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**SHORELAND ZONING REPORT TO THE
ONE HUNDRED AND NINETEENTH LEGISLATURE**

Submitted by the:

**Department of Environmental Protection
Bureau of Land and Water Quality
Division of Land Resource Regulation
Shoreland Zoning Unit**

Pursuant to 38 M.R.S.A., Section 449

March 15, 1999

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EXECUTIVE SUMMARY

Maine's organized communities are required to adopt ordinances regulating land-use activities in the shoreland zone. The Department of Environmental Protection is responsible for general oversight of municipal administration and enforcement of those ordinances.

In carrying out its responsibilities the Department places emphasis on providing assistance to the municipalities. Assistance efforts include: conducting code enforcement officer, planning board, and appeals board training; publishing educational materials; providing upgraded zoning maps; reviewing and providing comments on local shoreland ordinances; providing on-site technical assistance to town officials and the public; and responding to verbal and written inquiries from those parties. In order to improve the Department's abilities to carry out these activities, the Department has added a shoreland zoning staff position to its Bangor Regional Office.

An optional alternative to the 30% expansion limitation for nonconforming structures was adopted and incorporated into the Department's *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*. It is anticipated that many municipalities will be incorporating this new option into local ordinances in the next few years.

The return rate of the biennial code enforcement officer activity reporting forms remains disappointingly low. On a positive note, however, the information submitted shows a reduction in the percentage of variance applications that are approved. Although that rate is still too high, it dropped from 65% in the late 1980's to 38% during the two-year period covered by this report.

Regarding recommendations to the Legislature, the Department is requesting a statutory amendment to give it standing to appeal local board of appeals decisions to the Superior Court. It also is recommending that an independent analysis of the shoreland zoning program be undertaken to evaluate the effectiveness of the program, and to determine whether local

administration is the most appropriate method of accomplishing the purposes of the law.

SHORELAND ZONING REPORT TO the 119th LEGISLATURE

Prepared by the Department of Environmental Protection's
Shoreland Zoning Unit

Introduction

This report is submitted to the Maine Legislature pursuant to Title 38 M.R.S.A. section 449. Section 449 requires the Commissioner of Environmental Protection to biennially report on the implementation and impact of local shoreland zoning ordinances. The report must include:

1. a description of the assistance and supervision that the commissioner has provided to the municipalities in carrying out their shoreland zoning responsibilities;
2. a summary of the shoreland zoning violations investigated by municipal code enforcement officers and related court actions; and
3. any recommendations for legislation relating to shoreland zoning.

Program Description

The Mandatory Shoreland Zoning Act, commonly referred to as the shoreland zoning law, was implemented in the early 1970's. The Act, as amended, requires all organized municipalities to enact ordinances regulating land use activities in the shoreland zone. The shoreland zone consists of land areas within 250 feet, horizontal distance, of the normal high-water line of great ponds, rivers, and tidal waters; within 250 feet, horizontal distance, of the upland edge of freshwater and coastal wetlands; and within 75 feet, horizontal distance, of streams.

The Board of Environmental Protection (BEP) establishes minimum standards for the municipally adopted shoreland ordinances. The minimum standards are contained in the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances. The Act allows a municipality to enact a different set of standards than those of the Guidelines when it documents to the Commissioner that special local conditions warrant other standards.

The Commissioner of Environmental Protection must approve all shoreland ordinances, and amendments thereto, before they become effective. If a municipality fails to adopt a suitable shoreland zoning ordinance, the Act requires the BEP to adopt an ordinance for the municipality. That BEP-adopted ordinance is referred to as a *State-imposed ordinance*, and must be administered and enforced by the municipality just as if the municipality adopted it.

The Department's shoreland zoning program is presently administered by three staff members; two in the Augusta office and one in the Bangor office. The main thrust of the shoreland zoning staff's efforts is that of education and technical assistance. While enforcement efforts are necessary periodically, the Department believes that more benefit will come from diligent educational efforts than from formal enforcement activities.

Assistance to Municipalities

Municipal assistance makes up the core of the Department's shoreland zoning efforts and is accomplished in numerous ways. The following activities were undertaken during the past two-year period to assist municipalities with their shoreland zoning responsibilities.

1. Training. Working in cooperation with the State Planning Office's code enforcement officer (CEO) training program, the Department conducted five two-day workshops on shoreland zoning administration and enforcement. One day of the training took place in the classroom and the second day consisted of field exercises. Approximately 200 code officers attended the training sessions that were held in Auburn, Bangor, Farmington, Presque Isle and South Portland. Another, one-day classroom presentation in Augusta was video-taped for use by those who could not attend one of the other sessions. The tape is also available to individuals who are seeking to be first-time code officers.

