

**DEPARTMENT OF ECONOMIC  
AND COMMUNITY DEVELOPMENT  
OFFICE OF COMMUNITY DEVELOPMENT**



**CODE ENFORCEMENT OFFICER  
TRAINING/CERTIFICATION PROGRAM**

**LEGAL ISSUES**

**June 2017**

**DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT,  
OFFICE OF COMMUNITY DEVELOPMENT  
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## **INTRODUCTION**

The material in this manual is intended as a general discussion of the local Code Enforcement Officer's function and duties. While the information contained in the manual will apply to most municipalities and in most situations, an individual municipality may have an ordinance or charter provision which imposes additional requirements for its code enforcement officer to follow. The facts of a specific situation also may dictate that the general rules discussed in this manual should not be applied. The manual is a helpful source of general information, but is not a substitute for a legal opinion offered by an attorney based upon specific facts and ordinance language.

Any person using this manual should always check the exact section numbers and provisions of any statutes, ordinances, or codes mentioned in the manual's text, sample forms or other material. The references included in the manual are intended to provide general guidance to the reader rather than to serve as a substitute for reading the actual law, since the laws often are amended. By reading the whole law or regulation, rather than merely selected excerpts, a person also will get a better idea of whether the law or regulation covers a particular project or whether there are provisions which exempt the project.

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## TERMS AND ABBREVIATIONS

### 1. Case Citations

Maine's highest court is referred to as the "Law Court" or the "Supreme Judicial Court." Other courts in Maine are the District Court and the Superior Court (where jury trials are held).

Most of the current case law out of the Maine Supreme Judicial Court/Law Court is available on the State of Maine, Judicial Branch website. See:

[http://www.courts.state.me.us/opinions\\_orders/supreme/index.shtml](http://www.courts.state.me.us/opinions_orders/supreme/index.shtml)

An example of a Maine Supreme Judicial Court case law citation would be: 2000 ME 109, 753 A.2d 49.

Here are some tips for interpreting such citations:

- The first number in the first citation (2000) represents the year in which the case was decided and the second number (109) represents the chronological case number for that year.
- The first number in the second citation (753) is the volume of the Atlantic Reporter and the second number (49) is the page number in the Atlantic Reporter.
- "A.2d" means the Atlantic region reports, 2<sup>nd</sup> series as published by West Publishing. The Atlantic reporter series publishes cases for this State and court region.

### 2. Statutory Citations

An example of a reference to the Maine statutes would be: 30-A M.R.S. § 4401.

Here are some tips for interpreting Maine statutory citations:

- "30-A" refers to Title 30-A of the Maine Revised Statutes.
- "M.R.S." means the Maine Revised Statutes.
- "§4401" refers to section 4401 of Title 30-A.
- "Maine Statutes" are the laws which have been adopted by the Maine Legislature.
- The books in which they are bound are called the "Maine Revised Statutes."

Maine statutes and regulations are available online at:

<http://legislature.maine.gov/statutes/>

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

Here are some tips for interpreting Federal statutory citations:

- “42” indicates the Title number of Federal Code.
- “U.S.C.A.” means *United States Code Annotated*.

The U.S. Code is available online at:

<https://www.law.cornell.edu/uscode/text>

An example of a cite from the Federal Regulations would be: 44 CFR, Ch. 1 §59.22(9)(iii).

Here are some tips for interpreting Federal Regulations citations:

- “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; and
- “(iii)” is the paragraph number.

The Code of Federal Regulations is available online at:

<https://www.ecfr.gov/cgi-bin/ECFR?page=browse>

### **3. Other Terms and Abbreviations**

“*et seq.*” means the following sections.

“Injunction” means an order by the Superior Court which permanently prohibits an individual from conducting a certain activity.

“Legislative body” means the town meeting or town or city council.

“Maine Rules of Civil Procedure” means the rules governing non-criminal cases brought before the District or the Superior court. The rules cover such matters as who may be named as parties to a court action, the information which must be contained in a complaint, the issues which must be raised, time limits for filing certain court documents, and others.

“M.R.S.” means the Maine Revised Statutes.

“Municipal Officers” means the selectmen or the town or city council.

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

“Tort” means a civil action (i.e., one which is not a criminal act and not based on a contractual relationship) causing an injury for which the injured person is entitled to receive monetary damages or compensation.

## **SECTION I. THE CODE ENFORCEMENT OFFICER**

### **Chapter 1 - The Position of Code Enforcement Officer**

#### **A. Nature and Description of the Position**

The various code enforcement positions discussed in this manual are municipal offices, whether created by statute, charter, or ordinance. An office must be held by a person who is appointed (or elected) and who takes an oath before assuming any official duties. Many code enforcement officers think of themselves as employees of the municipality and their position as being no different from any other employment position, but that is not the case. The legal need to be appointed (or elected) and sworn into office is an important distinction and a prerequisite to performing the duties of the position.

Some code enforcement officers try to define their relationship with a municipality as an “independent contractor” and enter into a written contract with the municipality which establishes a rate of compensation, length of service, and description of services to be performed. Because the enforcement function being performed under such a contract relates to a public office that is governed by state and local laws, a CEO cannot legally establish himself/herself as an independent contractor. Even where there is a contract which defines various aspects of the CEO's job, the CEO still must be appointed to the enforcement office(s) to be held and must take an oath.

The powers and duties of a local code enforcement officer (CEO) are governed by State statutes, local ordinances and, in some cases, town or city charters. A CEO cannot take any legally enforceable actions unless that position has been formally created and the CEO officially sworn in.

Any action which the CEO wants to take must be specifically or implicitly authorized by a statute, ordinance, or charter provision. *See Clark v. State Employees Appeals Board*, 363 A.2d 735 (Me. 1976). Therefore, CEO's should be sure that:

1. their positions were created properly,
2. they were properly appointed and sworn into office, and

3. they are familiar with the ordinances and statutes they will be using before trying to take any official action.

There is no single state law(s) describing all of the duties of a CEO. The duties of CEOs will vary somewhat between municipalities statewide, depending upon the specifics of locally adopted ordinances and the selection of statutes that the CEO is appointed and authorized to administer and enforce. *See* 30-A M.R.S. §4451(2-A).

In addition to the requirements set out above, a well written job description will define the relationship established between the code officer and other employees of the municipality. This will make it easier for both the CEO, the board or official who supervises the CEO, and the public to know what is expected of the code officer. A job description will also help the Office of Economic and Community Development, Office of Community Development determine which aspects of a CEO's job require state certification under 30-A M.R.S. §4451.

When the term "Code Enforcement Officer" is used in this manual, it should be interpreted to include the various enforcement officials discussed below, unless the context requires a different meaning.

## **B. Creation and Appointment**

30-A M.R.S. §2601(1) authorizes the municipal officers to appoint CEOs, who are trained and certified in accordance with 30-A M.R.S. §4451, to serve for fixed terms of one year or more. This statute was intended to authorize the municipal officers to establish a multi-year term for a CEO even where a statute or ordinance refers to a one-year term. However, there is some confusion about which enforcement positions are governed by 30-A M.R.S. §2601(1). The best way to establish multi-year terms or even indefinite terms for all enforcement officials in a municipality is for the municipality's legislative body to adopt a home rule ordinance pursuant to 30-A M.R.S. §3001 which establishes a specific multi-year term and lists the enforcement officials to whom it applies.

### **1. Zoning Officer**

- (a) **Shoreland Zoning**: 38 M.R.S. §441 requires every municipality with a shoreland zoning ordinance to have a local code enforcement officer who enforces that ordinance. The statute states that the municipal officers must annually appoint a code enforcement officer by July 1st for that purpose. The municipal officers may appoint the planning board to serve as a board of code enforcement officers rather than an individual if they prefer; however, the Board must be certified by the state pursuant to 30-A M.R.S. §4451. Since most municipalities have a shoreland zoning ordinance, this means that they automatically must have a shoreland zoning code enforcement officer. No vote of the municipality's legislative body is needed to create this position. It should be noted that some municipalities have established a multi-faceted code enforcement position with a multi-year term, the duties of which

include shoreland zoning enforcement. Some municipalities elect their CEO rather than appointing someone. Arguably this is within the municipality's home rule ordinance authority.

(b) **General Land Use:** Shoreland zoning officers frequently assume responsibilities for other local and state land use regulations. Local ordinances might include town-wide "dwelling" ordinances, comprehensive zoning, site plan review, subdivision review, floodplain management, or regulation of junkyards. An ordinance provision adopted by the municipal legislative body is necessary in order to extend a shoreland zoning CEO's authority to other areas of land use enforcement.

## 2. **Plumbing Inspector**

30-A M.R.S. §4221(1) requires every municipality to have at least one plumbing inspector appointed by the municipal officers for a term of one year or more to administer and enforce the State's internal plumbing code and subsurface wastewater disposal rules. Plumbing inspectors must be certified prior to acting in this capacity. 30-A M.R.S. §4221(2) requires that all plumbing inspectors be certified by the former State Planning Office or the Department of Economic and Community Development, Office of Community Development. Said certifications are effective for 5 years.

## 3. **Building Official/Code Enforcement Officer**

25 M.R.S. §2351-A of the Maine statutes requires every town and city with a population greater than 2,000 to have a building inspector appointed each April by the municipal officers. Towns with populations of 2,000 or less may have a building inspector if authorized by vote of the legislative body. If a building official is appointed by a municipality that has adopted or is enforcing the Maine Uniform Building and Energy Code (MUBEC), then he/she must be certified in building standards pursuant to 30-A M.R.S. §4451 (2-A)(E).

## 4. **Fire Inspector**

25 M.R.S. §2391 requires each municipality to have a fire inspector. If the municipality has an organized fire department, the "duly appointed" fire chief or his/her "designee" serves in this capacity. If not, the municipality must elect a fire inspector at its annual meeting.

## 5. **Health Officer**

22 M.R.S. §451 of the statutes requires every municipality to have a health officer appointed by the municipal officers for a 3-year term. Although some municipalities appoint the same person as health officer and code enforcement officer, there are many aspects of the health officer's job which are better performed by someone with a medical background.

## 6. **Electrical Inspectors**

32 M.R.S. §1102-B(3) requires that state inspectors permit and inspect most electrical installations. Although state inspectors have authority to inspect all electrical installations, they are not required to and do not issue permits for one family residential units. This is the type of construction that the local Code Enforcement Officer or local Building Inspector is most commonly involved with through local ordinance.

## 7. **Other Code Enforcement Officials**

A municipality may establish other code enforcement positions by local ordinance or charter, or a single position may be created to enforce any combination of ordinances, each municipality uniquely determining the duties assigned to the position. For example, the position of "housing inspector" as opposed to "building inspector", where the focus is not limited to structural integrity. A "town-wide" code enforcement officer may be expected to handle all of the enforcement duties which must be performed at the local level. Sometimes such centralization of enforcement powers is the most efficient and cost effective system and the easiest for the general public to understand, provided the job does not become too much for one person to handle.

## 8. **Town Manager's Authority**

If a municipality has a town manager operating under the statutory town manager plan, 30-A M.R.S. §2631 *et seq.*, rather than a local charter, then any enforcement official required to be appointed by the municipal officers under some State law would be appointed by the manager instead, unless the manager delegates that authority to a department head. 30-A M.R.S. §2636(6). If the enforcement official is the head of a code enforcement department, then the manager appoints him or her subject to confirmation by the municipal officers. 30-A M.R.S. §2636(5).

## 9. **Regional Code Enforcement Officer**

One person may serve as a code enforcement official for several communities, if legally appointed and sworn by each municipality. This can either be done informally by separate arrangements between each individual town and the CEO or more formally through an interlocal agreement between a number of municipalities. If an interlocal agreement is used, it must conform to the requirements of 30-A M.R.S. §2201 *et seq.*

The main advantage of a regional code enforcement officer is that small towns in cooperation with other towns can offer a more attractive position and are more likely to fill the position with someone who has knowledge and experience to do code enforcement. Resources are pooled to the mutual benefit of several towns.

## 10. Failure to Reappoint

When a code enforcement officer is appointed for a definite term, the appointing authority (i.e., person or board who appointed the CEO) may choose not to reappoint the CEO, if the appointing authority is dissatisfied with the CEO's performance. However, that decision must be made in conformance with the provisions of 1 M.R.S. §401 *et seq.* ("Right to Know Law"). Furthermore, the CEO may be entitled to written notice of the possibility that the CEO will not be reappointed and an opportunity for a hearing before a decision is made on his or her reappointment. *See generally Bishop v. Wood*, 426 U.S. 341 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Elbert v. Board of Education of Lanark Community School*, 630 F.2d 509 (7th Cir., 1980); *Lovejoy v. Grant*, 434 A.2d 45 (Me. 1981); 38 M.R.S. §441(1). This will depend upon whether the CEO has acquired a property right, i.e., *vested right*, in the position as based upon practices by the municipality and its officials which created a "reasonable expectation of continued employment" in the mind of the CEO. *See Barber v. Inhabitants of Town of Fairfield*, 460 A.2d 1001 (Me. 1983); *Mercier v. Town of Fairfield*, 628 A.2d 1053 (Me. 1993). Such a "reasonable expectation" may be based upon a variety of actions: conversations between the CEO and the appointing official(s) indicating that reappointment was simply a formality or that the CEO "had the job as long as she wanted it"; a pattern of routine reappointments which were not preceded by any discussion; a history of positive performance evaluations and/or salary increases. Whether a CEO's expectation of continued employment is reasonable is a factual determination made by a court based upon the facts of a case. The opportunity for a hearing may not be required if the CEO's certificate of appointment explicitly states that the appointment is for a definite term and the municipality and the CEO enter a written signed agreement each year, containing language similar to the following:

It is the explicit and mutual understanding and agreement of the undersigned appointing authority and the undersigned appointed official that this appointment is for a period of \_\_\_\_ year(s) only, that the appointing authority and its agents have made no other representations or promises of any kind regarding this appointment or subsequent reappointment, that subsequent reappointment lies completely within the discretion of the appointing authority, that no prior hearing need be provided should the appointing authority decide not to reappoint the named appointee, that no facts exist which would support an implied contract, that the named appointee waives any and all rights to a hearing prior to a decision on reappointment regardless of the source of those rights and that the undersigned named appointee has read, understands and agrees with this statement and agreement.

If a hearing is conducted, once it is completed, the appointing authority must decide whether the evidence in the hearing record supports a finding of "just cause" for not reappointing the CEO.

A shoreland zoning code enforcement officer who is not reappointed may continue to serve until someone else is appointed and sworn. 38 M.R.S. §441. The same is true for plumbing inspectors. 30-A M.R.S. §4221. A court may not necessarily apply this same "holdover" rule for other appointed enforcement officials, so it is important to anticipate the expiration of a CEO's term and take all necessary steps to appoint or reappoint a CEO before that date.

## 11. Vacancy

In communities where the municipal officers have the power to appoint a code enforcement officer, they also have the authority to fill a vacancy in that position for the CEO's unexpired term. 30-A M.R.S. §2602. If a municipality has a town manager, the manager may have those powers. 30-A M.R.S. §2636(6).

## 12. Removal

Before an appointed code enforcement officer may be removed from office prior to the expiration of his or her term, the CEO must first receive written notice of the charges which have been alleged against him or her and an opportunity for a hearing before a designated official or board. Normally, this would be the person or board who appointed the CEO. 30-A M.R.S. §§2601-A, 2636 and 4221, and 38 M.R.S. §441.

If the municipality has established a probationary period, the requirements of notice and a hearing probably do not apply to a CEO removed before the completion of the probationary period. 30-A M.R.S. §2601-A; 38 M.R.S. §441.

The decision to remove the CEO must be made in accordance with the relevant provisions of the Right to Know Law (1 M.R.S. §401 *et seq.*). This includes the right of the CEO to be present at all of the proceedings related to the CEO's removal. The CEO has a right to decide whether the hearing and deliberations will be conducted in a public session or in an "Executive Session" pursuant to 1 M.R.S. §405.

Before a decision to remove the CEO from office legally can be made, the official(s) making that decision must find after notice and hearing that there is "just cause" for the removal (except in the case of a probationary CEO) 30-A M.R.S. §2601-A. There are a number of Law Court cases interpreting the meaning of: "just cause" in the context of the facts of a particular case. The case of *Frye v. Inhabitants of Town of Cumberland*, 464 A.2d 195, 201 (Me. 1983) defines "cause" as conduct which is "plainly sufficient under the law and sound public policy and has reference to a substantial cause touching qualifications appropriate to the office or employment...It also necessarily implies such degree of misconduct or culpability on the part of the Official as clearly implicates the public interest in precluding his continuance in that particular office." *See also Chapman v. City of Rockland*, 524 A.2d 46 (1987).



Philosophical differences or personality conflicts do not normally constitute a legally sufficient basis for a finding of “just cause.” In addition to these statutory and court-made rules governing removal, a municipality may have established additional removal procedures as part of a local personnel policy or other ordinance or charter provision.

### 13. **Reporting Appointments to State Agencies**

Various state laws and regulations require municipalities to report the appointment of their enforcement officials to State agencies:

- Health Officer: Department of Health and Human Services;
- Plumbing Inspector: Department of Health and Human Services and Department of Economic and Community Development, Office of Community Development;
- Shoreland Zoning Officer: Department of Environmental Protection and Department of Economic and Community Development, Office of Community Development; and
- Code Enforcement Officers (including plumbing inspectors, shoreland zoning officer, land use officers, building inspectors, electrical inspectors): Department of Economic and Community Development, Office of Community Development.

### C. **Qualifications for Office**

#### 1. **Age, Residency, Citizenship**

30-A M.R.S. §2526 states that as a general rule, municipal officials, meaning any individual that is either *appointed* or *elected* to a municipal position, must be 18 years old, residents of the State, and U.S. citizens. A person does not have to be a legal resident of the town or city in order to serve as its CEO, unless required by local ordinance or charter. See 30-A M.R.S. §2601-A and §2703. In recent years, it has come to light that many CEOs in fact live in a neighboring state (or even in Canada). Because of this, it should be stressed, that Maine-residency *is* a requirement for CEOs, as well as many other municipal officials, and failure to abide by this can lead to issues in future enforcement matters.

#### 2. **Oath**

Before performing any official duties as a code enforcement officer, a CEO must be sworn into office by someone with authority to administer oaths, such as the clerk, the moderator (if during open town meeting), a notary public, dedimus justice, or an attorney. 30-A M.R.S. §2526(9).

A new appointment must be made and a new oath taken at the beginning of *each new term*; the oath and appointment would be performed annually only where the CEO is serving a one year term.

### **3. Incompatible Positions**

A person serving as a CEO may not hold another office which is "incompatible" with the CEO position. Two offices are "incompatible" if the duties of each are so inconsistent or conflicting that one person holding both would not be able to perform the duties of each with undivided loyalty.

An example of incompatible positions would be if one person served as CEO and as a selectperson in a municipality where the selectpeople appoint and supervise the CEO. 30-A M.R.S. §2601-A; 38 M.R.S. §441. Another example is where one person serves as CEO and as a member of a local appeals board where decisions made by the CEO can be appealed to the appeals board. It is less clear whether the position of CEO is incompatible with that of a planning board member. It could be argued that, at least in the case of shoreland zoning, the Legislature did not want a single board member also to serve as CEO based on the language in 38 M.R.S. §441 authorizing the whole board to perform shoreland zoning enforcement. However, there is no case law directly on point and it is a common practice of many small towns to have the CEO serve on the planning board, as well as for town managers to also serve as CEO. If challenged, a court will have to analyze the role of each in the affected town. In accepting and taking an oath for an office which is incompatible with one already held, the courts have ruled that the person automatically vacates the first office, as though he or she had actually resigned it.

### **4. Plumbing Inspector Certification**

30-A M.R.S. §4221 requires a person to be certified as a local plumbing inspector (LPI) by the former State Planning Office or the Department of Economic and Community Development, Office of Community Development before that person may be appointed to serve as a plumbing inspector.

### **5. Building Inspectors**

25 M.R.S. § 2351-A requires that in every town and city of more than 2,000 inhabitants, and in every town of 2,000 inhabitants or less, if such a town so votes at a town meeting, and in each village corporation, if such a corporation so votes at the annual meeting of the corporation, the municipal officers shall annually in the month of April appoint a building official, and shall determine the building official's compensation. If a building official is appointed by a municipality that has adopted or is enforcing the Maine Uniform Building and Energy Code (or either of the individual uniform building or energy codes), the building official must be certified in building standards pursuant to 30-A M.R.S. § 4451(2-A)(E). Whenever the building official becomes incapacitated, the municipal officers may appoint or authorize the building official to appoint a deputy building official, who shall serve until removed by the municipal officers, but in no event beyond the term for which the building official was appointed. The deputy building official shall perform such duties as may be required of the deputy building official by the building official. The compensation of the deputy building official is determined by the municipal officers.

## 6. Certification Requirements for Code Enforcement Officers

All code enforcement officers, as defined below, must be certified by the former State Planning Office or the Department of Economic and Community Development, Office of Community Development. 30-A M.R.S. §4451. Newly appointed CEOs must become certified within 12 months of their initial appointment date in order to continue legally in that position, with the exception that plumbing inspectors must be certified prior to appointment. Once granted, certifications are valid for 6 years. "Recertification" will be granted to any CEO who "successfully completes at least 12 hours of approved training in each area of job responsibility during the 6-year certification period."

For purposes of certification, this law defines a Code Enforcement Officer (CEO) as a person certified under 30-A M.R.S. §4451 and employed by a municipality to enforce all applicable laws and ordinances in the following areas:

- Shoreland Zoning under 38 M.R.S. §§435-449;
- Comprehensive Planning and Land Use under 30-A M.R.S. §4301, *et seq*;
- Internal Plumbing under 30-A M.R.S. §4201-4223;
- Subsurface Waste Water Disposal under 30-A M.R.S. §4201-4223; and
- Building Standards under Title 30-A, chapter 131; chapter 185, subchapter 1; Title 5, §§ 4582-B, 4582-C and 4594-F; Title 10, chapter 1103; Title 25, chapter 313.

The law further states that a CEO must be certified only in the areas of his or her actual job responsibilities. However, it requires that the State develop training programs both for specific areas of job responsibilities, as well as, more general topics which apply to all CEOs.

Each individual member of a planning board which has been granted the authority to conduct inspections for purposes of enforcement and/or enforce an ordinance by citing a person for a violation must meet the §4451 certification requirements. The members of a planning board which is only authorized to issue permits or approvals are not required to be certified. The same is true for the individual members of the board of selectpeople if the board cites violators.

## 7. Process for Revoking CEO Certification; Effect of Revocation

30-A M.R.S. §4451(6) authorizes the District Court to revoke a CEO's certification. Before it may do so, the court must find that:

- the CEO has practiced fraud or deception;
- reasonable care, judgment or the application of a duly trained and knowledgeable CEO's ability was not used in the performance of the duties of the office; or

- the CEO is incompetent or unable to perform properly the duties of the office.

If a CEO's certification is revoked through this process, he or she must become newly certified by the Department of Economic and Community Development, Office of Community Development in accordance with State's program in order to continue to serve as a CEO.

#### D. **Conflict of Interest**

##### 1. **In General**

30-A M.R.S. §2605 provides that a municipal official who has a direct or indirect pecuniary interest in any question on which he or she must decide in an official capacity must make full disclosure of that interest for the record and must abstain from voting, negotiating or awarding a contract, or attempting to influence a decision in which he or she has an interest. The statute defines "direct or indirect pecuniary interest" as being the direct or indirect owner of at least 10% of the stock of a private corporation or having at least a 10% interest in the business or other economic entity involved in a contractual relationship with the municipality or otherwise the subject of discussion. To be covered by this statute, the CEO would have to be an officer, director, partner, associate, employee or stockholder of the business involved in the CEO's decision.

In the situation which falls outside the 30-A M.R.S. §2605 definition of pecuniary interest and the relationships which are covered by that statute, there is a common law (case law) standard defining activity which may constitute a conflict of interest. That standard is, "whether the town officer by reason of his interest, is placed in a situation of temptation to serve his own personal interest to the prejudice of the interests of those for whom the law authorized and required him to act..." *Lesieur v. Inhabitants of Rumford*, 113 Me. 317 (1915), as cited in *Tuscan v. Smith*, 130 Me. 36 (1931).

A CEO would also be well advised to avoid even the "appearance" of a conflict of interest. 30-A M.R.S. §2605(6) *Aldom v. Roseland*, 42 N.J. Super. 495, 127 A.2d 190 (1956).

If the CEO has a legal conflict of interest and fails to abstain from making a decision in which he or she has a financial interest, a court could declare that decision void if it were challenged.

30-A M.R.S. §2605(5) restricts a former CEO's ability to represent anyone but himself or herself or the municipality before a municipal official or board on an issue in which the CEO had direct involvement. There is a one year waiting period from the end of the CEO's employment where the issue is one which was completed at least one year before the CEO left office. If the issue was pending within one year of the end of the CEO's employment, then the CEO is absolutely prohibited from representing a client on that matter before a local board or official.

30-A M.R.S. §2605(6) further provides that “every municipal and county official shall attempt to avoid the appearance of a conflict of interest by disclosure or by abstention.

## 2. **Plumbing Inspectors**

30-A M.R.S. §4222 states that a plumbing inspector may not inspect or approve any plumbing work, site evaluation, or installation of subsurface disposal systems done by: 1) himself or herself; 2) any person by whom the plumbing inspector is employed; or 3) any person whom the plumbing inspector employs or with whom the plumbing inspector works.

## 3. **Deputy or Assistant Enforcement Officer**

One way to avoid problems resulting from a conflict of interest is for the municipality's legislative body to vote by ordinance to authorize the appointment of someone as a "deputy" or "assistant" who can make decisions in situations where the CEO, LPI, or other enforcement officer has a conflict of interest. Whoever is appointed deputy or assistant must meet the same qualifications and certification requirements as the official in whose place he or she is supposed to act. The appointment must be in writing and should state the extent of that person's authority and the term of office. The deputy or assistant must be sworn into office before performing any official duties. In authorizing such an appointment, the legislative body should also indicate how the deputy or assistant is to be paid.

The importance of ensuring that the deputy, assistant or "back-up" CEO's position has a legal basis cannot be overstated, since the municipality wants that person to perform the same functions as the regular CEO either on a daily basis or when the CEO has a conflict, is on vacation, sick, or otherwise unavailable. State law authorizes more than one LPI to be employed by the municipality. 30-A M.R.S. §4221. It also authorizes the municipal officers to appoint a deputy building inspector when the building inspector is "incapacitated," 25 M.R.S. §2351-A. There is no similar statutory provision regarding deputy CEO's for shoreland zoning, zoning, or other purposes. Consequently, without an ordinance approved by the legislative body creating such a position, the legal authority of anyone acting in that capacity would be questionable. Appointing and "swearing in" a certified CEO from a neighboring municipality is a way to easily provide necessary "back up."

### E. **Liability**

#### 1. **Nonperformance of Duty**

Under 30-A M.R.S. §2607, a municipal official can be personally liable for a \$100 fine for neglecting or refusing to perform a duty of office. An example of neglect or refusal is where a person files an application with the CEO and the CEO fails to act on it because he or she misplaced the application or because the CEO wants to discourage the applicant.

## 2. **Maine Tort Claims Act**

### (a) **Individual Official Generally Immune**

Under 14 M.R.S. §8104-D, a municipal official or employee generally is liable for his or her negligent acts or omissions occurring in the course and scope of employment subject to a limit of \$10,000 for any claims arising out of a single occurrence. However, the exceptions to liability found in 14 M.R.S. §8111 generally protect a CEO from personal liability and having to pay money damages to compensate someone claiming personal injury or property loss resulting from the CEO's negligent or intentional act or failure to act. The statute provides immunity from liability for an action or failure to act which falls into one of the following categories: "quasi-legislative" (for example, adoption or failure to adopt certain regulations); "quasi-judicial" (for example, granting, denying or revoking a permit); "discretionary" (for example, an ordinance provision which gives the CEO discretion whether to conduct a site visit); "prosecutorial" (for example, whether to cite a landowner for a violation and begin an enforcement action in court); or intentional, as long as the CEO acted in good faith and within the scope of his or her authority (for example, where the CEO is asked by the Planning Board at its public meeting to comment about the quality of a site evaluator's work, the CEO's comments are negative, and the site evaluator subsequently loses business as a result of this negative publicity). The statute also provides immunity from claims based on the performance or failure to perform an administrative enforcement function.

### (b) **Individual Liability for Negligence**

However, a CEO may be liable for his or her negligent or intentional act or failure to act if the act is ministerial (not involving any discretion), is an intentional act not undertaken in good faith, or is outside the scope of the CEO's authority. A possible example of a negligent ministerial act is where the CEO approves an application for a use which is clearly prohibited without exception by express language in the ordinance. Another example is where the CEO fails to conduct an inspection where clearly required by a code or ordinance. *See Carroll v. City of Portland*, 1999 ME 131, 736 A.2d 279, where the court found that a police officer was not entitled to immunity for exercise of discretion where liability stems from the ministerial act of copying names of persons arrested for airing on cable television program and a name was erroneously included in the list.) In order to recover damages as compensation for the CEO's negligence, the person injured would have to show that the CEO's negligence was the cause of the injury and not something else, such as the injured person's own negligence or bad faith.

### (c) **Municipal Liability and Immunity; Defense/Indemnification of CEO**

Generally speaking, the municipality will be immune from liability under the Tort Claims Act when a suit is brought against the CEO based on a decision by the CEO, since the municipality's liability must be tied to one of the categories in 14 M.R.S. §8104-A of the statute, all of which relate to negligence in connection with municipal equipment, buildings,

pollution, or public works projects. However, 14 M.R.S. §8112 generally requires the municipality to provide insurance or to pay attorney's fees and damages on behalf of the CEO in an amount up to \$10,000 (the statutory limit on personal liability) in cases where the CEO is found liable for negligence. Where the CEO is criminally liable, where he or she acts in bad faith, or where the CEO acts outside the scope of his or her authority, the CEO may be required to pay his or her own attorney's fees and damages award; these damages may exceed the \$10,000 cap under the Tort Claims Act and may be beyond the coverage of the municipality's public officials liability insurance. Generally, a municipality will stand behind its CEO and pay such costs either by providing insurance or by appropriating money for that purpose, except where a CEO is guilty of conduct in bad faith which is outside his or her authority and which the municipality does not want to condone. Examples of such conduct are physical assault of a difficult citizen at a meeting or carrying and using a weapon without authority while performing code enforcement duties.

(d) **Notice of Suit**

A CEO who is sued under the Tort Claims Act should notify the town or city manager (if any) or the selectpeople or council immediately, since an insurer may deny defense and coverage for lack of timely notice. The CEO also should refrain from commenting publicly about the suit.

(e) **Inspection Scenarios; Liability Analysis**

The following are three scenarios involving inspection of property by a municipal code enforcement officer for code violations and an analysis of whether the CEO could be held personally liable for damages under State law if someone claims that he or she was injured as a result of the CEO's inspection or failure to inspect. (Potential liability under federal law or other State laws is not addressed.)

**Scenario #1:**

A land use ordinance or statute which the CEO is required to administer or enforce states that the CEO "shall" conduct certain inspections and the CEO fails to conduct the required inspections. If a landowner can show that he or she has suffered a personal injury or property damage as the result of the CEO's failure to conduct a mandatory inspection, then the CEO may be personally liable for negligence up to \$10,000. 14 M.R.S. §§8104-D, 8111. The CEO's actual liability may be reduced or eliminated by proving that the landowner was at least as negligent, or more negligent than the CEO, and that his or her injury was caused totally or partially by the landowner's own conduct. In a case where an ordinance required a housing inspector to conduct a reinspection of the property within a certain number of days after citing the owner for a code violation, the Maine Supreme Court found that when and how to conduct the inspection was a discretionary decision by the inspector. *Chiu v. City of Portland*, 2002 ME 8, 788 A.2d 183.

