plan is consistent with the Act.

The Act 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.

The Legislature also intends the Act to encourage more than one municipality to work together to develop growth management programs by defining procedures for multi-municipal regions to develop comprehensive plans and requiring municipalities to have a regional coordination program as part of its comprehensive plan.

For more information about comprehensive planning, visit the State Planning Office's web site at: http://www.maine.gov/spo/landuse/compplans/index.htm.

3. Land Use Regulation

In addition to the requirement for consistency with a comprehensive plan, Chapter 187 contains more specific requirements for zoning ordinance enactment including creating a boards of appeals. Additional provisions of Chapter 187 are discussed later in this manual.

a. Administrative Requirements

State law contains some procedural provisions regarding the enactment of zoning ordinances that are more specific than those controlling the adoption of other ordinances. All ordinances must include a map showing the zoning district boundaries. The municipality must hold a hearing prior to adopting or amending a zoning ordinance (Title 30-A § 4352, sub §§ 9, 10). Subsection 9 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.

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.

b. Effect on State

30-A M.R.S. §4352 (6) requires that state agencies comply with zoning ordinances that are consistent with a comprehensive plan, which is consistent with the Growth Management Act, in the development of any building, parking facility, or other publicly-owned structure. The statute does contain exceptions for overriding public benefit reasons. Zoning ordinances continue to be advisory to the State if they are not consistent with a comprehensive plan which is consistent with the Growth Management Act (see section VIII-D of this manual for more information).

Having a zoning ordinance reviewed for consistency by the State Planning Office (as discussed above) is an option that the town may wish to consider if it wants to bolster the standing of its zoning regulations with regard to the location of state facilities within it boundaries.

c. Boards of Appeals

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.

Additional elements of hardship may be established by local ordinance.

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 DEP's *Chapter 1000: Guidelines for Municipal Shoreland Zoning Ordinances*, and include:

i) 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.

ii) A use variance is not permitted. No variances may be granted for starting a use that is prohibited by the shoreland ordinance.

iii) 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.

4. Enforcement of Land Use Regulations

Effective January 1, 1993, a municipality must employ a code enforcement officer who is certified by the State Planning Office. The individual has a 12-month grace period 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 or in cases where necessary training or examinations are not available (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 (30-A §4452) the provisions of the Natural Resources Protection Act.

B. OTHER STATE IMPACTING MUNICIPAL ZONING

1. Shoreland Zoning

Maine's mandatory Shoreland Zoning Act requires a municipality institute zoning controls within 250 feet of rivers, great ponds, tidal waters, freshwater and coastal wetlands, and within 75 feet of certain streams.

The Board 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 *Chapter 1000: 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.** These include:

- 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.

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 municipality shall set the amount of any fee. 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.

For more information, view the *Shoreland Zoning Enforcement Manual*, available on-line at: http://www.maine.gov/spo/ceo/publications.htm, or visit DEP's shoreland zoning web site.

2. Floodplain Management

In 1968, Congress adopted the National Flood Insurance Program (NFIP) to protect property from losses due to flooding and to reduce the cost of flooding to the taxpayers.

Flood insurance is not available in communities that do not participate in the NFIP. The NFIP offers flood insurance in return for local regulation of development in high-risk areas. 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. First, 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." Secondly, in communities with more risk or a greater potential for development in the high risk areas, FEMA provides 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).

The "100-year flood" is the term commonly used to describe the average return frequency of a 100-year flooding event. However, the term 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 deceases from the upland edge of the floodplain and gets closer to the water's edge.

In order to participate in the NFIP, the community must adopt a floodplain management ordinance with maps that conform to regulations adopted by the Federal Emergency Management Agency (FEMA) under the Flood Disaster Protection Act of 1973 as well as the State's additional standards. The basic requirements of the ordinance are that it:

a) adopts the most current Flood Insurance Rate Map (FIRM) provided by FEMA;

b) requires permits for all “development” in the Special Flood Hazard Area;

c) severely limits activities in a floodway due to high velocities and greater depths;

d) requires that the "lowest floor", including basement, of any structure built anywhere in the floodplain be one foot above the expected 100-year flood elevation; and

e) establishes standards for open foundation construction in coastal areas were 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 by voters 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. It can be downloaded from the Internet at: http://www.maine.gov/spo/flood/ordinances/index.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.maine.gov/spo/flood/publications.htm and click on FEMA Map Service Center under mapping publications or go directly to FEMA’s website: http://msc.fema.gov/.

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*, for additional assistance on the administration of floodplain management ordinances, which is available online at http://www.maine.gov/spo/flood/publications.htm.

Participation in the NFIP is voluntary. However, if a town does not choose to enter the Program, there are ramifications that should be thoroughly considered. For example,

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. Or if there is a presidentially-declared disaster, the amount of assistance the community receives could be severely limited. 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.

3. 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:

i) **Port and harbor development.** Promote the maintenance, development, and revitalization of the State's ports and harbors for fishing, transportation, and recreation;

ii) **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;

iii) **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;

iv) **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;

v) **State and local cooperative management.** Encourage and support cooperative state and municipal management of coastal resources;

vi) 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;

vii) **Recreation and tourism.** Expand the opportunities for outdoor recreation and encourage appropriate coastal tourist activities and development;

viii) **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

ix) **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 comprehensive plans must address these coastal policies and local ordinances affecting land use in coastal areas must contain review standards that will promote them.

4. Access Management Law

In May 2000, the 119th Maine Legislature enacted P.L. 1999, c. 676, An Act to Ensure Cost Effective and Safe Highways in the State, and directed MaineDOT to draft rules and regulations for an access management program (see 23 MRSA §704). The Access Management Program includes access management rules and corridor planning and preservation initiatives.

