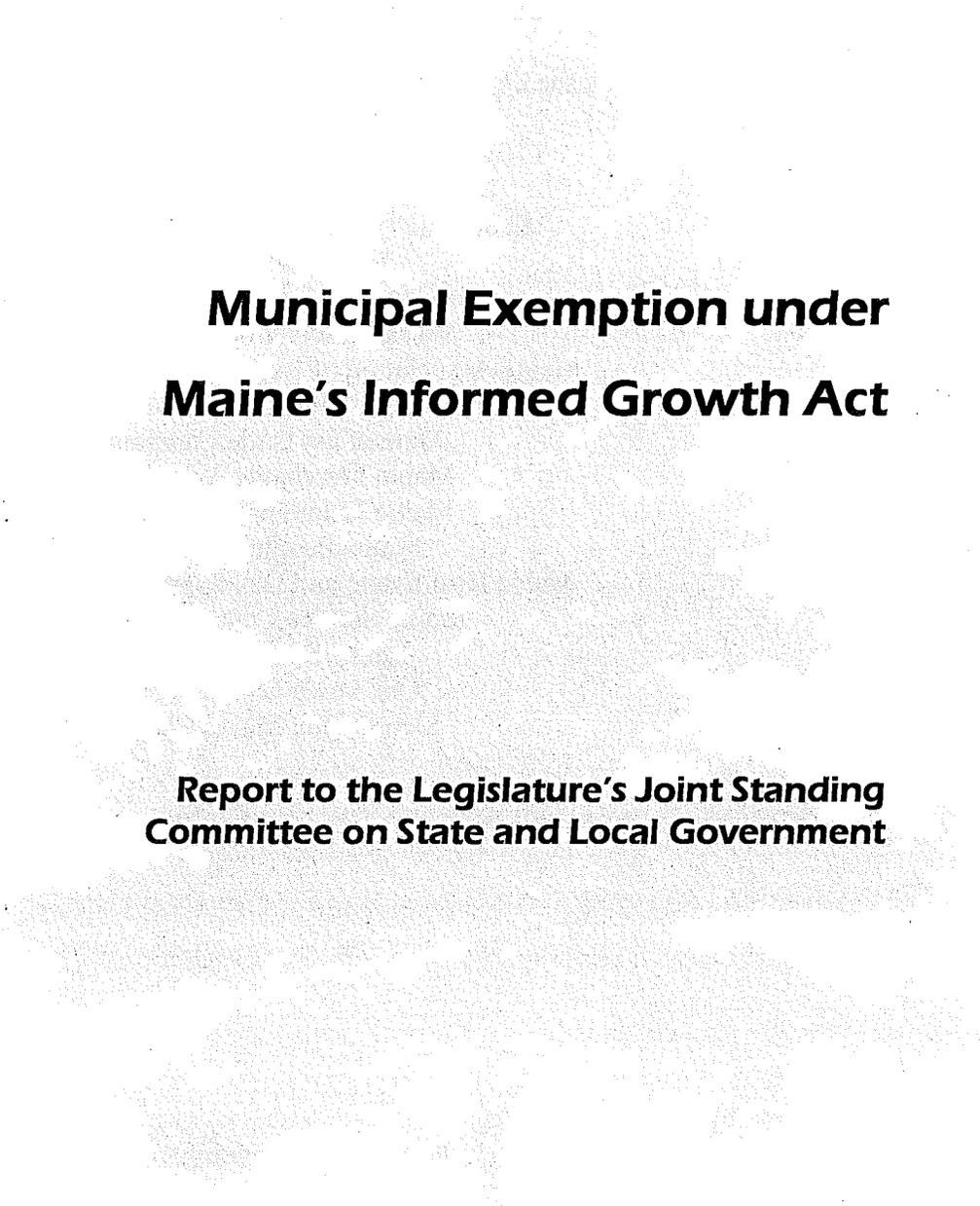


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**Municipal Exemption under
Maine's Informed Growth Act**

**Report to the Legislature's Joint Standing
Committee on State and Local Government**

January 2009

Acknowledgements

This report was prepared by the Maine State Planning Office at the request of the Legislature's Joint Standing Committee on State and Local Government.

We would like to thank the organizations that contributed to this report:

Citizens Protecting Cumberland's Character
City of Lewiston
Economic Development Council of Maine
Grow Smart Maine
Institute for Local Self Reliance
Maine Association of Planners
Maine Association of Regional Planning Councils
Maine Chamber of Commerce
Maine Fair Trade Campaign
Maine Merchants Association
Maine Municipal Association
Maine People's Alliance
Maine Real Estate and Development Association
Maine Service Center Coalition
Maine State AFL-CIO
Our Town Damariscotta
Sierra Club, Maine Chapter

Maine State Planning Office
38 State House Station
Augusta ME 04333

This report is available on-line at: <http://www.maine.gov/spo/>

January 2009

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SPO



Maine State Planning Office

Executive Department

JOHN ELIAS BALDACCI

Governor

MARTHA E. FREEMAN

Director

January 12, 2009

Senator Deborah L. Simpson
Representative Stephen R. Beaudette
Members of the Joint Standing Committee on State and Local Government
100 State House Station
Augusta, ME 04333-0100

Dear Senator Simpson and Representative Beaudette,

I am pleased to provide you with the State Planning Office's analysis of the municipal exemption clause of Maine's Informed Growth Act. This report was prepared at the request of this committee of the Second Session of the 123rd Legislature.

I am glad that the State Planning Office is able to assist you with your work. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Martha Freeman
Director

cc: Anna Broom, Legislative Analyst
Dr. Charles Lawton, Planning Decisions, Inc.

Contents

Background	4
Committee Request to State Planning Office	4
Stakeholder Input	4
Issues with Current Exemption Language	5
Range of Outcomes of the Informed Growth Act.....	8
Possible Amendments to the Informed Growth Act	9
Appendices.....	11
Appendix A – Maine Informed Growth Act.....	11
Appendix B – Letter to State Planning Office from State and Local Government Committee	15
Appendix C - Letter to State and Local Government Committee from Dr. Charles Lawton, Economist	17
Appendix D – Stakeholder Organizations Consulted	19
Appendix E – Stakeholders’ Comments – Grow Smart Maine	20
Appendix E – Stakeholders’ Comments – Institute for Local Self Reliance, Maine Fair Trade Campaign, Maine State AFL-CIO, Our Town Damariscotta, Sierra Club Maine Chapter	22
Appendix E – Stakeholders’ Comments – Maine Merchants Association	27
Appendix E – Stakeholders’ Comments – Maine Municipal Association	29
Appendix E – Stakeholders’ Comments – Maine Real Estate and Development Association	34
Appendix E – Stakeholders’ Comments – Maine People’s Alliance	37
Appendix E – Stakeholders’ Comments – City of Lewiston.....	39
Appendix E – Stakeholders’ Comments – Citizens Protecting Cumberland’s Character	45
Appendix E – Stakeholders’ Comments – Maine Association of Planners.....	46
Appendix F – Attorney General’s Opinion – Exemption Requirements.....	49

Background

In 2007, the Maine Legislature enacted the Informed Growth Act (30-A MRSA Chapter 347), hereinafter referred to as the “Act.” The Act requires municipalities to conduct comprehensive economic impact studies to determine whether proposed large-scale retail development would have an “undue adverse impact” on their local economies and communities. If the municipality decides that it would, it may not grant a local land use permit (see Appendix A).

The Act provides for an exemption for municipalities that enact their own economic and community impact review criteria and study requirement.

During the Second Regular Session of the 123rd Legislature, the Joint Standing Committee on State and Local Government took up LD 1962. The bill would have permitted a municipality to opt out of the study requirement contained in the Act by a two-step process: 1) by local vote of the legislative body; and 2) confirmed by referendum vote.

The committee was divided on the bill. It voted the bill out as “ought not to pass,” but with a minority report that supported the opt-out provision by legislative body vote alone (no referendum). The bill ultimately died between the houses.

Still uncertain and compelled by testimony it received, the committee sent an informal request to the State Planning Office (hereinafter referred to as SPO) to review the matter (see Appendix B).

Committee Request to State Planning Office

SPO was asked to conduct an informal review and offer recommendations to clarify the exemption provision, specifically as it relates to municipalities that already have ordinances requiring economic impact studies, and using a February 6, 2008, letter from Charles Lawton, PhD of Planning Decisions, Inc as a starting point (see Appendix C).

Stakeholder Input

The committee’s letter asked SPO to seek comment and recommendations from stakeholders on this issue, including the Maine Municipal Association, Maine Association of Planners, Maine Merchants’ Association, and any other organizations that are appropriate or have expressed interest in the clarification of the exemption. For balance, the Office added a number of other organizations to the committee’s list of stakeholder organizations named in the letter (see Appendix D).

