



DEPARTMENT OF

Professional & Financial Regulation

STATE OF MAINE

- OFFICE OF SECURITIES
- BUREAU OF INSURANCE
- CONSUMER CREDIT PROTECTION
- BUREAU OF FINANCIAL INSTITUTIONS
- OFFICE OF LICENSING AND REGISTRATION

Report of the Commissioner

Department of Professional and Financial Regulation

Submitted to the

**Joint Standing Committee on
Business, Research and Economic Development**

***Pursuant to Resolve 2007, c. 219 as amended by
Public Law 2009, c. 261***

**Directing the Department of Professional and Financial
Regulation to Study Residential Contractor Licensing**

December 8, 2010

DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

Report to the Joint Standing Committee on
Business, Research and Economic Development

Study of Residential Contractor Licensing pursuant to Resolve 2007, c. 219 as amended by Public Law 2009, c. 261

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I. Introduction

The concept of licensing building contractors, and in particular residential building contractors, has been the subject of numerous discussions in the Legislature for the past decade. During the 121st Legislature, the Joint Standing Committee on Business, Research and Economic Development directed the Commissioner of Professional and Financial Regulation to conduct a Sunrise Review of LD 1551 “*An Act to License Home Building Contractors and Improvement Contractors.*” In his January 2004 sunrise report, Commissioner Robert Murray recommended against establishing a licensing program for building contractors. (Attached as Appendix A).

The Commissioner reasoned that any attempt to regulate building contractors must be preceded by the adoption of a mandatory statewide building code, which is essential to provide the building and construction trade with a set of minimum standards against which the work of construction trades could be measured. Further, the Commissioner concluded that the potential benefit of regulating home contractors through licensing did not justify the burden associated with home contractor licensing, in terms of both increased cost to the consumer public and the increased cost to the regulated community.

In the 122nd Legislature, Commissioner Christine Bruenn testified in opposition to LD 1306, a proposal that mirrored the prior bill, LD 1551. She said the issues considered by Commissioner Murray in concluding that the case had not been made to support a new licensing program were still relevant, and little had changed. She testified that although progress toward a mandatory statewide building code had been made, the process was not complete.

The 123rd Legislature considered LD 1038, a bill similar in most respects to LD 1551 and LD 1306. LD 1038 was set aside by the Committee in favor of enacting LD 2257, codified as PL 2007, c. 699, that established the Technical Codes and Standards Board charged with harmonizing the Maine Model Building Code with existing building codes. The idea underlying LD 2257 was to set aside plans to license residential contractors to make significant progress toward developing a mechanism for harmonizing various existing codes with the International Residential and Building Codes so that builders in Maine would start to learn and understand the standards with which they might

eventually be asked to comply. The Technical Codes and Standards Board within the Department of Public Safety began its work in November 2008.

A separate but related resolve enacted by the 123rd Legislature directed the Department of Professional and Financial Regulation to study the building and construction environment as the new board developed and finalized the building code and conflicts between existing codes and the building code were resolved. The report-back date for the Department's study was theoretically set far enough in the future for progress to be observed and analyzed as a benchmark before any new licensing proposals would be considered. This report is submitted pursuant to PL 2007 Resolve, c. 219 as amended by Public Law 2009 c. 261.

Resolved: *That the Department of Professional and Financial Regulation shall study the issue of residential contractor licensing. The department shall include in its study a review of the various building and energy codes in existence throughout the State. The department shall report its recommendations for residential contractor licensing to the joint standing committee of the Legislature having jurisdiction over business, research and economic development matters no later than December 1, 2010. The joint standing committee of the Legislature having jurisdiction over business, research and economic development matters may submit legislation regarding residential contractor licensing to the First Regular Session of the 125th Legislature.*¹

Most recently, the 124th Legislature considered LD 272, a licensing proposal sponsored by Representative Bruce MacDonald similar in many respects to LD 1038 but without references to the Maine Building Code. The original bill was the subject of many thoughtful committee discussions and significant substantive revisions to address concerns raised by committee members and interested parties. The revised bill carried with it the same issues of increased costs for both consumers and contractors present in prior proposals. The 124th Legislature adjourned without enactment of LD 272, but with the assurance from the Department of Public Safety that work on the state-wide building code would continue and adoption of a state-wide building code by the Technical Codes and Standards Board would occur in June 2010 as required by law.