The Department also participated in two other State Planning Office-sponsored CEO training programs. Staff served as faculty during training in wetlands and forestry issues. As with the shoreland zoning workshops noted in the above paragraph, these training events were conducted in several locations throughout the state.

In addition to training directed at code officers, the Department has devoted many hours toward training of municipal planning board and appeals board members. In conjunction with the regional planning agencies, the Department conducted nine workshops at the various regional agencies throughout the state, and gave several presentations to code officers during their association meetings. Additionally, staff provided training or other related input at many planning board and appeals board meetings and workshops at individual town offices.

The Department has stepped-up its efforts to train loggers and woods owners in proper timber harvesting in shoreland areas. The shoreland zoning unit lectures at the sessions making up the very important Certified Loggers Program. Staff also annually lectures at other programs directed at foresters, loggers and forest landowners.

2. Educational Materials. The Department publishes the *Shoreland Zoning News*, a newsletter for municipal officials, at least three times per year. The newsletter addresses important issues such as changes to the law, the relationship between shoreland zoning and the Natural Resources Protection Act, and interpretations of the ordinance provisions. For instance, several times in the past two years we have discussed the proper implementation of the 30% expansion limitation for nonconforming structures.

Two new educational documents have been published during the past year, and are available for distribution. One is an *Issue Profile* describing an optional method of zoning adjacent to low value and non-rated freshwater wetlands. A municipality may choose to limit the width of the shoreland zone adjacent to low value and non-rated wetlands to only 75 feet if it also establishes a 75-foot zone adjacent to all outlet streams of freshwater wetlands in the municipality.

The second educational publication is a landowner handbook on shoreland zoning. Although it was primarily prepared for landowners of shoreland property, it will also be helpful for municipal officials, particularly new board members. The handbook contains many illustrations to complement the text.

3. Mapping Assistance. The Department, with the assistance of a grant from the Environmental Protection Agency has drafted more than 225 updated shoreland zoning maps for municipalities. The newly drafted maps incorporate information from the National Wetlands Inventory. These high quality wetland inventory maps were not available to many municipalities in the early 1990s, when their shoreland zoning ordinances and maps were required to be upgraded. Thus, many municipalities, when presented with the revised maps, were receptive to adopting them as their official shoreland zoning maps.

Although a private contractor drafted most of the 225+ maps for the Department, the DEP staff spent many hours reviewing the contractor's map products. Even more time was spent explaining the new maps to municipal officials and the local public. Approximately 75% of the DEP-generated maps have been adopted by the local municipalities or have been adopted by the DEP in the form of a State-imposed ordinance. The Department continues to work with other towns in an effort to upgrade local shoreland zoning maps.

4. Ordinance Reviews. As noted earlier in this report, the shoreland zoning law requires all shoreland zoning ordinances, and amendments to such ordinances, to be approved by the Department. During the past two-year period the shoreland zoning staff reviewed 174 shoreland zoning ordinances and amendments; 91 in 1997 and 83 in 1998. Also during this period, six state-imposed shoreland zoning ordinances were repealed after the respective communities adopted suitable ordinances. There are now only 59 fully state-imposed ordinances and 5 supplemental state-imposed ordinances in effect. The list of municipalities with state-imposed shoreland zoning ordinances is found in Appendix A of this report.
5. Miscellaneous Technical Assistance. Much of the shoreland zoning unit's day-to-day activities involve responding to inquiries from town officials and the public. These activities may involve phone conversations, responses to written inquiries, or reviews of situations on-site in the respective towns. Because planning board and appeals board meetings occur in the evening, staff devotes approximately one evening a week at such meetings. We respond to thousands of phone calls each

year, and respond in writing to hundreds of letters, both from town officials and the public.

6. New Position for the Northern and Downeast Areas. Last year, when the Legislature reinstated the Lakes program at DEP with supporting funds, the Legislature indicated that one of the new positions should go to support the shoreland zoning program. Thus, in August of 1998 the Department hired one additional shoreland zoning staff person and placed that position in the Bangor Regional Office. By locating that position in Bangor, we will be able to provide additional, and more timely, assistance to the northern and downeast areas. Consequently, the staff presently in the Augusta office will have more time to deal with issues in the southern half of the state, particularly those issues relating to lakes in watersheds most at risk.
7. Implementation of the Atlantic Salmon Plan. The Department has met with staff from the Atlantic Salmon Authority and discussed appropriate actions toward addressing the Plan's goals. In 1999 we will initiate efforts to ensure that all towns, particularly those downeast, are employing certified code enforcement officers. The Department will also train the Department of Conservation's rangers to understand shoreland zoning timber harvesting and other vegetative cutting standards, and to recognize violations of those standards. If those individuals, who are regularly in the field inspecting harvesting operations, are trained to recognize a shoreland zoning violation, they can inform the town code enforcement officer and work cooperatively to resolve the problem.