The Office compiled the written comments it received and provides them as part of this report (see Appendix E).

Based on these comments and its own understanding of the issues, the State Planning Office prepared this report for the Legislature’s Joint Standing Committee on State and Local Government with options for it to consider.

Issues with Current Exemption Language

The exemption language in the Act today reads

§ 4371. Exemption: The provisions of this subchapter do not apply to a municipality that has adopted economic and community impact review criteria that apply to large-scale retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application.

Stakeholders and SPO alike noted a number of issues with this language.

Clarity of Language

Some communities feel vulnerable to court challenges based on the lack of specificity of the exemption language. If a municipality determines it is exempt under section 4371, a disgruntled land use permit applicant, competing applicant, or abutter could legally challenge the municipality's permit decision on the validity of the impact study ordinance. Regardless of the court's ultimate ruling, upholding or overturning the local permit decision, the municipality faces the time and expense of defending its ordinance and procedures.

According to the City of Lewiston,

The inexactness of the language in the IGA made it challenging to put together an ordinance that would better reflect Lewiston's goals while still being able to withstand an appeal on whether or not the intent of the IGA had been met.

The Office identified the following areas where the Act's meaning is unclear:

- The current language reads that, "to qualify for an exemption, a municipality needs to adopt economic and community impact review criteria." The Informed Growth Act does not define "economic and community impact review criteria" or provide explicit language about what these criteria should be.¹
- Also, to be exempt, a municipality must require a study of the comprehensive economic and community impacts of the proposed development. While a comprehensive economic impact study is currently defined in 30-A MRSA §4366 (2), it is not clear if the exemption language refers to the specific study parameters defined in the Act for exemption purposes.
- The exemption language is silent on the geographic area to be studied, especially whether exempt municipalities must examine impact on abutting municipalities.

¹ Section 30-A MRSA §4367 (4) identifies a list of impacts on which analyses are to be performed by non-exempt municipalities, but does not specifically refer to these impacts as "review criteria."

- The exemption language is silent on the qualifications of, timeline for completing, payment for, and method of selecting a consultant to prepare the impact study, as well as any on specific public participation process or notice requirements.
- It is not clear whether municipalities, as part of their local ordinance, would be required to issue a finding of undue adverse impact or prohibit the issuance of a land use permit if the study reveals undue adverse impact. The Act states only that a municipality must consider the study of impacts among other evidence in applying the review criteria to the land use permit application.

Parties differ in their understanding of the exemption language. Some interpret the language to mean that, in order for a local ordinance to meet the exemption standard, it must not be materially different than the Act. Others read the exemption provision to say that a municipality has latitude in those areas that are not explicitly required.

The Attorney General's Office advised the Office that a municipality need not follow the letter of the definitions and criteria set forth in the Informed Growth Act to qualify for an exemption. The reason being is that, if municipalities were required to follow the letter of the definitions and criteria set forth in the Informed Growth Act, the exemption would be meaningless. They go further to say, these may be gaps in the Act. Their full opinion can be found in Appendix F.

Nevertheless, municipalities do not want to risk a legal challenge.

Transparency

One of the purposes of the Act is to provide an open process for planning and decision-making. Section 4368 details specific requirements for public notice, public hearing, and disclosure of the applicant for any land use permit application subject to the Act. Public involvement through a transparent process, including disclosure of the applicant's name, was cited by several stakeholders as fundamental to the original purpose of the Act.

Independent Analysis

Another foundational aspect of the Act is the requirement that the economic impact study be conducted by a consultant independent of the land use permit applicant developer, retailer, or other party connected to the project. Several stakeholders view an independent preparer as important to providing citizens and local officials with objective information.

Regional Impacts of Development

One of the key features of the Act is that it stipulates that municipalities consider development in a regional context and thereby encourage greater regional planning and cooperation. The Act requires an analysis of the impacts on abutting municipalities, which would be an important element of local municipal informed growth ordinances.

Local Control

In Maine, land use is regulated at the local level. We believe that the Legislature's intent for the exemption provision was to recognize local land use authority while giving local residents tools to evaluate large-scale development and the economic impact on their communities.

Flexibility

The exemption provision also recognizes that it is impractical to apply the same criteria to every municipality—large and small. Further, some locations are more appropriate for retail development. The city of Lewiston noted, for example, it has several hundred thousand square feet of mill buildings which it hopes to convert to retail space. If the city could waive or expedite the informed growth provisions for the mill sites, it may encourage development there as opposed to sites away from the downtown.

Existing Local Processes

We believe it was the committee's intent when crafting the exemption provision to ensure that municipalities that already have an economic impact study requirement in place need not significantly alter their development review process. In addition, since passage of the Act, at least two municipalities have adopted local informed growth ordinances under the exemption provision.² If this is indeed the intent of the Act, the committee may want to consider grandfathering municipalities with any kind of existing economic impact study requirements.

Study Methodology

The Act is silent on the methodology a qualified preparer is to use. It appears that the Legislature intended to assure that consultants would have the necessary knowledge and skills to produce the required study by requiring the State Planning Office to review qualifications and select qualified preparers.

The State and Local Government Committee asked Dr. Charles Lawton, chief economist for the firm Planning Decisions of South Portland, to describe what an economic impact study under the Act might entail.³ Dr. Lawton's process is thorough and complete (see Appendix C). Any study conducted in the manner he outlines would fulfill the requirements of the Act. Other consultants will likely use similar methodologies.

Stakeholders generally felt that there is more than one valid approach for analyzing economic impacts. And while methodologies may vary, qualified preparers should be capable of producing comprehensive economic impact studies that meet the requirements of the Act.

² Note: The town of Cumberland and the city of Lewiston have each adopted local informed growth ordinances. Westbrook's existing site law ordinance contains provisions for impact analyses and Belfast's contract zoning ordinance was recently amended to incorporate requirements of the Act.

³ For purposes of disclosure: Dr. Lawton is one of the state's qualified preparers listed by the State Planning Office as qualified by education, training, and experience to prepare such a study in accordance with 30-A MRSA §4367 (1).

Dr. Lawton's response to the committee concludes that,

The ultimate value of a comprehensive economic impact study is not in arriving at some theoretically 'correct' answer. Rather it is in providing public policy makers with a systematic way of listing the likely effects of a proposed change and a way of relating those effects to the collective goals it is their responsibility to pursue. In short, an economic impact study should be a tool to help public officials and citizens make more informed decisions.

The Maine Municipal Association notes a disconnect between the policy value of such a study and the need for a definitive standard for reviewing authorities on which to base a decision. The Act recognizes that the study is not the sole basis for a decision, but also includes other materials and testimony. Conversely, the Act prescribes a standard whereby if the negative effects of two of the factors in the economic study outweigh the positive effects, undue adverse impact is said to exist. So, there does seem to be a choice: are the municipal officials simply gathering evidence and then they can decide or must they rely on the study conclusions?

Range of Outcomes of the Informed Growth Act

While the stakeholders that SPO consulted generally agreed that the exemption language is unclear, their views varied as to how it should be modified. This difference of opinion stems from different beliefs about the purpose of the Act and from diverse philosophical views.

The State Planning Office identified three possible outcomes that may help guide the committee's deliberations based on what it intends to accomplish through this exemption provision.

Outcome 1: The exemption ensures that local ordinances are as equally rigorous as the Informed Growth Act

The committee may want to ensure the Act's integrity and purpose by requiring that local ordinances mirror the Act's standards. The Act is intended to provide municipalities with an important planning tool, ensure a transparent decision-making process, and help citizens and local officials understand the impact of development on their community. The exemption provision can help ensure that the Act will be implemented consistently across the state.

Outcome 2: The exemption allows local ordinances to vary to reflect differing local needs and values

The committee may favor local determination of standards and procedures by which municipalities implement the Act. The exemption provision can see to it that municipalities have the ability to determine the appropriate impact review criteria for their locations and residents.

Outcome 3: The exemption provides for local ordinances to be based on locally-determined review factors, but that they follow the Act with regards to other principles of informed decision-making

The committee may see the value of local determination of standards, but want to ensure a rigorous review and decision-making process. The exemption provision can permit latitude to municipalities to determine their own local impact review criteria and standards, but preserve the informed decision-making elements at the heart of the Act. These decision-making elements could include:

- requiring an independent study of the impact of large-scale retail development townwide;
- specifying the size of development that triggers the study (75,000 square feet)
- requiring an assessment of the regional impact of development (i.e. on abutting municipalities);
- requiring a preparer qualified by education, training, and experience;
- disclosing the applicant and conducting a public hearing on the study results, with proper public notice; and
- considering the findings of the study when reviewing any land use permit application.

The areas where municipalities determine their own measures could include:

- the review criteria for determining impact on existing retail establishments and municipal services; and
- the standard for determining when the impacts are detrimental to the community.