## **Scenario #2:**

A land use ordinance or statute administered or enforced by the CEO says that the CEO "may" inspect property and the CEO does not perform an inspection. Even if a landowner can prove that there is a direct connection between a personal injury or property damage and the failure to inspect, the CEO is immune from liability; because the inspection was discretionary, the CEO has no duty to the landowner and therefore is not guilty of negligence. 14 M.R.S. §8111.

## **Scenario #3:**

A land use ordinance or statute that the CEO administers or enforces states that the CEO "may" conduct an inspection. The CEO decides to conduct an inspection and fails to detect a violation. The CEO is potentially liable for negligence up to \$10,000 once the CEO decided to do an inspection. Liability depends upon whether the CEO's performance of the inspection was a discretionary act or a ministerial one. If discretionary, there is no liability. If ministerial, whether the CEO will actually be held liable will depend on the "comparative negligence" of the person claiming an injury and whether the CEO acted "reasonably" in the way he or she conducted the inspection. "Reasonableness" will be determined based on whether the violation was fairly visible or hidden. 14 M.R.S. §§8104-D, 8111.

### **3. Maine Civil Rights Act**

The Maine Civil Rights Act, 5 M.R.S. §§4681 – 4683, prohibits a person from "intentionally interfer(ing) by threat, intimidation or coercion" with another person's exercise or enjoyment of rights provided in the U. S. Constitution, the laws of the United States, the Maine Constitution, or the laws of the State. Unlike federal law (see discussion below), the Maine Civil Rights Act does not apply only to actions done "under color of law." This means that a CEO could be sued under this law whether or not he or she was acting in an official capacity if a violation of a right protected by this law results from the CEO's action. The Maine Attorney General is authorized to seek an injunction or other corrective action on behalf of the injured person in order to protect that person in exercising his or her rights. The injured person also may pursue a civil action on his or her own behalf seeking appropriate monetary or corrective relief. The law also authorizes the successful party (other than the State) to recover its reasonable attorneys fees and costs.

### **4. Federal Civil Rights Act**

The federal Civil Rights Act, 42 U.S.C. §1983 prohibits any violation by the CEO of any individual right that is guaranteed by either the United States Constitution or a federal statute.

#### **(a) Individual Liability**

The CEO would be immune from personal liability under federal law for damages resulting from a CEO decision if the CEO acted in "good faith." "Good faith" means that the



CEO did not know and should not have known that his or her decision or action would deprive the injured person of a federal or constitutional right. *Owen v. City of Independence*, 445 U. S. 622 (1980). For example, if the CEO denies an application, the applicant might try to sue the CEO and ask a court to order the CEO to approve the application and to pay damages as compensation for the loss of use of his property. As long as the CEO acted in good faith in interpreting the ordinance and denying the application, the court would not award damages against the CEO even if the court found that the application should have been approved. However, if the court found that the only reason that the CEO had for denying the application was that he or she wanted to prevent a family with a particular ethnic background from moving into the neighborhood, it probably would award personal damages against the CEO. Another example which might result in personal liability is where the CEO enters a building or land adjacent to the building to conduct an inspection without permission or a court warrant. (See Chapter 5 for further discussion of inspections.)

(b) **Municipal Liability**

In any event, even if the CEO is not personally liable for damages, the municipality may be liable if the court finds that the person bringing the suit actually was deprived of a federal or constitutional right by the CEO's decision and the decision was made pursuant to a "policy, practice, or custom" of the municipality. The municipality cannot rely on the CEO's good faith in defending a suit against the municipality. A person who wins a case under the Civil Rights Act of 1871, whether against the municipality or the CEO, can recover attorney's fees as well as damages. 42 U.S.C.A. §1988. There is no statutory limit on damages under the federal law as there is under the Maine Tort Claims Act.

(c) **Defense and Indemnification**

14 M.R.S. §8112(2-A) (Maine Tort Claims Act) states essentially that, if a CEO is sued for violating someone's rights under a federal law, the municipality must pay the CEO's defense costs and may pay any damages awarded against the CEO for a violation of federal law, if the CEO consents. This is not true if the CEO is found criminally liable or if it is proven that the CEO acted in bad faith.

(d) **Notice of Suit**

If sued under federal law the CEO should notify the town or city manager (if any) or the selectpeople or council immediately, since an insurer may deny coverage and defense costs if notice is not provided in time.

5. **Manslaughter in the Workplace**

A provision of the Maine Criminal Code, 17-A M.R.S. §203, states that a person is guilty of manslaughter if he or she:

- has "direct and personal management or control of any employment, place of employment or other employee,"
- "intentionally or knowingly violates any federal or State occupational safety or health standard,"
- "that violation in fact causes the death of an employee," and
- "that death (was) a reasonably foreseeable consequence of the violation."

It is unclear at this point exactly how or if this law applies to CEOs who supervise others where someone is killed while conducting an inspection of a dangerous building.

## 6. **Right to Know Law**

The CEO is legally required by the Right to Know Law (otherwise known as the Maine Freedom of Access Act) 1 M.R.S. §§401- 410, to allow the public to inspect and copy his or her public records. If the CEO willfully violates this law, the municipality is subject to a \$500 fine which may be enforced by the Attorney General's office not a private citizen.

## 7. **Records Retention and Disposal; Archives Advisory Board Regulations**

5 M.R.S. §95-B requires municipal boards and officials to comply with regulations adopted by the Archives Advisory Board when destroying or disposing of public records. Those regulations set out specific retention periods for many public records and establish a rule of indefinite retention for records not expressly covered. The text of these rules is available at <http://www.maine.gov/sos/arc/records/local>. Any person who violates those rules is guilty of a Class D crime. 5 M.R.S. §95-B also required boards and officials to protect the public records in their custody from damage or destruction. An official who leaves public office has an obligation under this statute to turn over any public records in his or her possession to his or her successor.

## F. **Compensation**

30-A M.R.S. §2601-A states that the municipal officers determine the compensation for CEOs and that amount must be paid by the municipality. The basic State minimum wage law applies to an appointed official such as a code enforcement officer only if the appointment is for an indefinite term. 26 M.R.S. §§663 and 664.

Most municipalities pay their code enforcement officials some amount, either by appropriating a lump sum annual salary or by dedicating permit fee revenues where the municipality has adopted an ordinance provision requiring all applicants to pay a fee reasonably related to the costs of administering the ordinance. The Maine Municipal Association prepares and publishes an annual salary survey of a representative cross-section of towns and cities by population which indicates how much a specific position, such as the CEO, is paid and what method of funding is used by a particular municipality.

If a municipality prosecutes people who have violated local ordinances and recovers fines, those fines go into the municipal treasury as unappropriated revenues which can later be appropriated by the legislative body for any public purpose, including compensation for the CEO. However, unlike the use of permit fees, a municipality should not dedicate fines in advance for the CEO's compensation and should not pay the CEO solely on the basis of fines recovered in cases that he or she has prosecuted. This will help avoid the appearance of over zealousness by the CEO in citing people for violations and taking them to court.

When the CEO collects any type of permit fee from an applicant, that fee must be turned over to the municipal treasurer to be deposited/invested in accordance with State law. This is true even if the town or city's legislative body has voted that permit fees are part of the CEO's total compensation. Those fees are municipal revenues and must first be accounted for by the treasurer and then approved for disbursement as an item on a treasurer's warrant approved by the municipal officer's (or other authorized official) before the treasurer is authorized to issue a check to the CEO.

#### **G. Code Enforcement Officer's Employment Status for IRS Purposes**

There is some confusion about whether a CEO should be considered an employee for income tax and FICA withholding purposes, or whether the CEO is an independent contractor. The Internal Revenue Service (IRS) has made it clear that code enforcement officers are employees and should be issued a W-2 form rather than a 1099 form. As the employer, the municipality should make the appropriate withholdings (income tax, FICA, etc.) from the CEO's pay. The primary reasons for the IRS' position are that code officers serve as officials under a statute or ordinance, are directed and paid by the municipality rather than by private citizens, and that code enforcement is a governmental function which has no private sector equivalent. In other words, a CEO does not hang a shingle offering his or her enforcement services to members of the general public, which is one hallmark of an independent contractor.

A CEO who works part-time for several communities is still considered an employee, for IRS purposes, of each community (unless an interlocal agreement provides otherwise), and not an independent contractor. Independent contractor status does not depend upon the number of employers, but instead on the nature and manner of the work performed.

Some CEOs are also self-employed as surveyors, site evaluators, or builders. They may be considered independent contractors for their private work, but are considered municipal employees for work done as a CEO.

## Chapter 2 - Duties of a Code Enforcement Official

### A. General

The duties of a code enforcement official 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. In some cases, such as the State junkyard law or subdivision law, the municipal officers and not the CEO are authorized to enforce the law. If they want the CEO to assume their enforcement role, they should approve a formal delegation of authority and record it in writing.

This manual discusses many State and federal laws of interest to CEOs. However, not all of them may be enforced by a local CEO. Do not attempt to enforce any laws unless there is express authorization to do so. Much of the discussion of various State and federal laws is intended to provide information for a CEO to pass along to applicants who wonder what other laws might govern their projects.

It cannot be emphasized enough that the CEO should be extremely familiar with the provisions of the ordinances and statutes which 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 which 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 are in compliance with any relevant State and federal statutes and regulations. By performing this function, the CEO builds credibility and can help minimize any harmful or costly effects on a permit applicant, as well as, the community which would result from a violation of a State or federal law. At a minimum, the CEO should be familiar with State and federal regulations which 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 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 suggest the applicant check with State and federal agencies to be safe rather than risk misleading the applicant with incorrect information. *See generally Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987). Seeking correct information about a proposed project helps the CEO to understand the application of state and federal laws and regulations and establishes contacts within those agencies for the future.

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

- Mr. X proposes to build a summer cottage within the shoreland zone on land which is within the floodplain and includes sand dunes. His driveway must cross a stream.
  - This project probably would require local permits under the town's shoreland zoning ordinance, flood hazard building permit ordinance, and the State plumbing rules. It may also require a permit under the Maine Natural Resources Protection Act (NRPA).
- Ms. W owns a vacant nonconforming lot of record in the R-2 zone. She wants to fill part of her lot to construct a building in which she wants to operate a gift shop and employ family members to make some of the items sold. A portion of her lot is part of a large freshwater wetland which is 16 acres.
  - This project probably would require permits under a town-wide zoning ordinance, a local building code, a town site plan review ordinance, and the Natural Resources Protection Act which provides joint permitting for compliance with State and federal wetlands regulations.
- Mr. and Mrs. Y are stockpiling scrap lumber, old doors and windows, corroded pipes, and broken furniture and appliances on a vacant lot which they own. They run an existing secondhand shop across the street on another lot which they own in the Village District.
  - This activity may require a land use permit (if it is a permitted use), a junkyard permit from the authorized official under State law, and a DEP permit for junkyards under the Site Location Act.

B. **Specific State Laws Enforced By Municipalities**

1. **Shoreland Zoning**

38 M.R.S. §441(3) lists the following duties for shoreland zoning code enforcement officers:

- Enforce the local shoreland zoning ordinance in accordance with the procedures contained therein;
- Collect a fee, if authorized by a municipality, for every shoreland permit issued by the code enforcement officer. The amount of any such fee shall be set by the municipality. The fee shall be remitted to the municipality;
- Keep a complete record of all essential transactions 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; and
- Investigate complaints of alleged violations of local land use laws. 38 M.R.S. §443-A(3) authorizes the State to take enforcement action against a municipality which fails to enforce its shoreland zoning ordinance either by ignoring violations or by approving applications which do not comply with the ordinance.

2. **Plumbing Code**

30-A M.R.S. §4221(3) provides a similar list of general duties for plumbing inspectors:

- Inspect all plumbing for which permits are granted, within their respective municipalities, to ensure compliance with State rules and municipal ordinances and investigate all construction or work covered by those rules and ordinances;
- Condemn and reject all work done or being done or material used or being used which does not comply with of State rules and municipal ordinances, and order changes necessary to obtain compliance;
- Issue a certificate of approval for any work that the inspector has approved;
- Keep an accurate account of all fees collected, and transfer those fees to the municipal treasurer;
- Keep a complete record of all essential transactions of the office;
- Perform other duties as provided by municipal ordinance;
- Investigate complaints of alleged violations relating to plumbing or subsurface waste water disposal and take appropriate action as specified in the State of Maine Enforcement Manual, Procedures for Correcting Violations to the Subsurface Waste Water Disposal and Plumbing Rules published by the Department of Health and Human Services; and

- Accompany staff of the DEP or DHHS in the conduct of a sanitary survey intended to identify potentially failing subsurface waste water disposal systems affecting shellfish harvesting areas when requested by either agency.

### **3. Seasonal Conversion**

30-A M.R.S. §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 30-A M.R.S. §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 7 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 the applicant has met one of four conditions.

### **4. Malfunctioning Sewage Disposal Units**

30-A M.R.S. §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 Wastewater Disposal Rules. While a violation of the Wastewater Disposal Rules is clearly something that the LPI is empowered to handle, any corrective action taken and notices sent under 30 M.R.S. §3428 should be by the municipal officers unless the LPI or CEO has been delegated that authority either by ordinance or by vote of the municipal officers.

### **5. Building Inspection and Regulation**

30-A M.R.S. §4101-4104 establish a number of requirements affecting building inspectors in municipalities which have ordinances regulating building construction, alteration, demolition or improvement. 30-A M.R.S. §4103 states that the building inspector is the licensing authority under such an ordinance unless otherwise provided. The building inspector must issue a written notice of his or her decision on a building permit application to the applicant within 30 days of filing; failure to do so constitutes a denial.

A building inspector cannot issue a permit to install a mobile home which is being relocated from another municipality without proof that all property taxes have been paid.

The building inspector cannot issue a permit for any building required to have an overboard discharge license from DEP under 38 M.R.S. §§413 and 414 until that license has been obtained.

The building inspector is also prohibited from issuing a permit for a building or use in a subdivision which has not received the approval required under 30-A M.R.S. §4401 or

under 38 M.R.S. §483-A. This situation may arise when a subdivision is intentionally or unintentionally created by offering lots for sale one at a time. One way to resolve the issue of whether the proposed structure or use will be in an unapproved subdivision is for the CEO to require either that the applicant provide a title or attorney's opinion and verify the same with the Town's attorney.

30-A M.R.S. §4211(3) requires any person erecting a structure requiring subsurface disposal to provide documentation to the municipal officers that the system can be constructed in accordance with the State's Subsurface Waste Water Disposal Rules. Any person expanding a structure using subsurface disposal must provide documentation to the municipal officers that a legal replacement system can be installed in the event of a future malfunction. Notice of that documentation must be recorded in the Registry with copies sent to all abutters. Abutters are then prohibited from installing a well in a location which would prevent installation of the replacement system. The landowner also is prohibited from erecting a structure or conducting an activity which would prevent installation of the replacement system. The Rules also require a minimum setback of 100 feet from the "normal-high-water-line" for new systems installed within a shoreland zone. This setback cannot be reduced by variance. Notice to the public drinking water supplier is also required if the lot is within a source water protection area mapped by the Department of Health and Human Services.

25 M.R.S. §2353-A requires that the building official inspect each building during the process of construction so far as may be necessary to see 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, and may give such directions in writing to the owner or contractor as the building official considers necessary concerning the construction of the building so as to render the building safe from the catching and spreading of fire. For a building official in a municipality that is enforcing the MUBEC, unless the municipality is enforcing MUBEC by means of a third party inspector, the building official shall inspect each new building during construction for compliance with MUBEC.

25 M.R.S. §2354 requires the building inspector to exercise similar authority regarding repairs to existing structures.

25 M.R.S. §2357-A provides that a building in a municipality of more than 2,000 inhabitants may not be occupied until the building official has given a certificate of occupancy for compliance with the inspections required by section 2353-A. A building in a municipality of more than 2,000 inhabitants that has adopted or is enforcing MUBEC may not be occupied until the building official has given a certificate of occupancy for compliance with MUBEC and in accordance with the required enforcement and inspection options provided in section 2373. The building official may issue the certificate of occupancy upon receipt of an inspection report by a certified 3rd-party inspector pursuant to section 2373, subsection 4. The municipality has no obligation to review a report from a 3rd-party inspector for accuracy prior to issuing the certificate of occupancy. If the owner permits it to be so occupied without such certificate, the owner must be penalized in



accordance with 30-A M.R.S. § 4452.

Building inspectors also have the authority to inspect buildings under 25 M.R.S. §2360 for the purpose of determining whether the building is dangerous due to the presence of combustible materials or flammable conditions on the premises, or heating fixtures or apparatus which are dangerous due to their construction. If such conditions exist, the building inspector can order their correction or removal. Violation of these laws may be prosecuted by the Code Enforcement Officer/Building Inspector, or Fire Chief.

## 6. **Electrical Installations**

Maine statutes do not require municipalities to have an electrical inspector. However, 30-A M.R.S. §4171 states that once an electrical inspector has been appointed, he or she shall enforce any applicable local ordinance as well as the provisions of 30-A M.R.S. §§4152- 4154, 4161-4163, 4171-4174 governing electrical installations.

Unless the municipality has adopted an ordinance requiring a permit for an electrical installation, the electrical inspector has no authority to require or to issue a permit. If that is the case, 32 M.R.S. §1102-B requires permits to be obtained from the State Electricians' Examining Board for new electrical installations and alterations of existing installations, with the following exceptions:

- Single-family dwellings;
- The electrical work and equipment employed in connection with the construction, installation, operation, repair or maintenance of any utility by a utility corporation in rendering its authorized service or in any way incidental thereto;
- The electrical work and equipment employed in connection with an aboveground electric line described in 32 M.R.S. § 1102(1-B);
- Minor repair work, including the replacement of lamps, fuses, lighting fixtures, switches and sockets, the installations and repair of outlets, radios and other low voltage equipment and the repair of entrance service equipment;
- Installations or alterations for which a permit and inspection are required by municipal resolution or ordinance under 30-A M.R.S. §4173;
- Any electrical equipment and work, including construction, installation, operation, maintenance and repair in or about industrial or manufacturing facilities;
- Any electrical equipment and work, including construction, installation, operation, maintenance and repair in, on, or about other properties, equipment or buildings, residential or of any other kind, owned or operated by a person engaged in industrial or manufacturing operations provided that the work is done under the supervision of an electrical engineer or master electrician in the employ of that person;
- Work performed by any person licensed under Title 32, Chapter 139 as an oil burner technician, subject to the restrictions of the license as issued;

- Work performed by a person licensed under Title 32, Chapter 139 as a propane and natural gas installer, when installing propane and natural gas utilization equipment, subject to the restrictions of that person's license;
- Work performed by a person licensed under Title 32, Chapter 49 as a plumber, except that this exception applies only to disconnection and connection of electrical conductors required in the replacement of water pumps and water heaters of the same or smaller size in residential properties; or
- Work performed by a person licensed under Title 32, Chapter 69-C as a pump installer, except that this exception applies only to disconnection and connection of electrical conductors required in the replacement of water pumps of the same or smaller size in residential properties and the installation of new water pumps and associated equipment of 3 horsepower or smaller.

If a municipal ordinance does require a permit for electrical installations, 32 M.R.S. §1103 prohibits the issuance of such a permit unless the electrical inspector is satisfied that the applicant is someone authorized to perform such work under 32 M.R.S. §1101, *et seq.*

Regardless of whether a local permit is required, 30-A M.R.S. §4172 requires local electrical inspectors "to examine and to issue certificates of acceptance of electrical installations at the request of any owner, lessee, tenant or municipal officer." Such certificates would be issued only if the installation conformed to 30-A M.R.S. §§4161, 4163. If the inspector finds a hazardous electrical installation, he or she has authority to order its correction and to prosecute anyone failing to comply with his or her order.

In communities which do require electrical permits, 30-A M.R.S. §4174 requires the person making the electrical installation governed by the permit to notify the electrical inspector when the installation is completed so that it can be examined for conformance with 30-A M.R.S. §§4161, 4163 and local ordinances. The electrical inspector must conduct an inspection within a reasonable time. If the installation does conform, the inspector issues a certificate of approval. If it does not, then he or she issues a written notice stating the defects and ordering their correction.

30-A M.R.S. §4161 requires all electrical equipment installations to be reasonably safe and in compliance with State and local laws. Compliance with the National Electrical Code, National Electrical Safety Code or other safety codes approved by the American Standards Association is "prima facie" evidence of safe installation.

## 7. **Fire Codes**

### (a) **Discretionary Authority to Enforce State Laws and Code; No Duty**

25 M.R.S. §2361 states that fire chiefs or their designees, building inspectors, and

code enforcement officers all have the discretionary authority to prosecute violations of the following State fire laws:

- 25 M.R.S. § 2351-A through § 2360 – municipal inspection of buildings;
- 25 M.R.S. §2396 – relating to regulations of the Commissioner of Public Safety pertaining to explosives, fire alarms, fire escapes, exits (Life Safety Code No. 101); and
- 25 M.R.S. §§2447-B, 2448, 2452, 2463-2465 – explosives and flammables, foam plastic insulation standards, public building construction, exits, sprinklers and smoke detectors, chimney, fireplace, and solid fuel burning appliances.

The authority granted to municipal code enforcement officers or other local officials to enforce these State fire codes does not make enforcement mandatory, because 25 M.R.S. §2361 and §2465 state that they “may” enforce them in a civil action. In contrast, a local building inspector “shall” perform certain inspection and certification duties outlined in the more general provisions of 25 M.R.S. §2351-A through § 2360. None of these (§2351-A through § 2360) expressly reference the Life Safety Code or any other State code. No provision of a State statute or regulation appears to obligate a municipality to enforce the Life Safety Code 101 as adopted by the Department of Public Safety or other State-adopted fire codes. Since no duty to enforce is imposed by law, no liability will result on the basis of negligence if the municipality chooses not to enforce those codes. Sections 2353-A and 2354 require local building inspectors to determine whether construction is sufficient to prevent the spreading or catching of fire. While a building inspector may choose to make this judgment using the Life Safety Code 101 as a guide, under the authority of §2361, he/she is not obligated to do so because §§2353-A and 2354 do not expressly reference the Life Safety Code as the basis for making decisions. A building inspector may make a reasonable judgment about these safety issues and will be protected by the Maine Tort Claims Act in this exercise of discretion. Some communities have adopted the Life Safety Code 101 and other nationally-recognized fire codes as local ordinances and enforce them on that basis rather than as State-approved codes. Such codes contain fairly precise standards and therefore are easier to enforce than the vague provisions of 25 M.R.S. §§2351-A through 2360.

(b) **Residential Care Facilities, Assisted Living Facilities, Child Care Facilities, and Adult Day Care Facilities**

22 M.R.S. §7855 (residential care facilities), § 7856 (assisted living facilities), §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. The local officials mentioned above in the discussion of “Fire Codes” are among those who may conduct such inspections.

## 8. **Health Laws**

The local health officer is empowered to enforce the provisions of 22 M.R.S. §454-A and §1561. The most frequently used health statute in connection with land use violations is §1561, which provides as follows:

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

## 9. **Protection of Public Water Source**

22 M.R.S. §2647-A(1) authorizes employees or agents of a water utility to enter upon land and conduct an inspection where the land is either within 1000 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 from the District Court pursuant to Rule 80E of the Maine Rules of Civil Procedure before entering the land or buildings to conduct an inspection, even though the statute implies that this is not necessary.) Following an inspection under 2647-A(3) and in addition to the remedies granted to municipal officers under 30-A M.R.S. §3428, any local or state health inspector or officer may order the owner to take action to stop further contamination and to clean up any existing contamination (if that is possible).

## 10. **Junkyards/Automobile Graveyards**

### (a) **Enforcement Authority**

30-A M.R.S. §§3753-3755-A impose an obligation on municipalities to license "junkyards" and "automobile graveyards" each year and "automobile recycling businesses" every five years. 30-A M.R.S. §3758-A provides that the State Police and local and county law enforcement officers "shall enforce" this law; the "municipal officers or their designee" "may" also enforce it. In addition, 29-A M.R.S. §106 provides that the State Police and county sheriff's office shall "expeditiously enforce" automobile graveyard laws. The reality, however, is that municipalities assume primary responsibility for enforcing this law because with a large geographic territory to cover and limited staff, neither the State Police nor the county sheriffs give enforcement of the automobile graveyard and junkyard law a very high priority. Although the law does not expressly name the CEO as being responsible for enforcement, generally the municipal officers will delegate their 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.

(b) **Definitions**

For the purposes of this law, the following definitions apply:

- "Junkyard" means "a yard, field or other area used as a place of storage for:
  - A. Discarded, worn-out or junked plumbing, heating supplies, 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. 30-A M.R.S. § 3752(4)."
- "Automobile Graveyard" means "a yard, field or other outdoor area used to store (other than temporary storage by an automobile repair business) three or more unregistered or uninspected vehicles as defined in 29-A M.R.S. §101(42), or parts of the vehicles. Changes in the junkyard law now exclude areas used by an "automobile hobbyist" to store, organize, restore or display antique autos, antique motorcycles, classic vehicles, horseless carriages, reconstructed vehicles, street rods or parts for these vehicles. However, beware of challenges regarding the classification of such cars as antique or classic vehicles, which are *excluded* from the definition of automobile graveyard. *See generally Town of China v. Althenn*, 2013 ME 107, 82 A.3d 835. There are other exceptions to the automobile graveyard definition for government vehicles, auto dealers, insurance salvage operations and certain commercial equipment." 30-A M.R.S. § 3752(1).
- "Automobile Recycling Business" is defined as "the business premises of a person who purchases or acquires salvage vehicles for the purpose of reselling the vehicles or component parts of the vehicles or rebuilding or repairing salvage vehicles for the purpose of resale or for selling the basic materials in the salvage vehicles, provided that 80% of the business premises specified in the site plan in 30-A §3755-A, subsection 1, paragraph C is used for automobile recycling operations but excluding certain financial institutions, insurance companies, new vehicle dealers and temporary storage for an insurance salvage pool." 30-A M.R.S. § 3752(1-A).

(c) **Junked Vehicles as a Nuisance**

Junked motor vehicles are also addressed in 17 M.R.S. §2802, which deals with miscellaneous nuisances. This is another State law that can be enforced locally through the CEO if so authorized by the municipal officers.

(d) **Notice of Application to Public Drinking Water Supplier**

When a junkyard, automobile graveyard, or auto recycling business is or will be located within a mapped public water source protection area, State law 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 M.R.S. §3754. *See* §3754 for other notice requirements.

(e) **Regulation by Department of Environmental Protection and Secretary of State**

Some automobile graveyards, junkyards and automobile recyclers are regulated by the DEP under the Site Location Act, the solid waste laws, hazardous waste laws and related DEP rules. The Secretary of State licenses "recyclers" pursuant to 29-A M.R.S. §1101 *et seq.* "Recycler" is not defined, but was intended to have the same meaning as in 30-A M.R.S. §3752.

(f) **Benefits of a Local Ordinance**

Some CEOs note that it is easier to deal with junkyards and auto graveyards if a provision regulating them is adopted as part of the town or city zoning ordinance. They recommend using a different definition for auto graveyard, one that focuses on the vehicles being unregistered.

(g) **Court Decisions Interpreting Junkyard and Automobile Graveyard Statute: DOT Regulations**

The Maine Supreme Court has held that, for the purposes of the definition of "automobile graveyard," the word "unserviceable" means "not ready for use or not presently useable." *Town of Pownal v. Emerson*, 639 A.2d 619 (ME 1994). Further, in *Town of Mt. Desert v. Smith*, 2000 ME 88, 751 A.2d 445, the Law Court found that what the landowner claimed to be "personal property" that he intended to use someday in fact was "junk" for the purposes of the junkyard statute. The Department of Transportation (DOT) also has promulgated regulations to be used by municipalities in defining this term and generally administering the permit requirement in the statute. These regulations also address screening issues. For copies of Maine Superior Court and Maine Supreme Court decisions involving junkyard and automobile graveyard violations, contact MMA's Legal Services Department.

## 11. **Dangerous Buildings**

17 M.R.S. §§2851-2859 authorize 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 which is so dangerous that immediate court action is required, there is no express authority given to the CEO to act under this statute. However, if the CEO is asked to assist

the municipal officers, this should be done in writing. Buildings or structures which 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.

## 12. **Abandoned Mobile Homes**

30-A M.R.S. §3106-A authorizes municipal officers to determine that a mobile home located within the municipality is “abandoned” and to take appropriate corrective action including taking legal title of such a mobile home and eventually disposing of it. Similar to the process for dealing with a “dangerous building,” no express authority is granted to the CEO to make this determination; however, the CEO can act on behalf of the municipality if authorized (preferably in writing) by the appropriate municipal officers. Nonetheless, because the Town Council or Board of Selectmen are ultimately responsible for determining that a mobile home is “abandoned” the CEO will likely be less-involved in these issues than those dealing with dangerous buildings

## 13. **State Law Requiring Municipal Review and Approval of Subdivisions**

30-A M.R.S. §4401 *et seq.* requires anyone creating 3 or more lots within a 5 year period by sale, lease, development, buildings or otherwise to obtain prior subdivision approval from the planning board (or from the municipal officers if there is no planning board).<sup>1</sup> Certain lots are exempt under the statute and cannot be counted as lots. The law also treats certain multi-unit dwelling structures and the construction or placement of 3 or more dwelling units on a single parcel as subdivisions.

There are major changes to the subdivision law, 30-A M.R.S. §4401 (applying retroactively to 6/1/01) which are as follows:

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<sup>1</sup> Beware that just because a lease may trigger subdivision review under 30-A M.R.S. §3106-A, that does not necessarily mean that a new “lot” has been created. In *Horton v. Town of Casco*, 2013 ME 111, 82 A.3d 1217, owners of a right-of-way sued, alleging that the leasing of land on which a cell phone tower was to be constructed triggered subdivision review *and* created a new lot under the Town’s land use ordinance. The Law Court agreed that subdivision review was triggered, but held that a new “lot” was not created, meaning that the cell phone tower would not be in violation of the Town’s minimum lot size and setback requirements. The take away here is that while two sets of standards may potentially apply to a situation, a CEO should read the applicable statutes and ordinances before making any final decisions.

- The law clarifies that the intent to avoid subdivision applies to each type of division otherwise exempted from review.<sup>2</sup>
- A person making a gift to a relative must have held to property five years prior to the gift.
- The five-year period after the gift during which the recipient of the gift must retain ownership remains the same.
- The definition of “family member” is narrowed to “spouse, parent, grandparent, brother, sister, child or grandchild related by blood, marriage or adoption.”
- The transfer to a relative cannot be considered an exempt gift if the relative paid consideration of more than ½ of the assessed value of the lot.
- Transfer to abutter exempt only if it does not create a separate lot.
- Municipalities must comply with the state definition of “subdivision” by January 1, 2006. A conflicting definition must be recorded in the Registry of Deeds by June 30, 2003 to remain valid.

Other changes include:

- Lots of 40 acres may be exempted by municipal ordinance when located entirely outside of Shoreland Zone but are no longer exempt under state statute.