The access management rules provide for a planned location and design of driveways and entrances to public roads. The Act specifically directs the MDOT and authorized municipalities to promulgate rules to assure safety and proper drainage on all state and state aid highways with a focus on maintaining posted speeds on arterial highways outside urban compact areas. The law also requires that the rules include standards for avoidance, minimization, and mitigation of safety hazards along the portions of rural arterials where the 1999 statewide average for driveway related crash rates is exceeded. The rules lay out requirements for the design of driveways and entrances on state and state aid highways, including driveway permits.

The Corridor Planning and Preservation Program envisions prioritized planning and preservation of Mobility Arterial corridors most at risk of losing capacity, safety, and of decreasing posted speeds, due to increasing development and commuter and visitor pressures.

MDOT, in partnership with adjoining municipalities, property owners, corridor committees, Scenic Byway corridor committees, and other stakeholders along a mobility arterial, join forces to outline appropriate locations for access management techniques such as:

- access rights acquisition,
- development of frontage roads and shared driveways,
- intersection improvements,
- development of turn lanes,
- installation of signals, and
- development of appropriate local land use regulations that meet the intent of the law.

Plans are required to outline corridor protection measures that assure maintenance of safety and speed and management of drainage, as well as the development, protection, or enhancement of important environmental features along the highway corridor.

Under this law, municipalities are authorized to adopt rules and regulations for the design, location and construction of driveways, entrances and approaches on state

highways and state aid highways to adequately protect and promote the safety of the traveling public and maintain highway right-of-way drainage.

More information about driveway permits as they impact code enforcement officers is in Section VIII of this manual. Also, visit the MaineDOT's Access Management web site.

5. Sensible Transportation Policy Act

The Sensible Transportation Policy Act (STPA) (23 MRSA §73) aims to strengthen the functional viability and lengthen the long-term life of state transportation corridors. It charged the Maine Department of Transportation to develop rules to implement the legislated, statewide comprehensive transportation policy.

The Act requires municipalities to singularly or jointly adopt a community transportation plan in order to be eligible for transportation incentive funding. The plan must address the manner in which development along state transportation corridors in the municipality or municipalities is to occur. Each municipality(ies) that adopts a plan must incorporate any land use development strategies recommended in the plan into its local ordinances.

The STPA also requires that the State Planning Office and the Maine Department of Transportation establish linkage between that Act and the Growth Management Act. Therefore the municipality needs to develop only one transportation plan for both the STPA and the transportation chapter in the municipality's comprehensive plan. For more information: STPA Homepage.

6. Informed Growth Act

In 2007, the Legislature enacted the Maine Informed Growth Act (30-A MRSA §§ 4365-71). The Act requires municipalities to determine whether proposed, large-scale, retail development would have an "undue adverse impact" on the local economy and community. If the municipality decides that it would, a local permit cannot be approved.

The Act requires an applicant for a permit for certain sized retail development to pay $40,000 for a comprehensive economic impact study. The Act contains a list of the types of impacts the study must evaluate, including the economic effects of the new development on existing retail operations, jobs, wages and benefits, and municipal services, among others.

The State Planning Office provides a list of qualified preparers from which the municipality and developer jointly select to prepare the study. The developer pays a $40,000 study fee to the State Planning Office at the time he or she files a land use permit application with the municipalities. The Office notifies the municipality that a fee has been paid. The municipality signs a memorandum of understanding (MOU) with the Office who remits study fee to the municipality for use in conducting the economic impact study. At the completion of the study, the municipality returns any unused portion of the study fee to the developer. For more information: Qualified Preparers for Maine's Informed Growth Act.

Section 4371 exempts a municipality from the Informed Growth Act if the municipality has adopted an ordinance that contains certain requirements for determining the impact of large-scale retail development and includes an independent study of the community economic impacts of large-scale retail development.

7. Maine Uniform Building and Energy Act

The Maine Legislature enacted the Maine Uniform Building and Energy Code (PL 2007, Chapter 699 and amendments PL 2009, Chapter 261).

A Technical Building Codes and Standards Board located within the Department of Public Safety was established to adopt, amend, and maintain the Maine Uniform Building and Energy Code, to resolve conflicts between the uniform code and other codes, and to develop standards for training and certification for municipal building officials, local code enforcement officers and 3rd-party inspectors.

The uniform code includes the following codes and standards as adopted and amended by the Technical Building Codes and Standards Board:

- International Building Code (IBC);
- International Residential Code (IRC);
- International Existing Building Code ("Rehab code", IEBC);
- International Energy and Conservation Code (IECC);
- Indoor and Outdoor Ventilation ASHRAE Standards 62.1, 62.1 and 90.1; and
- Maine model radon standards for new residential construction.

Enforcement is optional in towns with less than 2,000 residents. In a municipality that has more than 2,000 residents and that has adopted any building code by August 1, 2008, the Maine Uniform Building and Energy Code must be enforced beginning December 1, 2010. In a municipality that has more than 2,000 residents and that has not adopted any building code by August 1, 2008, the Maine Uniform Building and Energy Code must be enforced beginning July 1, 2012.

Municipalities may choose several options to administer the uniform code including: enforcement by a municipally-appointed building official; either the municipality's own building official or a building official shared with another municipality via interlocal agreement or contract. The municipality may also use private, third-party inspectors. Third-party inspectors (TPIs) are trained and certified in the same manner as code enforcement officers and the municipality can hire them via contract to act on its behalf. Alternately, municipalities can require their residents to hire TPIs at their own expense.

VI. 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 exemption 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[1] 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 effective date of the Subdivision Law was September 23, 1971. Subdivisions created prior to that date are exempt from review. These include:

[1] Leased dwelling units are not subject to subdivision review if the municipal reviewing authority has determined that the units are otherwise subject to municipal review at least as stringent as required by state law (i.e. site plan review).

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.

CEOs 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.