II. Methods of Regulation

Regulation of an industry, profession or occupation may take different forms. Some professions are regulated through implementation of a certification program. "Certification" is a term that connotes training or an examination process administered usually by a private trade or professional association at either the state or national level. Obtaining certification status by the service provider is voluntary. The state has no

¹ The resolve makes reference to studying "residential" contractor licensing which has been the subject of significant discussion by the Business, Research and Economic Development Committee. This report focuses on residential contractor regulation as a subset of the broader concept of regulation of building contractors. The policy decisions that must be considered are equally applicable to regulation of building contractors generally as to regulation of residential contractors specifically.

enforcement or regulatory role. Certification is used to enhance the stature of those certified within the profession or occupation. Since certification is voluntary, it would not prohibit anyone from practicing that profession or occupation. As described, certification is not typically a state function, and therefore not overseen by a state agency nor involving any state expense.

In other circumstances, a profession or occupation may be regulated at the local or municipal level. Many states regulate occupations, particularly those related to construction or construction-related occupations, including building contractors, at the municipal level. Municipalities are well situated to issue permits, perform inspections and enforce ordinances passed by cities and towns for the safety of residents. Some municipalities in other states issue local licenses and enforce the requirements associated with obtaining that license.

“Licensure” is a designation used to describe the highest level of state regulation. Typically, the state grants licensure to an individual who has complied with a legislatively mandated set of minimum educational, experiential, and training and competency standards, and has paid the required licensing fee. Regulation through licensure encompasses the setting of eligibility standards, examination requirements, and a process to resolve consumer complaints. The complaint process typically involves investigation of complaints and a disciplinary process whereby the licensing authority imposes discipline in situations where the licensee has violated state law. Effective licensing programs that protect the public require the existence of a clear threat to human health or safety, and a mechanism for protecting the public from that defined threat. The foundations for a licensure program typically include adoption of minimum standards and a clearly defined statutory scope of practice. This level of state regulation carries with it the highest level of state expense. The total cost of the program becomes the basis for a statutory fee cap, and license fees established through the Administrative Procedures Act rulemaking process.

Licensing professions and occupations at the state level is typically reserved for professions and occupations that have the potential for the greatest harm to the public in the absence of state action. Because it requires state involvement, state level licensing is expensive and carries with it the heaviest burden, both financially and economically, for those individuals subject to its requirements. In Maine, state regulation of occupations and professions is generally reserved for those professions that involve public trust being placed in the hands of professionals in areas in which the lay person might not be able to distinguish between an ethical, competent practitioner and an unethical or incompetent practitioner.

III. Regulation of Residential Building Contractors

With respect to the status of residential building contractors, a number of incremental steps have already been taken to protect the public from potential harm.

Trade associations representing building contractors have formed effective voluntary certification programs in which contractors participate. In addition, state agencies offer voluntary certification programs, including a voluntary certification program administered by the Department of Environmental Protection to certify contractors on erosion control practices; and by the Department of Health and Human Services, Division of Environmental Health to certify septic system installers. Private organizations offer certification programs such as the program offered by the Maine Concrete Technicians Certification Board to certify individuals who test qualities of concrete; by building material manufacturers and suppliers to train contractors in the intended use of their products; and by the Midcoast Builders Alliance and the Maine Home Builders and Remodelers Association for members relating to building and structural issues. Also, Maine community colleges routinely offer building trade training.

The Attorney General's Office has reviewed and revised the consumer education information posted on its website and has updated its Consumer Law Guide to provide more effective guidance about how to identify an ethical and competent residential building contractor. The Attorney General's Office has also updated the standard contract required by the Home Construction Contract Act in Title 10 to more effectively protect the financial and property interests of consumers.