The subdivision law provides minimum review standards for the planning board to use when taking action on an application. A municipality also may have subdivision regulations or an ordinance which provides additional standards and procedures. Several other State laws require the seal of the professional who prepared the proposed plan and certain information relating to elevation above flood level to be shown on the plan before it may be approved and recorded. Although the code enforcement officer is not specifically mentioned in the State statute, the power to enforce the subdivision law against violators usually is delegated to the CEO either by ordinance or by vote of the municipal officers. In addition, the CEO often is asked by the planning board to assist it in reviewing subdivision applications and in analyzing information submitted by a developer. By local ordinance or through a written job description, some CEO's are required to attend all of the planning board's meetings.

A building inspector may not issue a permit for a building or use in a subdivision which has not received required municipal approval or DEP approval under the Site Location of Development Act, 38 M.R.S. §481 *et seq.* and is discussed further in this chapter. The Site Location Act contains a definition of "subdivision" which differs from that in 30-A M.R.S. §4401 *et seq.* Some subdivisions will need both municipal and State review while others need only local approval, depending upon the size of the parcel and number of lots

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<sup>2</sup> See the following cases for a detailed discussion of the concept of “intent to avoid,” (particularly as it pertains to “family subdivisions”): *Tinsman v. Town of Falmouth*, 2004 ME 2, 840 A. 2d 100; *Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258.



involved. The CEO should consult with the DEP staff members who administer the Site Location Act when in doubt as to its applicability to a particular subdivision.

A subdivision which is in violation of the municipal subdivision law for 20 years or more essentially becomes "grandfathered" and cannot be treated as an illegal subdivision by the municipality and forced to comply with the statute. However, these illegal subdivisions will not be protected by the statute if the municipality has taken any of the following actions:

- Brought a legal action in court to enjoin the illegal subdivisions and enforce the statute pursuant to 30-A M.R.S. §4406;
- Expressly denied approval of the subdivision by action of the municipal reviewing authority and recorded a record of that denial in the appropriate registry of deeds;
- Denied a building permit for a lot owner in the illegal subdivision pursuant to 30-A M.R.S. §4406 and recorded a record of the denial in the appropriate registry of deeds; or
- Cited the subdivision as being in violation in an enforcement action or order and recorded a record of that action or order in the appropriate registry.

#### **14. Utility Installations**

30-A M.R.S. §4406(3) prohibits the initial installation of any kind of utility service to a lot or dwelling unit in a subdivision without written authorization from the appropriate municipal officials attesting that any necessary subdivision approval has been granted. This written authorization is not required for subsequent installations involving the same lot or dwelling unit.

#### **15. Subdivision Roads; Paper Streets**

For a discussion of a number of issues related to roads in a subdivision and "paper streets," see the MMA Municipal Roads Manual and Maine Townsman Legal Notes from October 1996, November 1996, and August/September 1997.

#### **16. Site Location of Development Act**

The Site Location of Development Act, 38 M.R.S. § 481 *et seq.*, is a law which requires DEP review and approval of various types of development activity. Effective July 1, 1997, in municipalities which are "deemed to have review capacity" by DEP, the following types of projects will be reviewed only by the municipality under its local ordinances and they will be exempt from review by DEP under the Site Location Act:

- "Structures" which are between 3 and 7 acres in size (*structure* is defined in 38 M.R.S. §482 (6)(B) as "buildings, parking lots, roads, paved areas,

wharves, or areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 3 acres"; including "stripped or graded areas that are not revegetated within a calendar year");

- Residential subdivisions (detached single-family units) of 15 or more lots that are between 30 and 100 acres. 38 M.R.S. §488(19) provides a process for petitioning for DEP review in certain cases. [Note: Effective July 1, 1997, the Site Location Act totally exempts from DEP review residential subdivisions of up to 15 lots created in a 5 year period that occupy a total land area of up to 30 acres.]. These subdivisions need only municipal review under 30-A M.R.S. §4401 *et. seq.* regardless of whether they occur in a municipality deemed to have *capacity* to review them.

A municipality is deemed to have *capacity* under 38 M.R.S. §488 (19) if DEP has delegated its review authority to the municipality pursuant to 38 M.R.S. §489-A or if it meets the following criteria:

- (a) the municipality has a planning board and has adequate resources to administer and enforce its ordinances;
- (b) the municipality has adopted a site plan review ordinance deemed adequate by DEP;
- (c) the municipality has adopted subdivision regulations deemed adequate by DEP; and
- (d) either the former State Planning Office or the Department of Agriculture, Conservation and Forestry has determined that the municipality has a comprehensive land use plan and land use ordinances or zoning ordinances that are consistent with 30-A M.R.S. §§4301-4457 in providing for the protection of wildlife habitat, fisheries, unusual natural areas and archaeological and historic sites.

DEP is required to publish a list by January 1<sup>st</sup> of each year of municipalities deemed to have capacity which it must develop in consultation with the Department of Agriculture, Conservation and Forestry. The DEP may review municipalities that are determined or presumed to have capacity pursuant to this subsection for compliance with the criteria in paragraphs A to D, and if the department determines that a municipality does not meet the criteria, the department may modify or remove the determination of capacity.

## 17. **Town-wide Zoning**

30-A M.R.S. §4353 authorizes the board of appeals to hear appeals from "any action or failure to act of the official or board responsible for enforcing" a town-wide zoning ordinance. The Law Court has interpreted this to mean that the code enforcement officer has statutory authority to decide whether or not a permit should be granted under a zoning ordinance as well as the authority to cite people for ordinance violations. *Oeste v. Town of Camden*, 534 A.2d 683 (Me. 1987). However, a CEO must read the actual zoning ordinance to know the exact extent of his or her authority

## 18. **Miscellaneous Nuisance Law**

17 M.R.S. §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 29-A M.R.S. §101 (42), 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.

No private right of action exists under statute; only municipalities may bring an action under the above provision. *See Charlton v. Town of Oxford*, 774 A.2d 366 (Me. 2001). Although the CEO is not expressly authorized by this statute to enforce it, that power usually is delegated to the CEO by the municipal officers where necessary to deal with a land use violation; such a delegation should be in writing.

## 19. **Farmland**

7 M.R.S. §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.

## 20. **Floodplain Development**

Municipalities which want to enable their residents to purchase federal flood insurance must adopt and enforce flood hazard development ordinances and maps. The ordinances and maps must conform to regulations adopted by the Federal Emergency Management Agency (FEMA) under the Flood Disaster Protection Act of 1973. In addition to flood insurance, granting of building mortgages is partially dependent upon compliance with FEMA regulations, as administered through a local ordinance.

Generally, enforcement of this ordinance rests with the CEO. For more information or assistance with floodplain management ordinance administration, contact the Department of Conservation.

## 21. **Small Gravel Pits**

30-A M.R.S. §3105 requires municipalities to enforce certain minimum standards against "small borrow pits" which do not fall within DEP's jurisdiction. (DEP regulates larger gravel pits, quarries, and excavation of topsoil, clay, and silt under the Site Location Act.) Although §3105 specifically designates the municipal officers as the enforcers, it is quite likely that the municipal officers will delegate some or all of their authority under the statute to the CEO.

## 22. **Manufactured Housing/Mobile Home Tax Payments; Older Manufactured Homes**

### (a) **Proof of Sales Tax and Property Tax Payments Before Issuing Permit**

30-A M.R.S. §4358(4) prohibits municipalities from allowing the construction or location of any new manufactured housing within the municipality (other than by a licensed dealer) without certain proof that sales tax has been paid on the unit. The law further states that any local permit required for the manufactured housing is deemed invalid until payment of the tax has been certified. It is unclear whether this law applies only to municipalities which require permits for the location of manufactured homes.

30-A M.R.S. §4103(3)(C) 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.

### (b) **Building and Occupancy Permits for State-Certified Modular Homes**

Locally-issued building permits and certificates of occupancy may not be delayed, denied or withheld for a State-certified modular housing unit on the basis that the unit does not comply with any code, standard, rule or regulation from which that unit is exempt (including MUBEC.) 10 M.R.S. §9042(3). This prohibition also applies to certificates of

occupancy issued by a building inspector pursuant to the fire safety provisions of 25 M.R.S. §2357-A. State-certified modular housing units are generally exempt from all State and local codes that regulate the same matters as the State Manufactured Housing Act (10 M.R.S. chapter 951) and related agency rules.

If a certificate of occupancy, required under 25 M.R.S. §2357-A, is denied based on a failure of the unit to comply with a rule from which it is exempt, 10 M.R.S. §9042(6) authorizes the applicant to file an appeal with the State Manufactured Housing Board. The Board is authorized to issue the certificate of occupancy after conducting an administrative hearing if it makes a finding that:

- the unit is State-certified;
- the original denial was based on a violation of a rule or ordinance from which the unit is exempt; and
- the denial was not based on a reasonable judgment by the building inspector that "an imminent and direct risk of serious physical injury or death would exist in the normal use" of the unit, as authorized by 10 M.R.S. §9042(5)(A).

If the building inspector denies a certificate of occupancy under §9042(5)(A), he/she must provide the applicant with a written notice of denial. The notice must describe all reasons for the denial in enough detail to allow the applicant to correct any deficiency noted in the denial. A copy of the notice also must be provided to the State Manufactured Housing Board.

(c) **Enforcement of State Manufactured Housing Board Rules**

According to 10 M.R.S. §9042(5), if a CEO or other local inspection official believes that a State-certified modular unit does not comply with the Manufactured Housing Act or Board standards or rules, the local official may file a complaint with the State Manufactured Housing Board pursuant to 10 M.R.S. §9051. However, §9042(5) makes it clear that local officials have no duty to inspect a State-certified unit for compliance with the State Manufactured Housing Act or State Board rules. 10 M.R.S. §9042(5) also clearly provides that the issuance of a certificate of occupancy by a local building inspector does not constitute a representation that the unit satisfies the State Manufactured Housing Act or Board rules, unless the certificate was issued under a local building code with State Board approval pursuant to 10 M.R.S. §9043(2).

23. **Child Abuse**

22 M.R.S. §4011-A(25) requires a CEO who "knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected" to immediately report it to the Department of Health and Human Services. If the abuse or suspected abuse is by a "person not responsible for the child," then the CEO must report it to the district attorney's office.

## 24. **Asbestos**

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 asbestos may be removed during renovation. DEP has delegated authority to administer and enforce these regulations. Therefore, notice to DEP will meet federal requirements. Notice of *all* demolitions must be provided, regardless of the amount of asbestos present 10 days prior to initiating any work. The EPA/DEP has asked CEO's to inform applicants for demolition and renovation permits of these requirements. DEP also licenses companies performing inspection, design, monitoring, analysis, training, or removal of asbestos. In addition, all employees of these companies must be certified by DEP to handle asbestos.

## 25. **Maine Endangered Species Act**

12 M.R.S. §12803 authorizes the Department of Inland Fisheries and Wildlife to designate and map sites which are essential habitat for the conservation of endangered or threatened species. Municipal boards and officials are prohibited from granting any license or approval for projects within a designated habitat area without the Department's approval.

## 26. **Regulation of State and Federal Projects**

5 M.R.S. §1742-B requires a municipality to notify the State Bureau of Public Improvements if the municipality intends to require State compliance with its building code. If so requested, the State must comply, if the local code is as stringent as or more stringent than the State's building code. With regard to zoning ordinances, 30-A M.R.S. §4352(6) requires that State agencies comply with zoning ordinances which are consistent with a comprehensive plan (which in turn must be consistent with the Growth Management Act in the development of any building, parking facility, or other publicly owned structure. The governor, or his/her designee, is authorized to waive any use restrictions in a zoning ordinance after given public notice, notice to the municipal officers, and opportunity for public comment as required by 30-A M.R.S. §4352(6) and making five specific findings relating to the public benefits of the project and available alternatives. 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.

The Law Court has held that a private project conducted on land leased from the State may be exempt from municipal zoning regulations if it is shown that the use of the State's land "furthers a state purpose or governmental function", that there is a "compelling need" for the exemption and that there is state involvement of a substantial nature in the project. *Senders v. Town of Columbia Falls*, 657 A.2d 93 (Me. 1994).

Even if a particular State or federal project is not legally required to comply with local ordinances, it is possible that the officials in charge can be persuaded to cooperate voluntarily if the CEO has been cooperative about helping State and federal agencies obtain compliance from the municipality and private citizens.

## 27. **Septage Permits Issued by DEP**

30-A M.R.S. §4452 (6) states that "a municipality may enforce the terms and conditions of a septage land disposal or storage site permit issued by the Department of Environmental Protection pursuant to Title 38, chapter 13, subchapter 1". A septage disposal site is a site on which material pumped from private subsurface septic systems is spread or stored. Before the CEO can assume any authority to cite someone for a violation of such a permit, the municipal officers would have to vote to delegate authority to the CEO to act on behalf of the town or city, unless an ordinance or charter provision already grants authority to the CEO to enforce all relevant state laws on behalf of the municipality. Any delegation approved by the municipal officers must be in writing. Before taking enforcement action, the CEO should obtain a copy of the permit and application materials from the DEP and check to ensure that any proposed action is consistent with that of DEP enforcement officials. Municipalities are required to notify DEP prior to enforcing a permit.

## 28. **Natural Resources Protection Act**

30-A M.R.S. §4452 (7) states that a CEO who is certified by the former State Planning Office or the Department of Economic and Community Development, Office of Community Development to prosecute land use cases in District Court using Maine Civil Rule of Procedure 80K and who is authorized by the municipal officers to represent the municipality in court may enforce the provisions of the Natural Resources Protection Act (NRPA), 38 M.R.S. §480-A *et seq.* The CEO may seek an injunction from a court to stop a violation or civil penalties as provided in 38 M.R.S. §349(2). As a practical matter, the CEO should consult with the municipal officers before exercising this power to be sure that they are in support of such enforcement, since it goes beyond what the municipality is required to do.

The NRPA is a law which is normally administered and enforced by DEP. It requires a DEP permit before a person may conduct certain activities in, on, over, or adjacent to a protected, natural resource (i.e., wetlands, rivers, streams and brooks, great ponds, certain mapped wildlife habitats). Where a CEO is to enforce the NRPA, it would be prudent to work in cooperation with DEP.

## 29. **Erosion and Sedimentation Control**

30-A M.R.S. §4452(7) provides that a Rule 80K certified CEO who has been authorized by the municipal officers to represent the municipality in court may go to court seeking injunctive relief or civil penalties to enforce the erosion and sedimentation provisions of 38 M.R.S. §420-C. §420-C contains the following erosion and sedimentation requirement:

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 and the site must be maintained to prevent unreasonable erosion and sedimentation.

### 30. **Cemeteries**

13 M.R.S. §1371-A provides that construction or excavation in the area of a known burial site or established graveyard containing the bodies of humans must comply with any applicable land use ordinance concerning burial sites or graveyards, regardless of whether the burial site or graveyard is properly recorded in the deed to the property. It also provides that "in the absence of local ordinances," excavation and construction cannot be done within a 25-foot zone around burial sites and from the boundaries of an established graveyard, unless the construction or excavation is pursuant to a lawful order or permit for the relocation of bodies, or when necessary for the construction of a public improvement, as approved by the municipality's "governing body" (the voters in a town meeting town) or, in the case of a state highway, by the Commissioner of Transportation. A municipality may enforce these provisions pursuant to 30-A M.R.S. §4452.

The statute includes special procedures to be taken where construction or excavation threatens an undocumented or unmarked burial site. The statute requires any person with knowledge of such a threat to give the Code Enforcement Officer an affidavit "and" any other evidence of the location of the burial site. The CEO then must issue a stop-work order to the person or entity responsible for the threatening activity. Before the activity can continue, the excavator or landowner must notify the Maine Historic Preservation Commission and the president of any local historical society and arrange, at the landowner's own expense, for appropriate investigation of the existence and location of graves. If the CEO is satisfied that the investigation is complete and accurate and it reveals no human remains, the CEO shall revoke the stop-work order. If human remains are detected, then excavation or construction may not continue unless the buffer zone is observed along with other applicable provisions of state law, unless the project qualifies for one of the exceptions discussed above.

### 31. **"Backyard Burning" of Household Trash**

12 M.R.S. §9321-A(1) authorizes municipal code enforcement officers to require a person who is burning household trash in his or her yard to produce the required permit from the local fire warden before continuing with the burning. It is not clear whether the law intended to empower the CEO to prosecute a person who has no permit. If the CEO becomes aware of someone burning without a permit, he/she should report this to a local fire chief or fire warden immediately. 12 M.R.S. §9324, portions of which took effect September, 2001, effectively prohibits most "backyard burning."



C. **Other State Laws Affecting Local Land Use**

Following is a partial list of a few other State laws which, though not enforced locally, may affect land use decisions by the CEO. There are still other State and federal laws not discussed here which may be of interest to CEOs.

1. **Overboard Discharges**

38 M.R.S. §464(4)(A)(6) generally prohibits the issuance of new overboard discharge licenses. It also establishes stricter standards for the renewal or expansion of existing licenses by DEP.

2. **Driveway Permits**

23 M.R.S. §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. 29-A M.R.S. §2074.

3. **Road Setback**

23 M.R.S. §1401-A 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. Many local ordinances do not clearly state the point from which setbacks must be measured. 33 M.R.S. §465 states that a person who owns land abutting a town road owns to the center line of the road, absent a deed to the contrary. It may be advisable for local ordinances to state that setback will be measured from the centerline rather than from the property line or from the right-of-way edge, which also can be hard to establish.

4. **Swimming Pools**

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

5. **Fences**

17 M.R.S. §2801 defines a "spite fence" as a fence which unnecessarily exceeds six feet in height and which is kept maliciously and for the purpose of annoying neighbors. Unless a fence qualifies as a "spite fence," there is no State law limiting the height of a fence. 30-A M.R.S. §2951 defines a "legal fence" for the purposes of the law governing partition fences as being four feet high and in good repair and constructed of certain materials or consisting of certain natural things, as described in the statute. Height and location of fences may also be addressed in a local ordinance. There is no general State law requiring "the good side" of a fence to face the adjoining property, contrary to popular belief. Other laws addressing fences include 30-A M.R.S. §3755-A(3)(A) (screening for junkyards and

auto graveyards), 23 M.R.S. §2952 (regarding fences abutting a road or right of way), 22 M.R.S. §1631 *et seq.*, (swimming pool fences), and 17-A M.R.S. §513 (unprotected wells).

## 6. **Minimum Lot Size**

12 M.R.S. §4807 *et seq.* establishes a statewide minimum lot size for land use activities which will dispose of waste by means of a subsurface disposal system. The minimum lot size for new single-family residential units (including mobile homes and seasonal homes) is 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. This law is administered and enforced by the Department of Health and Human Services. Municipalities may establish larger minimum lot sizes by ordinance. Many ordinances do not clearly state whether the lot size requirement applies on a per unit, per structure, or per lot basis. This can cause problems with interpretation for the CEO.

## 7. **Commercial Timber Harvesting**

12 M.R.S. §8883-B requires landowners or their agents to provide written notice to the State Bureau of Forestry before commencing commercial timber harvesting operations and to report harvest information to the Bureau upon completion of the harvest. The necessary forms are available from the Maine Forest Service. 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, such as the clearing and timber harvesting provisions of a Shoreland Zoning ordinance.

## 8. **Transfers of Shoreland Property**

30-A M.R.S. §4216(1) provides that any person transferring property in the shoreland zone, on which is located a subsurface waste water disposal system, must provide the person to whom it is being transferred with a written statement by the seller as to whether the system has malfunctioned during the 180 days preceding the date of transfer of property title.

38 M.R.S. §4216(2) provides that a person purchasing land on which a subsurface waste water disposal system is located within a coastal shoreland area as described in 38 M.R.S. §435, shall prior to purchase have the system inspected by a person certified by DEP. If weather conditions do not permit the inspection, it must occur within 9 months of the inspection. The inspection requirement does not apply to systems installed within 3 years of the closing date or if the seller provides an inspection report performed within 3 years prior to the closing. An inspection is also unnecessary if the purchaser certifies to the plumbing inspector that they will replace the system within one year of the transfer of the property.

## 9. **Campgrounds/Recreational or Sporting Camps**

22 M.R.S. §2491 *et seq.* requires any person operating a "campground" or "recreational camp or sporting camp" to obtain a license from the Department of Health and Human Services.

"Campground" is defined as "in addition to the generally accepted definitions, camping areas, recreational vehicle parks, seashore resorts, lakeshore places, picnic and lunch grounds or other premises where tents, recreational vehicles, rental cabins and cottages are permitted on 5 or more sites for compensation either directly or indirectly. "Campground" includes, but is not limited to, sites intended for recreational purposes rather than permanent residency. "Campground" does not include parking lots or areas where camping is not authorized." 22 M.R.S. § 2491(1).

"Recreational camp" or "sporting camp" means a building or group of buildings devoted primarily to the offering of primitive lodging for a fee to persons who want primitive recreation, snowmobiling, hunting, fishing and similar camps, not including summer sports programs overseen by employees or volunteers of municipalities and educational institutions when the activities generally take place at municipal or institutional properties and buildings." 22 M.R.S. § 2491(11).

If the Department finds that the municipality where the campground, recreational camp or sporting camp is located has adequate ordinances regulating those activities, then it may issue a license based upon an inspection conducted by a municipal inspector (not necessarily the CEO.) 22 M.R.S. §§ 2495, 2499.

## 10. **Child Care Facilities**

Under 22 M.R.S. §8301-A, the Department of Health and Human Services (DHHS) regulates several types of child care facilities: childcare facility means a childcare center, small childcare facility or nursery school.

## 11. **Private Wells/Well Drillers/Pump Installers**

The State Subsurface Waste Water Disposal Rules, 30-A M.R.S. §4211(3), and applicable local ordinances control the location of private wells in relation to property lines and subsurface disposal systems.

13 M.R.S. §1181 limits the expansion of cemeteries closer to private wells.

The Maine Water Well Drilling Commission administers a program for testing and registering people who drill wells and install water well pumps. 32 M.R.S. §4700-H. No person may engage in a business which constructs wells or installs pumps without being registered. 32 M.R.S. §4700-J. The Commission may initiate or suspend the registration of anyone who violates the Commission's code of professional conduct for well drillers and pump installers.

12 M.R.S. §550-B requires any person or company engaged in the business of constructing water wells to file a report with the Department of Agriculture, Conservation and Forestry, Bureau of Geology, Natural Areas and Coastal Resources within 30 days after completing a well or dry hole or enlarging or deepening an existing well. The Bureau provides the forms, which require such information as location, construction and well yield. This information is generally not available to the public under the Maine Right to Know Law (1 M.R.S. §401 *et seq.*), but the Bureau of Geology, Natural Areas and Coastal Resources is required to make the information available to any federal, state, or municipal entity or agency.

## 12. **Radon**

The Department of Health and Human Services, Division of Health Engineering is the agency in Maine which acts as an information clearing house on issues relating to radon. They sell kits to test for radon in air and drinking water, provide educational information, and maintain a registry of people who are qualified to conduct and evaluate tests and offer advice regarding how to reduce the level of radon in a structure. "Radon" means "the radioactive gaseous element and its decay products produced by the disintegration of the element radium in air, water, soil, or other media." 22 M.R.S. §771, *et seq.*

## 13. **Lead**

The Department of Health and Human Services is responsible for instituting programs to educate the public and health care providers regarding the dangers and sources of lead poisoning and methods for preventing and abating lead hazard. The Department's laboratory can test blood, water and other substance samples for the presence of lead. Authorized representatives of the Department may inspect any dwelling unit at reasonable times to determine the presence of lead-based substances and remove samples for analysis. Such inspections may only be done when:

1. the owner or occupant with whom children reside has requested it;
2. there are reasonable grounds to suspect lead-based substances in or upon exposed surfaces; or
3. a case of lead poisoning has been reported.

The Department may order the owner of any premises where an environmental lead hazard exists to remove, replace, or securely and permanently cover it in accordance with Department rules. If the owner of a dwelling which is rented to a family with children is ordered to remove or secure a lead hazard in that dwelling, and the owner decides to bring the dwelling into compliance while the dwelling is occupied, the owner may move the tenant to a substitute dwelling and pay reasonable moving expenses and other use and occupancy charges which exceed the rent for the vacated dwelling for which the tenant is responsible. Any person who conducts environmental lead inspection or abatement must be licensed by the Department, unless the person performing the abatement work is the owner and occupant, is 18 years old, and the work is being performed on his/her dwelling.

The level of lead in a substance which constitutes a health hazard is defined by DHS rules using information provided by the U.S. Environmental Protection Agency and Department of Housing and Urban Development. *See the Lead Poisoning Control Act, 22 M.R.S. §1314 et seq.*

#### 14. **Underground Oil Storage Facilities**

Under 38 M.R.S. §563, no person may register, install, or cause to be installed a new or replacement underground oil storage facility without having first registered the facility with the DEP. 38 M.R.S. §563(9) requires an annual inspection with results submitted to the DEP on or before July 1<sup>st</sup> of each year. Above ground tanks with underground piping used to store motor fuel must also be registered under 38 M.R.S. §563(10) and prior to sale the owner must notify the purchaser in writing of the existence of the underground piping and the requirement that the tank be registered with the DEP.

## Chapter 3 - Record Keeping and Relations With Others

### A. Record Keeping

It is very important for the code enforcement officer to keep accurate, detailed, and well-organized records. Good records may help to eliminate questions that might otherwise need to be settled in court. If a case does go to court, accurate and detailed records greatly increase the chances that the court will decide in favor of the municipality.

By State law, shoreland zoning CEO's and local plumbing inspectors are required to keep permanent written records of all their transactions. Such a practice is recommended for anyone performing any type of code enforcement function. The record in a particular case should include such documents as a written application, sketch or plan, supporting reports or other testimony by experts or other interested people, copies of correspondence with the applicant landowner, and copies of any notice of violation or other enforcement related evidence such as photographs. A log also should be maintained of incoming and outgoing telephone calls received or made by the CEO pertaining to a specific case or application. Written notes also should be kept of any inspection or site visit which the CEO conducts. If the CEO is aware of any other local, State or federal permits which have been issued in connection with a particular piece of property or any enforcement action taken, notations should be made in the file to that effect and copies should be obtained for the file if possible.

The CEO should place all records or other information relating to a particular parcel of land or project in one folder and file the folder by the lot number and/or owner's name. If the parcel changes ownership, the CEO should cross-reference the old and new files and note the date title to the property was transferred.

Records maintained by the CEO are public records under Maine's Right to Know Law. *See* 1 M.R.S. §§401-410. Any member of the public has a right to inspect and copy the CEO's records at a mutually agreeable time. If the CEO provides photocopies, the municipality may charge a reasonable fee. The CEO also must protect all records in his or her possession from damage or destruction. 5 M.R.S. §95-B. Retention periods and destruction procedures pertaining to public records maintained by local officials are governed by regulations adopted by the Archives Advisory Board. *See* <http://www.maine.gov/sos/arc/records/local/index.html>. Some records are governed by more specific law, such as the federal law requiring that flood hazard building permits be retained indefinitely, maintained for public inspection, and furnished upon request. 44 CFR Ch.1 §59.22 (a)(9) (iii).

### B. Public Relations

One key to the success of a municipal code enforcement program is a positive public image. The CEO may develop this image in several ways.

## 1. **Public Education**

Violations are sometimes the result of a lack of awareness on the part of the violator. The CEO should take every opportunity to educate the residents about the existence of local, State, and federal laws. The CEO can create such awareness by: including a report in the municipality's annual report; making presentations to real estate agents, lending institutions, and interested citizens' groups; making public service announcements on local television or radio stations; printing notices in the local newspaper; and including notices with property tax bills.

## 2. **High Visibility**

The CEO should maintain high visibility in the community. If property owners are aware that there is an active code enforcement officer who is serious about his or her work, they will be more likely to obtain necessary permits and to comply with the terms of those permits.

## 3. **Assisting Applicants and Violators**

A CEO should be willing to assist an applicant who has questions about how to fill out an application, whether the permits are required by local, State, or federal law. Oftentimes, people will fail to comply with a law because they do not understand the permit process, and therefore are intimidated by it. If an individual knows that the CEO will help with the paperwork, he or she is more likely to attempt to secure the necessary permits.

"Helping" does not mean filling out the forms for the person or telling him everything he needs to know about every State or federal law. Generally, it means a willingness to sit down with the applicant and go over the ordinance and the forms with him, to answer questions and give him an idea of what information is needed. It also may mean attempting to steer him to State or federal agencies which might also require a permit for the project. A CEO who tries to be too helpful and makes a mistake may find that it "backfires" and leads to possible liability, so a careful line needs to be drawn regarding the amount of assistance to be provided. *See generally City of Auburn v. Desgrosseilliers*, 578 A.2d 712 (Me. 1990).

If the CEO discovers a violation of a law which he or she is enforcing, the CEO should make every effort to work closely with the person responsible for the violation in order to help that person correct the violation. If the CEO's initial approach is sympathetic but firm, the violator is more likely to cooperate and comply, rather than becoming defensive and unyielding. Of course, if the violator refuses to comply, the CEO has no choice but to recommend legal action.

### C. Relationships With Other Officials

To demonstrate to the public that the municipality is serious about its enforcement program, it is important for all local officials, particularly the manager and the municipal officers, to support the CEO.

It is therefore important for the CEO to communicate regularly with local officials, particularly the manager, municipal officers, assessors, planning board, and appeals board. CEO's should consider preparing monthly reports explaining the amount and type of enforcement activity undertaken, the number and type of permits issued and denied, and problems the CEO has encountered with applicable ordinances, individual citizens, or other officials.

Some CEOs serve as staff to the planning board or appeals board. Where planning boards issue permits, the CEO reviews applications for the board, performs site visits, researches technical and legal information. The CEO also offers suggestions on how to interpret the ordinance and evidence involved as well as what conditions of approval the board should attach. This not only helps the board, but also makes the CEO's job easier in the long run; it is more likely to result in decisions with which both parties agree and understand. The CEO also should offer to meet individually with new members on any of these boards to explain how the code enforcement program works, the legal limits on the CEO's authority to deal with problems or issue permits, and how actions by the various boards affect code enforcement.

Even if not expressly required as part of the CEO's job description, the CEO should attend meetings of the planning board and appeals board whenever possible in order to answer questions which may arise. The CEO should also review minutes prepared for any planning board or appeals board meeting in order to keep informed about what they are doing. If the CEO becomes aware of a board action which conflicts with relevant ordinances or State law, the CEO should notify the board immediately so that they can take appropriate corrective action if there is still time. If the CEO detects a pattern of problem decisions by either board which indicates the need for training or educational materials, the CEO should discuss this with the board and tell them where they can get help.

Keeping in touch with the assessors also should prove helpful in detecting violations. If the assessors do annual property inspections for assessment purposes, they often will discover new construction which never received required local permits. This information should be passed along to the CEO.

Legal control over the CEO generally rests with whoever appointed the CEO. It is this authority that can remove or discipline the CEO for failure to properly perform his or her duties. Such action must be based upon a finding of "just cause." If whoever is responsible for disciplining the CEO think that the CEO is not doing his/her job properly, they should discuss the problem with the CEO informally and recommend ways to improve his/her performance. If stronger measures are required, then the appointing board or official must provide written notice and an opportunity for a hearing before taking



disciplinary action.

On the other hand, if the appointing officials try to pressure the CEO to ignore violations and be less aggressive in enforcing local ordinances, such actions probably would be legally inappropriate. If they attempt to pressure the CEO to issue a permit which is clearly prohibited by the ordinance, this would not be legal. Other officials, such as the planning board or appeals board, generally have no special authority to dictate how the CEO performs his or her work except to the extent provided by ordinance. (For example, where a CEO's decision to deny a permit is appealed to the board of appeals and the board reverses the CEO and orders him/her to issue the permit.)