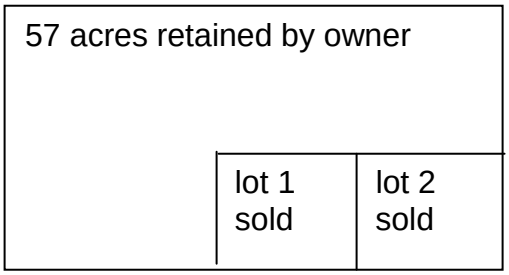
A number of examples of land transactions and whether they constitute subdivisions follow. For the purpose of these examples, assume that all transactions take place within a five-year period.

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 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.

EXAMPLES OF LAND TRANSACTIONS AND WHETHER THEY CONSTITUTE SUBDIVISION

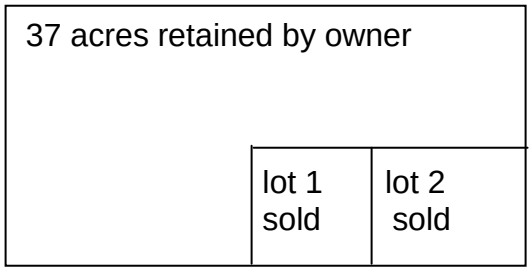
(For this purpose, assume that all transactions take place within a 5-year period)

EXAMPLE A



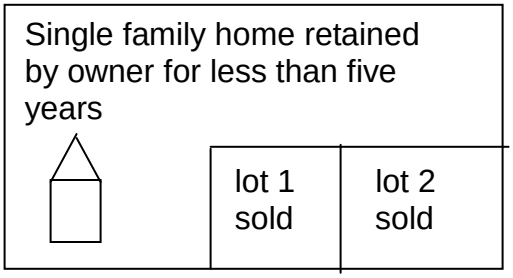
Is a subdivision unless the town has adopted the 40 acre lot exemption.

EXAMPLE B



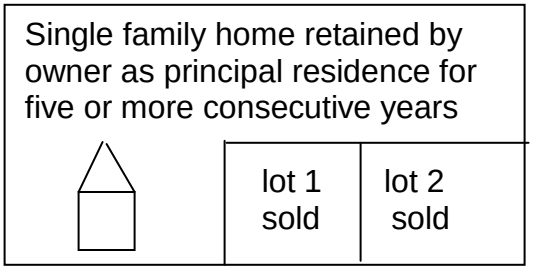
Is a subdivision because the remaining land is less than 40 acres.

EXAMPLE C



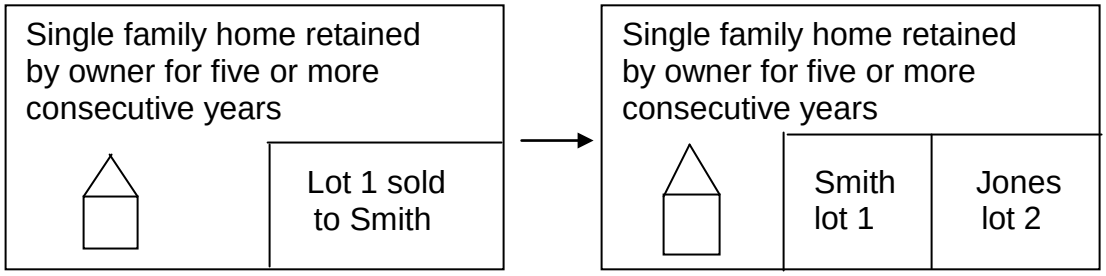
Is a subdivision because owner had not lived in the house for 5 years prior to the second lot being sold

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.

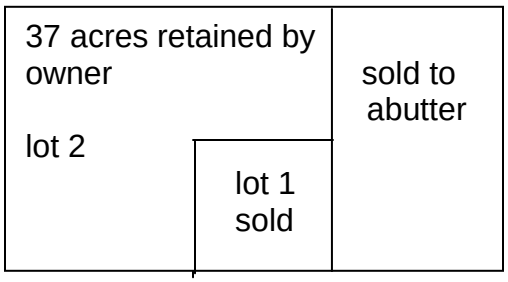
EXAMPLE E



Not a subdivision because only two lots.

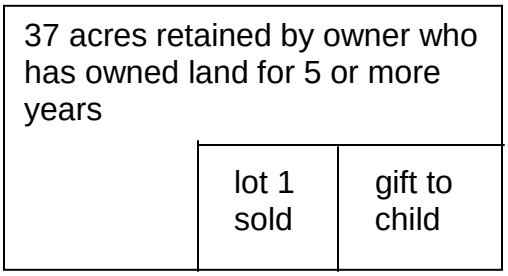
Is a subdivision because both lots were not created by original owner.

EXAMPLE F



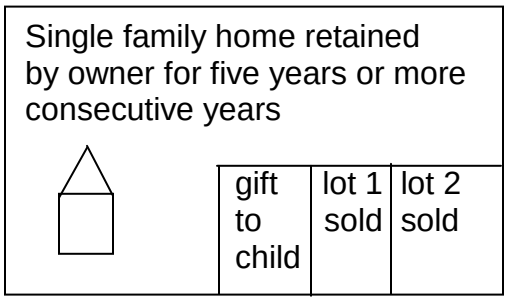
Not a subdivision because lot sold to abutter is exempt

EXAMPLE G



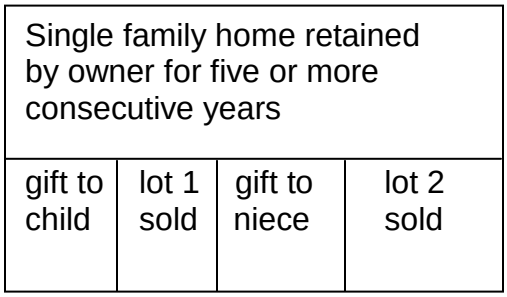
Not a subdivision because gifts to certain relatives are exempt provided donor has owned land for 5 or more years