Possible Amendments to the Informed Growth Act

The State Planning Office believes the exemption language would benefit from revisions to provide clear definitions, procedures, review criteria, and decision-making standards, and that those revisions may be guided by the Legislature's intended outcome for the exemption provision.

The Office does not recommend any specific language, rather provides three options from which the committee may choose, depending on the outcome it desires.

Option 1: The exemption ensures that local ordinances are as equally rigorous as the Informed Growth Act

§ 4371. **Exemption:** The provisions of this subchapter do not apply to a municipality that has adopted a local informed growth ordinance consistent with this subchapter. The municipal informed growth ordinance shall contain economic and community impact review criteria that apply to large-scale retail development land use permit applications; and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application.

Option 2: The exemption allows local ordinances to vary to reflect differing local needs and values

§ 4371. **Exemption:** The provisions of this subchapter do not apply to a municipality that has adopted local requirements for determining the economic and community impacts of retail development on the municipality, economic and community impact review criteria that apply to large-scale retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application.

Option 3: The exemption provides for local ordinances to be based on locally-determined review factors, but that they follow the Act with regards to other principles of informed decision-making

§ 4371. **Exemption:** The provisions of this subchapter do not apply to a municipality that has adopted townwide local requirements for determining the impacts of large-scale retail development on existing retail establishments and municipal services for the municipality and abutting municipalities. For purposes of this sub-section, “large scale retail development” shall mean the same as defined in §4366 (6) at a minimum.

The municipality shall and that require an independent study of the comprehensive economic and community impacts of the proposed large-scale retail development by a preparer qualified by education, training, and experience. The municipality must provide for public participation consistent with §4368. The municipality shall consider the findings of the study, for consideration, among other evidence, when reviewing a land use permit application. The ordinance must also identify the standards for determining when the impacts are detrimental to the community.

Grandfather Clause

Lastly, if the committee wants to clarify the uncertainty about how the exemption provision relates to municipalities that already have ordinances requiring economic impact studies, it may want to grandfather them.

Grandfathering Clause: Municipalities who have adopted local requirements for determining the economic and community impacts of retail development prior to January 1, 2009, are exempt from this Act.

Appendix A – Maine Informed Growth Act

PL 2007, Chapter 347
H.P. 1262 - L.D. 1810

An Act To Enact the Informed Growth Act

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 30-A MRSA c. 187, sub-c. 3-A is enacted to read:

SUBCHAPTER 3-A

§ 4365. Short title

This subchapter may be known and cited as "the Informed Growth Act."

§ 4366. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. **Comprehensive economic impact area.** "Comprehensive economic impact area" means the geographic area affected by a proposed large-scale retail development. This area includes the municipality and abutting municipalities.

2. **Comprehensive economic impact study.** "Comprehensive economic impact study" means a municipal study that estimates the effects of a large-scale retail development on the local economy, downtown and community pursuant to section 4367, subsection 4.

3. **Downtown.** "Downtown" means the central business district of a community that serves as the center for socioeconomic interaction in the community and is characterized by a cohesive core of commercial and mixed-use buildings, often interspersed with civic, religious and residential buildings and public spaces, typically arranged along a main street and intersecting side streets, walkable and served by public infrastructure.

4. **Gross floor area.** "Gross floor area" means the aggregate of the areas of each floor of a building or structure, including accessory structures, measured between the exterior faces of the exterior walls or limits of the building or structure at the level of each floor.

5. **Land use permit.** "Land use permit" means a municipal permit or approval required by a municipal land ordinance, site plan ordinance, subdivision ordinance, zoning ordinance or building permit ordinance or by the state subdivision law pursuant to subchapter 4.

6. **Large-scale retail development.** "Large-scale retail development" means any retail business establishment having a gross floor area of 75,000 square feet or more in one or more buildings at the same location, and any expansion or renovation of an existing building or buildings that results in a retail business establishment's having a gross floor area of 75,000

square feet or more in one or more buildings except when the expansion of an existing retail business establishment is less than 20,000 square feet. Other retail business establishments on the same site as the large-scale retail business establishment are not included in this definition unless they share a common check stand, management, controlling ownership or storage areas.

7. Municipal reviewing authority. "Municipal reviewing authority" means the municipal planning board, agency or office or, if none, the municipal officers.

8. Office. "Office" means the Executive Department, State Planning Office.

9. Retail business establishment. "Retail business establishment" means a business engaged in the sale of goods to the ultimate consumer for direct use or consumption.

10. Undue adverse impact. "Undue adverse impact" means that, within the comprehensive economic impact area, the estimated overall negative effects on the factors listed for consideration in section 4367, subsection 4 outweigh the estimated overall positive effects on those factors and that the estimated negative effects of at least 2 of the factors listed in section 4367, subsection 4, paragraph A outweigh the positive effects on those factors.

§ 4367. Preparation of comprehensive economic impact study

As part of its review of a land use permit application for a large-scale retail development, a municipal reviewing authority shall require the preparation of a comprehensive economic impact study.

1. Qualified preparer. A comprehensive economic impact study must be prepared by a person, other than the applicant for a large-scale retail development, listed by the office as qualified by education, training and experience to prepare such a study. The office shall provide the list of qualified preparers to a municipal reviewing authority and land use permit applicant upon request. The office shall adopt routine technical rules under Title 5, chapter 375, subchapter 2-A to carry out the purposes of this subsection.

2. Selection of preparer. The selection of the preparer must be mutually agreed upon by the municipal reviewing authority and the applicant. If no mutual agreement is reached within 15 days, the municipal reviewing authority shall select the preparer. The preparer must be qualified in accordance with subsection 1.

3. Payment. The applicant for the permit shall pay a fee of \$40,000 to the office to be deposited into a dedicated revenue account. The development application is not complete for processing until the office confirms that the fee has been paid.

The office shall disburse to the municipality from the dedicated account an amount equal to the municipality's projected costs of the comprehensive economic impact study contract, notice of the public hearing and related municipal staff support. The municipality's contract for the study must be defined and priced to ensure that the \$40,000 fee will be sufficient to cover both the costs of the study and the costs listed in this subsection. The office may charge against the fee an amount sufficient to cover its costs to record, administer and disburse the fee, but which may not exceed \$1,000. Any unexpended funds from the \$40,000 fee must be returned to the applicant.

4. Comprehensive economic impact study. The comprehensive economic impact study must be completed within 4 months of the filing of the application and must be made available to the municipal reviewing authority, the applicant and the public. It must estimate the effects of the large-scale retail development as set out in this subsection.

A. The comprehensive economic impact study, using existing studies and data and through the collection and analysis of new data, must identify the economic effects of the large-scale retail development on existing retail operations; supply and demand for retail space; number and location of existing retail establishments where there is overlap of goods and services offered; employment, including projected net job creation and loss; retail wages and benefits; captured share of existing retail sales; sales revenue retained and reinvested in the comprehensive economic impact area; municipal revenues generated; municipal capital, service and maintenance costs caused by the development's construction and operation, including costs of roads and police, fire, rescue and sewer services; the amount of public subsidies, including tax increment financing; and public water utility, sewage disposal and solid waste disposal capacity.

B. The comprehensive economic impact study must identify, to the extent that there are available for reference, existing studies and data, the general environmental effects on those factors enumerated in section 4404, regardless of whether the project is a subdivision, and in Title 38, sections 480-D and 484, regardless of the acreage of the project site.

§ 4368. Public hearing

1. Public participation required. The municipal reviewing authority shall provide the public with an adequate opportunity to be heard prior to the approval of a permit for a large-scale retail development.

2. Notice. Notice of the public hearing on the land use permit application must state that the comprehensive economic impact study will be presented at the hearing and that the municipal reviewing authority will take testimony on the comprehensive impact of the proposed large-scale retail development, and the notice must include the name of any potential retailer, a map of the development location and a map of the comprehensive economic impact area. The municipality shall also provide notice by regular mail to municipal officers of abutting municipalities and to all property owners within 1,000 feet of the proposed development.

3. Public disclosure of the applicant. If the applicant for a large-scale retail development is not the potential retailer, the applicant shall disclose in its application and at the public hearing the name of the potential retailer, including its commonly used retail name.

§ 4369. Land use permit approval

The municipal reviewing authority shall evaluate the impacts of the proposed large-scale retail development based on the comprehensive economic impact study; other materials submitted to the municipal reviewing authority by any person, including the applicant, state agencies, nonprofit organizations and members of the public; and testimony received during the public hearing under section 4368 to issue a finding of undue adverse impact or no undue adverse impact. The municipal reviewing authority may issue a land use permit for a large-scale retail development only if it determines that there is likely to be no undue adverse impact.

Nothing in this Act may preclude a municipality from adopting an ordinance to authorize additional studies and criteria regarding the effects of a proposed large-scale retail development. The requirements of this Act are in addition to all other required federal, state and local land use permit processes that pertain to a proposed large-scale retail development.