Most ordinances enforced by the CEO contain an enforcement provision which gives the municipal officers the ultimate authority to decide whether to bring legal action in court against a violator. This means that although the CEO may feel that the case against a violator is very strong, the municipal officers may decide not to pursue the case in court for a variety of reasons (e.g., they disagree with the CEO about the strength of the case; they don't want to spend the money to hire an attorney; they believe that the ordinance being violated is vague or has other legal problems so that its enforceability is questionable.)

When there is a major disagreement over how a violation should be handled or whether a violation exists, it may be advisable to arrange a meeting with an outside advisor, such as the town's attorney or a regional planner, to discuss the matter. Having someone with appropriate expertise involved who can look at the situation more objectively may help take the pressure off local officials trying to make a politically unpopular decision.

Hopefully, with education and good communication, the CEO and other municipal officials will view themselves as part of a land use "team" working together for the good of the community and the environment.

It should be noted that while most ordinances give the municipal officers ultimate authority on enforcement matters, few if any give them power to override a CEO's decision on the issuance or denial of a permit. If they are unhappy with such an administrative decision by the CEO, they must appeal the decision following the appeals procedures outlined in the ordinance.

## **SECTION II. ORDINANCES**

### **Chapter 4 - Ordinance Drafting and Authority**

#### **A. Ordinances Generally**

An ordinance is a local law which usually is adopted by the municipality's legislative body; i.e., the town meeting or town or city council. If adopted in conformance with applicable procedures and if carefully drafted to avoid legal problems, an ordinance generally has the same legal weight as a State statute enacted by the Maine Legislature. Some communities have adopted local ordinances which impose additional requirements on projects that are also regulated by a State law. Other municipalities may have no ordinances governing activities that are already regulated by the State, preferring to enforce a State law where empowered to do so (e.g., junkyards and dangerous buildings) or deferring completely to whatever authority a State agency may have to control an activity.

Local CEOs have an important role to play in the drafting of local ordinances. Even if the CEO has not been asked to "take the lead" in writing an ordinance, the CEO should share any ideas about which activities need to be regulated by the ordinance and practical suggestions regarding what would make the ordinance easier to administer and enforce.

It is crucial to the successful administration and enforcement of municipal ordinances that they be properly adopted and drafted to avoid conflicts with case law, state statutes, the Maine and U.S. constitutions, and other local ordinances. The following sections address some of the legal requirements which local ordinances must satisfy.

#### **1. Ordinance Enactment Procedures**

As a general rule, whether a municipality operates under a charter or only under the State statutes, its legislative body must adopt, in ordinance form, any requirement which it wants to enforce against the general public. The basic procedure for adopting an ordinance at an open town meeting is found in 30-A M.R.S. §3002. If the town enacts or amends ordinances by secret ballot referenda, the procedural requirements for enactment are discussed in 30-A M.R.S. §2528. If a municipality is governed by a charter, and it has adopted alternative ordinance enactment procedures, they would be spelled out in its charter.

Special rules governing public hearing requirements for the adoption or amendment of zoning ordinances and maps are found in 30-A M.R.S. §4352.

The rules governing ordinance enactment will also normally govern amendments to an ordinance. Some ordinances also will contain their own special requirements for adopting amendments.

## 2. **Form of the Ordinance**

Although a "one-liner" (for example, "no building may be constructed without a permit") may seem like an effective, simple-to-understand kind of ordinance, it would not contain enough detail to make it easy to administer or legally enforceable. In preparing an ordinance, the following checklist should be used to ensure that the ordinance has all the basic provisions:

- Statement of statutory authority;
- Statement of purpose;
- Definitions section;
- Basic requirements/prohibition;
- Designation of person or board to make decision on applications;
- Application fees, if any required;
- Standards to guide the person or board in deciding whether to issue or deny a permit or other necessary approval; standards to guide imposition of conditions on approval;
- Outline of right to appeal and appeal process (i.e., to whom and deadline);
- Designation of who enforces the ordinance and procedures to follow;
- Period after which a permit expires if substantial work has not been completed;
- Penalty section;
- Severability clause explaining what happens to the rest of the ordinance if part is held invalid by a court;
- Section dealing with effect of other inconsistent ordinances; and
- Effective date.

## 3. **Scope of the Ordinance**

When developing the ordinance, the drafter should try to keep in mind all of the possible types of activities which the municipality would want to regulate and all of the problems which might be associated with a particular activity. As difficult a job as this will be, it is very important that an ordinance "cover all the bases," since the municipality will not be able to control an activity through a given ordinance if it is not covered by the provisions of that ordinance. The drafter should contact neighboring municipalities, the regional planning agency, Maine Municipal Association, and Department of Economic and Community Development, Office of Community Development for examples of the kind of ordinance the municipality wants to adopt for guidance.

## 4. **Availability**

According to 30-A M.R.S. §3002, copies of any ordinance adopted by the legislative body must be on file with the municipal clerk and must be accessible to any member of the general public. Copies also must be made available for a reasonable fee to any member of the public requesting them. The clerk must post a notice regarding the availability of

ordinances.

## **B. Constitutional Issues**

### **1. Standards; Delegation of Legislative Authority**

If an ordinance requires the issuance of a permit or the approval of a plan, it is critical that it contain fairly specific standards in order to provide the decision maker with appropriate guidance during the review process. Otherwise, the ordinance can be found to be illegal based on the related premises that it is either unconstitutionally vague, or, that it constitutes an unlawful delegation of legislative authority.

An ordinance will be held to be void for vagueness when it forces people of general intelligence to guess at its meaning, leaving them without assurance that their behavior complies with legal requirements. When terminology is so vague and ambiguous that those regulated must guess at its meaning, and a CEO or board is given license to act based on preferences or criteria so subjective that they are virtually unreviewable, the Courts have held that this constitutes an improper delegation of legislative authority.

In sum, if an ordinance gives the CEO or planning board unlimited discretion in approving or denying an application, it violates the applicant's constitutional rights of equal protection and due process because: (1) it does not give the applicant sufficient notice of what requirements he or she will have to meet; and (2) it does not guarantee that every applicant will be subject to the same requirements.

Below are examples of ordinance language that has been struck down on the one hand, and upheld on the other. A review of these and other decided cases demonstrates that the cases are not always easy to reconcile.

The Courts have struck down the following language for being either unconstitutionally vague or an unconstitutional delegation of legislative authority:

- In ***Cope v. Inhabitants of Town of Brunswick***, 464 A.2d 223 (Me. 1983), the Law Court held that the governing standards must be something more than "as the CEO deems to be in the best interest of the public" or "as the CEO deems necessary to protect the public health, safety and welfare." The Court held that such language gave unlimited discretion. What is required to protect "the health, safety or general welfare of the public" is a legislative decision that must be made by the municipality's legislative authority and not by a municipal official administrative board.
- In ***Kosalka v. Georgetown***, 2000 ME 106, 752 A.2d 183, the Law Court held that a zoning ordinance standard that required the applicant to demonstrate a project would "conserve natural beauty" was an unconstitutional delegation of legislative authority because it was immeasurable and "totally

lacking in cognizable, quantitative standards.”

- In ***Wakelin v. Town of Yarmouth***, 523 A.2d 575 (Me. 1987), the Law Court held that the ordinance language that required the CEO to find that a project would be "compatible with existing uses in the neighborhood" was impermissibly vague and an unlawful delegation of authority because it contained no qualitative standards to guide the Board.

The courts have upheld as constitutional ordinance language in the following cases:

- In ***In re Spring Valley Development***, 300 A.2d 736, 751-752 (Me. 1973), the Law Court upheld the following language: “The proposed development has made adequate provision for fitting itself harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, natural resources or property values in the municipality or in adjoining municipalities.”
- In ***Secure Environments, Inc. v. Town of Norridgewock***, 544 A.2d 319 (Me. 1988), the Law Court upheld the following requirements under the ordinance: that the applicant demonstrate “adequate” technical and financial capacity to “properly” construct, operate, maintain and close a facility be demonstrated; that soil and groundwater “not be adversely affected,” and that “the entrance to the site ... be controlled to prevent accident and public harm.”
- In ***Davis v. Sec’y of State***, 577 A.2d 338 (Me. 1990), the Law Court upheld broad guidelines regarding an individual’s competence to drive a motor vehicle were not held to be vague because a “person of ordinary intelligence could reasonably understand what conduct is prohibited by the regulation.”
- In ***Gorham v. Town of Cape Elizabeth***, 625 A.2d 898 (Me. 1992), the Law Court upheld an ordinance with a standard that required a determination that the proposed use would not “adversely affect the value of adjacent properties.”
- In ***Town of Baldwin v. Carter***, 2002 ME 52, 794 A.2d 62, the Law Court upheld a barking dog ordinance that prohibited barking that was “unnecessary,” “continued or repeated,” and/or that “annoys or disturbs” and stated that “mathematical certainty and absolute precision are not required.”
- In ***Uliano v. Board of Environmental Protection***, 2009 ME 89, 977 A.2d 400, the Law Court considered and upheld language similar that struck down in the *Kosalka* case (i.e., the activity will not interfere with “existing scenic and aesthetic uses”) holding that “although scenic and aesthetic uses are not readily susceptible to quantitative analysis, the constitution does not demand

such an analysis.”

- In *Bizier v. Town of Turner*, 2011 ME 116, 32 A.3d 1048, the Law Court upheld the aesthetic criteria under challenge (i.e., whether “a proposed structure relates harmoniously to its surroundings”) because the zoning ordinance outlined 11 separate criteria to assist in that determination.
- In *Fitanides v. City of Saco*, 2015 ME 32, 113 A.3d 1088, the Law Court upheld the decision of the Planning Board to add certain conditions relating to future inspections of a property to a conditional use permit, inspections that would be conducted by the city planner, *not* the planning board. The Court reiterated that a municipality has nearly unlimited authority to delegate zoning authority *between* different officials and departments, provided there is a proper ordinance that lays these processes out.

## 2. Reasonableness, Taking Issue

Another constitutional limitation to keep in mind when drafting an ordinance is that the ordinance must be a reasonable means to protect the public health, safety and welfare. *Warren v. Municipal Officers of Gorham*, 431 A.2d 624 (Me. 1981); *Crosby v. Inhabitants of the Town of Ogunquit*, 468 A.2d 996 (Me. 1983). For example, land use regulations cannot be so restrictive that a landowner is deprived of all reasonable use of the property being regulated. Otherwise, the ordinance cannot be enforced unless the municipality compensates the landowner because it would be an unlawful “taking” of the landowner’s property. *See generally* Maine Constitution, Art. 1, section 6-A; *MC Associates v. Cape Elizabeth*, 2001 ME 89, 773 A.2d 439, *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Seven Islands Land Co. v. Maine Land Use Regulation Commission*, 450 A.2d 475 (Me. 1982); *Inhabitants of Town of Boothbay v. National Advertising Co.*, 347 A.2d 419 (Me. 1975); *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Waste Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

In addition, an ordinance generally cannot completely prohibit a land use unless the use is “ultrahazardous” (i.e., cannot be regulated safely). *See generally* Anderson, American Law of Zoning 3d, §9.16.

The Maine Legislature established a program in 1996 for the mediation of “takings” claims arising from the application of State and local land use laws. The process is outlined in 5 M.R.S. §3341. The program can also be used to mediate other land use disputes, *e.g.*, where an individual has sought and been denied a permit, variance, or special exception and has already pursued all other available avenues of administrative appeal.

### C. Ordinance Interpretation

A good working relationship between the CEO and various boards and other officials can help avoid challenges to decisions made. Each town ordinance should be reviewed together periodically. This review should focus on understanding each other's needs for specific language and also correct interpretation of the language of each ordinance.

In a situation where the code enforcement officer has a question about the intent or proper interpretation of an ordinance, the CEO could either deny the permit and advise the applicant to request a ruling by the Board of Appeals on appeal or request a formal ruling from the Board himself or herself, if the Board of Appeals has been given authority to hear such requests from the CEO by statute or ordinance. The CEO also could seek advice from the municipal attorney or the planner before making a decision.

If the CEO is confronted with an ambiguous provision in a zoning ordinance and is unsure about how to apply the provision to a particular project, he or she should keep the following rules of ordinance interpretation in mind. The CEO may find it necessary to seek legal advice in many instances in order to determine how these general rules apply to the ordinance and facts involved.

#### 1. **Consistency**

To determine the purpose of the ordinance provision, interpret each section to be in harmony with the overall scheme envisioned by the municipality when it enacted the ordinance. The assumption is that the drafter would not have included a provision that clearly was inconsistent with the rest of the ordinance. *Natale v. Kennebunkport Board of Zoning Appeals*, 363 A.2d 1372 (Me. 1976); *Cumberland Farms, Inc. v. Town of Scarborough*, 688 A.2d 914 (Me. 1997).

Zoning ordinances must be pursuant to and “consistent with” a comprehensive plan adopted by the municipal legislative body. 30-A M.R.S. §4352(2) (2008); *F.S. Plummer Co., Inc. v. Town of Cape Elizabeth*, 612 A.2d 856, 859 (Me.1992). A zoning ordinance is consistent with its parent comprehensive plan if it “strikes a reasonable balance among the municipality's various zoning goals.” *Id.* In recent years, the Law Court has been quite deferential to municipalities when determining consistency, and have only sought to ensure “basic harmony” between the plan and subsequently adopted ordinances. *Rommel v. City of Portland*, 2014 ME 114, ¶ 11, 102 A.3d 1168 (cited in *Friends of the Motherhouse v. City of Portland*, 2016 ME 178, ¶ 10, 152 A.3d 159).

Note, however, that while comprehensive plans and land use ordinances are complementary, their purposes are different. The comprehensive plan sets out *what* is to be accomplished and the ordinance sets out in concrete terms *how* those objectives are to be realized. *Nestle Waters of North America, Inc. v. Town of Fryeburg* 2009 ME 30, 967 A.2d 702.

## 2. **Object; General Structure of Ordinance as a Whole; Local Characterizations Awarded Substantial Deference**

A zoning ordinance must be construed reasonably with regard to the objects sought to be attained and to the general structure of the ordinance as a whole. All parts of the ordinance must be taken into consideration to determine legislative intent. *Moyer v. Board of Zoning Appeals*, 233 A.2d 311 (Me. 1967); *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Nyczepir v. Town of Naples*, 586 A.2d 1254, 1256 (Me. 1991); *Dyer v. Town of Cumberland*, 632 A.2d 145 (Me. 1993); *C.N. Brown, Inc. v. Town of Kennebunk*, 644 A.2d 1050 (Me. 1994); *Buker v. Town of Sweden*, 644 A.2d 1042 (Me. 1994); *Christy's Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995) *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998); *Oliver v. City of Rockland*, 710 A.2d 905 (Me. 1998).

While the interpretation of a local ordinance is a question of law that courts will review “de novo,” local characterizations or fact-findings as to what meets ordinance standards will be accorded substantial deference by the court. *Rudolph v. Golick*, 2010 ME 106, 8 A.3d 684, 686; *State v. Aboda*, 2010 ME 125, 8 A.3d 719, 722; *Town of Vassalboro v. Barnett*, 2011 ME 21, 13 A.3d 784.

## 3. **Ambiguity Construed in Favor of Landowner**

The restrictions of a zoning ordinance run counter to the common law, which allowed a person to do virtually whatever he or she wanted with his or her land. Accordingly, restrictions must be strictly interpreted against the municipality. Where the ordinance contains exemptions, they should be liberally construed in the property owner's favor. *Forest City, Inc. v. Payson*, 239 A.2d 167 (Me. 1968); *Toulouse v. Board of Zoning Adjustment*, 147 Me. 387, 393, 87 A.2d 670, 673 (Me.1952).

## 4. **Natural Meaning of Undefined Terms**

Zoning laws must be given a strict interpretation and cannot be extended by implication. *Toulouse v. Board of Zoning Adjustment*, 147 Me. 387, 87 A.2d 670 (Me. 1952). However, they should be read according to the natural and most obvious meaning of the language used when there is no express legislative intent to the contrary and where the ordinance does not define the words in question. *Underwood v. City of Presque Isle*, 715 A.2d 148 (Me.1998); *Britton v. Town of York*, 673 A.2d 1322 (Me. 1996); *Town of Freeport v. Brickyard Cove Assoc.*, 594 A.2d 556 (Me. 1991); *Hrouda v. Town of Hollis*, 568 A.2d 824 (Me. 1990); *Moyer v. Board of Zoning Appeals*, supra; *George D. Ballard Builder Inc. v. City of Westbrook*, supra; *Putnam v. Town of Hampden*, 495 A.2d 785 (Me. 1985); *Camping v. Town of York*, 471 A.2d 1035 (Me. 1984). Compare with, *C.N. Brown and Buker*.

Under the “plain meaning rule,” the Law Court has stated that in drafting their ordinances, municipalities should say what they mean and mean what they say because court will not reinterpret them. *Malonson v. Town of Berwick*, 853 A.2d 224, 2004 ME 96; *Town of Minot v. Starbird*, 2012 ME 25, 39 A.2d 897.



## 5. Nonconforming ("Grandfathered") Uses, Structures, and Lots

Provisions dealing with nonconforming lots, structures and uses must be included in a zoning ordinance in order to avoid constitutional problems. Such provisions commonly are called "grandfather clauses." They typically define a "nonconforming use or structure" as a use or structure which was legally in existence when the ordinance took effect, but which does not conform to one or more requirements of the new ordinance. The mere issuance of a permit under a prior ordinance generally does not confer "grandfathered" status by itself. *Thomas v. Board of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978). The use or structure must be in actual existence and have been legal when the new ordinance takes effect in order to be "grandfathered" *Town of Orono v. LaPointe*, 698 A.2d 1059 (Me. 1997). *Nyczepir v. Town of Naples*, 586 A.2d 1254, 1256 (Me. 1991).

Non-conforming uses and structures generally are allowed to continue and be maintained repaired and improved; however, the ordinance usually contains language limiting expansion or replacement. "Nonconforming lots" are generally defined in an ordinance to mean lots which were legal when the ordinance took effect and for which a deed or plan was on record in the Registry of Deeds. Such lots generally do not meet the lot size or frontage requirements (or both) of the new ordinance. However, the new ordinance generally allows them to be used for certain purposes as long as other requirements can be met.

Maine law establishes the following rules relating to nonconforming uses, structures, and lots. These court-made rules must be read in light of the specific language of the nonconforming use or lot provision of a given ordinance in order to determine whether the court decisions cited below apply in your municipality.

- (a) **Gradual Elimination/Amortization.** "The spirit of zoning ordinances is to restrict rather than to increase any non-conforming uses and to secure their gradual elimination. Accordingly, provisions of a zoning regulation for the continuation of such uses should be strictly construed and provisions limiting nonconforming uses should be liberally construed." *Lovely v. Zoning Board of Appeals of City of Presque Isle*, 259 A.2d 666 (Me. 1969); *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984); *Total Quality Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *Chase v. Town of Wells*, 574 A.2d 893 (Me. 1990); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me. 1998).
- (b) **Phased Out Within Legislative Standards.** "Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. Nevertheless, the rights of the parties necessitate that this policy be carried out within legislative standards and municipal regulations." *Lovely*, supra; *Frost v. Lucey*, 231 A.2d 441 (Me. 1967); *Oliver v. City of Rockland*, 710 A.2d 905 (Me.1998).

- (c) **Expansion.** "Where the original nature and purpose of an existing nonconforming use remain the same, and the nonconforming use is not changed in character, mere increase in the amount or intensity of the nonconforming use within the same area does not constitute an improper expansion or enlargement of a nonconforming use", where the language of the ordinance prohibits the extension or enlargement of a nonconforming use or the change of that use to a dissimilar use. *Frost v. Lucey*, 231 A.2d 441 (Me. 1967); *Boivin v. Town of Sanford*, 588 A.2d 1197 (Me. 1991); *WL.H. Management Corp. v. Town of Kittery*, 639 A.2d 108 (Me. 1994).

"Any significant alteration of a nonconforming structure is an extension or expansion. When an ordinance prohibits enlargement of a nonconforming building, a landowner cannot as a matter of right alter the structure, even if the alteration does not increase the nonconformity." *See Shackford*, supra. Where a portion of a structure is nonconforming as to setback or height expanding another portion of the structure to "line it up" or "square it off" constitutes an expansion which increases the nonconformity, absent language in the ordinance to the contrary. *Lewis v. Town of Rockport*, 1998 ME 144.

- (d) **Replacement.** There is no inherent right on the part of a landowner to replace an existing nonconforming structure with a newer one of the same or larger dimensions. That right hinges on whether the ordinance expressly allows it. This is true even where the original building was destroyed by fire or natural disaster. *Inhabitants of Town of Windham v. Sprague*, 219 A.2d 548 (Me. 1966).
- (e) **Discontinuance/Abandonment.** Zoning ordinances generally attempt to prohibit a person from reactivating a nonconforming use if it has been "abandoned" or "discontinued" for a certain period of time. Absent language in an ordinance to the contrary the word "abandonment" generally is interpreted by the courts on the basis of whether the intent of the landowner was to give up his or her legal right to continue the existing nonconforming use. The owner's intent is generally judged on the basis of "some overt act, or some failure to act, which carries the implication that (the) owner neither claims nor retains any interest in the subject matter of the abandonment." Anderson, American Law of Zoning 3d, §6.65. Although "discontinuance" or cessation of the use for the period stated in the ordinance does not automatically constitute abandonment, it may be evidence of an intent to abandon if accompanied by other circumstances relating to the use or non use of the property, such as the removal of advertising signs or allowing the building formerly occupied by the use to become dilapidated.

If the ordinance regulates the reactivation of a "discontinued" nonconforming use rather than an "abandonment" of such a use, an analysis of the owner's intent is not necessary. Cessation of the use for the period of

time stated in the ordinance is enough. *Mayberry v. Town of Old Orchard Beach*, 599 A.2d 1153 (Me. 1991). When a landlord voluntarily removes a nonconforming structure and thereby returns the use of the property to a permitted use, a replacement structure may not later be returned to the property if the town's zoning ordinance prohibits resumption of a nonconforming use once a nonconforming use has been superseded by a permitted use. This is true even though the ordinance also has a provision establishing a stated period of time after which a discontinued nonconforming use may not be resumed. *Chase v. Town of Wells*, 574 A.2d 893 (Me. 1990).

- (f) **Constitutionality.** Nonconforming use provisions are included in zoning ordinances "because of hardship and the doubtful constitutionality of compelling immediate cessation of a nonconforming use. *Inhabitants of the Town of Windham v. Sprague*, 219 A.2d 548 (Me. 1966).
  
- (g) **Merger of Lots.** Where two or more prerecorded, unimproved nonconforming lots are adjacent and owned by the same person, the State Minimum Lot Size Law (12 M.R.S. §4807-A) and many zoning ordinances require that those lots be merged and considered as one for the purposes of development to the extent necessary to eliminate the nonconformity. In order to require the merger of a developed and undeveloped lot of record which are contiguous and in the same ownership, the Maine courts have said that the ordinance must expressly require such a merger. *Moody v. Town of Wells*, 490 A.2d 1196 (Me. 1985). (For other nonconforming lot cases, *see Farley v. Town of Lyman*, 557 A.2d 197 (Me. 1989) and *Robertson v. Town of York*, 553 A.2d 1259 (Me. 1989).) If a zoning ordinance establishes a local minimum lot size which is different from and more restrictive than the State's the question of merger will be controlled by the ordinance. Where an ordinance requires the merger of lots in the same ownership which have "contiguous frontage" with each other, the court in Maine has held that such a provision does not apply to corner lots. *Lapointe v. City of Saco*, 419 A.2d 1013 (Me. 1980). The court also has held that it does not require the merger of a back lot which is landlocked with an adjoining lot or the merger of adjoining lots which "front" on different streets. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391.

As a general rule, in order for a nonconforming lot to be conveyed and retain its "grandfathered" status, it must be conveyed with the same boundaries as it had when the ordinance took effect. In some circumstances additional acreage can be added to the existing lot without affecting its grandfathered status, although the legal status of an adjoining lot may be affected by doing this. Otherwise, it must be treated as a newly-created illegal lot. (For a discussion of the meaning of "lot of record," *see Camplin v. Town of York*, 471 A.2d 1035 (Me. 1984)).

Where a single parcel of land had been developed with a number of buildings prior to the effective date of the ordinance and the buildings had all been used for distinct and separate uses prior to that date, the Maine court has held that the buildings could be sold separately on nonconforming lots, finding that the land had already been functionally divided. *Keith v. Saco River Corridor Commission*, 464 A.2d 150 (Me. 1983). The *Keith* case might be decided differently today, since shoreland zoning ordinances now contain much more detail and expressly address a variety of scenarios with regard to the merger, division and separate conveyance of developed or vacant contiguous or isolated nonconforming lots of record. Whether the functional division theory applied in *Keith* will control a nonconforming lot situation in a particular town will depend on exactly what the town's ordinance does and doesn't address and what intent can be inferred from the ordinance's regulatory scheme. It may be advisable for the CEO to seek legal advice regarding the interpretation of the specific ordinance language adopted by the town before deciding to apply *Keith* to the division of a developed nonconforming lot.

The fact that a deed describes multiple contiguous lots by their external perimeter does not automatically destroy their independent status. *Bailey v. City of South Portland*, 1998 ME 54, 707 A.2d 391; *Logan v. City of Biddeford*, 2001 ME 84, 772 A.2d 1183.

- (h) **Change of Use.** The test to be applied in determining whether a proposed use fits within the scope of an existing nonconforming use or whether it constitutes a change of use is: 1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning ordinance took effect; 2) whether there is created a use different in quality or character, as well as in degree, from the original use; or 3) whether the current use is different in kind in its effect on the neighborhood." *Total Quality Inc. v. Town of Scarborough*, 588 A.2d 283 (Me. 1991); *Boivin v. Town of Sanford*, 588 A.2d 1197 (Me. 1991); *Keith v. Saco River Corridor Commission*, supra.
- (i) **Illegality of Use; Effect on "Grandfathered" Status.** "As a general rule...the illegality of a prior use will result in a denial of protected status for that use under a nonconforming use exception to a zoning plan. But violations of ordinances unrelated to land use planning does not render the type of use unlawful." *Town of Gorham v. Bauer*, CV-89-278 (Cum. Cty. Super. Ct., November 21, 1989). In *Bauer* the court held that the failure of a landowner to obtain a State day care license did not deprive an existing day care of nonconforming use status, but the fact that the owner had not obtained the necessary local site plan approval and certificate of occupancy did prevent his use from becoming a legal nonconforming use.

## 6. **Split Lots**

Absent a provision in a zoning ordinance to the contrary, the requirements of the ordinance for a particular zone apply only to that part of the lot which is located in that zone. *Town of Kittery v. White*, 435 A.2d 405 (Me. 1981).

## **SECTION III. ENFORCEMENT: ENSURING CODE COMPLIANCE**

### **Chapter 5 - Review, Permitting, and Appeals Procedures**

#### **A. Review and Permitting**

##### **1. Coordinate the Review and Permitting Process**

Except in municipalities where there is a Town Planner or a formal process prescribed by the town's ordinances, the CEO should coordinate the review and permitting process. Regardless of whether a local ordinance specifies an individual, the Planning Board, or another review committee to authorize a particular land use, the CEO should make an initial determination of the specific ordinance provisions that are applicable in the circumstances. This allows the CEO to route the application to those who should or must (according to local ordinance) review it.

##### **2. Confirm You Are Legally Authorized to Issue Permits**

CEO's should make sure, at the beginning of each new term, they are duly sworn in to enforce the specific ordinances for which they are to be responsible. To this end, CEO's should also confirm that the ordinances have specific language giving them (as opposed to another local official or board) the authority to issue permits. (According to 30-A M.R.S. §3701, the municipal officers are the licensing authority if the ordinance does not provide otherwise).

##### **3. Exchange and Review Necessary Information With Applicant**

Permit application forms should require applicants to put all information required by the governing ordinance in writing. Site plans with accurate measurements are a must.

It is crucial that the CEO gain from the applicant a thorough understanding of their proposal. A statement such as, "I just want to add a deck to the camp" is not sufficient information for the CEO to advise the applicant of potential requirements and the review process. A good exchange of information between an applicant and the CEO at an initial meeting can prevent misunderstandings later. There should be a general discussion of the application form(s) and a few "what, where, and how" questions. The applicant needs to be advised early in the process as to the applicability of floodplain management regulations, building codes, plumbing rules, or other local ordinances which may apply to a proposed project. In addition to local administration, the CEO should be able to identify the possibility of State and Federal jurisdictions which may govern the proposed project early in the process. Even though the local CEO is not responsible for State or Federal requirements or permits, it is good customer service to make applicants aware of the existence of other laws or rules that may apply to a proposal at hand. Even though applicability of laws under other jurisdictions can not be used to delay local action on otherwise complete applications for permits, under most local ordinances, early knowledge of other potential requirements may prevent project delays.

Some local ordinances require that necessary permits from other jurisdictions be obtained prior to the issuance of a local permit. In this situation, there exists a greater burden on the CEO to be as informed as possible regarding the applicability of other jurisdictions' standards.

#### **4. Determine Review Process**

The applicable review process should be established based on the type of permit desired. If local review by a Site Review Board, Planning Board, and/or Fire Prevention Specialist is necessary, the CEO should submit a report of his or her site visit to the appropriate board or officer regarding the project for the official record. Applicable reports from other municipal offices such as police, fire, and public works also should be submitted for the official record to help the reviewing board assess the impact of the development and make a more informed decision.

Any relevant information must be entered into the official record in order to provide a basis for a decision. It also should be presented and discussed at a public meeting rather than during a private meeting between the board (or individual members of the board) and the CEO or other official submitting a report. This will ensure compliance with the "Right to Know" Law and avoid illegal "ex parte" communication.

#### **5. Remember That the Purpose of Permit Issuance is to Determine Compliance with Pre-established Standards**

Pre-established review procedures make the review efficient, effective, and fair. The standards and review procedures must, therefore, be clear and understandable.

#### **6. Reference a Checklist for Review and Legal Procedure Before Issuing Decision**

- Confirm your authority specified by ordinance or statute.
- Confirm that the applicant submitted adequate evidence of his/her legal standing to apply for a permit.
- Assure that all preliminary requirements, such as fee payment, have been met.
- Having reviewed ordinance standards, assure yourself that the applicant successfully met the burden of proof for each of these standards.
- Review all issues raised in the review process and assure yourself that all have been satisfactorily resolved and that any conditions attached to the approval of the permit are clearly stated in writing on the permit itself and on the face of any plan which will be recorded.
- Reviewing the ordinance again, assure yourself that any conditions imposed to achieve compliance by the applicant do not exceed the authority granted to the CEO by the ordinance and are related to the applicable standards of review.
- Determine whether there is sufficient evidence to support a decision to approve the application by comparing the information in the record to the requirements

of the ordinance/statute. Neither personal nor community opinion about a project can be allowed to interfere with an assessment of the facts. Any opinions expressed about an application must relate to the review standards of the ordinance/statute in order to be considered by the CEO in making a decision. The decision must be based solely on whether the applicant has met his/her burden of proof and complied with the provisions of the ordinance or statute. *Bruck v. Town of Georgetown*, 436 A.2d 894 (Me. 1981). If the application and supporting evidence does not meet the burden of proof, further evidence could be sought or the permit denied. Where a proposed project complies with all of the ordinance requirements, the CEO must approve an application. *WLH Management Corporation v. Town of Kittery*, 639 A.2d 108 (Me. 1994).