EXAMPLE H



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

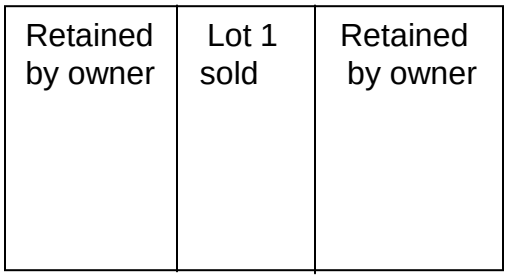
EXAMPLE I



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

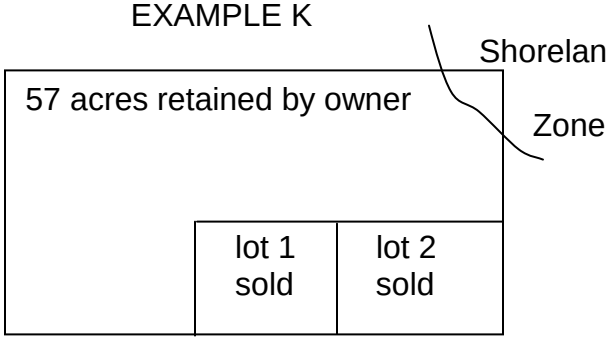
EXAMPLE J

d



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.

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, or other CEOs is recommended. Please see the discussion of subdivision in Chapter VII 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)).

For more information:

Subdivision Review Criteria, 30-A M.R.S. §4404

The Southern Maine Regional Planning Council has developed Model Subdivision Regulations for Use by Maine Planning Boards, with expanded commentary and model forms, 12th edition, 2007.

Open Space Subdivision Model Ordinance, Kennebec Valley Regional Planning Commission, with commentary, 2009

VII. State Laws that may be Administered by CEOs

A. LAWS WHICH MANDATE OR RESTRICT MUNICIPAL ACTION

5 § 4594. 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 four or more units if such buildings have one or more elevators and ground floor units in other buildings consisting of four 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 and accessibility covers routes, doors, toilet stalls, tactile warnings on doors to hazardous areas, and in some cases, parking.

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; or elementary or secondary school, 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 two weeks of the submission of the plan.

In a municipality that has official designed 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 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 requires 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 five persons or more will be employed or as public housing that is constructed using either state or federal money.

For compliance and regulatory information, contact the Maine Human Rights Commission at 207-624-6050 or the Maine State Fire Marshal's Office at 207-624-3880. Alpha One, a nonprofit center for independent living, can provide technical assistance on technical, design, and compliance information.

7, Chapter 6. Farmland

The Maine Farmland Protection Law restricts municipal land use authority in several ways.

It protects a commercial farm from being prosecuted by a municipality as a public or private 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.

A farm or farm operation located in an area where agricultural activities are permitted may not be considered a violation of a municipal ordinance if the method of operation constitutes best management practices.

A municipality must provide the Department of Agriculture with a copy of any proposed ordinance that affects farm operations. The department will review the proposed ordinance and advise the municipality as to whether the proposed ordinance restricts or prohibits the use of farming best management practices.

Also, 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.

12, Chapter 805, Subchapter 3-1, Forest Practices

The Maine Forest Service regulates timber harvesting activities in shoreland, such as areas adjacent to rivers, streams, ponds, wetlands and tidal waters (12 MRSA § 8867-B). In general, timber harvesting activities in shoreland areas must protect shoreline integrity and not expose mineral soil that can be washed into water bodies, including nonforested freshwater and coastal wetlands and tidal waters. Timber harvesting and related activities in shoreland areas below the 300 acre drainage point must leave windfirm stands of trees that provide adequate shade. Roads used primarily for timber harvesting and related activities must be constructed and maintained to standards designed to minimize the chance of exposed soil washing into water bodies, including wetlands. Stream crossings must not disrupt the natural flow of water and must not allow sediment into water bodies. The Maine Forest Service's rules establish statewide standards for timber harvesting and related activities in shoreland areas. Towns that choose to regulate timber harvesting in the shoreland area in a manner inconsistent

with the statewide standards will not receive assistance from the state in addressing compliance issues.

Any municipality that wants 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. 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).

12 § 12801 et seq. Maine Endangered Species Act

The Maine Endangered Species 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 threatened or endangered species habitat. CEOs should be aware of these habitats and check for them when reviewing a permit application.

Of the habitats for threatened and endangered species, some habitats are designated as *essential habitat* and are afforded a higher degree of protection. 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.

Habitats for threatened and endangered species that have not been officially designated as *essential habitat* are also protected. DIF&W also should be contacted whenever a project is proposed within threatened or endangered species habitat not officially designated *essential habitat*.

The location of threatened and endangered species habitats can be found on current *Beginning with Habitat* maps at: www.beginningwithhabitat.org. Municipalities are strongly advised to contact regional DIF&W offices if a project is proposed within or adjacent to any mapped location of a threatened or endangered species.

22 § 1471-U. Pesticide Use

Title 22 § 1471-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.

30-A § 3105. 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 Department of Environmental Protection. If a municipality regulates gravel or sand pits which are not subject to the jurisdiction of the DEP, 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.

30-A § 3428. 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 rule violation 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.

30-A § 3751-3760. Junkyards/Automobile Graveyards/Automobile Recycling

Title 30-A §§ 3753-3755-A impose an obligation on municipalities to license junkyards automobile graveyards and automobile recycling businesses and to enforce the law. The statute requires the issuance of an 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. This must be done in writing. Otherwise, the CEO's authority to take enforcement action could be successfully challenged.

For the purposes of this law, a junkyard means 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.

An 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 101 (42) or parts of the vehicles. An automobile graveyard includes an area used for automobile dismantling, salvage and recycling operations. The junkyard law excludes areas used by an "automobile hobbyist" to store, restore, or display antique autos, antique motorcycles, classic vehicles, horseless carriages, reconstructed vehicles, street rods or parts for these vehicles. Other exceptions include: government vehicles, auto dealers, insurance salvage operations, farm equipment, and certain commercial equipment and certain types of temporary storage.