The Maine Municipal Association has provided information with respect to considerable efforts of municipalities to regulate construction practices of the residential contractors. It asserts that "More than 70 municipalities, encompassing over half of the state population, have adopted building codes governing the construction of residential property. Furthermore, most of these municipalities employ professional staff that inspects completed construction for compliance with the building code."²

Another effective form of state regulation of residential construction to protect the public interest is the adoption of a state-wide building code which resulted from the passage of a state law requiring the establishment of the Technical Codes and Standards Board within the Department of Public Safety (PL 2007, c. 699). In 2008, the Board embarked on a public process to adopt various residential and commercial building codes for the state as a whole and harmonize those with existing state-wide safety and installation codes in related construction areas. Throughout the process of adopting and harmonizing codes under the heading of the Maine Uniform Building and Energy Code ("MUBEC"), individuals and companies involved in the construction industry in Maine provided important input and have now been become focused on how enforcement of the new codes will affect their business plans and improve the housing stock in Maine. The public harmonization and adoption process has drawn needed attention of municipal officials across the state that are working to determine training needs for municipal inspectors and building officials who will eventually be involved in local inspections of construction in their jurisdictions for compliance with the MUBEC.

² DPFR Sunrise report on LD 1551, p. 14.

IV. Maine Uniform Building and Energy Code (MUBEC)

The Maine Uniform Building and Energy Code was formally adopted by the Technical Codes and Standards Board on June 1, 2010. Maine towns with a population of 2,000 and over now have the option of implementing MUBEC effective June 1, 2010 or, continuing to observe an existing locally adopted building code until December 1, 2010. However, effective December 1, 2010, all Maine towns and cities must apply and comply with the provisions of the Maine Uniform Building and Energy Code and its component standards.

As described by the Technical Codes and Standards Board, the MUBEC is comprised of the four international building codes: 1) International Residential Code (2009); 2) International Building Code (2009); 3) International Existing Building Code (2009); and 4) International Energy Conservation Code (2009).

The following standards are adopted as additional components of the Code:

A. The American Society of Heating, Refrigerating and Air-Conditioning Engineers, Standards (ASHRAE)

1) 62.1 - 2007 (Ventilation for Acceptable Indoor Air Quality); 2) 62.2 - 2007 (Ventilation and Acceptable Indoor Air Quality in Low-Rise Residential Buildings); and 3) 90.1 - 2007 (Energy Standard for Buildings except Low-Rise Residential Buildings) editions without addenda.

B. E-1465-2006, Standard Practice for Radon Control Options for the Design and Construction of New Low- Rise Residential Buildings

The following existing installation and safety codes are also in effect:

National Electrical Code	NFPA ³ 70
National Fire Code	NFPA 1
Flammable Liquids Code	NFPA 30
Fuel Gas Code	NFPA 54
Life Safety Code	NFPA 101
Oil Burner Code	NFPA 31
Plumbing Code	Maine State Internal Plumbing Code
Floodplain Regulations	Local Municipal Regulation
Shoreland Zoning Regulations	
Sprinkler Codes	NFPA 13, 13D & 13R

The Technical Codes and Standards Board was granted authority in the 2008 law to review available building codes and adopt all or portions of those codes. Some codes were not adopted in their entirety as noted by the board in its adoption documents.

³ National Fire Protection Association

For the first time in state history, Maine has a state-wide mandatory building code. The final effective date of the code is December 1, 2010. Enforcement of the code will be phased in so the impact of having adopted a state-wide building code will not be known for several years. See, <http://www.maine.gov/dps/bbcs/>

V. Training Opportunities in MUBEC

An important component of preparing for adoption of a state-wide building code is the development of effective training modules for individuals who will inspect and evaluate building plans and construction quality. The Technical Codes and Standards Board within DPS has partnered with the State Planning Office to redesign the existing SPO training and certification program for code officials. Pursuant to the provisions of the MUBEC, local code enforcement and building officials are required to be appropriately trained and certified to carry out the mandate of the original law. The State Planning Office staff, in conjunction with Technical Board staff, adopted training rules during a public process that garnered comments from the code enforcement and construction communities with suggestions for making training material more effective.