#### **7. Issue a Decision Within Required Time Period**

Some ordinances and statutes state that the CEO must issue a decision on a permit application within a certain number of days. One statute provides that if a building inspector fails "to issue a written notice of his or her decision, directed to the applicant, within 30 days from the date of filing of the application," the applicant must consider the request denied. 30-A M.R.S. §4103. If a statute or ordinance does not contain this kind of "automatic denial" provision, and the CEO fails to make a decision within a reasonable time, the applicant would either have to persuade the municipal officers to convince the CEO to take action, or seek a Superior Court order pursuant to Civil Rule 80B.

Under some ordinance provisions, the clock does not begin to tick on a decision-making deadline until the CEO has determined that an application is "complete." "Completeness" normally does not involve a substantive review of the application to determine whether it satisfies all of the performance standards of the ordinance. It is more of a judgment based either on a specific checklist of submission requirements included in the ordinance or the CEO's finding that some information has been submitted related to each ordinance requirement, without judging whether it is adequate.

#### **8. When Decision is Made, Support It in Writing**

After an application has been granted or denied, the code officer issues an approval (permit) for construction and/or other development or a letter of denial. An approval may be unconditional where the original application meets the specific standards of an ordinance(s) as proposed. Another form of approval is conditional approval which may be issued when the original proposal will satisfy the requirements of the ordinance only if conditions of approval are attached. Both conditions of, or any reasons for, denial must be clearly identifiable and supported by evidence, which is part of the official written record for that particular project. If it is the municipality's intention to render a permit void if the holder fails to comply with conditions of approval within a certain time frame, this should be stated clearly in the ordinance. *Nightingale v. Inhabitants of City of Rockland*, CV-91-174 (Knox Cty. Super. Ct., July 1, 1994).



The Maine Right to Know Law, 1 M.R.S. §407, states that every "agency" must make a written record and decision whenever it denies or grants conditional approval to an application. *See also Mills v. Eliot*, 2008 ME 134, 955 A.2d 258 (which seems to require the CEO's make findings not only for denials and conditional approvals, but for approvals as well.) The record must state the reasons for the decision and must contain findings in writing which are legally sufficient to explain the basis for the decision. Whether or not the CEO is a local "agency," he or she would be well-advised to comply with this provision of the Right to Know Law in making a decision. In doing this, the CEO will help to reduce legal challenges to his or her decisions and will make it easier to defend a decision in court if it is challenged. In preparing findings, it is important for the CEO to address every review criteria rather than stopping with the first standard on which a denial can be based. This will increase the chances of having a court uphold the CEO's decision.

## 9. Findings of Fact/Conclusions of Law

"Findings" take two forms, "findings of fact" and "conclusions of law." "Findings of fact" are statements by the CEO summarizing all the basic facts involved in a particular application. Such a summary of facts would include the name of the applicant and his/her relationship to the property, location of the property, basic description of the project, key elements of the proposal (number of lots, size of lots, frontage, setback, type of structures, type of streets, sewage and solid waste systems, water supply, etc.), and evidence submitted by the applicant beyond what is shown on the plan (letters/testimony by engineer, site evaluator, etc.), evidence submitted by people other than the applicant either for or against the project.

"Conclusions of law" are statements linking the specific facts covered in the findings of fact to the specific list of criteria in an ordinance or statute which the applicant must meet in order to receive the CEO's approval. For example, a conclusion of law pertaining to sewage disposal would be: "The applicant will provide adequate sewage disposal for the lot. Soils reports have been submitted for the site prepared by a site evaluator showing that at least one area could support a subsurface wastewater disposal system which complies with the State Plumbing Code." Rule 80B(e) of the Maine Rules of Civil Procedure, which governs appeals from a local decision which are filed in Superior Court, indicates that as part of the record which the court will be reviewing, the court wants to see the CEO summarize his or her findings of fact and conclusions of law. *See P.H. Chadbourne & Co. v. Inhabitants of the Town of Bethel*, 452 A.2d 400 (Me. 1982); *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983); *Mills v. Eliot*, 2008 ME 134

The practical purpose of preparing findings and conclusions is that it helps the CEO ensure that he or she has considered all the review criteria and that sufficient evidence has been submitted to support a positive finding on each. Another purpose is to provide a written statement of the reason for the CEO's decision which is detailed enough to enable the applicant or anyone else who is interested: 1) to judge whether they agree or disagree with the CEO; and 2) to decide whether there are sufficient grounds on which to appeal the decision. Probably the most important purpose is to provide a clear statement for the Superior Court of the facts which were submitted for the CEO's consideration and the facts

on which the CEO relied in concluding that the review standards were/were not met by the applicant. This will avoid the need for the court to "remand" the case to the CEO to prepare findings and conclusions after an appeal has been filed. *See Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, 769 A.2d 834; *Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258 (where the court remanded a matter involving a family subdivision to the CEO finding that "meaningful judicial review" was precluded because the CEO had not made findings of fact regarding the intent of the creators of the family subdivision).

## **B. Other Legal Issues Related to Permits**

### **1. Prior Mistakes**

The fact that a CEO or his or her predecessor made mistakes in the issuance of a permit does not have any legally binding precedent-setting value. Past mistakes do not give any administrative board (or official) the right to act illegally. However, in *Juliano v. Town of Poland*, 1999 ME 42, 725 A.2d 545, the Law Court has held that once the appeal period has expired an applicant may rely on the building permit even if improperly issued.

### **2. Permit Transferable**

Generally, unless a permit or approval is granted based on an applicant's personal qualifications (such as financial ability to complete the project), the approval "runs with the land." When a use is allowed through the issuance of a variance, it should be treated as a permitted use rather than a nonconforming use. A variance runs with the land. *Wescott Medical Center v. City of South Portland*, CV-94-198 (Cum. Cty. Super. Ct., July 15, 1994).

### **3. Time Limit on the Use of the Permit**

Generally, once the CEO has issued a permit, the holder of the permit has an unlimited amount of time within which to complete the work covered by the permit. However, the CEO should check the applicable ordinance or statute to be sure. (*See* discussion below regarding "Applicability of New Laws.") Some ordinances provide that a permit expires if work is not begun within a certain period of time. This sort of time limit has been upheld by the Law Court. *George D. Ballard, Builder v. City of Westbrook*, 502 A.2d 476 (Me. 1985); *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Cobbossee Development Group v. Town of Winthrop*, 585 A.2d 190 (Me. 1991); *City of Ellsworth v. Doody*, 629 A.2d 1221 (Me. 1993) (interpretation of "significant progress of construction" within six months of obtaining a permit); *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998) (interpreting meaning of "the work authorized.. is suspended or abandoned at any time after the work is commenced..")

The CEO should send a copy of his or her decision to the applicant as soon as possible after making it. Some ordinances and statutes specify how soon this must be done.

#### 4. Revocation of Permit

Situations may arise in which a property owner has obtained approval from the code enforcement officer before doing work, but the CEO subsequently believes that he or she should revoke the approval. Generally, the CEO may not revoke his or her approval on the grounds that the property owner is violating certain conditions of the approval without a court order, unless the ordinance specifically grants that power to the CEO and also provides a right to appeal the decision to revoke to a local appeals board. *Cf., Howe Realty Co. v. City of Nashville*, 141 S.W. 2d 904 (1940). However, even where an ordinance does not expressly authorize revocation, a code enforcement officer may revoke a permit, after notice and hearing, without a court order upon discovering that it either was issued by mistake or without authority or that the applicant made false statements on the application that were material to the decision to issue the permit, provided the permit holder has not acquired a vested right in the permit (i.e., a property interest which can't be taken away without compensation). *Wasserman v. O'Brien*, 230 N.W. 59 (1930); *Arroyo v. Moss*, 56 N.Y.S. 2d 29, *aff'd* 56 N.Y.S. 2d 17 (1945); McQuillin, *Municipal Corporations* (3<sup>rd</sup> ed. rev.), §§26.211a, 26.213, and 26.214.

The Maine Supreme Court outlined the test for analyzing whether a permit holder has acquired vested rights in *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266. This case is discussed later in this chapter under "Vested Rights." A person aggrieved by the issuance of a permit cannot bypass an applicable appeal deadline simply by requesting that the CEO revoke the permit. *Wright v. Town of Kennebunkport*, 1998 ME 184, 715 A.2d 162 (abrogated on other grounds.)

#### 5. Applicability of New Laws

Sometimes a municipality amends an applicable ordinance provision either while an application is being reviewed by the CEO or after the CEO has granted approval but before the landowner has begun any of the work authorized. If an application is "pending" when the ordinance is amended, 1 M.R.S. §302 of the Maine statutes requires the CEO to complete the review under the original ordinance. The courts have found that an application is "pending" if the CEO has started to treat it as complete and has begun to review it for substantive compliance with the requirements of the ordinance, absent a contrary definition of "pending application" in the ordinance. *Littlefield v. Inhabitants of the Town of Lyman*, 447 A.2d 1231 (Me. 1982); *Maine Isle Corp, Inc. V. Town of St. George*, 499 A.2d 149 (Me. 1985). However, the Maine Supreme Court has held that a municipal ordinance provision which applies the ordinance retroactively is valid. *Kittery Retail Ventures v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183; *City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d 160 (Me. 1988). The Court has also held that where a project is governed by more than one ordinance, the fact that an application is "pending" under one ordinance does not mean that it is "pending" for all purposes. Consequently, changes enacted in other relevant ordinances would apply. *Larrivee v. Timmons*, 549 A.2d 744 (Me. 1988); *see also* 1 M.R.S. §302 which defines "substantive review" as a "review of the application to determine whether it complies with the criteria and other applicable requirements of the law."

Preliminary review for completeness is not substantive review. *Waste Disposal v. Town of Porter*, 563 A.2d 779 (Me. 1989).

In the absence of such an expiration clause, it still may be possible to apply new ordinances to previously approved projects in certain cases, depending on the facts. For example, where a subdivision plan has been recorded for a number of years and the landowner has not sold the lots or made any substantial expenditures to develop the plan, it may be possible to require the owner to merge some of the lots shown on the plan to bring them into compliance with new lot size and frontage requirements which were adopted after the approval of the plan. Another example is where a shoreland zoning permit was issued under an existing ordinance for a structure to be located 75 feet from normal high water but the ordinance was amended to require a 100 foot setback before construction was begun. Generally, an approved but undeveloped structure or plan will be "grandfathered" under the nonconforming use section of a new ordinance only if enough work has been done to qualify the structure or use as one in "actual existence." This is an issue which has not been directly addressed by the Maine courts, so it is advisable for the CEO to consult with an attorney before deciding what to do in such situations.

#### **6. Applications Requiring Surveyor's Seal**

33 M.R.S. §652(2) prohibits the registry of deeds from accepting any plan for recording unless it is "embossed with the seal of an architect, professional engineer or registered land surveyor". Therefore, any approved subdivision plan submitted for local approval should be required by local ordinance to include the signature, as well as, the seal of a professional land surveyor or other design professional. This will avoid problems for both town officials and applicants.

#### **7. Permit Fees**

It is legal for a municipality to require a permit fee as part of an application as long as the amount of the fee is reasonably related to the municipality's actual costs of administering and enforcing the ordinance which established the fee. *State v. Brown*, 135 Me. 36 (1937). The legislative body may dedicate permit fees as compensation for the CEO or to pay for equipment and supplies for the CEO. (This is in contrast to fines collected by the CEO or municipality in the prosecution of ordinance violations, which should not be dedicated as a funding source for the code enforcement program; fines should go into the municipality's "general fund".)

#### **8. Standing/Who May Apply For a Permit**

In order to apply for a permit, a person must have legal "standing." Absent a provision in an ordinance, regulation, or statute to the contrary, the CEO may issue a permit to any applicant who has some "title, right, or interest" in the property, because such an applicant would meet the test for "standing." *Walsh v. City of Brewer*, 315 A.2d 200 (Me. 1974). For example, a person who is a joint owner of property with one or more people may receive a permit even though the other owners are not parties to the

application. *Losick v. Binda*, 102 N.J. Law 157, 130 A. 537 (1925). A written leasehold interest or a written option to purchase also would constitute a sufficient "right, title, or interest." *Murray v. Town of Lincolnville*, 462 A.2d 40 (Me. 1983). A title dispute will not automatically deprive a person of standing to apply for a permit. *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995) (See #10 below).

#### **9. Dispute Between Co-Owners; Deed Restrictions; Other Violations on Same Property; Constitutional Issues; Pending Litigation**

The existence of a dispute between the co-owners of property over the proposed use would not be grounds for denial of a permit, nor would the fact that the proposed use would violate a private deed restriction. See 4 Rathkopf, *The Law of Zoning and Planning*, Ch. 74; *Whiting v. Seavey*, 188 A.2d 276 (Me. 1963); Cf., *Southridge Corp. v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995); *Portland Museum of Art v. Town of Scarborough*, Decision No. Mem. 12-133 (November 1, 2012). The court has said that it is not appropriate for a local official to attempt to resolve a title problem as part of a decision to grant or deny a permit. If an applicant has submitted reasonable evidence of ownership or boundary location, it is not up to a CEO to resolve a dispute between the applicant and an abutter or some other party as to who has legal title or where the property line is located. Those battles must be fought by those people in court through separate civil suits. *Rockland Plaza Realty Corp. v. LaVerdiere's Enterprises Inc.*, 531 A.2d 1272 (Me. 1987); Also, even if the property is already violating an ordinance or statute, that fact cannot be used to deny a permit application unless authorized by the ordinance under which the application was filed. See *Town of Gorham v. Bauer*, Cum.Cty., CV-89-278 (11/21/89). Likewise, the CEO is powerless to resolve a constitutional problem with an ordinance which is raised by an applicant. *Minster v. Town of Gray*, 584 A.2d 646 (Me. 1990). Nor may the CEO refuse to act upon or deny approval of a permit because of the existence of a pending lawsuit by the applicant on a related issue, absent language in the ordinance to the contrary. *Portland Sand and Gravel, Inc. v. Town of Gray*, 663 A.2d 41 (Me. 1995).

#### **10. Providing Notice of Certain Land Use Applications to Public Drinking Water Suppliers**

The Public Laws of 1999, chapter 761, amended or enacted a number of statutes requiring notice of certain land use applications to public drinking water suppliers. These include:

- a junkyard, automobile graveyard, or auto recycling business which is located within a source water protection area of a particular public drinking water supplier as shown on maps prepared by the Department of Health and Human Services (30-A M.R.S. §3754);
- an expansion of a structure using subsurface waste water disposal where the lot is within a mapped drinking water source protection area (30-A M.R.S. §4211(3)(B));

- a proposed land use project which is within a mapped source water protection area, is reviewed by the planning board, and notice to abutters is required as part of that review (30-A M.R.S. §4358-A); and
- a subdivision which is within a mapped source water protection area (30-A M.R.S. §4403(3)(A)).

## C. Decision/Appeals

### 1. **Jurisdiction**

Generally speaking, if a decision by the CEO on a permit application is made under a local ordinance, the ordinance will provide for an appeal of the CEO's decision to the local board of appeals.

If an ordinance or statute does not expressly authorize a local appeal, then the person wishing to challenge the CEO's decision must appeal directly to the Superior Court under Civil Rule of Procedure 80B. 30-A M.R.S. §2691; *Lyons v. Board of Directors of SAD No 43*, 503 A.2d 233 (Me. 1986); *Levesque v. Inhabitants of Town of Eliot*, 448 A.2d 876 (Me. 1982). One exception to this rule is when the appeal is from a decision made under a general zoning or shoreland zoning ordinance. By statute, 30-A M.R.S. §4353, the board of appeals is authorized to hear and decide certain types of zoning appeals. It should be noted that 30-A M.R.S. §2691(4) states that when an ordinance grants jurisdiction to the board of appeals, it must specify "the precise subject matter that may be appealed to the board and the official(s) whose action or non action may be appealed to the board".

25 M.R.S. §2356 and 30-A 4103(5) authorize the municipal officers to hear appeals from a building inspector's decisions under a building code or the building inspection statutes. Under "home rule," however, a municipal ordinance could delegate this authority to the appeals board.

When an appeal involves an enforcement decision by a CEO rather than an administrative decision regarding a permit application, the board of appeals will have to study the ordinance carefully to determine whether it has jurisdiction. Some ordinances say that "any decision" or a "decision" of the code enforcement officer or planning board may be appealed to the board of appeals. Others say that "decisions in the administration of this ordinance" may be appealed. Some ordinances authorize appeals from "decisions made in the administration and enforcement" of the ordinance. The first and third examples above authorize appeals from decisions regarding the enforcement of the ordinance, while the second example only authorized appeals from decisions regarding the approval or denial of a permit. *See Salisbury v. Town of Bar Harbor*, 2002 ME 13, 788 A.2d 598 (holding that a decision to issue or deny a certificate of occupancy was appealable and did not constitute improper intrusion into the exercise of prosecutorial discretion.) Compare, *Nichols v. City of Eastport*, 585 A. 2d 827 (Me. 1991) and *Town of Freeport v. Greenlaw*, 602 A.2d 1156 (Me. 1992) (ordinance language authorized an appeal from any decision by the CEO), with *Pepperman v. Town of Rangeley*, 659 A.2d 280 (Me. 1995)

(holding that the appeals board decision was advisory because the enforcement section of the ordinance did not provide for an administrative appeal of an enforcement order and because the administrative appeal section limited the board's authority to recommending that the CEO reconsider the decision being appealed if the board disagreed with the CEO's decision) and *Herrle v. Town of Waterboro*, 2001 ME 1, 763 A.2d 1159 (where court concluded that under the language of the ordinance the board of appeals' decision was purely advisory regarding violation determinations of the CEO and therefore was not subject to judicial review).

The issue of whether an appeal of a CEO's enforcement decision is purely advisory (and therefore not subject to judicial review) was the central issue in *Eliot Shores, LLC v. Town of Eliot*, 2010 ME 129, 9 A.3d 806. The case involved a CEO's determination that a developer created an unapproved subdivision in violation of the Town's ordinance and state subdivision law. The developer appealed the CEO's decision to the local board of appeals. The Law Court held that because municipal officers, not CEOs, have ultimate authority regarding whether to initiate enforcement proceedings, decisions of local boards of appeal and CEOs are only "advisory in nature." See *Farrell v. City of Auburn*, 2010 ME 88, 3 A.3d 385. Accordingly, the Law Court held that the courts have no jurisdiction to review boards of appeal decisions regarding enforcement decisions. The practical upshot of the *Eliot Shores* case was to strip boards of appeal of the authority to review CEO's enforcement decisions *unless* there was specific language in a municipality's board of appeals ordinance stating that such review was *not* advisory in nature. The Law Court's decision in *Eliot Shores* prompted a legislative amendment to 30-A M.R.S. § 2691(4), which reverses the Court's finding. Now, local boards of appeal have authority to review CEO's enforcement decisions absent an express provision in a charter or local ordinance to the contrary. See *Paradis v. Town of Peru*, 2015 ME 54, 115 A.3d 610.

Courts will allow a person with legal standing to file a direct legal challenge in court where a municipality refuses to bring an enforcement action because it believes that the ordinance is not being violated. *Richert v. City of South Portland*, 1999 ME 179, 740 A.2d 1000; *Toussaint v. Town of Harpswell*, 1997 ME 189, 698 A.2d 1063.

## 2. Time Limit

If an ordinance or statute does not provide a time limit within which an appeal to the board of appeals must be filed, the court has held that a period of 60 days constitutes a reasonable appeal period. *Keating v. Zoning Board of Appeals of City of Saco*, 325 A.2d 521 (Me. 1974); *Gagne v. Cianbro Corp.*, 431 A.2d 1313 (Me. 1981). *Boisvert v. Reed*, 692 A.2d 921 (Me. 1997). The Maine Supreme Court has held that in the case of the issuance of a building permit, the appeals period begins to run from the date of issuance of the permit, even though there is no formal public decision. *Boisvert v. King*, 618 A.2d 211 (Me. 1992). *Otis v. Town of Sebago*, 645 A.2d 3 (Me. 1994). Effective October 9, 1991, an appeal to the Superior Court from a decision of the appeals board must be filed within 45 days of the date of the board's original decision on an application (not the date of a decision to reconsider an earlier decision, where there has been a request to reconsider). 30-A M.R.S. §2691. This means within 45 days of the meeting at which the board actually voted on the

application, even though the applicant may not have received written notice of the decision. *Vachon v. Town of Kennebunk*, 499 A.2d 140 (Me. 1985). It is possible that a court might allow these time periods to be extended under Rule 80B if the person filing the appeal can show good cause. *See Brackett v. Town of Rangeley*, 2003 ME 109, 831 A.2d 422; *Viles v. Town of Embden*, 2006 ME 107, 905 A.2d 298; *Reed v. Halprin*, 393 A.2d 160 (Me. 1978). For an appeal which must go directly to Superior Court, the appeal deadline is governed by Rule 80B and is 30 days from the date of the vote, except in the case of a subdivision decision, where the court has said that the deadline runs from the date of the planning board's written order. *Hylar v. Town of Blue Hill*, 570 A.2d 316 (Me. 1990). If the applicable local ordinance establishes a deadline for appealing to Superior Court, then that deadline will control. *Woodward v. Town of Newfield*, 634 A.2d 1315, 1317 (Me. 1993). Appeals to the Law Court must be made within 21 days of the Superior Court decision.

As a general rule, the court will dismiss an appeal which was not filed within these time limits. If a decision is not appealed, it cannot be challenged indirectly at a later date by way of another appeal on a related matter. Nor can one town official or board challenge a decision by another town official or board by refusing to issue a permit or approval on the basis that the other board's or official's decision was wrong. (For example, if a board of appeals grants a setback variance which the planning board believes is illegal, the planning board cannot refuse to grant its approval for the structure which was the subject of the variance solely on the basis that the variance should not have been granted. The planning board must "live with" the decision of the appeals board unless the planning board, municipal officers, or other "aggrieved party" successfully challenges the variance in Superior Court.) *Milos v. Northport Village Corporation*, 453 A.2d 1178 (Me. 1983); *Fisher v. Dame*, 433 A.2d 366 (Me. 1981); *Ocean Park Associates v. Town of Old Orchard Beach*, No. CV-87-396 (Me. Super Ct., Yor. Cty, Dec. 23, 1988); *Wright v. Town of Kennebunkport*, 715 A.2d 162 (Me. 1998). *See also Town of North Berwick v. Jones*, 534 A.2d 667 (Me. 1987), *Fitanides v. Perry*, 537 A.2d 1139 (Me. 1988), and *Crosby v. Town of Belgrade*, 562 A.2d 1228 (Me. 1989) and *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998) (dealing with collateral estoppel/res judicata).

### 3. Exhaustion of Remedies

If a statute or ordinance requires appeals to be heard first by the board of appeals, a court generally will refuse to decide an appeal which has been filed directly with the court and will "remand" the case (send it back) to the board of appeals to create a record, prepare findings and conclusions, and make a decision. This is true even where the municipality has not appointed any one to serve on the board of appeals. The concept involved here is called "exhaustion of administrative remedies." *Fletcher v. Feeney*, 400 A.2d 1084 (Me. 1979); *Noyes v. City of Bangor*, 540 A.2d 1110 (Me. 1988); *Freeman v. Town of Southport*, 568 A.2d 826 (Me. 1990); *Bizier v. Town of Turner*, 2011 ME 116, 32 A.3d 1048.

Further, if one particular board in a municipality reserves issues dealing with a particular matter for another board to decide, the courts will find that exhaustion *has not* occurred. In *Bryant v. Town of Camden*, 2016 ME 27, 132 A.3d 1183, the Camden Zoning



Board of Appeals granted a special exception to a hotel owner, allowing the owner to expand the number of rooms of the hotel. However, the owner still had to receive site plan approval from the planning board, and the ZBA also made clear in its approval that the planning board was “strongly encouraged” to reassess these criteria in its review. So, when an angry abutter sued the Town, the court dismissed the case, reminding the abutter that she had to exhaust all her remedies, such as contesting site plan approval before the ZBA in this case, before the court would consider a lawsuit under Rule 80B. Exactly what types of implications *Bryant* may have for the local process remains unclear, but the Maine Legislature is expected to consider legislation to fix these issues during the 2017 session.

#### 4. Standing

When a citizen can demonstrate that he or she has suffered, or will suffer, a "direct and personal injury" as a result of a decision by the planning board or CEO, that citizen has met one of the prongs of a two-part test for "standing" to file an appeal with the board of appeals if the board has jurisdiction. To meet the "direct and personal injury" test, the person must show how his or her actual use or enjoyment of property will be adversely affected by the proposed project or must be able to show some other personal interest which will be directly affected which is different from that suffered by the general public. *Witham Family Limited Partnership v. Town of Bar Harbor*, 2011 ME 104, 30 A.3d 811; *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735; *Brooks v. Cumberland Farms, Inc.*, 703 A.2d 844 (Me. 1997); *Christy's Realty Ltd. v. Town of Kittery*, 663 A.2d 59 (Me. 1995); *Pearson v. Town of Kennebunk*, 590 A.2d 535 (Me. 1991). *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987); *New England Herald Development Group v. Town of Falmouth*, 521 A.2d 693 (Me. 1987); *Leadbetter v. Ferris*, 485 A.2d 225 (Me. 1984); *Lakes Environmental Association v. Town of Naples*, 486 A.2d 91 (Me. 1984); *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983). The Law Court has held that abutters need only allege “a potential for particularized injury to satisfy the standing requirement” and that “particularized injury” for abutting landowners can be satisfied by a showing of “the proximate location of the abutters’ property together with a relatively minor adverse consequence.” *Friends of Lincoln Lake v. Town of Lincoln*, 2010 ME 78, 2 A.3d 284; *Wister v. Town of Mount Desert*, 2009 ME 66, 974 A.2d 903 (abutter need not produce deeds, maps or other proof of abutter status); *Rowe v. City of South Portland*, 1999 ME 81, 730 A.2d 673; *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266. For the purposes of the test for “standing” to appeal, the court has interpreted an “abutter” to mean both the owner of land which adjoins or abuts as well as land which is in close proximity although not actually adjoining. *Sahl, supra*.

Further, in *Almeder v. Town of Kennebunkport*, 2014 ME 139, 106 A.3d 1099, the Law Court dealt with the issue of the standing of back lot owners. In *Almeder*, direct abutters on Goose Rocks beach were challenging the public’s use of what they alleged was their land. A group of additional persons, who owned parcels directly behind the abutters, but *not abutting the actual beach*, sought to join the matter. However, the Law Court found that these back lot owners lacked standing, as they claimed an injury that was “identical to those claimed by the public . . .” *Almeder*, 2014 ME 139, ¶ 17, 106 A.3d 1099.

Standing to pursue a Rule 80B appeal to Superior Court from a board of appeals decision is governed by 30-A M.R.S. § 2691(3)(G), which states: "Any party may take an appeal, within 45 days of the date of the vote on the original decision, to Superior Court from any order, relief or denial in accordance with the Maine Rules of Civil Procedure, Rule 80B." *See also Norris Family Assocs., LLC v. Town of Phippsburg*, 2005 ME 102, 879 A.2d 1007. A "party" within the meaning of section 2691(3)(G) is defined as one who: (1) has "appeared before the board of appeals," and (2) is "able to demonstrate a particularized injury as a result of the board's action." *Witham Family Limited Partnership v. Town of Bar Harbor*, 2011 ME 104, 30 A.3d 811; *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266 (quotation marks omitted). A party's standing to pursue a Rule 80B appeal is a matter of law we review de novo. *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, 2 A.3d 284.

## 5. Standard of Review

Unless a local ordinance provides otherwise, when a planning board or code enforcement officer's decision is appealed, the board of appeals is not limited to the record prepared by the planning board or CEO in making its decision. 30-A M.R.S. §2691 indicates that the board of appeals conducts a "de novo" proceeding. *See Stewart v. Town of Sedgewick*, 2000 ME 157, 757 A.2d 773. This means that it holds its own hearing, accepts any relevant evidence or testimony presented, and creates its own record. The board of appeals then uses its record to decide whether the planning board's or CEO's decision is "clearly contrary to the ordinance" and "unsupported by substantial evidence in the record." *See Central Maine Power v. Town of Moscow*, 649 A.2d 320 (Me. 1994). If the board of appeals' record could support a decision either way, then it should uphold the decision of the planning board or CEO. Because the board of appeals is not bound by the planning board's or CEO's record, it is important for a planning board representative or the CEO to attend the board of appeals hearing and to have the board's or CEO's record formally entered into the board of appeals' record.

As a general rule, the authority of the appeals board in deciding an appeal is limited to reversing or approving the decision being appealed. The board does not normally have the power to issue a permit which was denied by the CEO or planning board. Procedurally, the appeals board would reverse the CEO's or planning board's decision and then "remand" the case to the CEO or planning board (as appropriate) with an order to issue the permit. However, a different approach may be authorized or required by local ordinance.

Sometimes the CEO or planning board is unhappy with the decision of the appeals board and attempts to overturn it by refusing to comply with the appeals board's order. This has the effect of placing the burden on the applicant to ask a court to order the CEO or planning board to issue the permit. In such a case the court probably would approve an order directing the issuance of the permit, finding that the only legal way to reverse a decision by the appeals board is to file a Rule 80B appeal in Superior Court. *Milos v. Town of Northport*, 453 A.2d 1178 (Me. 1983).

If the board of appeals' decision is appealed to Superior Court, the Superior Court must review the board of appeals' record to determine whether the appeals board's

analysis of the appealed decision was correct. (If the appeals board did not conduct a "de novo" hearing and instead simply reviewed the record of the planning board or CEO, then the court will likewise review the planning board's or CEO's record on appeal. *Kulp v. Town of Vinalhaven*, No. CV- 89-1 69 (Me. Super. Ct., Knox Cty., December 6, 1990). The court must decide whether the board "abused its discretion, committed an error of a law, or made findings not supported by substantial evidence in the record." It will uphold the decision being appealed unless it was "unlawful, arbitrary, capricious, or unreasonable". *Senders v. Town of Columbia Falls*, 647 A.2d 93 (Me. 1994); *Kelly & Piceme v. Wal-Mart Stores*, 658 A.2d 1077 (Me. 1995); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me. 1998). The court will uphold the board's decision if conflicting evidence in the record would support a contrary decision, as long as the record does not compel a contrary conclusion. *Herrick v. Town of Mechanic Falls*, 673 A.2d 1348 (Me. 1996); *Two Lights Lobster Shack v. Town of Cape Elizabeth*, 712 A.2d 1061 (Me. 1998).

If the board of appeals fails to make an adequate record with findings and conclusions, the court will probably "remand" the case to the board of appeals to create an adequate record. This is also true if an appeal is filed directly from the planning board's or CEO's decision to Superior Court (where no local appeal is available, resulting in direct review of the decision by the court). *Bruk v. Town of Georgetown*, 436 A.2d 894 (Me. 1981); *Sanborn v. Town of Eliot*, 425 A.2d 629 (Me. 1981); *Harrington v. Town of Kennebunk*, 459 A.2d 557 (Me. 1983). However, the court has held that, even if the decision being appealed did not include formal findings and conclusions, the court will uphold the decision "as long as the decision is supportable on the basis of express or implicit findings revealed by the record as a whole." *Glasser v. Town of Northport*, 589 A.2d 1280 (Me. 1990); for example, comprehensive minutes which contain detailed oral statements of board members. *Laverty v. Town of Brunswick*, 595 A.2d 444 (Me. 1991); *Putnam v. Town of Hampden*, 495 A.2d 785 (Me. 1985); *Bragdon v. Town of Vassalboro*, 2001 ME 137. In light the following two Maine Supreme Court cases, *Christian Fellowship Renewal v. Town of Limington*, 2001 ME 16, 769 A.2d 834, and *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172, the safest approach is to prepare findings and conclusions where required in order to avoid a remand.