Permit for a junkyard or auto graveyard may not be issued within certain distances of highways and highway rights-of-way, drinking water wells, and public facilities. In addition, an auto graveyard or junkyard must be part of a viable business.

Operating standards are imposed to decrease the likelihood of contamination of ground or surface waters, to require a log be maintained of all motor vehicles handled, to remove all fluids, refrigerant, batteries and mercury switches, and to comply with federal and state laws, rules, and regulations for the storage, recycling or disposal of all fluids, refrigerant, batteries and mercury switches.

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.

An "automobile recycling business" is defined in Title 30-A § 3752(1-A) as a business that purchases or acquires salvage vehicles for the purpose of reselling the vehicles or

component parts, and/or rebuilding or repairing salvage vehicles for resale, or for selling the basic materials in the salvage vehicles, provided that 80% of the business premises is used for automobile recycling. The definition excludes certain financial institutions, insurance companies, new vehicle dealers, and temporary storage for an insurance salvage pool.

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 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.

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.

When a junkyard, automobile graveyard, or auto recycling business is located within a public water source protection area, 30-A § 3754 requires the municipal officers to give written notice of the public hearing on the application to the public drinking water supplier 7-14 days before the hearing.

30-A § 4101-4104. Building Inspection and Regulation

Title 30-A §§ 4101-4104 establishes a number of requirements affecting ordinances regulating building construction, alteration, demolition or improvement. Section 4103 states that the building official is the licensing authority under such an ordinance unless

otherwise provided. The building official 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 official 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 official 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* or under Title 38 § 481. 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-A requires a building official (or one of the other inspection options provided for in section 2373) to inspect each new building during construction to ensure compliance with the Maine Uniform Building and Energy Code and 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 official to give appropriate written direction to the owner or contractor concerning these fire prevention matters.

Section 2354 requires the building official to exercise similar authority regarding building repairs. Section 2357 requires a building official to certify all new buildings as being built in accordance with section 2353 before such a building may be occupied. Building officials 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 official can order their correction or removal. The code enforcement officer, building official, or fire chief may prosecute violation of these laws.

Title 30-A, Chapter 185, Subchapter 3. Plumbing Laws

1. Local Plumbing Inspectors

Title 30-A, §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.

2. Permits and Rules

Title 30-A §4215 requires state permits for the installation of plumbing, subsurface waste water disposal systems, and conversion of seasonal dwellings.

The Plumbers' Examining Board has adopted the *International Association of Plumbing and Mechanical Officials Uniform Plumbing Code*, 2000 edition, as the standard for plumbing installations in the State of Maine. It is referred to as the *Maine State Internal Plumbing Code* (http://www.maine.gov/sos/cec/rules/02/395/395c004.doc).

External plumbing, or subsurface wastewater (septic systems), is governed by the *State of Maine Subsurface Waste Water Disposal Rules* (http://www.maine.gov/dhhs/eng/plumb/Adobe/10-144_CMR_241_Final.pdf). The Local Plumbing Inspector administers both at the local level.

3. Subsurface Wastewater Disposal Systems

Title 30-A § 4211(3) requires any person erecting or expanding a structure requiring subsurface disposal to provide documentation to the municipal officers that the system can be constructed in accordance with the subsurface waste rules.

If an expanded system is located outside of the shoreland zone of a major water body/course, the owner may elect to not install the expanded disposal system at the time of expansion, provided the existing disposal system is functioning properly, by utilizing the following procedure. This procedure must be met prior to the expansion:

> *(1) Application:* The applicant shall provide a completed application to the local plumbing inspector demonstrating that if the existing disposal system malfunctions in the future, it can be replaced or enlarged in accordance with this

code and any municipal ordinances that apply to systems. The application must show the location of the existing system, the replacement or enlarged system, lot lines and all wells within applicable setback distances. The application form, *HHE-200,* is available at: http://www.maine.gov/dhhs/eng/plumb/forms.htm.

(2) Registry of deeds: A copy of the documentation required in 1703.3.1 of the subsurface waste disposal rules must be recorded in the appropriate registry of deeds. The Department shall prescribe the form of the notice to be recorded in the County Registry of Deeds.

(3) Notify abutters: The person seeking to expand a structure shall send a copy of the notice of documentation, by certified mail, return receipt requested, to all owners of abutting lots.

(4) Protection of future installation: After the documentation required in 1703.3.1 has been recorded in the appropriate registry of deeds and all abutters have been notified, no owner of abutting property may install a well in a location that would prevent the installation of the expanded disposal system. The owner of the lot on which the expanded disposal system is to be installed may not erect any structure on the proposed site of the expanded disposal system or conduct any activity that would prevent the use of the designated site for the expanded disposal system.

A common enforcement question is whether state plumbing codes or other state laws require 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.

4. 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.

30-A § 4356. Moratoria

If a municipality wants to place a moratorium on new development permits or licenses, it must demonstrate need; either an overburden on public facilities or local land use regulations that are inadequate to prevent serious public harm due to additional development. It must have a definite term and can only be extended following notice and public hearing.

30-A § 4357-A. 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.

30-A § 4358. 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. 30-A § 4130 (3)(C) also prohibits local officials from issuing a permit to install a mobile home, which was previously installed in another municipality, without proof that all property taxes owed in that other municipality have been paid.

State standards related to the installation of manufactured housing may be obtained from the Department of Professional and Financial Regulation, Manufactured Housing Board.

For more information on manufactured homes, refer to the State Planning Office's legal issues manual available on-line at: http://www.maine.gov/spo/ceo/publications.htm.

30-A § 4358-A. Protection of Public Water Supply

Title 30-A 4358-A requires that if any 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.

30-A § 4360. 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 requires that rate of growth ordinances be consistent with the municipality's comprehensive plan. Any municipality that enacts a rate of growth ordinance must follow a specific calculation to determine the number of permits allowed and it 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.

38 § 1305 sub-§6. 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 violate these provisions

(see Title 38 MRSA §1305). A municipality may enforce the terms and conditions of a septage land disposal or storage site permit issued by DEP (see Title 30-A § 4452).