§ 4370. **Appeal**

The provisions of this subchapter granting persons, municipalities, the State and other entities the opportunity to provide input on a municipal land use permit or approval do not, and may not be interpreted to, authorize persons or entities who would not, absent the provisions of this subchapter, have an interest in or otherwise have standing to appeal a municipal action on the permit or approval.

§ 4371. **Exemption**

The provisions of this subchapter do not apply to a municipality that has adopted economic and community impact review criteria that apply to large-scale retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application.

Sec. 2. Construction. Nothing in this Act may be construed to limit the ability of a municipality that, after the effective date of this Act, adopts economic and community impact review criteria that apply to large-scale retail development land use permit applications to be exempt from the provisions of the Maine Revised Statutes, Title 30-A, chapter 187, subchapter 3-A in accordance with Title 30-A, section 4371.

Appendix B – Letter to State Planning Office from State and Local Government Committee

SENATE

ELIZABETH M. SCHNEIDER, DISTRICT 30, CHAIR
JOSEPH C. BRANNIGAN, DISTRICT 9
PAULA I. BENOIT, DISTRICT 19

ANNA BROOME, LEGISLATIVE ANALYST
SUZANNE ARMSTRONG, COMMITTEE CLERK



STATE OF MAINE

HOUSE

CHRISTOPHER R. BARSTOW, GORHAM, CHAIR
STEPHEN R. BEAUDETTE, BIDDEFORD
JAMES M. SCHATZ, BLUE HILL
ANDREA M. BOLAND, SANFORD
TERESE M. HAYES, BUCKFIELD
LAWRENCE G. SIROIS, TURNER
HENRY L. JOY, CRYSTAL
PHILIP A. CURTIS, MADISON
H. DAVID COTTA, CHINA
WINDOL C. WEAVER, YORK

ONE HUNDRED AND TWENTY-THIRD LEGISLATURE

COMMITTEE ON STATE AND LOCAL GOVERNMENT

April 8, 2008

Martha Freeman, Director
State Planning Office
38 State House Station
Augusta, ME 04333-0038

Dear Director Freeman,

The State and Local Government Committee recently considered LD 1962, An Act to Amend the Informed Growth Act. This bill would have allowed a municipality to waive the right to apply the provisions of the Informed Growth Act with a vote by its legislative body and a referendum. The Committee was divided on LD 1962 and the bill ultimately died between the bodies. However, the Committee was unified in its concern that the exemption enacted in Title 30-A, section 4371 may need clarification. Towards this end, the Committee requested of Charles Lawton, PhD., of Planning Decisions, Inc. his description of what an economic impact study might entail. The Committee reviewed his response (attached) but made no recommendations regarding this matter.

The uncertainty surrounding the exemption under section 4371 relates to how it applies to municipalities that already have ordinances requiring economic development impact studies prior to the approval of a permit. Therefore, we request that during the upcoming interim of the Legislature, the State Planning Office conduct an informal review on this matter. We ask that you begin with the description provided by Dr. Lawton and that you seek review, comment, and recommendations from stakeholders on this issue, including the Maine Municipal Association, the Maine Association of Planners, the Maine Merchants' Association and any other organizations that are appropriate or have expressed interest in the clarification of the exemption. In addition, the Committee would like to be involved so we ask that you keep Representative Stephen Beaudette informed of any meetings and supplied with any documents as this process unfolds.

We further request that you provide to this Committee, by January 15, 2009, a letter summarizing your review and recommendations received from stakeholders in response to Dr. Lawton's proposal.

If you have any questions, please feel free to contact one of us or the legislative analyst for the Committee, Anna Broome.

Sincerely,

Handwritten signatures of Elizabeth M. Schneider and Christopher R. Barstow.

Senator Elizabeth M. Schneider
Senate Chair

Representative Christopher R. Barstow
House Chair

cc: Senator David Hastings III

Appendix C - Letter to State and Local Government Committee from Dr. Charles Lawton, Economist



Planning Decisions, Inc.
Research & Planning
22 Cottage Road
South Portland, Maine 04116
V 207-799-2226
F 207-767-6432
www.planningdecisions.com

February 6, 2008

MEMORANDUM

To: Anna Bloom, Legislative Analyst
From: Chuck Lawton, Planning Decisions, Inc.
Re: Conducting an Economic Impact Study

Anna,

Here is my brief response to your question about the nature of a Comprehensive Economic Impact Study and how to go about conducting one. Hope this is useful for you. Call if you have any questions.

A Comprehensive Economic Impact Study is a thinking about and quantification of the consequences for a particular area of a proposed change. It is both a way of thinking—a methodology—and a formal quantified estimate drawn from current patterns of consumer, business and government spending, employment and taxation. Its value lies less in seeing its final number than in understanding the twists and turns of the journey that led to that number...and in seeing the points of departure (different facts or assumptions) that can lead to other numbers at different destinations. It is, in essence, a tool for helping public policy makers articulate and weigh their options before making a decision on a public policy issue.

An economic impact study is **not** a forecast or a market feasibility study. It is **not** intended to predict whether a proposed investment will or will not be successful. It is intended, rather, to answer the question "If what is proposed does occur, what will be the likely economic consequences?" It depends, therefore, on the answers to three questions:

1. What exactly is proposed?
2. What will be the economically significant effects of this action? and
3. Over how wide a geographic area will these effects occur?

Conducting an economic impact study involves three separate research tasks:

1. Interviewing the owners/developers proposing the investment.
 - a. What is to be built? Where? At what cost?
 - b. What will be sold in the proposed development? Delivered how and when? Drawing shoppers from what area? Employing how many people? At what wages?
2. Gathering and analyzing published statistics.
 - a. What are the current retail sales, by category, within the impact area?
 - b. What is the pattern of employment, wages and income within the impact area, current levels and recent trends of growth or decline?
 - c. What is the property tax base within the impact area, current levels and recent trends of growth or decline?
3. Interviewing business owners and public officials within the impact area concerning likely impacts of the proposed investment on them:
 - a. Business impacts: Competitive sales losses? Complementary sales gains? Effects on wage rates and labor market? Effects on product pricing, consumer choices and hours of operation?
 - b. Government impacts: Changes in taxes paid? Changes in demand for services? Population migration? Traffic changes? Changes in demand for police and fire services? Changes in land use patterns—increasing sprawl? Enhancing or impoverishing downtowns? Effects on housing prices?

The ultimate value of a comprehensive economic impact study is not in arriving at some theoretically "correct" answer. Rather it is in providing public policy makers with a systematic way of listing the likely effects of a proposed change and a way of relating those effects to the collective goals it is their responsibility to pursue. In short, an economic impact study should be a tool to help public officials and citizens make more informed decisions.

Appendix D – Stakeholder Organizations Consulted

Stakeholder Organizations Consulted:	Comments Received
Economic Development Council of Maine	
Grow Smart Maine	X
Institute for Local Self Reliance	X
Maine Association of Planners	X
Maine Association of Regional Planning Councils	
Maine Chamber of Commerce	
Maine Fair Trade Campaign	X
Maine Merchants Association	X
Maine Municipal Association	X
Maine Real Estate and Development Association	X
Maine Service Center Coalition	X
Our Town Damariscotta	X

In addition, the Office received comments from:

City of Lewiston
Maine People's Alliance
Maine State AFL-CIO
Citizens Protecting Cumberland's Character
Sierra Club, Maine Chapter

Appendix E – Stakeholders’ Comments – Grow Smart Maine

Jody Harris
State Planning Office
38 State House Station
Augusta, ME 04333

Aug. 15, 2008

Re: Municipal Exemption Provision under Maine's Informed Growth Act

Dear Ms. Harris,

First, let me clarify that GrowSmart Maine has no formal position on the Informed Growth Act. Our Board hasn't discussed it in detail, and we didn't actively work on the original bill or any of the subsequent amendments. Because we've been asked for our opinion in this process, we offer it with the understanding that we are neither for nor against the Act or subsequent amendments until and unless our board discusses the issue.

With the passage of the Informed Growth Act, the Legislature made clear that a detailed assessment of the economic impact of large retail developments should be a component of municipal land use decisions – and further that this analysis should be presented to the public in a particular way, and utilized (with other information) for a finding of no undue adverse impact before the project may move forward. In short, the Legislature didn't just require that the study be done, but also that the public be involved through a transparent process, and that a specific conclusion be drawn before permitting goes forward.

It is our understanding that the exemption provision in the Informed Growth Act exists to ensure that Municipalities that already have a process in place which meets these requirements need not significantly alter their development review process. We don't believe the Legislature intended the exemption provision to give communities a way to opt out of the comprehensive economic analysis, involving the public, or from drawing a conclusion based in part on that analysis.