Courts will review questions of law on a "de novo" basis (no deference will be given to a municipal official's or board's interpretation of an ordinance). On the other hand, questions of fact will be reviewed with "substantial deference." *Bizier v. Town of Turner*, 2011 ME 116, 32 A.3d 1048; *Town of Vassalboro v. Barnett*, 2011 ME 21, 13 A.3d 784; *Rudolph v. Golick*, 2010 ME 106, 8 A.3d 684; *Jordan v. City of Ellsworth*, 2003 ME 82, 828 A.2d 768.

## **6. Authority of Municipal Officers**

The municipal officers do not have the authority to hear appeals and override a decision of the CEO unless an ordinance or statutory provision expressly gives them that authority.

## **7. Second Appeal of Same Decision/Reconsideration by the Board**

## of Appeals

Unless an ordinance provides otherwise, the Maine Supreme Court has held that an applicant whose appeal or request for a variance was denied has no legal right to request another hearing on the same appeal or variance unless he or she can show a substantial change in the circumstances which provided the basis for the first appeal or variance. *Driscoll v. Gheewalla*, 441 A.2d 1023 (Me. 1982); *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290 (Me. 1985). 30-A M.R.S. §2691 authorizes a board of appeals to reconsider a decision within 45 days. However, a change in the statute requires a request for reconsideration to be filed within 10 days of the original decision. The entire process should be completed within the 45 day time frame. In doing so, the board is authorized to hold additional hearings and receive additional evidence. Before doing this, however, the board must give direct notice to the original appellant and/or applicant and to anyone else required by the ordinance or State law to receive special notice of the original proceedings. Notice also must be given to the public in the manner required for the original proceedings. If specific individuals actively participated in the original hearing, the board should also notify them directly of the reconsideration hearing. However, if the applicant has already filed a Rule 80B appeal from the board's decision, the board should not attempt to reconsider its original decision. If a request for reconsideration is received, the board must vote at a public, advertised meeting as to whether it will entertain the request or deny it. Even if the chair knows that the board always rejects requests filed too close to the 10-day deadline, the chair must schedule it for action at a board meeting if the person will not withdraw the request. The deadline for filing a Rule 80B appeal in a case where a consideration request is denied is 15 days from the denial of the reconsideration.

### D. **Role of Code Enforcement Officer at Appeals Board Meeting**

Some ordinances expressly require the code enforcement officer to attend board of appeals hearings. Whether or not it is a local requirement, it is a recommended practice and should not be viewed by the appeals board as a threat to its authority. In most cases, the appeals board members will find it helpful to have the CEO present to answer questions relating to a particular decision being appealed or about the municipality's ordinances generally. This will avoid possible "*ex parte*" communications problems, since the board members might otherwise be tempted to consult the code enforcement officer outside the public meeting. ("*Ex parte*" means without the presence of one of the parties to the proceeding. Such discussions deprive a party of the opportunity to hear some of the information which may be used as a basis for the decision and to challenge that information if he/she disagrees with it. It renders the process unfair and provides a basis for a constitutional challenge to the decision. Ignoring this can raise potential issues related to due process, and can lead to numerous legal headaches. *See, e.g., Duffy v. Town of Berwick*, 2013 ME 105, 82 A.3d 148). It is important to remember that an applicant and other parties to the proceeding must have adequate time to address any information provided to the board, especially if the information is not provided during the public hearing and is a fact or legal conclusion that might be disputed.

In some communities the code enforcement officer acts as staff to the board of

appeals and actively conducts research for them, prepares summaries of appeals it will be hearing, drafts board minutes and prepares draft findings and conclusions for the board to adopt when deciding an appeal. While this role for the CEO may not cause legal problems when the appeal involves a planning board decision, it does present some constitutional due process concerns if the appeal is from a decision of the CEO and should be avoided in those cases.

#### E. **Variations and Waivers**

A zoning variance is an authorization by the Zoning Board of Appeals given to a property owner to use his property in a manner which is otherwise prohibited by the zoning ordinance. Variances typically are authorized by zoning ordinances for lot size, frontage, setback, and similar dimensional requirements. They also may be allowed for uses otherwise prohibited. The exact language of the ordinance governs what zoning variances may be granted in a particular municipality. A variance should be granted only when "undue hardship" would result to the landowner if it were denied. Undue hardship is defined in 30-A M.R.S. §4353. Additional elements of hardship may be established by ordinance. The hardship conditions which lead to the granting of variances must be "peculiar and unique" to the land in question. Additionally, there is a burden of proof upon the landowner to prove that the land cannot yield a "reasonable return" without a variance. *See, e.g., Summerwind Cottage, LLC v. Town of Scarborough*, 2013 ME 26, 61 A.3d 698 (holding that the Scarborough Planning Board did not err by finding that undue hardship existed when a parcel of land next to the ocean could not yield a reasonable return unless a cottage (requiring a reduction in the minimum setback) was built). Moreover, any hardship which justifies the granting of a variance must stem from the application of the ordinance to the property in question and not from actions of the applicant. If the same type of variance is frequently requested in a particular neighborhood, that may be an indication that the ordinance requirements are too restrictive or unrealistic for that area of town and that the legislative body needs to consider amending the ordinance. For a discussion of other types of variances and the tests that govern their issuance, *see* MMA's Variance Information Packet at <http://www.memun.org/members/infopks/Legal/variance.htm>.

##### 1. **Authority to Grant Zoning Variances**

A zoning ordinance provision which attempts to give the planning board, CEO or municipal officers the authority to grant variances would be in violation of 30-A M.R.S. §4353, since the statute gives the board of appeals the sole authority to grant a zoning variance. *Perkins v. Town of Ogunquit*, 1998 ME 42, 709 A.2d 106 (Me. 1998); *York v. Town of Ogunquit*, 2001 ME 53, 769 A.2d 172; *Sawyer v. Town of Cape Elizabeth*, 2004 ME 71, 852 A.2d 58; *but see Wyman v. Town of Phippsburg*, 2009 ME 77, 976 A.2d 985 (where court held that plaintiff's waiver request for a "buffer" strip was different from a setback, which is a dimensional requirement that cannot be waived, and which would require a variance).

A municipality's home rule authority under 30-A M.R.S. §3001 has been preempted by 30-A M.R.S. §4353 in this regard.

## 2. **Effect on CEO Actions**

When the board of appeals grants a variance, the effect is to waive or modify some requirement(s) of the ordinance which the applicant was unable to meet. Without the variance from the board of appeals waiving or modifying the ordinance requirement, the CEO would have had no legal authority under the ordinance to approve the application. (This assumes that the ordinance gives the CEO the authority to grant the permit rather than some other board or official.) A variance is not a permit. It is a waiver or reduction of some requirement which otherwise must be met in order to obtain a permit. Once granted a variance "runs with the land" indefinitely, unless the municipality has set a time limit by ordinance after which the variance will expire if not used. Some ordinances allow an applicant to seek a variance from the appeals board before applying to the CEO for a permit, while others require that the applicant apply for the permit first and then seek a variance as part of an appeal from the CEO's denial of the permit application.

## 3. **Appeal of Variance Decision by CEO**

If the CEO believes that the board of appeals has wrongfully granted a zoning variance where the applicant has not met *all* of the criteria for "undue hardship" set out in section 4353, the CEO may have standing to challenge the board of appeals decision in Superior Court if he or she can meet the "direct and personal injury" test outlined above. *Tremblay v. Inhabitants of Town of York*, No. CV-84-859 (Super. Ct., York Cty., October 3, 1985). However, the municipality may vote to not pay for such an appeal, so the CEO should consult with the municipal officers before retaining a lawyer to avoid having to pay from his or her own pocket.

## 4. **Shoreland Zoning Variances**

The DEP's minimum shoreland zoning guidelines (on which all municipal shoreland zoning ordinances are based) require the municipality to send to the Maine Department of Environmental Protection a copy of any variance decision issued by the board of appeals under a shoreland zoning ordinance. Review and comment by the DEP before the board makes its decision is no longer required. However, the DEP may ask the town to reconsider its decision if the staff believes that the BOA improperly interpreted the "undue hardship" test in granting a variance. The Maine Supreme Court has interpreted 30-A M.R.S. §4353 and 38 M.R.S. §439-A(4) as allowing a municipal board of appeals to grant a dimensional variance to permit an expansion within the shoreland zone as long as the applicant proves undue hardship and that the dimensional variance and expansion are not otherwise prohibited by the ordinance. *Peterson v. Town of Rangeley*, 715 A.2d 930 (Me. 1998).

## 5. **Disability Variances**

Most zoning variances may not be granted unless the applicant has satisfied all elements of the "undue hardship" test in 30-A M.R.S. §4353(4). 30-A M.R.S. §4353(4-A), provides a separate variance for applicants who want to construct a structure needed for access to or egress from a dwelling by a person with a disability who resides there or who regularly uses the dwelling. The disability may be physical or mental, as defined in 5 M.R.S.

§4553-A. The applicant does not need to satisfy the "undue hardship" test applicable to other zoning variances.

#### 6. **Waivers**

Oftentimes a non-zoning ordinance gives the planning board or municipal officers the authority to "waive" certain requirements of the ordinance by variance or waiver if they would cause "hardship" to the applicant. The definition of "hardship" in that context is not necessarily the same as the definition of "undue hardship" in 30-A M.R.S. §4353, unless the ordinance expressly refers to the statutory definition. Although the municipality may give the authority to grant these waivers to the board of appeals, there is no conflict with §4353 if the ordinance empowers the planning board or municipal officers to grant waivers. In any case, a non-zoning ordinance which authorizes the planning board or municipal officers to waive certain requirements should set out standards to use in determining whether an applicant will suffer a hardship without a waiver. However, it should be remembered that waivers can only be granted when the authority to do so has been *expressly given* in a municipality's ordinance. Without such authority, even the most cumbersome and needless standards in a site plan review ordinance cannot be waived, although the ordinance can be amended to grant this power. *See Hartwell v. Town of Ogunquit*, 2015 ME 51, ¶ 9, 115 A.3d 89.

#### 7. **Recording Variances**

Maine law requires that zoning and subdivision variances be recorded in the Registry of Deeds within 90 days of the decision to be valid. 30-A M.R.S. §4353 and §4406. Municipalities are required to provide certificates to the applicant for recording. Failure to record within the deadline means that the variance becomes void. The applicant then must begin the process of obtaining a variance again, with no guarantee that it will be approved a second time.

#### 8. **Authority of Appeals Board to Convert Variance Application to Administrative Appeal**

Where an applicant requests only a variance on appeal, but in the course of its review the board of appeals determines that a variance is unnecessary because of an erroneous interpretation by the CEO or planning board, the board of appeals has the power to treat the application as an administrative appeal and grant the necessary relief for the applicant. The board does not need to deny the variance request and force the applicant to bring a new appeal application for an administrative appeal. The same would be true if the applicant had sought only an administrative appeal. The board's authority to do this depends upon whether the appeal is otherwise authorized and properly before the board. *Cushing v. Smith*, 457 A.2d 816 (Me. 1983). As a practical matter, the board may need to provide additional public notice and continue its public hearing on an appeal to another meeting in order for the applicant and any proponents or opponents of the administrative appeal or variance to prepare and present relevant information related to the revised appeal.

## 9. Time Limit for Use of Variance

Questions are often asked as to how long the recipient of a variance has to use it. This question was partially answered by the Law Court in *Campbell v. City of South Portland*, 2015 ME 125, 123 A.3d 994. In *Campbell*, an area variance had been granted to the affected parcel in 1973. However, it wasn't until 2013 that the owner of the parcel sought to build a single family home. Faced with protests from abutters, the Law Court held that despite the lapse of 40 years, the *area variance* was still valid.

In contrast, the Law Court held that such an indefinite life for variances *does not apply*: (1) to a use variance; or (2) when the particular municipality's ordinance specified otherwise. Because of this, it is very important to remember that area variances and use variances are treated differently in this regard.

### F. Legal Concepts Applicable to Appeals

#### 1. Ripeness

In order for an issue to be ripe for review by the court, there has to be some "genuine controversy" and some "concrete, certain and immediate legal problem." If the problem is only hypothetical or speculative, the court will not hear the matter. *Marquis v. Town of Kennebunk*, 2011 ME 128, 36 A.3d 861. The policy behind the ripeness doctrine is to prevent "judicial entanglement in abstract disputes, avoid premature adjudication, and protect agencies from judicial interference until a decision with concrete effects has been made." *Johnson v. City of Augusta*, 2006 ME 92, 902 A.2d 855.

#### 2. Final Judgment Rule

As a general rule, the courts will not allow appeals of an "interlocutory" decision (which means an appeal that deals with less than all claims asserted in a particular case) unless the appeal falls within one of the recognized exceptions to the final judgment rule. *Bruesewitz v. Grant*, 2007 ME 13, 912 A.2d 1255; *Marquis v. Town of Kennebunk*, 2011 ME 128, 36 A.3d 861; *Town of Minot v. Starbird*, 2012 ME 25, 39 A.2d 897; *Cassidy v. City of Bangor*, 2014 ME 44, 88 A.3d 732. The policy behind this rule is to discourage "piecemeal" litigation. *Aubry v. Town of Mount Desert*, 2010 ME 111, 10 A.3d 662.

Courts will only hear interlocutory appeals if one of the following exceptions to the final judgment rule applies:

- (1) Death Knell Exception: applies if substantial rights of a party will be irreparably lost if review is delayed until final judgment.
- (2) Collateral Order Exception: applies when the appellant can establish that:
  - (a) the decision is a final determination of a claim separable from the main issue underlying the litigation;
  - (b) it presents a major unsettled question of law; and



(c) it would result in irreparable loss of the rights claimed, absent immediate review.

(3) Judicial Economy Exception: applies when dealing with the issue on the interlocutory appeal will practically dispose of the entire litigation. For example, in *Almeder v Town of Kennebunkport*, 2014 ME 139, 106 A.3d 1099, the Law Court considered the appeal of the Town's decision by affected landowners because substantial legal fees had already been spent on the matter, and the Court reasoned that determination of the cause could allow the parties to stop litigation.

### 3. Operative Decision/De Novo vs. Appellate Review

When reviewing the decision of a municipal appeals board, the court will review the "operative decision" of the municipality. *Dunlop v. Town of Westport Island*, 37 A.3d 300, 2012 ME 22; *Aydelott v. City of Portland*, 2010 ME 25, 990 A.2d 1024; *Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258; *Gensheimer v. Town of Phippsburg*, 2005 ME 22, 868 A.2d 161; *Stewart v. Town of Sedgwick*, 2000 ME 157, 757 A.2d 773; *Yates v. Southwest Harbor*, 2001 ME 2, 763 A.2d 1168.

What is the "operative decision"? When the board of appeals conducts a *de novo* review (it acts as fact-finder and decision maker), the Court will review the appeal board's decision directly. Therefore, the board of appeals is the operative decision. When the appeals board acts only in an *appellate* capacity (it does not undertake its own fact-finding but simply determines whether there were sufficient facts to support the decision,) the Court will not review the appeal board's decision. Rather, the operative decision is that of the Planning Board or other original decision-maker (e.g., the CEO).

Finally, it is worth noting that when and if the decision of the Superior Court is appealed to the Law Court, the Law Court considers the decision of the municipality (either the planning board or the board of appeals) to be the operative decision, *not* the decision of the Superior Court itself. This means that the parties will effectively get a clean slate, unaffected by the lower court's ruling. *Fitanides v. City of Saco*, 2015 ME 32, ¶ 8, 113 A.3d 1088.

### 4. Preemption

Home rule is granted to municipalities by the Maine Constitution and by statute. ME. CONST. art. VIII, pt. 2, § 1; 30-A M.R.S. § 3001. The home rule statute states that it is to be liberally construed, that there is a presumption in favor of home rule, and that preemption is not to be implied unless local action would "frustrate the purposes" of state law. "Only where the municipal ordinance prevents the efficient accomplishment of a defined state purpose should a municipality's home rule power be restricted, otherwise municipalities are free to act to promote the well-being of their citizens." *School Comm. v. Town of York*, 626 A.2d 935, 938 n. 8 (Me.1993); 30-A M.R.S. § 3001(3).

The Law Court has also indicated that “an action under a municipal ordinance will be preempted *only* when state law is interpreted to ‘create a comprehensive and *exclusive* regulatory scheme’ inconsistent with the local action”. *Id.*; *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1193 (Me. 1990). In other words, state law will only preempt local law when the state law reflects an intention to “occupy the field” of regulation. *City of Bangor v. Diva’s, Inc.*, 830 A.2d 898, 2003 ME 51.

## **Chapter 6 - Violations, Right to Enter, and Administrative Warrants**

### **A. Detecting Violations**

Code enforcement officials learn about violations in a number of ways. The CEO may spot a violation while doing a routine "windshield" survey while driving the roads in town. A CEO should set aside a block of time each month, if at all possible, to do this kind of general inspection work. The CEO also might find out about a violation while doing a site visit at the property in connection with another application or while conducting an inspection during construction. Some violations are referred to the CEO by other municipal officials, such as the assessors, the conservation commission, or the planning board, or by State officials, such as DEP's enforcement staff. Members of the public, particularly neighbors, may also take the time to report suspected violations to the CEO.

The CEO should keep a log in connection with a particular violation and note as much information as possible about his or her own observations or those reported by others. It is important to include dates on which the observations were made and on which the information was received, as well as names and addresses, since the CEO will probably have to refer to the log later, particularly if the case goes to court.

The CEO should make an effort to follow-up on a reported violation as soon as possible since this will improve the chances of a successful prosecution if the case does go to court. It also will provide an incentive for others to continue to report violations when they see them, which will help the CEO do his or her job more effectively. If time permits, it is also advisable to have some sort of form letter which can be sent to the person who reported the violation which indicates that the CEO did investigate the reported violation, that a violation did/did not exist, that steps are being taken to resolve the violation (if any), that the CEO appreciates the person's cooperation in reporting the situation, and that the person can call the CEO if there are any questions. Although this will obviously involve time and money, the public relations benefits which will result and the increased detection of violations which will result should be worth it in the long run.

Sometimes a person who calls to report a violation may be unwilling to give his or her name out of fear of retaliation. The CEO should explain that it would be helpful to have the caller's name in case the CEO needs to talk to the caller later or in case the CEO needs the caller as a witness in court. The CEO could offer not to record the caller's name in writing in order to avoid making it part of a public record and can offer not to divulge the name to the violator if asked. However, if the caller still refuses to give his or her name, the CEO should take whatever information the caller does provide and investigate the complaint just as any other complaint. The fact that a complaint is made anonymously does not mean that it should be ignored automatically.

### **B. Right to Enter Property**

Often a local ordinance or a State statute being enforced by a code enforcement officer will contain language declaring that the enforcement officer has a "right to enter

property" for the purpose of conducting an inspection and enforcing the ordinance or statute. Such a right is not always automatic. In some cases entry must be preceded by permission from the owner or a court order. The main purpose of such a provision in an ordinance or statute is to make it clear that the officer has a legal basis on which to seek admission to the property which the enforcement officer may enforce in court if necessary.

The 4th Amendment to the U.S. Constitution prohibits "unreasonable" searches of private property, whether the property is occupied by a residence or a business. Whether a search is "unreasonable" hinges largely on whether the area involved in the search is one in which the owner/occupant has a "reasonable expectation of privacy." Generally, an owner/occupant will be considered as having a reasonable expectation of privacy in the use of a building and the immediately adjoining land (sometimes referred to as "the curtilage"), but not in undeveloped fields or woodlands ("open fields"). This means that before entering a building or the "curtilage" to conduct an inspection and determine whether an ordinance violation exists, the code enforcement officer must either: (1) obtain permission from the landowner or other person having legal authority to grant access to the property; or (2) obtain an administrative warrant from the District Court under Rule 80E. (See Section C of this chapter). This is true even if the building is a seasonal residence or only used occasionally, like a hunting cabin. 68 Am. Jur.2d §§37, 38.

Although there are a few exceptions to the requirement that a warrant be obtained prior to an inspection where the activity involved is a business which has a long history of close government supervision and control (e.g., firearms, liquor), those exceptions generally will not come into play in connection with local code enforcement. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1987); *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967); *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861(1974); see *Oliver v. United States*, 64 S.Ct. 1735 (1984); but see *Goodall v. Inhabitants of City of Presque Isle*, CV-88-194 (Aroost. Cty. Super.Ct., January 10, 1990) (holding entry onto property to take photos as evidence in a nuisance action did not amount to a "search" under the 4th Amendment).

If an enforcement officer's inspection of an area outside "the curtilage" is challenged, he or she can point to 30-A M.R.S. §4452(1)(A) of the Maine Statutes as additional support for the right to enter that area of land without permission or a warrant. 30-A M.R.S. §4452(1)(A) reads as follows:

1. Enforcement. A municipal official, such as a municipal code enforcement officer, local plumbing inspector or building inspector, who is designated by ordinance or law with the responsibility to enforce a particular law or ordinance set forth in subsection 5, may:

A. Enter any property at reasonable hours or enter any building with the consent of the owner, occupant or agent to inspect the property or building for compliance with the laws or ordinances set forth in subsection 5. A municipal official's entry onto property under this paragraph is not a trespass.

However, a good rule of thumb even in these cases is to try to get express permission from the landowner or other person with legal authority before conducting an inspection. Although on its face the statute appears to give authority to the CEO to enter all land without the owner's permission, various court cases on this question impose a more restrictive rule.

There may be times when an enforcement officer enters property to look for the landowner to talk about a possible violation reported by a neighbor and in approaching the house or office building to ask permission to inspect the property, the enforcement officer gets a clear view of the violation from the walkway, driveway, or road. In a case such as this, a court probably would allow evidence of what the enforcement officer saw to be admitted into evidence because he or she entered the property for the purpose of obtaining permission to inspect and because the information was not obtained in the course of a "search" or "inspection." See *Artes-Roy v. City of Aspen*, 31 F.3d 958 (10th Cir. 1994). Again, it would be better not to use this evidence if it is possible to get permission to conduct a closer inspection from the landowner or other person with legal authority.

Evidence gathered by the CEO while observing the violation from a public place or from abutting property (with the abutting owner's permission) generally would be free of constitutional problems. Case law also suggests that evidence obtained while observing the property from an airplane at a low altitude would also be constitutional, so long as the airplane was operating in public airspace. *Florida v. Riley*, 488 U.S. 455 (1989). However, CEOs should be very cautious about the use of drones or other similar aircraft, as the constitutional implications for their use are far from settled.

A CEO who needs to inspect an apartment unit or a common area in an apartment building can rely on permission from the owner or the tenant in the case of the individual unit; in the case of a common area, anyone with a right to use the area may grant access to the CEO. If a CEO needs to inspect property served by a private road which is in multiple ownership, the permission of one of the road owners would be enough for the CEO to legally use the road.

If a CEO needs to inspect activity on land which is posted, the CEO probably should seek permission before entering, even if the inspection will occur outside the "curtilage." A CEO who is legally on property in another capacity, such as mail delivery, assessing, or repair work, faces a unique dilemma if he or she observes a code violation. Unless the CEO receives the owner's permission to rely on those personal observations in prosecuting a violation, the CEO probably should schedule another visit to conduct an inspection for a code violation.

An inspection conducted during the course of construction to determine compliance with the ordinance governing the project or the conditions of any permit issued for the work being done generally also would be governed by the rules outlined above. However, one federal court decision, *Frey v. Panza*, 621 F.2d 596 (1980), has upheld a warrantless inspection prior to completion of work where the applicable ordinance expressly allowed it

and where the work was being done by a professional contractor.

Even though an inspection conducted without permission may be constitutional in some cases and even though the evidence gathered during such an inspection may be admissible, the enforcement officer should be aware that such an inspection could provide the basis for a trespass action by the landowner against the enforcement official personally. This is particularly true if the land in question is posted. To avoid the costs and aggravation of such a lawsuit, the enforcement officer should analyze a situation carefully and weigh the possible risks before deciding to inspect property without permission.

There are other reasons why it is advisable to obtain permission prior to conducting an enforcement inspection whenever possible. One reason is to eliminate an opportunity for the violator to raise a constitutional issue which will only serve to complicate the case and which possibly may cast the town's or city's position in an unfavorable light. Another reason is that an inspection conducted without permission might provide an incentive for the violator to request that a case filed in District Court under Rule 80K be removed to Superior court in order to have a superior court judge decide the case on constitutional grounds.

These are all factors which the enforcement officer should consider when preparing to conduct an inspection. When in doubt about the best way to proceed, the enforcement officer should consult an attorney.

C. **Administrative Warrant Procedure and Forms**

If the property owner refuses the CEO's oral request to inspect the property in cases where permission is necessary, the CEO should not inspect the property without first obtaining an administrative warrant by following the procedures listed below:

- Complete the application for an Administrative Inspection Warrant authorized by Civil Rule 80E.
- Prepare an Administrative Inspection Warrant.
- Complete a written notice to the owner or occupant of the premises that the CEO intends to make an application for an Administrative Inspection Warrant to the district court on a date and at a time specified in the notice. Keep a copy of this notice.
- Give notice to the owner or occupant of the premises. This must be done at least 24 hours before the CEO plans to present the application for an Administrative Inspection Warrant to a district court judge. However, if the violation on the premises constitutes an immediate threat to the health or safety of the public, the CEO is not required to make an oral request or to give written notice to the owner or occupant. In such cases, the CEO may go straight to a district court judge with the application.
- On the date and at the time which the CEO specified in the written notice delivered to the owner or occupant of the premises, the CEO should

present to the judge the completed application for an Administrative Inspection Warrant, the Administrative Inspection Warrant which the CEO has prepared, and a copy of the written notice. (Note: The CEO is more likely to get the full extent of inspection authority being sought, if he/she has taken the time to type a proposed warrant and order in advance and presents this to the judge to sign once the judge has decided to grant the inspection request.) The CEO also should have a certified copy of the ordinance in question and a copy of his/her certificate of appointment available in case the judge wants to see them. This is not a formal procedure. The CEO should go to the district court during usual business hours, locate a district court judge, and after identifying himself or herself and stating his or her purpose, present the papers. The application must be based on "probable cause" to believe that a violation actually exists on the property. This means that either the CEO has personally observed activity which appears to constitute a violation or such activity has been reported to the CEO by someone with personal knowledge. A CEO who anticipates trouble at the site may ask the court to specify in the warrant that the CEO may be accompanied by a law enforcement officer.

- If the warrant is issued by the judge, the CEO must conduct the inspection within ten days. When the CEO conducts the inspection, he or she must deliver a copy of the warrant to the owner or occupant, or leave a copy of the warrant on the premises in a conspicuous place.
- Within ten days after conducting the inspection, the CEO must file a Return with the clerk of the district court which issued the warrant. The Return must state the date and time of the inspection and any violations which were found on the premises. These violations may be enforced through the procedures outlined in the ordinance or statute being violated.
- If the owner still refuses to allow the CEO to enter the property after the CEO has secured a warrant, the CEO should report that refusal to the court. The judge then may find the owner in contempt of court and authorize a sheriff to arrest the owner if the owner continues to refuse to permit the CEO to enter.<sup>3</sup>

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<sup>3</sup> A. Polakewich. "Enforcement Packet: Procedures for Correcting Plumbing Violation," Department of Health and Welfare, Division of Health Engineering, pp. 10-11 and "Enforcement Manual: Procedures for Correcting Violations to the Subsurface Wastewater Disposal and Plumbing Rules" (Mar. 1982 ed.) Department of Health and Human Services. Division of Health Engineering, pp. 13-2 and 13-3.

## Chapter 7 - Inspections and Enforcement Procedures

The discussion in this chapter refers to the "CEO" taking various enforcement steps, ordering a violator to take specific actions, and negotiating a consent agreement as a way to resolve a violation out of court. When reading this material, a CEO must keep in mind that:

- the specific ordinance or statute being enforced may contain additional or different steps or requirements governing or limiting the CEO's enforcement authority;
- no violator can be forced to take any action or pay any monetary penalty without a court order, regardless of whether it's the CEO or municipal officers making the request or whether the requested action or penalty is contained in a notice of violation a negotiated consent agreement; and
- since most ordinances name the municipal officers as the officials who ultimately decide whether to send a case to court, the CEO may want to work with the municipal officers to establish some general guidelines about the type of corrective action and penalty which they would support in various types of cases. Even though this may not be legally required by the ordinance being enforced, if the CEO acts independently and then finds that the municipal officers refuse to support the terms of a consent agreement which the CEO has negotiated or the request for corrective action and penalties which the CEO is proposing for a court complaint, the CEO will quickly become frustrated. Even where a CEO is certified to prosecute cases in court without an attorney using Rule 80K, and has been authorized by the municipal officers to go to court on behalf of the municipality, the municipal officers may revoke this authority if they don't like the way that the CEO is handling cases or the types of consent agreements the CEO is negotiating and signing. Constant communication between the CEO and municipal officers is a key to a CEO's success. See additional discussion of a CEO's authority and relation to the municipal officers appearing later in this Chapter and in Chapter 3.

### A. Conducting Inspections

Conducting inspections is an important part of any effective code enforcement program. Inspections help prevent ordinance/code violations and costly construction errors. Before heading out to conduct inspections, the CEO should focus on his/her role here as part of a larger process. The purpose of the inspection is to ensure compliance with pre-established standards or codes, and also ensure that any conditions which became part of a permitted use are met. A building inspector is not expected to provide architectural or engineering services, nor is it the role of a CEO to secure the best possible work, raise the standard of construction, or establish the best practice. A CEO may not insist upon more than is required by the ordinance or statute involved. No code provides this authority. But, the CEO should be capable of judging alternative methods which do meet requirements of the permit which has been issued or which would be acceptable if the permit were



modified. When planning to inspect a particular site, the CEO should arrive with a good checklist, be familiar with the plans for the project, noting especially any changes required in approving the permit, be familiar with applicable code requirements, be familiar with approved materials and construction methods (including their limitations), and make accurate notes detailing observed conditions. Remember that any routine inspection could yield a violation and potential enforcement action. Be prepared for any outcome.

Unless a local ordinance or applicable code provides otherwise, the CEO should schedule inspections for typical residential construction as follows:

1. when excavation for the foundation is complete or the forms installed, but prior to pouring the concrete, in order to check such things as setback, soils, and locational dimensions;
2. at the time of "closing in," to check the plumbing and electrical wiring; and
3. at completion of the project, upon notification by the owner either by phone, letter, or application for a certificate of occupancy which must be issued pursuant to 25 M.R.S. §2357-A.

In addition, the CEO should periodically drive around the community in order to detect activities which might warrant closer inspection. The CEO should refer apparent violations of State statutes to the appropriate agency.

#### **B. Preliminary Enforcement Action**

Upon detecting a violation of an ordinance or a State law enforced locally, the CEO should notify the person responsible and attempt to obtain voluntary cooperation in correcting the violation. If the person who actually performed the illegal activity is not the landowner, the CEO should also notify the landowner, since some types of corrective action that the CEO might want to order could only be done by the owner or with the owner's permission (e.g., remove a building, reseed a clear-cut area). The CEO should follow the procedures outlined below, as well as any special procedures that may be spelled out in the ordinance or statute that the CEO is enforcing:

##### **1. Oral Notice**

Give oral notice to the person conducting the illegal activity, explaining the nature of the violation and the steps the person should take to correct it.