38 § 1305. 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 (see Title 38 § 1310-U).

For questions regarding solid waste issues, contact the Solid Waste Program of the MDEP at (207) 287-2651.

38 § 1391 et al. Drinking Water Protection

State laws protect existing public and private water supplies from spills and leaks from new aboveground and underground oil storage tanks, automobile graveyards, and other commercial hazardous waste facilities. It prohibits the installation these facilities within the source water protection area of a public drinking water well, or within 1000 feet of the public water well, whichever is greater and within 300 feet of a private well (except for a private well located on the same property as the facility and serving only that facility). The statute does contain some exemptions for replacement tanks and allows the DEP to issue variances in certain circumstances.

State law also requires that all underground storage tanks be registered with the state. As of July 1, 2009, all new and replacement home heating oil tanks within a wellhead protection zone or near community drinking water wells must be double-walled.

Maps showing the location of all public drinking water supplies are available at http://www.maine.gov/dep/gis/datamaps/DWP_Wells/index.htm.

For more information about siting oil storage tanks and other facilities go to DEP's Drinking Water Protection website at:

http://www.maine.gov/dep/rwm/drinkingwater/index.htm#law

State law allows municipalities to enact stricter standards than those contained in Title 38. In addition, the Drinking Water Program at the Department of Health and Human Services offers a model wellhead protection ordinance at: http://www.maine.gov/dhhs/eng/water/Templates/newDWPServices/SourceProtection/ModelOrdinance/modelord1.htm.

B. LAWS THAT AUTHORIZE MUNICIPAL ACTION

17 § 2802. 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.

17 § 2851. 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.

If the CEO is asked to assist the municipal officers, this should be done in writing.

22 § 454-A. Health Laws

The local health officer is empowered to enforce the provisions of Title 22 §§ 454-A and §1561. The most frequently used health statute in connection with land use violations is 22 §1561, which deals with filth that is potentially injurious to health.

The CEO should contact the local health officer when dealing with housing unfit for human habitation, dangerous buildings, unclean premises, public and private nuisances that could be injurious to health, dead animals, malfunctioning sewage disposal systems, and automobile junkyards.

22 § 2647. Protection of Public Water Source

Title 22 § 2647 authorizes local and state health inspectors or officers to access 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).

25 § 2361. Fire Codes

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

- Title 25 §§ 2351-2360: 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 §§ 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 solid fuel burning appliances;
- Title 22 §§ 7856 (assisted living programs), 8304-A (child care facilities), 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.

30-A § 4354. Impact fees

New development often puts a strain on local government services and facilities. A municipality may enact an impact fee ordinance under its home rule authority requiring the construction of capital improvements including the expansion or replacement of existing infrastructure or the payment of impact fees instead of the construction. Title 30-A §4354 describes limitations on impact fee ordinances primarily that the improvements must be made necessary by the new development, the fee reasonably related to the development's share of the cost of the improvement, and the fees must be spent solely for the purposes for which they were collected. The State Planning Office has a handbook designed to provide Maine communities with the information and tools necessary when considering implementation of an impact fee ordinance. See Financing Infrastructure Improvements through Impact Fees: A Manual for Maine Municipalities on the Design and Calculation of Development Impact Fees available on-line at http://www.maine.gov/spo/landuse/index.htm.

30-A § 4171. Electrical Installations

Maine statutes do not require municipalities to have an electrical inspector. However, 30-A § 4171 states that once an electrical inspector is appointed, he or she shall enforce any applicable local ordinance as well as the provisions of 30-A §§ 4152-4154, 4161-4163, and 4171-4174 governing electrical installations. See the State Planning Office's legal issues manual for more information on electrical installations (available on-line at: http://www.maine.gov/spo/ceo/publications.htm.

30-A § 4454. 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, contact the DEP.

38 § 401. Groundwater Protection

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

38 § 413. Overboard Discharges

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 Water Quality Bureau.

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.

38 § 1319-P. 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.

VIII. State and Federal Laws of which to be Aware

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

12 § 1862. Submerged Lands

With only a few exceptions, the land beneath Maine's lakes ("great ponds") and coastal waters below the low-water mark is owned by the State and held in trust for the people of Maine. Under the Public Trust Doctrine, the State manages these "submerged lands" in the public interest in a manner that recognizes the public's shared rights to use and enjoy these areas for fishing, recreation, navigation, and other purposes. Although piers and other structures located on submerged lands are often privately owned, the land and water beneath rarely, if ever, is. Construction activity on submerged lands requires a lease or easement from the Bureau of Public Lands in the Department of Conservation (BPL), which manages state-owned Public Reserve Lands and coastal islands, as well as Maine's submerged lands.

12 M.R.S.A. §1862 defines publicly-owned, submerged lands as:

a) *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.

b) *Tidal Rivers*: All land below the mean low-water mark of tidal rivers upstream to the farthest natural reaches of the tides.

c) *Great Ponds*: All land below the natural low-water mark of ponds that in their natural state are 10 or more acres in size.

d) *Boundary Rivers*: Land lying below the low-water marks 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 (the intertidal zone), 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.

1. 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 registration fees) is needed. To qualify for a lease or easement, a proposed use cannot have undue 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 easement generally takes from 45-60 days. BPL 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, i.e., activities that are not water dependent. BPL 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.

2. DEP/LURC Permits

Before a DEP or the Land Use Regulatory Commission (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. An applicant may be required to obtain a lease option from BPL to demonstrate that it has the right, title, and interest in the property needed for DEP or LURC permitting. Even when an activity does not require a permit, a lease or easement may still be required.

3. Constructive Easements

Structures that were in place prior to October 1, 1975 were granted 30-year constructive easements that ended on September 30, 2005; at which time a new lease or easement was required. Owners of these structures that have not received a new lease or easement should contact the Bureau of Parks and Lands.