However, we agree that the exemption provision language is vague and should be clarified so that Municipalities can decide with more certainty whether their own process meets the requirements of the Act or whether changes are necessary.

To make the language less vague, the basic components of the Informed Growth Act should be mirrored or referred to in the exemption language, unless the Legislature **intends** the exemption provision to apply the requirements of the Informed Growth Act only to those towns that choose to use it. Our reading and understanding of the language is that the same basic requirements apply, but that some municipalities may already have ordinances in place that accomplish the requirements- i.e. the municipality already does a comprehensive study of economic impact, involves the public and makes a finding based on the study and other data & considerations.

The exemption provision gives communities flexibility to tailor the process to other components of their development review. These flexible factors that may not mirror the Informed Growth Act process for exempted municipalities may include different fee amounts, public notification methods and process, and timelines for study completion and finding, etc.

The State Planning Office requested responses to specific questions listed in bold below.

1. What is meant by the terms:

- a. **“economic and community impact criteria”** The economic and community impact criteria should be defined as the factors listed for study in §4367 subsection, 4 A.
- b. **“a study of the comprehensive economic and community impacts”** In order to be comprehensive, the study should cover the same factors listed in §4367 Subsection 4A and evaluate the impact on a geographic area that includes neighboring municipalities.

2. What should be the public notice and public hearing requirements?

Municipalities should decide the specific timeline and requirements for public notice and public hearings. The exemption provision should be clear that public notice and hearings are required in some form if that is the Legislature’s intent.

3. How should consultants be selected?

Municipalities should choose the consultants, and may utilize the State’s list of qualified preparers or choose outside of that list. The key issue related to the consultant in the Act seems to be that the Consultant is hired by the municipality, not the developer, and is an independent voice.

4. Should the methodology used for conducting the study be detailed in the Act? Should it be Dr. Lawton’s methodology?

There is often more than one approach for analyzing factors for economic impact. Different sources of data and methodologies may be more or less appropriate depending on the circumstances- for example; a larger service center may be very different than a rural community.

5. Should municipalities, as part of their local ordinance, have to issue a finding of undue adverse impact in order to qualify for the exemption?

Yes. We believe this was the intent of the Informed Growth Act and the exemption provision – that the study is done, public involved, and a conclusion drawn from that study (with other data). If this is not the case, the Legislature needs to make that clear.

Thank you for the opportunity to offer comments.

Sincerely,
Maggie Drummond, Policy Director, GrowSmart Maine

Appendix E – Stakeholders’ Comments – Institute for Local Self Reliance, Maine Fair Trade Campaign, Maine State AFL-CIO, Our Town Damariscotta, Sierra Club Maine Chapter

Jody Harris
State Planning Office
38 State House Station
Augusta, ME 04333

Aug. 15, 2008

Re: Comments on the Municipal Exemption Provision of the Maine's Informed Growth Act

Dear Ms. Harris,

We believe that the proper function of the exemption provision under the Informed Growth Act is to ensure that the fundamental requirements of the law are in place statewide, while providing municipalities with the option of customizing the process for carrying out these requirements so that it best fits their needs and integrates seamlessly with other components of their development review process. The Legislature has affirmed the importance of a uniform standard by twice rejecting opt-out provisions. It is imperative that the exemption provision does not become a mechanism to weaken or skirt the terms of the Informed Growth Act.

We agree that the exemption provision would be improved by greater clarity and specificity.

One of the key features of the Informed Growth Act is that it stipulates that municipalities consider development in a regional context and thereby encourages greater regional planning and cooperation. The Act accomplishes this by stipulating that municipalities take into account the positive and negative effects of large-scale retail development on adjacent municipalities and by establishing a statewide requirement, which ensures that towns can evaluate these impacts without worrying that doing so will put them at a disadvantage in attracting development relative to other towns.

Regionalism has been identified by the state legislature, as well as many citizens, economists, and public interest groups, as an essential objective if we are to check the rising cost of local government, protect Maine's assets, and achieve long-term prosperity. The Informed Growth Act's contribution to fostering regionalism would be critically undermined if the exemption provision were to function in a way that allowed towns to opt-out of the law's fundamental requirements.

The components of the Informed Growth Act that need to be mirrored in a municipal ordinance in order for a municipality to be exempt without compromising the Act's fundamental purpose and effectiveness are:

1. *The ordinance must use the same definition for "large-scale retail development" and "land use permit" as defined in the statute; these two terms are used in the exemption provision, and are defined in the statute's Section 4366(5) and (6).*

To the extent a municipal ordinance includes a definition of "large-scale retail development" or "land use permit" that is different from the statutory definition, the ordinance would not qualify the municipality for exemption. For example, an ordinance that excluded "approvals", including contract zoning approvals, from the definition of "land use permit" would not exempt the municipality from the statute, as it would not meet the exemption's requirement that the ordinance apply to all Section 4366(5) "land use permits".

2. *The ordinance must apply to the entire land area in the municipality.*

The statute states that it applies to all municipal "land use permits", and thus it applies to any permit regardless of the location or zone of the proposed large scale retail development site. To the extent the ordinance applies only to a single zone or only to some of the land in a municipality, it would not exempt the municipality from the statute.

3. *The ordinance must require a comprehensive economic impact study for large-scale retail development.*

To be "comprehensive", the study should cover the same factors listed in §4367 (4)(A) and evaluate the impact on a geographic area that includes abutting municipalities. The requirements of §4367 (4)(B) need not be replicated in a local ordinance, because this provision calls only for compiling information generated by other required reviews, not for new analysis. Municipalities should have the option of including additional factors for study in their local ordinance.

4. *The comprehensive economic impact study must be independent and subject to formal public comment.*

We feel strongly that the integrity of the study depends on two factors. It must be independent — that is, the municipal reviewing authority should have the final say in selecting the consultant and the consultant should be working for the municipality, not the developer. This makes it clear that the consultant's duty is to provide information useful to the municipality and citizens, not to produce a report that augments the developer's proposal. The second factor is that the study needs to be subject to a public hearing or other formal opportunity for residents, the applicant, and others to comment on the study and offer additional evidence for the reviewing authority's consideration.

5. *The ordinance must require that the municipal reviewing authority issue a finding of no undue adverse impact in order to grant a land use permit.*

A review standard is what allows a municipal reviewing authority to consider lawfully the economic and community impacts of large-scale retail development, among other evidence, in deciding whether to issue a land use permit. A municipal reviewing body may not consider evidence that is not relevant to its review criteria. Thus, the local ordinance would have to include an economic and community review standard, such as

the typical "no undue adverse impact" standard, to render its consideration of economic and community impact data relevant.

6. *The ordinance must define large-scale retail development to include all of the applications that would trigger an impact study under the Informed Growth Act.*

Nothing should preclude a municipality from also applying its ordinance to applications that include retail businesses smaller than 75,000 square feet.

We believe the exemption provision gives municipalities the leeway to customize the process and integrate it with other components of their development review. They are free to determine:

- their own timeline for completion of the study and issuance of a finding,
- the fee amount assessed to the applicant,
- notification requirements, and
- their approach to taking comment on the study from the public and the applicant.

The exemption allows municipalities to combine aspects of the economic impact study process with other components of their development review. For example, a single public hearing that takes comment on both the study and other land use questions relevant to the application.

The State Planning Office requested responses to specific questions listed in bold below.

6. What is meant by the terms:

- a. **“economic and community impact criteria”** Although this phrase is not defined in the statute, it has a common sense meaning. The phrase "economic and community impact criteria" implies that all substantive criteria that relate to economic or community impacts should be considered. The statute's §4367 (4)(A) factors are intended to provide a comprehensive list, and thus economic and community impact criteria should be interpreted to encompass at least the factors listed for study in that section of the statute. The criteria laid out in subsection (4) (B) exists to provide local officials and citizens with a central survey of other impacts that have been analyzed under other requirements. Since this information is available elsewhere, the local ordinance need not require it to meet the terms of the exemption..
- b. **“a study of the comprehensive economic and community impacts”** In order to be comprehensive, the study should cover the same factors listed in §4367 (4)(A) and evaluate the impact on a geographic area that includes abutting municipalities. The requirements of §4367 (4)(B) need not be replicated in a local ordinance, because this provision calls only for compiling information generated by other required reviews, not for new analysis. Municipalities should have the option of including additional factors for study in their local ordinance.

7. What should be the public notice and public hearing requirements?

As many of those who testified in support of the Informed Growth Act stated, an important goal of this legislation is to provide an open and transparent process for evaluating the positive and negative effects of large-scale retail development. As stated above, we believe the integrity of this process depends on there being an opportunity for the public and the applicant to comment on the study and offer additional evidence. The specifics of how this public comment is taken and the notification requirements can be left to the municipality's discretion, subject to the procedural and public participation requirements in other statutes.