##### **2. "Stop Work" Notice**

If the person conducting the activity is unavailable, the CEO should post a "stop work" notice in a conspicuous place on the property on which the violation exists.

### 3. Written Notice

Follow up the oral notice or "stop work order" with a written notice. Whether the CEO uses the three notices process described below or sends only one or two written notices will depend on the CEO's personal preference, unless an ordinance or charter provision dictates the number and form of notices provided. A Maine Supreme Court decision, *Town of Freeport v. Greenlaw*, 602 A.2d 1156 (Me. 1992), outlines the essential elements of a written notice of violation. If the CEO's enforcement order may be appealed to the board of appeals, the enforcement order must expressly say this. The notice also must be worded in the form of an order rather than as a simple request or suggestion. Before using a sample violation notice, be sure to make any additions required by *Greenlaw* in light of the specific appeals, enforcement, and penalty sections of the ordinance being violated.

(a) **First Notice.** The CEO should mail or deliver a written notice to the violator and landowner, referencing the oral notice and describing the property in question, the nature of the violation and the specific ordinance section being violated, and including an order that the violation cease and that certain corrective measures be taken, a reasonable deadline for taking those measures, information about whether the ordinance provides a right to appeal the enforcement order, and a statement of the penalty that a court could assess against the violator for failure to comply with the CEO's order. The notice should also mention the possibility of negotiating a consent agreement with the CEO and municipal officers as a way to resolve a violation, where appropriate. (See discussion of consent agreements later in this chapter.)

(b) **Second Notice.** After the deadline for taking corrective action has passed, the CEO should inspect the property again. If the person still has not corrected the violation, the CEO should send a second letter. This letter should state: (1) that the CEO gave previous notice of the violation and the date of that notice, (2) the nature of the violation and the ordinance section, (3) that the CEO has inspected the property again and the violation still exists, (4) that certain corrective measures should be taken by a specific date, and (5) that if the violation continues after that date, the CEO will recommend that the municipal officers refer the violation to a municipal attorney for legal action, in which case the violator could be required to pay the municipality's legal fees if it prevails in court.

(c) **Third Notice.** If the second letter does not result in an abatement of the violation, the CEO should send a third letter informing the violator that: (1) the CEO has conducted another inspection, (2) the violation still exists even though the CEO has given the violator previous written notice, and (3) the CEO is recommending that the case be referred for legal action unless the violator is willing to negotiate a consent agreement.

If the CEO has the authority to file a complaint in District Court under Rule 80K, then the letter may state that the CEO is preparing to file a complaint. If the municipal officers make the final decision about whether to go to court, the letter should state that the CEO is recommending that the municipality prosecute the violation. The letter also should state the date, time and place when the municipal officers will be meeting to make their decision,

and should inform the violator that he or she has a right to attend. Once the municipal officers have made their decision, the CEO should send a letter to the violator to inform him of this fact.

#### 4. **Maintain File**

The CEO should keep copies of all correspondence concerning the violation and should also be sure to retain the postal receipts from certified letters.

#### 5. **Delivery of Notices**

If the person to whom they are addressed refuses the notices that the CEO sends by certified mail, the CEO may want to hand-deliver them or ask a local law enforcement officer or a sheriff's deputy to do it. If the notices are hand-delivered, then the CEO should keep on file a "return" prepared by the person making the delivery as proof that the notice was received. If delivered by regular mail, the CEO should keep a record of the date and time mailed, from what location, and to what name and address.

#### 6. **Additional Inspections**

Once the case has been referred to court, the CEO should continue to monitor the property periodically until the day of the hearing. This will enable the CEO to testify from personal knowledge that the violation still exists or that it continued until a certain date.

#### 7. **State or Federal Law Violations**

If the CEO becomes aware of a violation of a State or federal law which is not enforced at the local level, the CEO should report it to the appropriate State or federal agency.

#### 8. **Violator's Right of Appeal**

Traditionally, notices of violation were not considered to be appealable on their own, until the municipality decided to take some sort of action to enforce the notice. *Paradis v. Town of Peru*, 2015 ME 54, 115 A.3d 610. However, since 2013, the recipient of a Notice of Violation has been entitled to appeal such notice to the municipality's board of appeals. 30-A M.R.S. § 2691(4). The only exception to this rule is if the municipality's ordinance *explicitly* states that a notice of violation is "merely advisory" and not appealable. *Paradis*, 2015 ME 54, ¶ 7, 115 A.3d 610. Because of this, it should be kept in mind that a violator's right to appeal likely depends on the *exact* language within the town's ordinance.

#### C. **Permit Revocation**

Situations may arise when a CEO believes that a permit should be revoked. Generally, the code enforcement officer may not revoke a permit on the grounds that the property owner is violating certain conditions of the permit, unless an ordinance

specifically grants that power to the CEO and also provides a right to appeal the decision to revoke to a local appeals board. *See Nichols v. City of Eastport*, 585 A.2d 827 (Me. 1991).

#### **D. Types of Voluntary Corrective Action Ordered by CEO**

The type of corrective action which a CEO may order to eliminate a violation depends primarily on the nature of the violation and the language of the ordinance or statute being violated. Some common examples include:

##### **1. Obtaining a Permit After-the-Fact**

When the violation involves a failure to secure a necessary permit, but the project is otherwise in conformance with the law, the code enforcement officer should encourage the property owner to apply for a permit after-the-fact. Such an application would involve the normal review procedures, and there is no guarantee that the permit will be approved. If the permit is granted, it should be dated from the time of the decision to issue it, rather than "back dated" to the time the work was actually done. Some municipalities have ordinances which require a higher permit fee for after-the-fact permits to help the town or city recover the additional administrative and enforcement costs which it incurs in connection with such a permit. *State v. Brown*, 135 Me. 36, 188 A. 713 (1937); *City of Commerce v. Cooper*, 609 P.2d 106 (Cob., 1979).

##### **2. Removal or Reconstruction**

If the project involves other violations, such as inadequate setback, undersized lot, improper drainage or use of unsafe building materials, the CEO may need to order seemingly harsh corrective measures, such as removal of the illegal structure or its reconstruction or relocation in conformance with ordinance requirements. (To obtain relief from the CEO's order, the property owner must appeal the CEO's order to an appeals board, if authorized. If an appeal is not authorized, and the landowner fails to comply, the CEO is forced to resort to court action; the landowner could raise objections to the CEO's order as part of his defense.)

##### **3. Reseeding a Clear Cut Area**

If a forested area was cut too heavily in violation of a local ordinance, the CEO can order the owner to reseed it in a manner which will achieve the required forest density.

##### **4. Penalty**

Even if the violator agrees to obtain a permit or take other corrective action, the CEO may believe that the municipality should also request payment of a monetary penalty covering the period of noncompliance. This would be especially true where the CEO felt that the granting of a permit after-the-fact would not provide a sufficient deterrent to future violations of local ordinances. The amount of the penalty should be based on the penalty provision in 30-A M.R.S. §4452(3), which establishes penalties for specific

violations ranging from \$100-\$2,500 per violation per day for first-time violators and higher penalties for subsequent violations. (See additional discussion below.)

If the violator refuses to perform the corrective action ordered by the CEO or to pay a penalty voluntarily, the only way to force compliance is by filing a complaint in court requesting a court order.

**E. Voluntary Compliance Using Administrative "Consent Agreements"**

It cannot be emphasized enough that resolving a violation out of court through the voluntary compliance of the violator should be every local enforcement official's goal.

Serving a citation or summons and filing a complaint in court normally should be a last resort. This does not mean that the municipality should "go easy" on a violator or always settle for less than full compliance. It does mean that the CEO normally should give the violator a reasonable opportunity to solve the problem before looking to the court for an answer. It also means that the CEO should be creative and think of remedies which the violator might agree to perform and which would be satisfactory to the town or city without having to involve a judge. If all else fails, though, and the violation is well documented, the CEO should not hesitate to refer the case for legal action.

If a person responsible for a violation is willing to resolve the problem without a court order, the CEO should attempt to negotiate an administrative "consent agreement" which spells out what the violator agrees to do in return for the town's or city's promise not to go to court. Such an agreement is in the nature of a contract between the violator and the municipality. Unless the CEO has been expressly authorized to sign a consent agreement on behalf of the municipality, the municipal officers must sign it.

In trying to persuade a violator to enter a consent agreement with the town or city, the CEO may find it helpful to emphasize the potential costs and penalties which a judge could order the violator to pay if the case went to court. 30-A M.R.S. §4452(3) authorizes a penalty of up to \$2,500 per day for first time violators and up to \$25,000 where a person has been convicted of the same violation within the past two years. The statute also requires the court to order the violator to pay the municipality's court costs and attorney's fees if the town or city wins. In addition to these penalties and costs, the court also could order the violator to pay for necessary remedial work (i.e., removing a building, reseeding a forest).

If the violator is not the landowner, then the CEO should attempt to obtain written permission from the landowner allowing the violator to perform any necessary corrective action involving land or buildings. This is because a person who does not own the property cannot legally agree to make changes to the property; therefore, a court would not enforce such an agreement against him.

The terms contained in consent agreements can include an agreement to remove an illegal structure within a stated period of time, pay a large penalty, reseed a clearcut area, an agreement to discontinue an illegal use of property within a stated period of time, to submit an application for a permit or a variance after-the-fact, or any appropriate combination of these and other agreements. For example, the enforcement official could negotiate a large penalty and agree to waive a portion if certain corrective action is taken within a specified period of time. Some CEOs have negotiated agreements in which a violator agreed to pay for new zoning maps and for the cost of sending the CEO to a particular training session. The agreement should be very clear about what actions the violator is promising to take and the compliance deadlines. For example, if an area is to be revegetated with tree seedlings, the agreement should specify the type and size of trees, how far apart to plant, when to start, and what happens if some or all of the seedlings die within a certain time frame.

In negotiating agreements involving illegal structures or activities, the enforcement official ordinarily should not settle for less than the removal of the structure or cessation of the activity since any settlement that allows such violations to continue would be condoning illegal activity. In most cases such an agreement probably would not be authorized under the enforcement provision of the statute or ordinance being enforced. *See State v. Town of Franklin*, 489 A.2d 525 (Me. 1985); *Pike Industries, Inc. v. City of Westbrook*, 2012 ME 78, 45 A.3d 707. It also would send a message to the public that the municipality is willing to "sell" violations. In these cases the most the enforcement official should offer is additional time to correct the problem and no penalty or a small penalty. Most, if not all, shoreland zoning ordinances expressly prohibit consent agreements which allow a violation to continue unless certain factors are present. CEO's should look at their ordinances to determine what limitations they impose.

Title 30-A M.R.S. §4452(3)(C-2) provides a number of factors which a judge must consider in deciding how much of a penalty to award or what kind of corrective action to order. If the court finds that a violation was willful, the statute requires the court to order corrective action unless it would: 1) result in a threat or hazard to public health or safety; 2) result in substantial environmental damage; or 3) result in substantial injustice. In setting a penalty, the statute requires the court to consider: 1) prior violations by the same person; 2) the degree of environmental damage that cannot be abated or corrected; 3) the extent to which the violation continued following the CEO's order to stop; and 4) the extent to which the municipality contributed to the violation by providing the violator with incorrect information or by failing to take timely action. A violator is subject to a potential \$25,000 penalty per violation per day for a second conviction of the same offense within a two year period. The maximum penalty may be increased where the economic benefit resulting from the violation exceeds the statutory maximum penalty. The maximum penalty may be as high as twice the economic benefit in such a case. "Economic benefit" includes costs avoided or enhanced value accrued at the time of the violation as a result of the failure to comply with the law. In weighing the strengths of the town's or city's case against a violator and in deciding what to include in a consent agreement, the CEO should keep these statutory factors found in Section 4452 in mind. If the CEO determines that it is unlikely that a judge would order a penalty or elimination of a violation because of one or

more of the factors listed in section 4452, then the CEO may decide that he or she will have to settle for less in a consent agreement. Before doing so, however, the CEO may want to consult with the municipality's attorney.

Many CEOs and attorneys have found it more effective to negotiate a consent agreement after a Rule 80K or other land use violation court complaint has been filed. Once the terms of the agreement have been resolved, the parties submit the agreement to the court for endorsement by the judge as the decision in the case. It is then referred to as a "consent decree" rather than a "consent agreement".

When drafting consent decrees and consent agreements, it is important to be mindful of the following five criteria established by the Law Court in *Pike Industries, Inc. v. City of Westbrook et al*, 2012 ME 78, ¶ 24, 45 A.3d 707, 71-717. In *Pike Industries*, the Law Court held that a consent decree in a land use violation action would only be valid if: (1) the parties have validly consented; (2) reasonable notice has been given to possible objectors and they have been afforded a reasonable opportunity to present their objections; (3) the consent decree will not violate the United States or Maine Constitutions, a statute, or other authority; (4) the consent decree is consistent with express legislative objectives and other zoning-related public policy considerations; and (5) the consent decree is reasonable and is not legally impermissible in its effects on third parties.

#### F. **Non-Action Letters**

Some CEOs have begun issuing what they refer to as "non-action" letters instead of negotiating consent agreements. In essence, such a letter says that the municipality is aware that a particular property is in violation of a municipal ordinance, but that the municipality has no intention of prosecuting at this time. Apparently title attorneys and landowners have been willing to accept this in some parts of the State in order to resolve title problems and pave the way for financing. However, such a letter makes no guarantees that a future council or board or selectmen will agree to abide by it. Such letters are typically issued in cases involving minor dimensional violations which have existed for years and gone unchallenged by the municipality.

#### 1. **Additional Enforcement Techniques**

The CEO may find that he or she can gain some additional leverage with violators by providing information about violations to the following individuals or companies:

(a) **Notify Applicable Utility Company.** The State Subdivision Law and the Mandatory Shoreland Zoning Act state that no public utility, water district, sanitary district or any utility company of any kind shall install services to any lot or dwelling unit in a subdivision, or to any new structure in the shoreland zone, unless given written authorization by the town or city attesting that all necessary local permits have been issued and are valid and current. 30-A M.R.S. §4406(3); 38 M.R.S. §444. These laws authorize the municipal officers to make "other written arrangements" with the utility as an alternative means of providing the utility with the authorization that it needs to proceed. If a CEO

discovers an unapproved project and contacts these utility companies, the utilities should refuse new service to the owner until the project has been approved.

(b) **Contractor Liability.** 30-A M.R.S. §4452(2) makes contractors liable for violations of land use ordinances which they commit. Local contractors should be made aware of this.

(c) **Realtors.** The CEO should maintain a list of detected violations and make it available to the public upon request. Local real estate agents should be interested in such a list, since it would enable them to avoid selling a building or land that did not comply with local or State requirements.

#### G. **Initiating Prosecution in Court**

If the CEO is unable to resolve a violation out of court through a consent agreement, the only solution is to file a complaint in court and seek a court order. Violations involving "land use" ordinances or statutes may be prosecuted in District Court using Maine Rule of Civil Procedure 80K or in Superior Court. If a CEO has been certified to go into District Court without an attorney by the former State Planning Office or the Department of Economic and Community Development, Office of Community Development, and the CEO has been authorized by the municipal officers to do this, then the CEO may prepare, serve and file a Land Use Citation and Complaint in District Court in accordance with 30-A M.R.S. §4452 and Rule 80K. For a more detailed discussion of Rule 80K and the preparation and prosecution of land use cases, CEO's should obtain a copy of the "Rule 80K Enforcement Handbook" from the Department of Economic and Community Development, Office of Community Development. If the CEO is not certified to bring an 80K action, the CEO should refer the violation to the municipal officers for prosecution by an attorney.

#### H. **Issuing Summons**

30-A M.R.S. §4452 authorizes all CEO's, whether certified to prosecute Rule 80K cases or not, to issue a summons to appear in court to any one violating a law or ordinance the CEO is empowered to enforce. As a practical matter, however, a CEO who is not certified to prosecute a case without an attorney should not issue a summons unless asked to do so by the attorney who will be prosecuting the case in court.

#### I. **Injunctions**

##### 1. **When to Request a Temporary Restraining Order (TRO) or Preliminary Injunction**

There may be times when a local enforcement official finds a violation in progress and cannot locate the person responsible or cannot persuade the person conducting the illegal activity to stop voluntarily until the project has been reviewed and approved by the proper local official(s) or until the project has been brought into compliance with the law.



The CEO may decide to seek an injunction even though the violation can theoretically be undone by later order of the court. If the activity is going to cause immediate harm which cannot be undone by a later agreement or court order, then the local official should consider seeking a type of injunctive relief called a "temporary restraining order" (TRO) or a preliminary injunction either on his or her own (if certified to do so) or through the municipality's attorney. If a flagrant violation is ongoing, and if the CEO seeks an injunction, most judges will be willing to restrain the violation.

## **2. Differences Between TRO, Preliminary Injunction and Permanent Injunction**

Both a TRO and an injunction order a person to act or cease acting in a particular manner. Both require a showing of "irreparable harm," roughly meaning something that cannot be fixed simply by paying ordering the offender to pay the harmed party a sum of money. The difference between them is the speed with which the court will act, the amount of evidence necessary to obtain them, and their duration. A TRO is, by its very nature, of brief duration. The court acts quickly on a motion for a TRO because the nature of the acts complained about is such that irreparable harm will result immediately if the court does not intercede. Because a TRO only lasts for a short time, the court does not normally require the same evidentiary showing required to obtain a preliminary or permanent injunction, both of which require more evidence. While a TRO can be granted based only on evidence contained in an affidavit attached to the motion or complaint, an injunction requires a fuller evidentiary hearing. It should be emphasized that in the case of both a TRO and a preliminary injunction, the court will be reluctant to grant the requested relief without convincing evidence as to the type of irreparable harm which will occur.

## **3. Examples of "Irreparable Harm"**

Examples of the types of violations which would cause "irreparable harm" and which would justify a TRO or preliminary injunction are the clearcutting of a forested area in the shoreland zone, the existence of a badly malfunctioning septic system where raw sewage was accumulating on the ground in a thickly-settled residential neighborhood, or the filling of a stream with solid fill material in a shoreland zone. While a court also might be willing to grant a request for a TRO to prevent the construction of a dwelling without a permit before a full hearing could be held, it might be more difficult to convince the court that irreparable harm will result without a TRO since the harm may not seem as serious or immediate as in the other examples. In a case where a significant building is being built illegally, it might be wise to seek a TRO or preliminary injunction even if it is denied as a way to convince the court, at a later hearing, to order the removal of the building if the town or city ultimately wins its case.

Keep in mind, however, that these are just examples. A judge will review the facts of any request for a TRO to see how serious a potential violation could potentially be. Because of this, if a CEO worries that irreparable harm could actually occur, a TRO should always be an option to explore.

J. **Nuisances/Statute of Limitations/Laches**

If an ordinance violation is defined as a "nuisance" by statute, a new violation arises each day the illegal activity continues. *Card v. Nickerson*, 150 Me. 89, 96 (1954). Consequently, there is no "statute of limitations" per se which would cut off a municipality's right to prosecute a nuisance violation after a certain number of years. 30-A M.R.S. §4102 expressly defines certain building ordinance violations as a nuisance. 17 M.R.S. §2802 also defines certain activities as nuisances. 30-A M.R.S. §4302 states that any property or use existing in violation of a municipal land use ordinance or regulation is a nuisance. The prosecution of any violation which is not defined by statute as a nuisance is ordinarily subject to a 6 year statute of limitations, according to 14 M.R.S. §752.

Even if no formal statute of limitations applies to the prosecution of a violation, a municipality may be prevented from prosecuting on the basis of an equitable doctrine called "laches." Laches is similar to a statute of limitations, but requires both: (1) that the municipality waited too long to bring a complaint; and (2) the person against whom the complaint was brought was prejudiced by that delay. The facts of a particular case will determine whether laches applies. If a municipality has known about a violation for a number of years, or should have known, but has done nothing to stop the violation, a court might find that even if there is a violation, it would not be fair to order corrective action in light of the lack of enforcement action by the municipality. However, several Maine Supreme Court cases have upheld municipal enforcement actions against a violator even though the violation had existed for a long period of time, e.g., *Bakery. Town of Woolwich*, 517 A.2d 64 (Me. 1986) and *Town of Falmouth v. Long*, 578 A.2d 1168 (Me. 1990).

K. **Estoppel**

If a person commits an ordinance violation on the basis of advice provided by one or more municipal boards or officials, the municipality may be prevented in some cases from enforcing the ordinance against that individual on the theory of "equitable estoppel." Equitable estoppel means that it would be unfair for the municipality to take enforcement action because the violator reasonably relied to his detriment on the advice by doing something he would not have done otherwise. In assessing a claim of equitable estoppel against a government entity, the court considers the "totality of the circumstances, including the nature of the particular governmental agency, the particular governmental function being discharged, and any considerations of public policy arising from the application of estoppel to the governmental function." *Town of Union v. Strong*, 681 A.2d 14 (Me. 1996); see also *City of Auburn v. Desgrosseilliers*, 578 A. 2d 712 (Me. 1990). However, a town cannot be equitably estopped from asserting a violation when town approval for a project was based on misleading information provided by an applicant. *Turbat Creek Preservation, LLC v. Town of Kennebunkport*, 2000 ME 109, 753 A.2d 489.

Where the plain language of an ordinance is inconsistent with the advice given or action taken by the CEO, the court has held that the violator's reliance was not reasonable and therefore the municipality was not "estopped" from enforcing the ordinance. *Shackford and Gooch, Inc. v. Town of Kennebunk*, 486 A.2d 102 (Me. 1984); *Murray v. Town of*

*Topsham*, CV-87-36 (Me. Super. Ct., Sag. Cty., Oct. 6, 1988); *Schenker v. Town of York*, CV-88-88 (Me. Super. Ct., York Cty., Dec. 22, 1988); *Harris v. City of Portland*, CV-86-1297 (Me. Super. Ct., Cum. Cty., Feb. 1, 1989). Further, the unauthorized act of a municipal official cannot be grounds for estopping the municipality. *Shackford*, 486 A.2d at 106. However, where a property owner relies on the actions of officials who have legislative authority, a court is more apt to find that the municipality is estopped from enforcing the ordinance in question against that landowner. *City of Auburn v. Desgrosseilliers*, 578 A.2d 712 (Me. 1990). Even if the municipality is not estopped from enforcing the ordinance, the court will take into account whether the violator was provided incorrect information by the municipal officials in setting a penalty under 30-A M.R.S. §4452.

L. **Selective Enforcement**

If a municipality has been lax in enforcing its ordinances and then decides to prosecute a particular landowner for a violation, the violator may argue that the municipality is selectively enforcing the ordinance and unconstitutionally discriminating against him. The courts have held that to prove discrimination, the violator must show that the enforcement action against him "was a conscious intentional discrimination" and not just an attempt to begin reversing historically lax enforcement. *Alexander v. Town of Hampstead*, 525 A.2d 276, 280 (N.H. 1987).

M. **Governmental Projects**

As a general rule, projects conducted by a municipal or county government are subject to any relevant local ordinances (e.g., 30-A M.R.S. §4352(5)). State and federal projects, however, generally are not regulated by local ordinances, except as provided by state or federal law.

N. **Funds For Prosecution**

30-A M.R.S. §4452(3)(D) states that, if the municipality wins its case in the prosecution of a land use violation, it "must be awarded reasonable attorneys fees, unless the court finds that special circumstances make the award. . . unjust." In a growing number of land use cases at every level of the Maine court system, the courts are acknowledging this statute and awarding attorneys fees to prevailing towns and cities, *see, e.g., Town of Freeport v. Brickyard Cove Associates*, 594 A.2d 556 (Me. 1991); *City of Ellsworth v. McAlpine*, 590 A.2d 545 (Me. 1991); *Town of Holden v. Pineau*, 573 A.2d 1310 (Me. 1990). Compare, *Town of Freeport v. Ocean Farms of Maine, Inc.*, 633 A.2d 396 (Me.1993).

38 M.R.S. §355 establishes a non-lapsing Lake Environmental Protection Fund to assist municipalities with legal expenses incurred as a result of regulating land use activities and enforcement of land use laws adjacent to great ponds. The fund is administered by the DEP and is intended as a partial reimbursement (up to a total of \$25,000 in a single fiscal year) to municipalities which were not fully reimbursed by order of the court under 30-A M.R.S. §4452 and 38 M.R.S. §356.

O. **Prosecution Seeking Penalty - Strict Construction of Ordinance**

When a municipality is seeking to have a court impose a penalty on a violator, the Maine Supreme Judicial Court has held that it will strictly construe the provisions of the ordinance in favor of the person alleged to be in violation. *Town of Hartford v. Bryant*, 645 A.2d 18 (Me.1994). The Maine Supreme Judicial Court also has held that where a statute imposes a minimum civil penalty, the courts may not order the violator to pay a lesser penalty, unless the Legislature has authorized the court to do so. *Town of Orono v. LaPointe*, 1997 ME 185, 698 A.2d 1059. In *LaPointe* the district court calculated a fine against a junkyard operator at \$100 per day, for a total of \$73,000, then ordered all but \$3,000 suspended. The Supreme Court held that even though 30-A M.R.S. §4452 gave the court discretion regarding the calculation of a penalty on a daily basis, the State Junkyard and Automobile Graveyard Law (30-A M.R.S. §3751 *et seq.*) states that each day a violation continues constitutes a new violation and requires that the penalty be computed on a daily basis, 30-A M.R.S. §3758-A. The court's only declaration in this case was what dollar amount to impose per day within the minimum and maximum penalty range of \$100 to \$2,500 provided in §4452. The Supreme Court concluded that a minimum total fine of \$73,000 was statutorily required in this case.

P. **Religious Institutions and Activities**

The federal Religious Land Use and Institutionalized Persons Act, colloquially known as RILUPA, 42 U.S.C. § 2000cc *et seq.*, prohibits any governmental entity from enacting or enforcing any land use regulation that imposes a "substantial burden" on the exercise of religion by any person, including religious assemblies and institutions, unless the government can show that the regulation furthers a "compelling governmental interest" and is the "least restrictive means" of furthering that interest. In general, RILUPA's existence means that CEOs should taken into account any effect that an action, or subsequent land use decision by a planning board, could have an effect on religious practice, possibly triggering RILUPA's protections. For a copy of the law and information about court cases interpreting it, go to [www.rluipa.com](http://www.rluipa.com).

Q. **Chimneys, Fireplaces, Vents and Solid Fuel Burning Appliances**

25 M.R.S. §2465(5) expressly acknowledges that a municipal ordinance regulating the materials, installation, and construction of chimneys, fireplaces, vents, and solid fuel burning appliances may exceed the requirements of rules adopted by the Commissioner of Public Safety.

## SECTION IV. CASE LAW AND LEGISLATIVE UPDATE

### A. Case Law Update (as of May 30, 2017)

#### Osprey Family Trust v. Town of Owls Head, 2016 ME 89

(Relevant concepts: Board of Appeals, Standard of Review, Shoreland Zoning)

#### Overview:

- Osprey applied to the Town’s Planning Board to replace an existing deckhouse with a larger house. The project was located within the 75 foot shoreland setback.
- There was also a wetland of special significance in the rear of the property.
- The proposal was for the new structure to still be partially located within the 75-foot setback, but the amount of incursion would be reduced – an addition would also be built that didn’t incur into the setback or the protected wetland.
- The Planning Board held several hearings and unanimously accepted the plan.
- However, in its findings of fact, the Planning Board concluded that it felt the proposed location was a sufficient compromise.
  - Yet, the applicable section of the Town’s Land Use Ordinance stated that “a nonconforming structure may be relocated within the boundaries of the parcel on which the structure is located provided that the site of relocation conforms with all setback requirements *to the greatest practical extent...*”
- Abutters challenged and the Board of Appeals reversed the Planning Board, finding that the structure was not relocated to a position where incursion was limited to the greatest possible extent.
- Superior Court upheld the decision of the Board of Appeals.
- Osprey appealed, arguing in part that it *was* reasonable for the Board to take the location of the wetland and the drainage into consideration when deciding where the most practical location for the house would be.

#### Holding:

- Planning Board erred. They relied on the portions of the Shoreland Zoning Ordinance that dealt with the *relocation* of buildings; this was incorrect.
- Instead, the Planning Board should have looked at the provisions regarding the construction of *new buildings* within the shoreland zone.

#### Takeaway:

- While “compromise” solutions may make policy sense, they don’t usually stand up in court, particularly when they don’t conform to the plain language of an ordinance.

**Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate LLC, 2016 ME 114  
(Relevant concepts: Public Trust Doctrine, Public Beach Access)**

Overview:

- Landowner had permitted public to use a private path to reach Cedar Beach for many years, but had installed a chain to prevent cars from using it. Many other adjacent landowners also had private rights of way over the path.
- Public began to leave trash and create noise on the path.
- Subsequent owners posted a sign telling the public that they were preventing the public from acquiring a right of way.
- Members of the public sued, alleging that they had acquired a prescriptive easement over the path.

Holding:

- To establish a prescriptive easement, a person must prove: (1) lack of owner's express permission; (2) that the person had used the land as the true owner would have; (3) do so for at least 20 years; and (4) give the true owner adequate notice of your use.
- Since *Almeder*, it has been established that public prescriptive use has been *with the owner's implied permission*, making establishing public prescriptive easements particularly difficult.
- This was the case here. There was not a sufficient showing to prove the existence of a public prescriptive easement.

Takeaway:

- Establishing a *public* prescriptive easement is extremely challenging.

**Friends of the Motherhouse v. City of Portland, 2016 ME 178  
(Relevant concepts: Rezoning; Ordinance Definitions; Authority of Planning Board)**

Overview:

- Developers purchased an old school in Portland, with hopes of converting it into a senior-housing complex.
- To do so, they requested a zoning amendment from the City, to allow them to build a denser project.
- The Planning Board reviewed the request and unanimously recommended it to the City Council, who also approved the rezoning.
- After the successful rezoning, the developer applied for subdivision approval, which was granted.
- Plaintiffs challenged the rezoning, claiming that a rezoning to this particular zone was not allowed because it was not consistent with the City's comprehensive plan.
- The Superior Court granted summary judgment to the City and the developer, finding that the rezoning was in "basic harmony" with the City's comprehensive plan, and thus the rezoning was valid.

#### Holding:

- The basic rule is that zoning amendments are legislative actions, giving municipalities a wide amount of discretion to enact what they see fit.
- Here, the change to the zoning was clearly consistent with the comprehensive plan, as the CP contemplated residential uses and allowed for greater density in particular places.

#### Takeaway:

- Challenging a zoning change as being inconsistent with the comprehensive plan is usually not a strong argument.
- Municipalities have *wide latitude* in adopting zoning ordinances, so long as they're not outlandish.