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

12 § 4807. Minimum Lot Size for Septic Systems

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 wastewater 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.

Local plumbing inspectors may approve development with a subsurface wastewater system on lots smaller than 20,000 square feet if the system is not an engineered system, it meets the subsurface wastewater disposal rules for a first time system, and the applicant has a current application.

12 § 8883-B. Commercial Timber Harvesting

Title 12 § 8883-B requires landowners or their agents to provide written notice to the Maine Forest Service before commencing commercial timber harvesting operations and to report harvest information to them upon completion of the harvest. The necessary forms are available from the Maine Forest Service. A CEO is not responsible for enforcing this law in any way. However, 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 sends a form to the municipality when they receive a notification of intent to harvest.

13 §1371-A. Limitations on construction and excavation near burial sites

Construction or excavation in the area of a known burial site or established graveyard containing bodies of humans is restricted and must comply with local land use ordinances or state law.

When notified that excavation or other construction activity may disturb or is disturbing a burial site, the code enforcement officer shall issue a stop-work order, pending an investigation to determine the existence and location of graves. When the investigation is complete, if no human remains are discovered, the code enforcement officer shall revoke the stop-work order if satisfied that the investigation is complete and accurate.

22 § 1631-32. 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.

23 § 704. Entrances to Highways Regulated - 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.

MaineDOT rules establish the procedures and standards for driveway and entrances on state highway system. These rules may be downloaded from the Internet at http://www.maine.gov/sos/cec/rules/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.

A 2009 amendment to the law makes abutters to state or state-aid roads responsible for the condition and stability of access to the road, including replacement of any culverts or other structures pertaining to access, at the abutter's expense.

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.

23 § 704-A. 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.

23 § 1401. 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 within:

- the full width of the right-of-way of any highway;
- 33 feet of the centerline of any highway; and
- 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 Property Office at MaineDOT at 624-3460.

23 § 1901. 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.

33 § Subchapter 8-A: Conservation Easements

Under Maine law, property owners may restrict development or uses on their property through conservation easements. These easements often are placed on property to retain or protect its natural, scenic or open space values to assure its availability for agricultural, forest, recreational, or open space use. All easements are required to be registered with the state. Code enforcement officers can check with the Registry Administrator at the State Planning Office to see if there is an easement on a property.

38 § 420-C. 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 Natural Resources Protection Act 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.

For more information, refer to the *Maine Erosion and Sediment Control Handbook for Construction; Best Management Practices*, Maine DEP, March 2003.

38 § 420-D. Stormwater Management Law

A development project is required to meet appropriate standards to prevent and control the release of pollutants and to reduce impacts associated with increases and changes in stormwater flow.

Title 38 § 420-D, Maine's stormwater law, requires a permit from the DEP prior to the construction of a project that disturbs one acre or more. There are six categories of stormwater standards: basic, general, phosphorus, flooding, urban impaired stream, and other. More than one standard may apply to a project. In this situation, the stricter standard is applied as determined by the department. For example, a project may be located in a stream watershed, and the stream may drain to a lake. The standards for the particular stream and lake are compared, and the stricter standard is applied as determined by the department. DEP Rules Chapter 500 and Chapter 502 govern stormwater law permitting and describe these standards.

A project needing a stormwater law permit qualifies for a permit by rule (PBR) if it results the following:

> (1) Less than 20,000 square feet of impervious area and 5 acres of developed area in the direct watershed of a lake most at risk or urban impaired stream; and

(2) Less than one acre of impervious area and five acres of developed area in any other watershed.

An applicant must file notice of the project with the department prior to beginning work on the project.

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.

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).

For more information, visit DEP's stormwater program web site. The department's Stormwater Best Management Practices Manual is available on-line.

38 § 480. Natural Resources Protection Act

The Natural Resources Protection Act (NRPA) (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:

1. **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.

2. **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;

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

4. **Freshwater Wetlands,** which are freshwater swamps, marshes, bogs and similar areas that are inundated or saturated by surface or groundwater at a frequency and for a duration sufficient to support, wetland vegetation;

5. **Coastal Wetlands**, which are tidal and subtidal lands 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 that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes;

6. **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, vernal pools, and shoreland nesting, feeding and staging areas, seabird nesting islands; and

7. **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.

For more information, please visit DEP's Natural Resources Protection Act web page.

38 § 481 et seq. Site Location of Development Act

The Site Law regulates development of state and regional significance with regard to a variety of environmental criteria. Municipalities assume responsibility for permitting some projects, while the state Department of Environmental Protection 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 Natural Resources Protection Act.

A proposed project must be reviewed if it meets the definition of a "development" as defined by the law. 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 20 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.

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.

The Site Law prohibits 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 sub-§5 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-A *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*.

For more information, please visit DEP's site location of development web site.

38 § 561. Fuel Storage Tanks

Title 38 MRSA §561 *et seq.* requires that all underground oil storage tanks and facilities 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. A person who is licensed by the Board of Underground Storage Tank Installers must install underground tanks, as well as underground piping for above ground tanks. 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. A list of locations of tanks installed within a municipality is available from the Bureau of Remediation and Waste Management at http://www.maine.gov/dep/rwm/ust/formslists.htm.

The State Fire Marshal regulates aboveground tanks 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.

Spill prevention, control and countermeasure plans are required by the US EPA for storage in excess of 660 gallons of fuel in a single tank or 1,320 gallons in total.

B. FEDERAL STATUTES AND REGULATIONS

1. 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 three linear or three 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 specified amounts and types of material are 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. Maine DEP has a code enforcement's officers' information packet. Contact the DEP for more information or with questions about these regulations.

2. Lead Paint

EPA rules (US EPA Lead- Based Paint Pre-Renovation Education Rule (406b)) require contractors working in pre-1978 residential houses and apartments who may disturb more than two square feet of lead based paint to distribute information to the to the owner or tenant. EPA is the agency that enforces this rule. Violations are costly. Maine DEP has a code enforcement's officers' information packet.