The State Planning Office Code Enforcement Officer Training and Certification program schedule has been announced. The schedule of training workshops for code and building officials, as well as third-party inspectors, in the following standards has now been announced: residential building code, commercial building code, residential energy code, indoor residential ventilation code, and indoor commercial ventilation code.

Instructors have been presenting periodic workshops during November and December at community college locations across the state covering: 1) statutory requirements of the Maine Uniform Building and Energy Code; 2) code purposes and organization; 3) applicable state laws, review and permitting; 4) report procedure; 5) occupancy approval requirements; and 6) inspection and enforcement techniques. Anyone may register and pay to attend these workshops, however, code enforcement officials and building officials who are municipal employees may attend at no cost. (see www.maine.gov/spo/ceo/index.htm).

At the present time, specific MUBEC training for residential building contractors on the IRC (2009 version) has not been planned. Although the State Planning Office has notified building and construction-related groups and associations about the adoption and effective date of the Maine Uniform Building and Energy Code, SPO is not required to provide training to any groups other than code enforcement officials and individuals seeking to become certified as third-party inspectors.

VI. Policy Questions To Be Addressed

The Department of Professional and Financial Regulation's 2004 Sunrise Report on LD 1551 focused on three key foundational issues that would need to be addressed and resolved before a licensure program for building contractors should be considered. The first was the lack of a mandatory state-wide building code by which to measure quality of construction. As noted in prior sections of this report, the adoption of the Maine Uniform

Building and Energy Code and related standards is now an on-going process and will eventually determine what entities will be responsible for enforcing the provisions of the MUBEC.

- **Defining the Objective of State Licensure**

The Business, Research and Economic Development Committee has heard public testimony about the quality of residential construction as well as about the financial conduct and business practices of contractors. Should a state licensure program regulate the **quality of construction work** or the **business practices of building contractors**? Should a state licensure program encompass both objectives? How would a proposal address both objectives?

Measuring the quality of construction may be addressed by a mandatory state building code. However, a building code does not address ethical and honest business practices. Some states have combined contractor licensing programs with other components of a remedial program which requires disclosure of financial information as a condition of licensure and in some cases, to provide consumer remedies. These licensure models clearly increase costs associated with the program.

- Licensure of residential contractors that includes the imposition of financial requirements on residential contractors: Some states require a demonstration of financial stability and net worth as a condition of licensure.
- Licensure of residential contractors that includes a provision for a homeowner restitution fund: Some states have established a restitution account funded by an assessment on each licensed contractor.
- Licensure of residential contractors that includes a subcontractor recovery fund.

These and other combinations can be found in other states. As noted, the more complex the program, the more state expense is involved. However, until the basic policy objectives of a licensure program are established, the total costs of any program are speculative, at best.

- **Defining Scope of Practice**

The second key foundational issue that must be resolved is the “scope of practice” for any defined group of individuals that may be regulated. The statutory scope of practice provision is the hallmark of licensing statutes for all regulated professions and occupations. A profession or occupation’s “scope of practice” indicates to the public which services will require the service provider to have obtained a state license and, to the contrary, which services will not require a license.

The licensing proposals considered to date have failed to adequately define a specific scope of practice for residential home contractors. LD 1551 would have required

licensure of a “home contractor” which included any person who undertakes, offers to undertake or submits a bid to build a dwelling or perform any home improvement. However, the bill did not define which specific services performed by a home contractor are included in the “building” or “improving” of a dwelling.

Some proposals would have exempted a subcontractor providing window installation for a home contractor from licensure; however, the same subcontractor would have to obtain a license if he or she provided the same window installation service to a consumer directly. Thus, it would have been the relationship between a service provider and the consumer on a given day that would determine whether a license is required, rather than the actual service or conduct itself.