### **21 Seabran, LLC v. Town of Naples, 2017 ME 3**

#### **(Relevant Concepts: Ordinance interpretation; Board of Appeals)**

#### Overview:

- Plaintiff owned a parcel on Brandy Pond in Naples. The lot had a 3-bedroom house and a 30 x 40 foot detached garage.
- Plaintiff submitted building permits to renovate the second floor of the garage, in order to become a “bunk house” and to add a suitable subsurface wastewater disposal system.
  - The structure was going to include three bedrooms, two bathrooms, a sitting room, a washer and dryer, and storage closets.
- CEO did not act on the permits, because it was felt that the structure didn't constitute a bunkhouse within the meaning of the Maine subsurface wastewater treatment rules.
- Plaintiff then submitted a new application. The plan was unchanged, but the description was changed to **“3 accessory bedrooms and 2 baths on the second floor of existing garage.”**
- CEO deemed the proposal to constitute a **“dwelling unit”** and denied the application because the parcel lacked sufficient frontage and lot area.
- Administrative appeal was filed.
  - CEO argued that while the definition of “dwelling unit” within the Naples ordinance required a kitchen, which was not called for in the plan, it was potentially possible for someone to add a hot plate, or similar equipment, to create a makeshift kitchen.
  - Board of Appeals denied the appeal.
    - Board reasoned that they were able to use their “common sense” to decide whether something constituted a dwelling unit or not.
- Appeal under Rule 80B was filed.
  - Superior Court affirmed the Board of Appeals, citing the great amount of deference given.

Holding:

- Law Court reversed the Board of Appeals.
  - The plain language of the ordinance required the presence of a kitchen in order for a dwelling unit to exist.
  - Board of Appeals can't use their "common sense" to go beyond the clear language of an ordinance. When you have a definition, it has to be used.

Takeaway:

- Boards of Appeals (and CEOs) are more than welcome to use their discretion when definitions are murky or ambiguous.
- HOWEVER, even if "common sense" would dictate otherwise, if there's a clear definition of a particular use or other term, that definition must control.
- Don't go out of your way to go beyond the stated definition – chances are you'll be overturned.

**Hollie A. Beal v. Town of Stockton Springs, 2017 ME 6  
(Dangerous Buildings; Due Process; Substantial Evidence on the Record)**

Overview:

- CEO received complaint about Beal's house being potentially dangerous.
- CEO later made a site visit to inspect the property.
- Eventually, the CEO met with Beal and her attorney to establish a compliance plan.
- A month later, this plan was submitted, but the CEO determined that it was grossly inadequate – just a page in length.
- Then, at the meeting during which a consent agreement regarding the property was going to be submitted, Beal did not attend, so the item was tabled.
- A few months later, Beal requested that the entire Board recuse itself, because she felt as if they had all prejudged her case.
- Regardless, the Board proceeded with a public hearing on the dangerous building.
  - The Board heard testimony from the CEO and from Beal's contractor regarding the structural issues with the building.
  - However, the Board did not allow Beal's attorney to examine or cross-examine these witnesses.
    - Instead, Beal's counsel was invited to submit questions for the witnesses and provide a closing argument.
- Board eventually voted unanimously to condemn the building.
- However, the Board then voted to reopen the public hearing to hear additional testimony, including allowing the cross-examination of witnesses – however, Beal declined to give any additional information.
- Finally, the Board produced findings of fact regarding the unsafe nature of the building.
- Beal filed suit, alleging:
  - The Board violated her right to due process when the Board held a public hearing, but denied her the opportunity to present evidence or cross-examine.



Holding:

- Affirmed Superior Court decision.
- Applying the *Mathews* test, the Court found that although Beal had an important property right at stake, the Board did provide enough procedure to allow her due process.
  - This was particularly true after the Board reopened the hearing to allow for the cross-examination of witnesses.
- As a general matter, due process at a local administrative level does not include the right to cross-examine witnesses.

Takeaway:

- Be sure to not “prejudge” matters before a public hearing has occurred.
- However, although there must be substantial evidence upon the record to allow a Board to make a competent decision, this does not necessarily require the cross-examination of witnesses.

**B. Legislative Update From the First Regular Session of the 128<sup>th</sup> Legislature (as of June 1, 2017)**<sup>4</sup>

**Marijuana**

**LD 88 – An Act To Delay the Implementation of Certain Portions of the Marijuana Legalization Act**

- This emergency bill delayed the full implementation of the retail elements of the citizen initiative that legalized recreational marijuana in Maine to February 1, 2018.
- The elements of the initiative providing lawful personal use and possession and the right to limited levels of personal cultivation are not affected by the bill and the effective date for those provisions of the initiative remains January 30, 2017.
- This bill delays the full implementation of the retail elements of the citizen initiative that legalized recreational marijuana in Maine to February 1, 2018.
- The bill also makes several targeted amendments to the initiative. Specifically, it:
  - Limits the areas where marijuana can be lawfully consumed to a private residence, including curtilage or on other private property, not generally accessible by the public;
  - Prohibits the consumption of marijuana:
    - (a) in a motor vehicle in the public way;
    - (b) in a private residence or on private property used as a day care or baby-sitting service during the hours of operation;

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<sup>4</sup> The authors are grateful to the Maine Municipal Association for the information provided in its “LD List,” upon which this legislative summary is based.

- (c) in a designated smoking area under the Workplace Smoking Act of 1985; and
- Prohibits the possession of edible retail marijuana products until February 1, 2018 unless the edible marijuana is a product purchased for medical use; and

Status: Enacted (1/27/17)

**LD 231 – An Act To Allow Municipalities To Regulate the Growing of Marijuana**

- Provides express authority to municipalities to adopt ordinances that limit the cultivation of *either* medical or recreational marijuana to certain geographic locations within the municipality or prohibit the cultivation of marijuana within the municipality altogether.

Status: Carry over requested 5/17/17

**LD 243 – An Act To Change the Oversight Agency for Recreational Marijuana from the Department of Agriculture, Conservation and Forestry to the Department of Administrative and Financial Services, Bureau of Alcoholic Beverages and Lottery Operations and To Allocate Funds for Implementation**

- Changes the state licensing authority under the Marijuana Legalization Act from the Department of Agriculture, Conservation and Forestry to the Director of the Bureau or Alcohol Beverages and Lottery Operations with the Department of Administrative and Financial Services.
- Creates a fund to cover the costs of the rule making process to be undertaken by the Director and capitalizes the fund with an appropriation of \$1.6 million.

Status: May 24, 2017 Passed to be Engrossed.

**LD 301 – An Act To Protect Children from Marijuana Sales by Prohibiting Retail Marijuana Establishments and Social Clubs near Schools**

- This bill prohibits the issuance of a license under the Marijuana Legalization Act to an applicant that would operate a retail marijuana establishment or social club located within 2,000 feet of the property line of any pre-existing public or private school serving children from prekindergarten to grade 12.

Status: Carry Over Requested, May 17, 2017

**LD 433 – An Act To Allow Municipalities To Apply a Local Option Sales Tax to the Sale of Marijuana**

- This bill authorizes a municipality that approves the location of a retail marijuana store or social club to impose, presumably by ordinance, a local option sales tax that would piggyback on the 10% state tax that current law imposes on the retail sale of marijuana.

Status: Carry Over Requested, May 17, 2017

**LD 499 – An Act To Allow Municipalities To Prohibit Retail Marijuana Facilities in Safe Zones**

- This bill allows municipalities by ordinance to prohibit the location of retail marijuana establishments and retail marijuana social clubs within any youth congregation “safe zone” designated by the municipality.

Status: Carry over requested (5/17/17)

**LD 596 – An Act To Promote Highway Safety by Restricting the Use of Marijuana and Possession of an Open Marijuana Container in a Motor Vehicle**

- Similar to the laws regarding alcohol, this bill makes consuming marijuana or possessing an open container of marijuana in the passenger area of a motor vehicle a traffic infraction.

Status: Carry over requested

**LD 625 – An Act To Prohibit the Location of a Marijuana Facility within 2,000 Feet of a House of Public Worship or Property Associated with a House of Public Worship**

- Title is self-explanatory.

Status: Carry over requested

**LD 672 – An Act To Clarify a Municipality's Authority To Adopt and Enforce Land Use Regulations for Marijuana Facilities**

- This bill clarifies that a municipality may adopt and enforce land use regulation that applies to marijuana facilities that grow, process, package, distribute, sell or provide *either* medical or recreational marijuana in the same regulatory manner as any other activities generating similar land use and compatibility effects.

Status: Carry over requested

**LD 734 – An Act Extending the Time Period for Municipalities To Approve Marijuana Businesses**

- Under the law legalizing the use of recreational marijuana, the state licensing authority for recreational marijuana facilities is supposed to forward a licensing application it receives for a marijuana facility to the municipality where the facility is going to be located and that municipality has 14 days to review the application and report back to the state as to whether it approves or denies each application. This bill extends that timeframe to 60 days.

Status: Carry over requested

**LD 1135 – An Act To Strengthen the Efficacy of the Medical Marijuana Laws**

- This bill makes several amendments to the Maine Medical Use of Marijuana Act, including:
  - (1) allowing municipalities to limit the number of primary caregivers that may operate within that municipality and allowing for the enactment of reasonable municipal regulations of those facilities; and
  - (2) requiring a primary caregiver to disclose upon the request of a law enforcement official, municipal code enforcement officer or planning board, any of the information contained in applications and supporting information submitted by the primary caregiver to the Department of Health and Human Services except confidential and personally identifying information regarding any qualifying or registered patients.

Status: Carry over requested

**LD 1527 – An Act To Ensure Safety, Quality and Transparency in the Medical Marijuana Market and To Ensure Sufficient Funding for Regulation and Enforcement with Respect to the Retail Marijuana Industry**

- Among other things, this bill amends the Maine Medical Use of Marijuana Act to provide that registered dispensaries and primary caregivers are subject to inspection by the local fire department, building inspector or code enforcement officer to confirm that no health or safety concerns are present and compliance with local health and safety ordinances.

Status: Carry over requested

**MUBEC**

**LD 873 – An Act To Adopt Tiny House Standards in the Maine Uniform Building and Energy Code**

- This bill requires the Technical Building Codes and Standards Board, which oversees the ongoing maintenance of MUBEC, to ensure that “tiny house” construction (less than 400 square feet of floor area, excluding the area above the main floor) is permissible under that code, and that the Board adopt standards for tiny house

construction consistent with the Tiny House Appendix to the International Residential Code.

Status: Dead

**LD 1392 – An Act To Allow Municipalities To Opt Not To Enforce the Maine Uniform Building and Energy Code**

- Under current law, all municipalities with a population over 4,000 residents must enforce MUBEC. Formal adoption of the code by the municipality’s legislative body is not necessary.
- The bill authorizes those municipalities to choose not to adopt and enforce a building code.

Status: 5/30/2017 - Unfinished Business

**Dangerous Buildings**

**LD 1459 – An Act To Protect the Public from Dangerous Buildings**

- This bill modernizes the dangerous building statute without significant substantive change except that the bill allows the order issued by the municipal officers prescribing the required disposal of the dangerous building to allow for delay of disposal if the owner or party in interest has demonstrated the ability and willingness to satisfactorily rehabilitate the building.

Status: Passed to be enacted 5/24/17

**Tax Increment Financing Districts (“TIF’s”)**

**LD 1565 – An Act To Ensure the Effectiveness of Tax Increment Financing**

- This bill amends the municipal Tax Increment Financing District law to provide that on or after April 1, 2018, the Department of Economic and Community Development may *only* approve development programs for tax increment financing if 80% of the area within the TIF district is designated for development by an entity engaged in business directly related to financial services, manufacturing or certain “targeted technologies”, including biotechnology, aquaculture and marine technology, composite materials technology, environmental technology, advanced technologies for forestry and agriculture, information technology and precision manufacturing technology.

Status: Carry over requested 5/19/17

## Subdivisions

### **LD 628 – An Act To Amend the Municipal Subdivision Laws**

- Current law provides that a subdivision is not created by the transfer of any interest in land to an abutter, unless the intent of the transferor is to avoid the objectives of the law governing subdivisions.
- Current law further provides that a subdivision is created if the land that was transferred is again transferred within 5 years to another person without all of the merged land.
- This bill repeals the 5-year holding period.

Status: Dead. (Note: A similar bill, LD 1081, attempting to delete the 5-year holding period, is also dead).

### **LD 805 – An Act To Streamline the Municipal Review Process When Dividing a Structure into 3 or More Dwelling Units and To Amend the Process for Recording Subdivision Variances**

- Adds a new exemption from subdivision review, allowing a division of a structure into 3 or more dwelling units in municipalities where the project is subject to municipal site plan review.
- The bill amends the provision concerning when a municipal ordinance may have a definition of "subdivision" that conflicts with state law.
  - Previously, municipalities could to expand the definition of "subdivision" to include the division of a structure into three or more commercial or industrial units. This bill removes that authority.
- The bill repeals provisions under which leased dwelling units are not subject to subdivision review.
- Under current law, when a variance is granted with respect to a subdivision application, the variance must be recorded in the registry of deeds within 90 days of the final subdivision approval or the variance is void. This bill changes that period to two-years.

Status: Passed to be enacted 5/24/17

## Roads

### **LD 1588 – An Act to Maintain Mail Routes and Access to Residential Structures**

- Amends the laws governing the process of discontinuing a town way, the presumption of abandonment, and a very old statute regarding "mail routes".
- Prohibits the discontinuation of a town way that includes the discontinuation of the public easement if the public easement provides the sole access to any property.
- Provides that if public easement is retained in a discontinuation order, the purpose of the retention must be stated in the order and the municipality must keep the public easement passable for that purpose.

- Provides that no town way can be discontinued if there is a residential structure on the roadway and the town way is the only way to provide access to that residential structure, and that any town way that cannot be discontinued for that reason must be maintained by the municipality for motor vehicle access.
- Allows for any presumption of road abandonment after 30 consecutive years of no municipal maintenance to be rebutted upon the showing of evidence that a residential structure was on the town way and depended on the town way for sole access.
- Mandates the year-round municipal maintenance of any established mail route in the municipality regardless of the legal status of the town way or discontinued, abandoned or private road.

Status: Carry Over Requested, May 26, 2017

#### **Of Interest to LPI's**

#### **LD 372 – An Act To Protect Public Health through Septic Tank Inspections**

- With exceptions for recently constructed or inspected septic systems, current law requires a written statement from the seller of property with a septic system within the shoreland zone that the system has not malfunctioned within the last 180 days and further requires a full inspection of a septic system located on property being sold or transferred that is located within the coastal shoreland zone.
- This bill expands those same requirements to the sale or transfer of property including a septic system no matter where the property is located in the state.

Status: Dead

#### **LD 559 – An Act To Standardize the Law Concerning Property Transfers and To Protect Water Quality**

- With exceptions for recently constructed or inspected septic systems, current law requires a full inspection of a septic system located on property being sold or transferred that is located within the coastal shoreland zone.
- This bill expands those same requirements, effective on and after April 1, 2018, to the sale or transfer of property including a septic system in all shoreland zones, not just the coastal shoreland areas.

Status: Dead

## Shoreland Zoning

### **LD 400 – An Act Regarding the Construction or Placement of Decks within the Shoreland Zone**

- This bill authorizes municipalities to adopt ordinance provisions under the shoreland zoning law that would allow the construction of a deck on a private residence that extends into the shoreline setback area provided the deck was no larger than 192 square feet, is for residential use or storage of small watercraft or portable docks, does not extend over or into the waterbody or wetland, and the construction of which does not create a cleared opening greater than 250 square feet in the forest canopy.

Status: Dead 5/24/17

### **LD 684 – An Act To Increase Vegetative Buffers in the Shoreland Zone**

- This “concept draft” bill proposes to amend the laws governing shoreland zoning to increase the vegetative buffer requirement from 75 feet to 150 feet for certain areas in the shoreland zone, and to remove the grandfathering provisions that allow smaller vegetative buffers on the grandfathered parcels.

Status: Dead

### **LD 1096 – An Act To Improve Shoreland Zoning Rules and Enforcement To Support Municipalities**

- This bill makes four changes to the law governing the shoreland zoning program.
  - (1) requires the Office of Community Development within the Department of Economic and Community Development to provide an advanced training course in the practice of shoreland zoning management for municipal code enforcement officers (in addition to the basic training course currently available);
  - (2) requires municipal shoreland zoning ordinances to establish a requirement for all applicants for development within the shoreland zone to provide preconstruction photographs and, ultimately, post construction photographs of the shoreland vegetation and development site;
  - (3) increases the maximum per day civil penalty established in statute for a specific violation of a municipal land use ordinance from \$2,500 to \$5,000; and
  - (4) increases the special maximum per day penalty for a violation of a land use ordinance within a resource protection zone from \$5,000 to \$10,000.

Status: Divided report 5/24/17



## Signs

### **LD 119 – An Act Regarding the Display and Content of Political Signs**

- This bill amends the law regarding the placement of signs in the public right of way, which was significantly amended in 2016 to achieve “content neutrality” in order to comply with a 2016 U.S. Supreme Court decision (*Reed v. Town of Gilbert*) which sharply limited the ability of governments to regulate roadside signage on the basis of sign content.

Status: Dead (4/27/17) like similar bills regarding signs in a right of way (LD 1169, LD 1351). Although these bills are dead, it is a good reminder that towns need to be reviewing their own sign ordinances.

- Note: In the *Reed* case, the local ordinance established different requirements for different kinds of signs. Political signs could be larger and displayed for longer than other kinds of signs, including ideological signs and religious event signs. In this case, a local church challenged these distinctions, arguing that these distinctions ran afoul of the first amendment constitutional requirement of “content neutrality.”
- Why is this important? Towns need to review their sign ordinances to see if they would pass constitutional muster. Very likely that they will not, so they may need to be tweaked.
  - **For more information:**  
<https://mainemunicipalinsights.wordpress.com/2017/05/25/sign-of-the-times-almost-two-years-later-maine-sign-laws-on-dubious-legal-ground/>

## Impact of Rising Sea Levels

### **LD 467 – An Act To Authorize a General Fund Bond Issue To Address Changes in Sea Level**

- This bill sends out to the voters a proposed \$5 million bond issue to support improvements to sea level prediction models by providing more detailed mapping of coastal zones and monitoring sea level changes in order to mitigate the impact of rising sea levels

Status: Dead

### **LD 469 – An Act To Establish a Generally Applicable Regulatory Standard To Address Impacts of Sea Level Change and Increased Storm Surges**

- This bill directs the Department of Environmental Protection to develop a generally applicable regulatory standard that addresses the impact of sea level change and increased storm surges on coastal resources and to apply that standard to the various related activities under its jurisdiction.

Status: Dead

### **LD 540 – An Act To Help Municipalities Prepare for Sea Level Rise**

- This bill amends the laws governing municipal and multi-municipal comprehensive planning to add an additional goal in the list of goals which form the foundation of the growth management law. The additional goal is to plan for the effects in sea level on buildings, transportation infrastructure, sewage treatment facilities and other relevant infrastructure proximate to the coastal area. In the section of law detailing the elements of a comprehensive plan, the bill authorizes coastal municipalities to include projections regarding changes in sea level and the potential effects of the rise in sea level on those same types of infrastructure.

**Status:** Governor Vetoed 5/19/17 and veto sustained in House 5/23/17 (Dead)

### **LUPC (Formerly “LURC”)**

### **LD 549 – An Act To Recognize Preexisting Land Uses**

- This bill amends the law governing the Maine Land Use Planning Commission. It provides that if a person can demonstrate that a land use or structure that does not conform with the applicable land use standards has existed for at least 30 years, then there is a rebuttable presumption that the use or structure is legally nonconforming.

**Status:** Passed to be enacted 5/24/17

### **Right to Know Law**

### **LD 70 – An Act To Allow Municipal Governing Boards of 3 Members To Perform Official Duties via Technology**

- This “concept draft” bill proposes to allow municipal governing boards of three members to perform official duties via technology, such as conducting meetings remotely.

**Status:** Dead 4/11/17

### **LD 146 – An Act To Protect the Confidentiality of Local Government Employees' Private Information**

- Imposes similar confidentiality provisions for the protection of municipal employees' personal information as for state employees.
- It provides that information in the municipal employer's possession of an employee's age, ancestry, ethnicity, genetic information, national origin, race or skin color, marital status, mental or physical disabilities, personal contact information, personal payroll management decisions, religion, sex or sexual orientation and social security information is confidential and not a public record. (This list adds two new categories, i.e., sexual orientation and genetic information.)

Status: Passed to be enacted 5/1/17

**Miscellaneous:**

**LD 422 – An Act To Facilitate the Creation of the Maine Water Trust To Regulate and Protect Maine's Water Supply and To Ensure the Quantity and Quality of Maine's Drinking Water**

- Imposes a two-year moratorium on new contracts or agreements by consumer-owned water utilities, municipalities, state agencies or other governmental entities involving or allowing the extraction of more than 75,000 gallons of groundwater during any week or more than 50,000 gallons of groundwater on any day, with an exception for extraction solely for agricultural use or storage for agricultural use.
- Establishes a 10-member working group that is charged during the period of the moratorium to develop the Maine Water Trust. The working group must develop and recommend laws that establish the control and dominion of the state government over all groundwater in the state and the trust must be designed to monitor groundwater levels and quantity, determine the quantities of groundwater that can be accessed for commercial use, regulate the use of groundwater for commercial purposes and inventory water infrastructure, including municipal drinking water and wastewater pipelines. The working group's report and recommendations must be submitted to the Legislature by January 15, 2019.
- Directs the Department of Agriculture, Conservation and Forestry to convene the Water Resources Planning Committee, which must include membership from five state agencies and six members of the public with expertise in the areas of agriculture, public water utilities, water bottling and the sale of bottled water, the use of water by private well owners, the environment and conservation, and the use of water by commercial entities.

Status: Passed to be enacted 5/23/17

**LD 535 – An Act To Protect Maine Citizens from Aerial Trespass**

- Proposes to make the activity of flying an unmanned aerial vehicle into the airspace over or crossing the boundary of another person's property and recording or videotaping or otherwise violating the privacy of the property owner a form of trespass.

Status: Dead

**LD 1139 – An Act To Clarify Certain Right-of-way Limitations**

- This bill provides that a conveyance after January 1, 2018 of an easement or a right-of-way leading to or touching upon a water body does not include any right by

implication to install a dock or other fixture on that waterbody unless expressly stated in the conveyance document.

Status: Passed to be enacted 5/31/17

**LD 1381 – An Act To Clarify Appeals of Municipal Land Use Decisions**

- Amends the laws regarding municipal boards of appeal and regarding appeals of municipal land use decisions to reflect the holding of the Law Court in *Bryant v. Town of Camden*, which relates to when a local land use decision is ripe for appeal.
- It provides that a final decision occurs only after an application has received all required municipal administrative approvals by a municipality’s board of appeals, planning board or municipal review authority, a site plan or design review board, a historic preservation review board and any other review board created by municipal charter or ordinance.
- Provides that an appeal to the Superior Court may not be made until a final decision occurs (i.e., that each applicable review board has weighed in).

Status: May 3, 2017 (out to pass) but not reported out

**LD 22 – An Act To Repeal the Requirement That Municipalities License Roller-skating Rinks**

- In 2014, a number of old municipal licensing statutes were repealed in favor of a general statute recognizing the inherent municipal authority to license the various activities as a matter of home rule authority.
- The mandate to license roller skating rinks was inadvertently left out of the list of repealed mandates. This bill repeals the mandate that municipalities license roller skating rinks.

Status: Signed by Governor 4/11/17 (Enacted)

**DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT,  
OFFICE OF COMMUNITY DEVELOPMENT  
CODE ENFORCEMENT OFFICER TRAINING/CERTIFICATION PROGRAM**

**Marijuana Supplement**

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**INTRODUCTION**

The passage of the Maine Marijuana Legalization Act (the “Act”) in November 2016 has caused a flurry of activity in municipalities across Maine. Towns and cities have attempted to navigate the potential economic impact of legalized recreational marijuana, while also taking steps to help protect their communities from some of the potentially negative forces associated with legalization.

Unfortunately, the impact of the Act changes every day. As of this writing, *some* of the Act’s provisions are in full force, particularly those relating to individual cultivation and consumption of marijuana. However, much of the Act’s impact relating to the establishment and operation of retail marijuana businesses will not begin until at least February of 2018, and many of the bills considered by the Legislature during the past term (see the Legislative Update) have been carried over for consideration next year. In the meantime, Code Enforcement Officers (and other local officials), should do all they can to familiarize themselves with the Act, and determine what steps they can take within the confines of the position to help their respective municipalities transition into this new legal landscape.

This supplement to the Legal Issues manual attempts to provide a brief, non-comprehensive overview of the Act, the options available to municipalities to regulate recreational marijuana on a local level, and some ideas of how CEOs can best support these efforts.

## MARIJUANA LEGALIZATION ACT

The Act itself is best split into two distinct parts: individual use, and retail marijuana establishments and regulation. The individual use aspect is rather straightforward. Any person over the age of 21 may possess: (1) up to 2 ½ ounces of prepared marijuana; and (2) up to 6 flowering marijuana plants and up to 12 immature marijuana plants. 7 M.R.S.A. § 2452(1).

There are, however, a few caveats. First, any marijuana plants that a person is growing must be kept either on that person's private property, or the private property of another person who has provided written consent. 7 M.R.S.A. § 2452(2). Second, this "individual use" marijuana *cannot be sold* to another person. Some clever individuals have attempted to *donate* excess marijuana to another in exchange for a *return donation* of some other form of compensation. The courts have not spoken on the issue, but one can imagine that this approach likely will not be approved. Third, while a person may possess marijuana within these limits, they may only consume such marijuana in a nonpublic place. Individual residences are certainly included, but to what extent nonpublic businesses, or even an individual's front yard or driveway may be included, have not been clarified. Finally, as opposed to the retail marijuana businesses discussed below, municipalities have very little, if any authority to enact further restrictions on personal use beyond those that are laid out in the Act.

Next, the Act allows the establishment of five distinct types of marijuana-related businesses (7 M.R.S.A. § 2448):

- **Retail Stores:** these are "storefront" facilities where marijuana can be sold to those over age 21. These stores can also sell paraphernalia and other merchandise related to marijuana, but *cannot* sell any consumable product like alcohol, cigarettes, or food.
- **Cultivation Facilities:** these are facilities where marijuana is grown and processed for sale to others. Currently, statewide cultivation space is limited to 800,000 square feet and will be divided between smaller facilities (less than 3,000 SF) and larger facilities (3,000 SF or more).
- **Manufacturing Facilities:** this is the "middle man." Manufacturing facilities purchase marijuana from cultivators and process it into retail marijuana or marijuana-infused products. However, these products cannot be sold directly to consumers, but have to be sold to retail stores first.
- **Testing Facilities:** the Act includes numerous provisions related to health, safety, and the potency of marijuana sold. These facilities *only* test marijuana before sale, but cannot sell it.

- **Social Clubs:** these are facilities that individuals can go to and both purchase and consume marijuana *on premise* (as opposed to a retail store) where the product must be consumed *off premise*. Social clubs may also sell food, both infused with marijuana and without, but may not sell alcohol or cigarettes.

However, these facilities cannot simply open up shop whenever they please. After the passage of LD 88 by the Maine Legislature, the State has until February of 2018 to draft applicable regulations to detail the process and rules for the licensing of these facilities. Then, once those rules are written, interested entrepreneurs must go through a rigorous process to receive the needed licenses. This not only includes a state component, but the possibility of additional local licensing. At a minimum, the state will ensure that any licensed retail marijuana facility is in a proper location, in accordance with the host municipality's land use ordinance. Additionally, municipalities may opt to add their own round of licensing, like that for other liquor licensees, or other businesses. 7 M.R.S.A. § 2449.

### LOCAL LAND USE OPTIONS

For good reason, the allowance for retail marijuana stores and social clubs concerns a lot of local municipal officials, particularly in regards to safety, property values, and the potential effect on the local economy. Luckily, the Act provides several local regulatory options, allowing municipalities to allow retail marijuana within their limits to the extent they feel comfortable.

First, a municipality may choose to be a *dry town*, completely prohibiting retail marijuana establishments and social clubs within the town. 7 M.R.S.A. § 2447(4). Note, however, that even if a town has elected to be a *dry town*, it cannot prohibit the private consumption and cultivation of marijuana explored above.

Second, a municipality has all of its zoning "tool kit" available. 7 M.R.S.A. § 2449. In this regard, municipalities can define each retail marijuana "use" and limit each to a zone or zones. Additionally, as with other allowed land uses, municipalities can establish *performance standards* tailored to each use and the needs of the community. Although this is not an exhaustive list, many municipalities have chosen to enact standards that require a certain buffer zone (e.g., 1500 feet) between retail marijuana facilities and schools or day cares, require certain security measures, and require that marijuana facilities use certain equipment to limit the amount of adverse smell produced.

However, as discussed above, such local land use regulations can only be used to restrict or otherwise regulate the retail aspects of the Act. They *cannot* be used to further constrict or otherwise interfere with an individual's ability to possess and consume legal amounts of recreational marijuana.

## MEDICAL MARIJUANA

What is important to remember is that the legalization of recreational marijuana *does not affect* Maine's existing medical marijuana system. Since 1999, individuals diagnosed with certain medical conditions can receive a prescription for medical marijuana. This prescription allows the individual to either grow up to six marijuana plants on their own, or purchase marijuana from a certified *dispensary* or *caregiver*. A dispensary is like a retail marijuana store – a facility where a patient can go to shop for and buy marijuana and accompanying supplies. Alternatively, Maine's 3,000 caregivers are varied in their methods. While each caregiver is only allowed to grow marijuana for five patients, some choose to do this within their own homes, while others choose to grow in larger, more industrial facilities. The only express prohibition on this practice is that caregivers cannot operate as a collective – meaning that caregivers must operate independently and cannot pool resources. This leads to some rather interesting setups, with four or five caregivers growing in a warehouse that has been separated into individual stalls with their own electricity and water supply, which should be kept in mind by CEOs when and if they perform routine electrical or plumbing inspections.

## ROLE OF THE CODE ENFORCEMENT OFFICER

CEOs wear many hats. We have outlined several them in Section I, Chapter 1 of the legal issues guide. However, when it comes to a highly-charged, fast-evolving topic like recreational marijuana, it is also important to remember that a CEO is not charged with enforcing the ins and outs of the Maine Marijuana Legalization Act, or federal law. Instead, the CEO's focus should remain on ensuring that marijuana enterprises are compliant with the municipality's land use ordinance (including shoreland zoning), as well as state building and plumbing codes, to the extent that the CEO administers them. With that in mind, here are a few tips for CEO involvement in retail marijuana regulation:

1. **Leaving Policing to the Police:** if a town licenses a retail marijuana facility then the CEO should ensure that any renovations and improvements made to a building are code-compliant. Additionally, the CEO should ensure that the business is compliant with all appropriate land use provisions, including minimum lot size, density, and setbacks. However, a CEO should *not* look to ensure that every marijuana business or individual cultivator is complying with state law. For example, a CEO should not get in the habit of inspecting to ensure that a person is only growing six plants instead of seven, or to ensure that the business is compliant with its state license. With that being said, keeping an open line of communication between the Code Enforcement and Police departments could prove helpful if future problems arise.
2. **Retail and Medical Marijuana Are Separate:** many municipalities have already adopted zoning classifications for medical marijuana cultivation facilities, often limiting them to more industrial parts of town. If this is the case, a CEO may be called to issue a notice of violation when and if medical marijuana is being grown in a zone where it is not permitted. **However**, if the marijuana is being grown in an



individual home, remember that a person may still grow *recreational marijuana* regardless of any medical marijuana zoning restrictions. While this may be a mind-numbing, mind-bending exercise, the important point is that the rules regarding what and where marijuana can be legally grown differ dramatically based on which law a person is operating under.

3. **Stay informed:** the laws and policies surrounding recreational marijuana in Maine are changing rapidly. This guide is a good place to start should questions arise, but staying on top of new developments, particularly as they relate to land use and zoning, will prove invaluable. Also, because this area of the law is changing so quickly, always be sure to consult legal counsel if you are unsure of the correct way to move forward.