Other Initiatives and Activities

The shoreland zoning unit has either directed or participated in four "stakeholder" groups during the past two years. The group project which involved the greatest amount of time for the Unit was the review of the 30% expansion limitation for nonconforming structures in the shoreland zone, and the crafting of an alternative to that limitation. That group reached consensus on a recommended optional alternative to the 30% rule and presented it to the most recent session of the legislature. The recommended option was adopted, incorporated into the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances, and is now being incorporated

into municipal ordinances. It is too early to determine if a significant percentage of the municipalities will adopt the new option. That new option bases allowable expansion on a building's total floor area and height, rather than on a percentage of the floor area and volume of a structure as it existed on January 1, 1989.

Staff also participated in the stakeholder groups which dealt with: standardizing timber harvesting rules on a state-wide basis; providing vegetative buffers on smaller streams; and addressing septic system malfunctions in shoreland areas. The recommendations of those groups are being presented to this session of the legislature in separate reports.

Enforcement Related Activities

1. Reports from Municipal Code Enforcement Officers Relating to Permits and Variances. Municipal code enforcement officers are required, on a biennial basis, to report to the Commissioner on their permitting and enforcement activities. At the end of the two-year reporting period the Department provides standard forms to the code enforcement officers to complete and return. Unfortunately, the percentage of municipalities that comply with the reporting requirement of the law is quite low. Of the nearly 450 municipalities required to submit the reports, only 45% of the municipalities filed reports with the Department. Appendix B lists the municipalities that filed reports and includes a portion of the reported permit and enforcement information.

Another concern of the Department is that it appears that many of the reports filed are not accurate. Approximately 20 percent of the reports indicated that no permitting activities occurred in the shoreland zone during the two-year reporting period. While it may be true that some municipalities had no shoreland construction activities during the time-period, it is unlikely that so many towns did not actually have activities requiring permits.

The nearly 200 communities submitting permit information indicated that 728 permits for new principal structures were granted during the two-year period of January 1, 1996 through December 31, 1997. A total of 930 permits were issued for accessory structures, and 1557 permits were issued for additions and/or renovations.

Eighty-three timber harvesting permits were issued in the reporting communities. Although this figure appears to be low, one must keep in mind that permits for timber harvesting are required only in the Resource Protection district. The Resource Protection district includes only a relatively small percentage of the shoreland area in most municipalities.

The information submitted that relates to variance appeals is encouraging. In the late 1980s and early 1990s, information submitted to the Department revealed that nearly two-thirds of all variance requests were granted. The Department was very concerned about that figure and launched an effort to reduce the percentage of variance requests that were approved. The figures from this reporting period indicate that 75 of 195 variance requests were granted (38%). While the Department believes that 38% is still too high, it is pleased with the drop in the percentage of variance requests that were granted. Also encouraging is the fact that only 16 of the 75 variances granted were for water setback reductions.

2. Reports from Code Enforcement Officers Relating to Enforcement Activities. The reporting communities indicated that a total of one hundred ninety-six violations of shoreland zoning ordinances were confirmed. Twenty-seven of the violations were resolved through administrative consent agreements, and ten of the confirmed violations were referred to the courts for resolution.

The reports indicate that the majority of confirmed violations are resolved through informal action. Many of the reported violations involved construction prior to obtaining a permit. Those violations are usually resolved through after-the-fact permits and the assessment of a monetary penalty. The monetary penalty can be as simple as an increased permit fee.

Other common types of violations include excessive vegetative cutting, expansions of nonconforming structures which exceed the 30% expansion limitation, and placing fill within the vegetated “buffer” strip. Excessive vegetative cutting is a very common violation. A common resolution for that particular violation is a requirement to replant the cut

area and pay a monetary fine. That fine varies from town to town, and can range from \$100 to several thousand dollars. In some cases no monetary penalty is assessed.