To date, the various licensing proposals have failed to define in specific terms the activity that would require a state license. Some proposals have focused on whether “home improvement” should be defined to include the “structural repair, renovation or rehabilitation of construction or an addition to a dwelling.” Is this definition limited to what is generally thought of as carpentry work? If so, what is the definition and scope of practice for a carpenter? The definition in other proposals also includes “the removal, repair, replacement or installation of roofing, siding, insulation, windows or chimneys.” Does this mean that a person working on a foundation is not required to be licensed? What about drywallers, floor covering installers or other specialty service providers? What specific range of services is included in each category? Does “roofing” include replacing both boards and shingles or just shingles?

Without a clear statutory scope of practice adopted by the Legislature, neither potential licensees nor the public will be able to determine under what circumstances a license would be required. Regulation of a profession is a policy determination to be made by the Legislature. More specifically, defining the actual conduct which will require a state license should be made by the Legislature.

- **Identifying Program Costs and Sources of Funding**

A third seminal issue that has not been resolved is the source of funding for any form of new regulation. The cost of regulating a profession is typically borne by the licensees in that profession through the payment of dedicated license fees. A typical licensing program will build into the established license fee the direct costs of examination development and administration, dedicated personnel and associated equipment, as well as overhead costs including rent, legal service, and technology and staff, depending on whether the program is located in a state agency or a private organization.

As noted previously, because prior licensing proposals have lacked specificity in defining what types of conduct would be regulated and under what specific circumstances, it is almost impossible to project either the number of potential licensees or the total cost of the regulatory program. Clearly, the important policy decisions about goals and objectives of licensing drive the costs associated with a regulatory program. Until those policy determinations are made, the costs cannot be determined. State licensing

programs are expensive to administer. Those costs would be imposed on licensees in the form of license fees and to the public in the form of increased construction costs.

- **Understanding the Consequences of Imposing New License Requirements**

Effective licensing statutes are the product of public policy discussions when a need to protect citizens from a certain group of businesses or individuals who offer professional services for compensation is clearly identified. Policy makers must balance the positive and negative consequences of imposing new license requirements on an industry whose financial stability impacts the state's financial and economic status.

When a licensing proposal is implemented and licensing requirements are imposed, many individuals and companies now doing business will not meet minimum standards and qualifications. Depending on how broadly the Committee views the necessary scope of licensure, many individuals who would not meet basic licensing standards will be prohibited from engaging in their current occupation. Is the existing economic climate in Maine strong enough to withstand the consequences of imposing new license requirements on individuals and businesses? In an economic climate in which some businesses are struggling under existing regulatory requirements in various areas, new regulatory programs must be evaluated in light of existing regulations affecting the same individuals and businesses. The mandatory nature of the Maine Uniform Building and Energy Code, standing alone, may be as much regulation as the economic and business environment can withstand.

VII. Recommendation

These are important policy considerations. The answers will determine the need for and breadth of any future licensing program. If every individual who performs any home improvement work with or without a contract is required to obtain a state license, the resulting program could include a group of more than 12,000 individuals.⁴ If a program that imposes new licensing requirements on 12,000 individuals and businesses is perceived as too broad, then what subcategory of that 12,000 would it be more appropriate to license to avoid perceived harm to the public?

To the extent that these issues remain unresolved, meaningful discussion by the Legislature of whether regulation in this area should occur, and if so, what specific regulatory options should be considered remains difficult. Answers to the key policy questions discussed above should inform the decisions of policy makers only after a decision is made by the Legislature that additional regulation of building contractors, beyond those measures already in place, is necessary to protect the public.

⁴ Appendix D, DPFR Sunrise Review Report, "Economic Impact Analysis of Proposed Home Contractor Regulation, pgs 8, 10, 18. Planning Decisions, Inc. was engaged by the Office of the Attorney General to provide an economic impact analysis of LD 1551. 1997 US Census Reports for Maine were used by Planning Decisions. 2002 US Census Reports for Maine provide updated statistics.

If the Committee determines that, as a policy matter, it desires to move toward development of a regulatory program for residential and/or commercial builders, the Department stands ready to assist in that effort with information and staff expertise, as needed. Any proposal to regulate in this area should clearly state the Committee's policy determinations and reflect the Committee's policy objectives.