8. How should consultants be selected?

The final authority for choosing the consultant should be with the municipal reviewing authority. The municipality may select a consultant from the State Planning Office's list of pre-qualified preparers, but is not required to.

9. Should the methodology used for conducting the study be detailed in the Act? Should it be Dr. Lawton's methodology?

No. As this legislation was being drafted, we interviewed several consultants who have experience conducting economic impact studies. They all said that there is often more than one valid approach for analyzing these factors. Indeed, different data sources and methodologies may be more appropriate depending on the circumstances (e.g., larger metropolitan area versus rural town). We do believe that the analysis should be based primarily on empirical data, with interviews providing supplemental not determinative information.

10. Should municipalities, as part of their local ordinance, have to issue a finding of undue adverse impact in order to qualify for the exemption?

Yes. We feel that it is imperative that the municipality make a finding of undue adverse impact or no undue adverse impact. As discussed above, this provides the municipality with the legal authority to consider these impacts. The "undue adverse impact" standard is a typical standard in Maine state and local land use regulation..

Thank you for the opportunity to offer comments.

Sincerely,

Stacy Mitchell



Institute for Local Self-Reliance
774-6792 or smitchell@ilsr.org



Daphne Loring
Maine Fair Trade Campaign
777-6387 or daphne@mainefairtrade.org



Ed Gorham
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Ken Cline
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Appendix E – Stakeholders’ Comments – Maine Merchants Association

August 13, 2008

Jody Harris
Maine State Planning Office
38 State House Station
Augusta, ME 04333

Re: Comments Regarding Municipal Exclusion under the Informed Growth Act

Dear Jody:

Thanks for the opportunity to comment on the circumstances under which municipalities may be exempted from the Maine Informed Growth Act. I understand that the Maine Legislature’s State & Local Government Committee directed the State Planning Office to examine the current exemption language in light of an unsuccessful committee attempt to modify the language in the most recent legislative session.

Although Maine Merchants Association believes that the Informed Growth Act should be re-examined in its entirety, it will comment first on the exemption clarification issue per your specific request.

- (1) First, the law does permit municipalities an opportunity to opt-out of the state statute if they have established economic and community impact review criteria comparable to that of the Informed Growth Act. However, the law is not clear as to who would make the determination whether towns have, indeed, achieved acceptable standards for project review, and precisely what those standards should be.
- (2) As you know, Chuck Lawton of Planning Decisions, Inc., was asked by the legislative committee to comment on the nature of comprehensive economic impact studies, and how a town could go about conducting one. He posed several questions that obviously beg answers:
 - (A) He notes that current language stipulates that “to qualify for an exemption, a municipality needs to adopt economic and community impact review criteria.” Yet, he points out that the Informed Growth Act does not define “economic and community impact review criteria” or provide clear language about what these criteria should be.
 - (B) Further, he notes that to be exempt a municipality must require a study of the comprehensive economic and community impacts of the proposed development, but again it is not clear if the exemption language refers to the specific study defined in the act.
 - (C) Mr. Lawson also notes the exemption language is silent on the qualifications of, timeline for completing, payment for, and method of selecting a consult to prepare the impact study.
 - (D) Finally, he said the Informed Growth Act does not require municipalities, as part of their local ordinance, to issue a finding of undue adverse impact. Legislative intent in that regard is not clear.

In its request for comments, the State Planning Office asks whether the exemption language should remain as it is, mirror state law, or be allowed to be different. In that regard, it appears to be virtually impossible and unwise to treat economic development in every town the same.

But, fine-tuning of the exemption language begs the larger question of the need for the Informed Growth Act itself. The idea that the state can apply the same growth criteria to every single municipality – large and small – is impractical. Maine Merchants Association believes that one solution would be to allow service center communities such as Augusta, Waterville, Lewiston, Auburn, and Bangor to opt-out of the Informed Growth Act by demonstrating that they have:

- (1) Current comprehensive master plans,
- (2) Professional planning staffs,
- (3) Active Planning Boards, and
- (4) Sufficient mechanisms for public notice and hearings for all projects over 75,000 sq. ft.

A provision could be added to require that such projects be approved by town councils or at town meetings in service center communities.

In the final analysis, the Informed Growth Act represents a major assault on local control and to the fundamental concept of free enterprise. Since it only applies to retail development and to projects in excess of 75,000 square feet, it discriminates against businesses based on products sold and their size. The very heart of free enterprise and retailing is competition, and any attempt by the state to arbitrarily reject projects because they might increase competition does not serve the public good.

Maine Merchants Association has been unable to locate a large retail development (75,000 square feet) proposal that has elected to move forward in Maine since the Informed Growth Act was enacted. The comments we hear are that developers are taking a wait and see approach, and do not want to be the first to attempt the complex, confusing, and costly requirements of the Informed Growth Act. In any event, it is clear that the State Planning Office or the State and Local Government Committee should take steps to determine whether enactment of the Informed Growth Act has had this chilling impact on needed economic development in Maine.

Finally, Maine Merchants Association recommends that – after comments have been received – the interested parties be assembled for discussions of the comments and the issue as a whole.

Thank you for considering these comments.

Best regards,

Jim McGregor

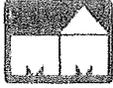
Director of Government Affairs
Maine Merchants Association (MMA)

Roger Pomerleau

Marketplace of Augusta
MMA Treasurer

Appendix E – Stakeholders' Comments – Maine Municipal Association

Rec 8/12/08



Maine Municipal Association

60 COMMUNITY DRIVE
AUGUSTA, MAINE 04330-9486
(207) 623-8428
www.memun.org

August 14, 2008

Jody Harris
State Planning Office
38 State House Station
Augusta, Maine 04333

Dear Jody,

Please accept these comments from the staff of the Maine Municipal Association ("MMA") in response to your request for comments regarding the Informed Growth Act ("IGA") 30 MRSA §4365-4371 and the municipal exemption to the Act in §4371.

The exemption would benefit from some clarification. In particular, we believe our policy committee would support an amendment to the IGA that would provide more flexibility to municipalities than the statute appears to provide. As currently constructed, it seems as if a municipality would need an ordinance which exactly mirrors the IGA in order to qualify for the exemption – in essence rendering the exemption meaningless.

SPO's background memo makes some interesting points about the vagueness of the exemption and emphasizes what the IGA and the exemption *do not* facially require. Nevertheless, we believe that without some modest amendments to the statute the ambiguity in the wording will cause many municipalities to conservatively estimate that they must exactly reproduce the IGA in order to qualify for the exemption.

Suggested amendment language would read:

§4371. Exemption

The provisions of this subchapter do not apply to a municipality that has adopted economic and community impact review criteria that apply to large-scale retail development land use permit applications and that require a study, and a public presentation of the study, of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application.

This amendment would strike the phrase "economic and community" which is used twice in the exemption. As stated in the SPO memo, this phrase is not defined and so its precise meaning is unknown. However, the phrase or close variations of the phrase do appear in the Act. It is our opinion that the phrase "economic and community" impacts in the exemption section can be read to encompass all of the factors listed in §4367(4). That is, read in its entirety, the exemption seems to require a complete IGA ordinance locally.

SPO makes a strong case that the MMA opinion is wrong. It lays out how the exemption does not require a finding of "undue adverse impact" and further that the exemption is silent on administrative and procedural issues such as timing and public notice. Another argument against the MMA interpretation is that if the legislature had intended for the exemption to exactly replicate the substance of the Informed Growth Act in its entirety, it could have easily drafted exemption language to that effect.

Even if the ambiguous language is amended to clarify that an exact replica of the IGA is not required in order to qualify for the exemption, the heart of the IGA can still be preserved.

That is, in order to qualify for the exemption a municipality would need to:

- Adopt impact review criteria;
- Require a study of the impact review criteria;
- Conduct a public hearing on the study, and,
- Consider the findings of the study when reviewing a permit application.

The only difference between a municipality that would qualify for the exemption and one that relies upon the statutory IGA would be that the "exempt" community would choose both the review factors and the review standard for itself.

In response to your specific questions:

The State Planning Office is seeking input on the exemption provision in the Informed Growth Act (30 MRS §4371). Specifically, should the Act be more specific about the following four aspects of the exemption:

1. what is meant by the terms: "economic and community impact criteria," and "a study of the comprehensive economic and community impacts?"

MMA Response:

Since those terms are undefined it is unclear. MMA's interpretation has been that the terms are quite similar to other terms in the IGA and that the phrase is a reference to the study in §4367. The Act should require a study, but a community should be able to select its own impact factors and criteria.

2. what should be the public notice and public hearing requirements?

MMA Response:

The public notice and public hearing requirements should be the same as the IGA.

3. How should consultants be selected?

MMA Response:

The state's list of qualified preparers should be used.

4. should the methodology used for conducting the study be detailed in the Act? Should it be Dr. Lawton's methodology?