3. 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.

4. 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 U.S. Environmental Protection Agency (EPA). 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 used 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.

5. Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) is the main federal law that ensures the quality of Americans' drinking water. Under SDWA, EPA sets standards for drinking water quality and oversees the states, localities, and water suppliers who implement those standards. Oversight of water systems is conducted by state drinking water programs. The State of Maine Drinking Water Program helps public water systems comply with the federal and state regulations. For more information: http://www.maine.gov/dhhs/eng/water/.

6. Federal Stormwater Permit

Since 1992, discharges of stormwater from industrial activities into any water body 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

A land use activity that violates a local ordinance may also violate a state or federal law. When that is the case, the CEO may wish to contact the state or federal oversight agency. 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 takes the violator to court and wins, the municipality benefits without spending its own time and money on legal action. Some examples 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 of

Development 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 of Development 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).

D. MUNICIPAL AUTHORITY OVER STATE AND FEDERAL PROJECTS

Title 5 § 1742-B requires a municipality to notify the state Bureau of General Services 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 code for state buildings.

Zoning ordinances, however, 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 (Title 30-A § 4352). The governor is authorized to waive any use restrictions in a zoning ordinance after giving public notice, notice to the municipal officers, and opportunity for public comment and making five specific findings relating to the public benefits of the project and available alternatives:

1. the proposed use is not allowed anywhere in the municipality;
2. there are no reasonable alternative sites for or configurations of the project within the municipality that would achieve the necessary public purposes;
3. there are no reasonable alternatives to the project, including sites in other municipalities, that would achieve the necessary public purposes;
4. the project will result in public benefits beyond the limits of the municipality, including without limitation, access to public waters or publicly owned lands; and
5. the project is necessary to protect the public health, welfare or environment.

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.

IX. Role of CEO in Zoning Administration

The most important role of the board of selectmen in zoning administration is the appointment of the code enforcement officer. Once the content of an ordinance is decided on and enacted by the municipal governing body, the CEO is critical to its effective functioning. While ordinances may assign responsibility for administration to an individual, the planning board, or another review committee, or split these responsibilities among different parties, the bulk of the responsibility falls to the CEO. A CEO plays a number of roles in the administration of zoning and other land use ordinances. These roles, which may range from clerical to technical and from being an assistant to property owners to enforcement agent, are:

A. 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:

i) **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.

ii) **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.

iii) **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.

iv) **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.

v) **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*).

B. 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.

C. 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, the board of appeals rather than the planning board review these uses. 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.

D. 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).

E. 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.

X. 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.

Zoning Law and Regulations:

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.

Zoning and Land Use Planning Technical Assistance:

Model Subdivision Regulations for use by Maine Planning Boards, 12th ed. 2007. Southern Maine Regional Planning Commission.

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.

Creating Traditional, Walkable Neighborhoods: A Handbook for Maine Communities, 2009. Maine State Planning Office.

Financing Infrastructure Improvements through Impact Fees: A Manual for Maine Municipalities on the Design and Calculation of Development Impact Fees, *2003*. Maine State Planning Office.

Site Plan Review Handbook: A Guide to Developing A Site Plan Review System, 1997. Maine State Planning Office.

Manuals from the Maine Municipal Association:

Handbook for Local Appeals Boards: A Legal Perspective, 1999

Handbook for Local Planning Boards: A Legal Perspective, 1999

Code Enforcement Officers Manual, 2002

Code Enforcement Training Program Publications:

The Program has developed and maintains several training manuals, an information guide, and a web site at http://www.maine.gov/spo/ceo/index.htm for use in delivering basic training and information. This material is available on-line. There is a fee for hard-copy or CD versions.

Certification Information Guide
Municipal Code Enforcement Officer Training & Certification Information Guide (Rev. Oct 09)

Building Standards
Maine Uniform Building and Energy Code. The Technical Building Codes and Standards Board adopted the 2009 IRC, 2009 IBC, 2009 IECC, 2009 IEBC, ASHRAE 62.1-2007, ASHRAE 62.2-2007, ASHRAE 90.1-2007 and ASTM E 1465-06, as the standard for construction in the State of Maine. See the SPO web site for training presentations on these codes.

Land Use
Zoning and Land Use Regulations (Rev. December 2010)
Maine Floodplain Management Handbook (Rev. Nov 07)

Legal Issues
Legal Issues and Basic Enforcement Techniques (Rev. Jan. 09)
Rule 80K (Jan 08)

Plumbing and Subsurface Wastewater
Subsurface Wastewater Disposal in Maine (July 04)

Shoreland Zoning
Shoreland Zoning with Incorporation of Best Management Practices (Rev. 08)

APPENDIX A

APPLICABILITY GUIDE FOR LOCAL LAND USE PROJECTS

This guide will help municipal code enforcement officer identify the land use-related state statutes and regulations that may apply to some of the more commonly-encountered types of development proposals. The municipality may customize this guide for their own use by adding local ordinance where 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
- insert applicable local ordinances here

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
- MaineDOT Access Management Rules
- 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
- Informed Growth Act
- Maine Uniform Building and Energy Code
- insert applicable local ordinances here

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

- Local Floodplain Management Ordinance
- Shoreland Zoning
- Coastal Management Policies
- Natural Resources Protection Act
- Endangered Species Act
- Erosion and Sedimentation Control Law
- Submerged Lands Statute
- Maine Forest Service's Timber Harvesting Rules
- insert applicable local ordinances here

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
    - Maine Uniform Building and Energy Code
    - insert applicable local ordinances here

5. **Project includes a fuel storage tank:**
    - Local Groundwater Protection Ordinance
    - Fuel Storage Tank Regulations
    - Maine Hazardous Waste Management Rules
    - insert applicable local ordinances here

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
    - insert applicable local ordinances here

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
    - insert applicable local ordinances here

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
- insert applicable local ordinances here

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
- insert applicable local ordinances here