Several reported violations were related to nonconforming structure expansions in excess of thirty percent. Those violations should be resolved through removal of the portion of the structure that exceeds the allowable 30%. The reports submitted did not detail how each matter was resolved. However, it is clear that several of the violations were resolved through removing the excess expansions.

3. Enforcement Actions Initiated by the Department of Environmental Protection. The Department, through the Attorney General's Office, initiated two enforcement actions against municipalities. The first action was filed against the town of Otis for granting frontage and lot size variances to a landowner, although there was no justification for the variance. The landowner had sought a variance in order to establish a commercial marina on a property that already supported a residential structure. The Department argued that the presence of the residential structure constituted a reasonable return on the property, and filed suit in Superior Court to revoke the variance. The Superior Court sided with the Department. However, upon appeal by the landowner and the town, the Maine Supreme Judicial Court ruled that the Department did not have standing in the matter, and allowed the variance decision to remain.

The court ruled that the Department did not have standing because it had not participated in the actual board of appeals hearing. The Department had provided input on the matter to the planning board and had also asked the board of appeals to reconsider its decision, but the Court did not consider those actions as ones that would give the Department legal standing to appeal the town's decision. That Court decision is of significant concern to the Department.

The other Department-initiated enforcement action involves the town of Damariscotta and Lake Pemaquid Camping, Inc. That case involves numerous cabins placed within the setback area of Pemaquid Pond on the grounds of Lake Pemaquid Camping, Inc. The suit was initially filed against the town and the campground. The Department and the

Town have since entered into a consent agreement to resolve that aspect of the complaint. The Department's issue with the campground remains, however, and it is pursuing the matter in court, with the Town assisting.

Recommendations and Related Issues

1. Departmental Standing to Appeal a Decision of a Local Board of Appeals. The Department is concerned over the Supreme Court ruling that the Department has no legal standing to appeal a local board of appeals decision to a higher level. First, the majority of local boards of appeals grant variances more freely than the "undue hardship" criteria, if properly interpreted, would allow. The courts have ruled that variances should be the exception rather than the rule. Although the percentage of variance applications that are being approved is diminishing, the 38% granted in the shoreland zone in 1996-97 is still too high. Therefore, it is important for the Department to be able to appeal a decision of the board of appeals.

The second reason for the Department's concern is that it can not, with only three shoreland zoning staff members state-wide, attend every board of appeals hearing that may be of concern to the Department. Even if enough staff were available, the Department is not always notified of hearings of the local board of appeals.

For the above reasons the Department recommends that the legislature amend the shoreland zoning law to give the Department of Environmental Protection standing to appeal a local board of appeals decision, even if it did not directly participate in the hearing process.
(Legislative action needed)

2. Need for Assessment of Effectiveness of the Shoreland Zoning Law. The shoreland zoning law has been in effect for more than 25 years. While it is clear that the law has been beneficial for shoreland areas, including protection of water quality and wildlife habitat and the conservation of the natural beauty, it is not clear that all municipalities

are effectively administering and enforcing their respective ordinances. It is not uncommon for the Department to receive complaints that municipalities are not administering their shoreland rules.

The Department suggests that the time may be ripe for a comprehensive assessment of the implementation of the shoreland zoning program. If this is undertaken, the Department recommends that the assessment be conducted by an independent agency or firm. The assessment should address the Department's effectiveness in oversight of the law, the municipalities' administration of local shoreland zoning ordinances, coordination with the comprehensive planning program, and any recommendations for change in the administration of the law.

(Legislative action not required, but lack of funding may be a limiting factor if done by an independent agency)

3. Ensure that All Municipalities Retain Certified Code Enforcement Officers. The shoreland zoning law, and local shoreland ordinances, require municipalities to appoint code enforcement officers to enforce the provisions of those ordinances. Title 30-A section 4451 further requires all appointed code enforcement officers to be certified in the areas of their job responsibilities. The Department is aware of numerous communities that are not in compliance with the appointment and certification requirements. It has, until now, taken only low-key measures to bring those towns into compliance, without a great deal of success. The Department plans to undertake a more rigorous effort during the next year to gain compliance with the code officer appointment and certification requirements. **(Legislative action not required)**

4. Optional Alternative to the 30% Expansion Limitation for Nonconforming Structures. The Department should undertake a significant effort to educate municipal officials, the real estate and building trades communities, and the general public about the new optional alternative for expansions of nonconforming structures in the shoreland zone. That effort should include state-wide workshops, feature articles in the *Shoreland Zoning Newsletter*, and a new *Issue Profile* on the expansion option. **(Legislative action not required)**