MMA Response:

Possibly. The concept of having approved, qualified preparers rests upon a belief that these individuals are capable of producing a report without having to be told how to do it. However, after reading Dr. Lawton's letter, some further direction may be needed.

We are concerned that Dr. Lawton's (admittedly brief) explanation of how he would undertake an IGA study is disconcerting.

First, Dr. Lawton suggests that the qualified preparer should ask the developer for information about its closely guarded business plan: what will be sold, what is the target market area, how many employees will be hired and at what wages. Some of these questions go directly to a developer's market analysis and business plan. Many businesses would rightfully consider these questions to be proprietary (at least until the project is complete). Maybe a study cannot be done without asking these questions. However, we have doubts about whether a developer would be forthcoming with this information.

Furthermore, these questions seem to be irrelevant to a traditional land use permit application. For example, what does the proposed wage rate for retail clerks have to do with whether a project should receive a building permit? These wage and employment issues have always been relevant to developer benefits (such as TIF agreements) but not for land use permits.

Next, the third research task Dr. Lawton proposes is to "*interview business owners and public officials within the impact area concerning the likely impacts of the proposed investment on them.*" These "business owners" are frequently going to be competitors who are negatively impacted by competition. Dr. Lawton does not give any guidance as to how the preparer should weigh self-interested estimates of the negative impact of a new competitor.

Third, Dr. Lawton does not explain how (or even if) a preparer will analyze the data and use his/her expertise to provide estimates for the "*economically significant effects of the development.*" We presume that this analysis stage will occur and it will be a critical component of the study.

For example, if Dr. Lawton's first research task reveals that the development will produce 50 entry-level retail clerks and that their proposed hourly wage rate is \$8.00; and Dr. Lawton's second research task discovers that there are 500 entry-level retail clerks in the market area and they earn an hourly wage rate of \$11.00; the IGA presumes that the qualified preparer can give the public an accurate estimate of the "economic impact" on area wages that caused by the development.

It would have been comforting to hear from Dr. Lawton that there is an objective analysis stage, particularly for the complex economic issues such as wages, because municipal planning boards have generally not used comparative wage estimates as land use permit review criteria.

Instead, Dr. Lawton seems to be dampening expectations that the study will provide the kinds of information permit authorities will need to comply with the law. He indicates that a study will not arrive at some “theoretically correct” answers regarding the policy questions. We’re not sure what this means.

The Legislature was certainly led to believe that these economic impact studies would provide “accurate” answers about the economic impacts from large-scale retail development. That is, the entire law is built on the theory that experts can predict what will occur in a number of different policy areas if a large-scale retail development were constructed in a particular area.

Dr. Lawton seems to downplay the importance of the study’s answers to the questions posed by the IGA and instead emphasizes the “journey” that the preparer took to arrive at the answers – and how different assumptions can provide different answers. However, we believe Dr. Lawton is not fully appreciating the mandate given to local permitting authorities under the IGA.

Permitting authorities are obligated to: (1) reach conclusions about the future economic impacts of a pending project; (2) somehow decide (without any statutory guidance) if those future economic impacts are “positive” or “negative” by some undefined set of standards or values; (3) decide if the negative impacts outweigh the positives (the required “undue adverse impact” finding), and, (4) deny a permit if there is a finding of undue adverse impact. This report is not, as Dr. Lawton describes it, a tool for considering “options.” The report is the foundation for a planning board’s “yes or no” decision.

The permitting authority has been given a difficult assignment. Decisions made by permitting authorities (unlike those made by legislative committees) can be appealed in court. These permitting authorities need to be able to articulate and subsequently defend in court their decision to grant or deny a permit application. The economic impact study is not about making more generally “informed” decisions. The economic impact study is the key document that local boards will use to make a particular decision that has not been made by planning boards before. The final numbers provided in the report are crucial and will be the primary exhibit offered in court if the board is ever sued – for either granting or denying an application. The utility of the report is not in the journey but in the destination.

While our initial reaction was that these preparers should know how to conduct the study, we now see that there is nothing in law, rule or guidelines that provides these qualified preparers with the state’s expectations. There is nothing that can be used to tell a preparer that his/her report fails to provide the information requested (and paid for by others.) Given the hedging that is apparent in Dr. Lawton’s letter, we are fearful that these reports might be long on data and the process used to produce the data but short on analyses and actual estimates. The state, the public and planning boards will not get their money’s worth if these reports continually conclude: “...using one set of assumptions, area wages might go up, using slightly different assumptions, area wages might go down.” If this is the kind of conclusions we can expect from these studies, then the entire theory underpinning the IGA is destroyed. SPO is probably correct to suggest that more direction to the qualified preparers is needed.

5. should municipalities, as part of their local ordinance, have to issue a finding of undue adverse impact in order to qualify for the exemption?"

MMA Response:

No. As long as the exemption requires "review criteria" the community will be obligated to clarify the standards for meeting those criteria.

The Office also seeks input on whether the language in §4571 with respect to exemptions should:

- stay as it is.

MMA Response:

No.

- mirror state law, that is, to be exempt, a municipality must use the same definitions, standards, and procedures as applies to non-exempt municipalities; or

MMA Response:

No.

- establish that the local procedures, standards, and definitions need not all be exactly the same as applies to non-exempt municipalities. If the local procedures, standards, and definitions need not be same, should municipalities be required to enact ordinances that meet certain criteria or address specific elements?

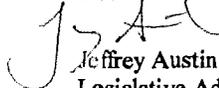
MMA Response:

Yes and Yes. Yes, it should be clear that municipalities need not entirely replicate the IGA at the local level to qualify for an exemption. And, yes, municipalities should be required to have an ordinance that includes review criteria, a third-party study/analysis of those criteria, and a public process to receive the report.

Summary

We appreciate that the Legislature and State Planning Office are reviewing the scope of the exemption in the Informed Growth Act. We suggest that an amendment be made to the statute to clarify that a municipality does not need to exactly reproduce the IGA locally in order to be exempt. Yet, the exemption should only be available in communities which require the study of the impacts of a proposed development on locally-determined factors of importance followed by a public hearing on the results of that study. Thank you for accepting these comments.

Yours,


Jeffrey Austin
Legislative Advocate

Appendix E – Stakeholders’ Comments – Maine Real Estate and Development Association

January 7, 2009

Jody Harris
State Planning Office
38 State House Station
Augusta, ME 04333-0038

Re: Informed Growth Act – Municipal Exemption

Dear Jody:

Thank you for soliciting comments from the Maine Real Estate & Development Association (“MEREDA”) regarding its thoughts pertaining to the Informed Growth Act (“IGA”) municipal exemption as set forth in 30-A M.R.S. §4371.

We appreciate the opportunity to provide comments to you regarding the IGA municipal exemption issues, and provide responses to your specific questions. I would appreciate copies of all comments that you receive, and further am requesting a meeting of the interested stakeholders to discuss the issues and work toward creating recommendations for inclusion in the January 15, 2009 letter to the State and Local Government Committee. We believe that this is in keeping with the intent of the Committee’s letter to Director Freeman (April 8, 2008), and will provide you and your Office with the ability to fully craft recommendations reflective of the stakeholder interest.

The “exemption” language contained in §4371 is not truly an exemption as it is currently drafted. Because the section is vague, contains undefined terms, and no specific decision-making process, it truly does not provide a municipality with the ability to seek or obtain an exemption. We believe the section would benefit greatly from revisions and would urge the Office to recommend changes to the current statute to afford those municipalities wishing such an exemption, the clear criteria, process, and procedure for obtaining such an exemption.

Municipalities should be provided with flexibility in determining the appropriate impact review criteria for their specific locale and specific local concerns, rather than mirroring the list in §4367(4), otherwise again, it is not truly an exemption.

Specific MEREDA responses to your questions are:

1. *What is meant by the terms: “economy and community impact criteria” and “a study of the comprehensive impact and community impacts?”*
Currently, §4371 uses the undefined terms of “economy and community impact criteria” and “comprehensive economic and community impacts”. The IGA would benefit for having either these terms defined, or we believe more appropriately, amending §4371 to allow municipalities to determine the appropriate impact review criteria for the respective

area. As the section is currently drafted, we do not believe it is an exemption. The section should be specific regarding the criteria relative to obtaining an exemption, the process for seeking an exemption and how an exemption is created. In other words, when does the developer “know” whether the statutory IGA is to be followed or whether a municipal process is to be followed?

2. *What should be the public notice and public hearing requirements?*

The project should be subject to a local, noticed public hearing, as part of the development review permitting process. It would be during such a review process that the impact criteria appropriate for that municipality would be discussed, deliberated, and decided.

3. *How should consultants be selected?*

The Office’s list of qualified preparers should be used, and the municipality should be clear in the process of choosing and funding a qualified preparer.

4. *Should the methodology used for conducting the study be detailed in the Act? Should it be Dr. Lawton’s methodology?*

We are unclear regarding the intent of this question. If the Office means whether the impact review criteria used by a municipality should be the same that is enumerated in 30-A §4367(4)(A), we do not believe the same criteria should apply to a municipality obtaining an exemption. Municipalities should determine the appropriate and important review criteria for their specific locations, and those that are specifically of concern to their residents. This would be undertaken during a planning process with an ordinance responsive to and implementing such a planning process.

If the Office is asking whether Dr. Lawton’s methodology outlined in a February 6, 2008 letter to Anna Bloom, Legislative Analyst should be placed in statute, we respectfully disagree. The concept behind establishing a list of qualified preparers is that each such person is qualified to undertake such work. Methodologies may vary between preparers, but each should be capable of producing a comprehensive economic impact study meeting the criteria of §4367(4)(A).

5. *Should municipalities, as part of their local ordinance, have to issue a finding of undue adverse impact in order to qualify for the exemption?*

No, each municipality should be able to establish its own criteria, which have undergone public consideration and examination as part of the ordinance drafting process.

The Office also seeks input on whether the language in §4371 with respect to exemptions should:

- *Stay as it is;*

No, as we have discussed earlier in these comments, the current section is neither a true exemption, nor does it provide any clarity for a municipality to seek and/or maintain an exemption.

- *Mirror state law, that is, to be exempt, a municipality must use the same definitions, standards, and procedures as applies to non-exempt municipalities; or*

No, again, please see the previous discussion in our comments. If you simply mirror a state law, then there is no exemption.

- *Establish that the local procedures, standards, and definitions need not all be exactly the same as applies to non-exempt municipalities. If the local procedures, standards, and definitions need not be [the] same, should municipalities be required to enact ordinances that meet certain criteria or address specific elements?*

As we have discussed above, we believe municipalities should have the ability to determine the appropriate impact review criteria for their locations and for their residents. The determination of the impact review criteria should come through a planning process and ordinance drafting process, so that public discussion, and determinations are undertaken.

MEREDA sincerely appreciates the Office soliciting our comments, and requests that the interested parties meet for further discussion of comments, and formulation of recommendations for submission to the Legislature in January, 2009.

Best regards.

Patricia W. Aho, Esq.

ajg

(E-mailed August 14, 2008)

Appendix E – Stakeholders’ Comments – Maine People’s Alliance



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mpa@mainepeoplesalliance.org
145 Lisbon St Ste 201 Lewiston ME 04240 (207) 782-7876 Fax (207) 782-3236
kate@mainepeoplesalliance.org
27 State St Ste 44 Bangor ME 04401 (207) 990-0672 Fax (207) 990-0772
jesse@mainepeoplesalliance.org
www.MainePeoplesAlliance.org

The Maine People’s Alliance would like to thank the State Planning Office for carefully considering the exemption provision of the Informed Growth Act (IGA). As a twenty-six year-old organization with 32,000 members, we strongly believe this law is a model for democratically guided economic development. For too long our communities across the state have been forced to make tremendous decisions about their economic destiny without adequate information or public process. The Informed Growth Act (IGA) is an elegant, ingenious, and fair way to address this problem. But the law’s integrity must remain intact for Maine to fully benefit from all it offers. That is why the interpretation of the exemption provision is so important: it essentially determines whether or not the law will be followed.

We believe that the exemption provision should enable towns to manage the funds and timetable without compromising the transparent and thorough process established in the IGA. The exemption provision allows municipalities to locally manage this process. It does make the process optional or allow towns to weaken it. What follows are some specific examples of provisions that must not become optional or weakened.

To begin with, the comprehensive economic impact study must be conducted by a consultant independent of the developer, future retailer, or other entities related to the project. An independent preparer is critical to providing citizens and local officials with objective information. If the permit applicant hires the consultant, the entire IGA process would be undermined by this conflict of interest. The preparer could come from the State Planning Office’s list of pre-qualified preparers or from a selection process that takes place at an open meeting where the public is notified in advance and can review the qualifications and weigh in.

Additionally, the existing exemption requires a "study of the comprehensive economic and community impacts" and "economic and community impact criteria." The former should address the same factors listed in Section 4367, Subsection 4A. To reflect the nature of the impacts and to preserve the regional approach embedded in the IGA, the scope of the study must not only include the host municipality, but also adjacent municipalities. Local management of the IGA shall not mandate the requirements of Section 4367 Subsection 4B as that information will be available elsewhere. The "economic and community impact criteria" should be defined as the factors listed in Section 4367, subsection 4A. Since the criteria established in 4B exists to provide a central survey of other impacts and this information is available elsewhere, these criteria need not be required in the exemption provision. Nothing shall preclude a municipality from adding additional criteria for evaluation.

Furthermore, to preserve the open process, local management of the IGA must provide a public hearing with adequate notification to municipal residents and officials from the surrounding communities. The terms of the hearing and public notice should reflect the terms laid out in Section 4368 of the Informed Growth Act. The municipality should be free to combine this public hearing with other meetings or hearings that take place in their existing development review process.

Finally, the IGA not only provides municipal officials and citizens with independent information and an open process for planning and decision making, but also with the legal mechanisms to consider the economic impacts. Therefore, it is critical that municipalities make a finding of undue or no undue adverse impact. This finding should be based on the factors laid out in Section 4367 subsection 4A and any other relevant economic and community impacts to the particular municipality.

While we believe these examples to be some of the most important aspects of the law that must be preserved if and when towns create their own processes to exempt themselves from the state law, we do not mean to suggest that these are the only essential provisions of the law. Rather, we wish to clearly highlight the intention of the exemption provision: it allows towns to either tailor an equally rigorous process to their needs, or develop an even more democratic policy themselves.

Thank you for considering our comments. We are happy to answer any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Jesse Graham", with a long horizontal flourish extending to the right.

Jesse Graham

Maine People's Alliance Executive Director

jesse@mainepeoplesalliance.org

Appendix E – Stakeholders’ Comments – City of Lewiston



Executive Department
Lincoln Jeffers
Assistant to the Administrator



August 15, 2008

Jody Harris
State Planning Office
38 State House Station
Augusta, ME 04333

Dear Ms. Harris:

I am writing in response to your request for comments regarding the municipal exemptions to the Informed Growth Act (IGA) 30 MRSA §4364-4371.

As background I should note that I testified against the IGA, and lobbied for inclusion of an opt out provision if it were to pass. It is the City's belief that municipalities should have right to determine, independent of the state, whether the community wants large scale retail development. Since the law passed without an opt out provision, Lewiston took advantage of the little bit of latitude included in the IGA. The City adopted an ordinance to take advantage of the municipal exemption included in §4371. A copy of our ordinance is attached.

The inexactness of the language in the IGA made it challenging to put together an ordinance that would better reflect Lewiston's goals while still being able to withstand an appeal on whether or not the intent of the IGA had been met. On many fronts, the City felt it had to mirror the state language to be able to withstand a challenge. The areas the City amended include:

- 1) The Developer will pay for the study directly.
- 2) The Developer can use the consultant of their choice. The developer is not limited to the SPO list. It is the City's belief that nationally there are more qualified analysts than the 7 consulting companies on the SPO list, and to limit a developer's choice would be the same as limiting their choice of civil engineers. The City mirrored the IGA language as to what constitutes a qualified analyst.
- 3) The City may have the comprehensive impact study peer reviewed at the developer's cost. This measure was taken to give professional assistance to the Planning Board in evaluating loosely defined economic impact criteria, which is an area of expertise historically not needed or utilized by planning board members.
- 4) The public notice, public hearing and development review process mirror the City's existing development review requirements. The abutters to be notified were expanded to

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include landowners within 1,000 feet and the municipal officers of neighboring communities.

5) The developer can do the economic impact study and regular development review process together or separately, as they prefer. If done separately, the public notice and hearing requirements must be done both times. The option of separating the two was done so as to remove a degree of financial risk in requiring fully developed civil engineering plans to be developed on a project that may not pass the economic impact criteria.

As originally drafted the local ordinance would have waived the IGA requirements for retail projects 75,000 s.f. or larger for projects located in downtown Lewiston. Lewiston has several hundred thousand square feet of mill buildings that could be converted to retail. Waiving the IGA requirement for those buildings would potentially have made them more attractive for retail development against other sites away from downtown. Large scale retail would serve as an anchor and catalyst for more downtown development. However, the City's legal counsel advised that the IGA did not allow downtown properties to be exempt from the economic impact review criteria and the language was removed.

Some of the issues raised in your Questions for Input have been touched upon above, but following is a direct response on the questions asked.

1. What is meant by the terms: "economic and community impact criteria" and a "study of the comprehensive economic and community impacts?"

The lack of clear definitions leave them open for interpretation which makes them ripe for legal challenges. Communities should be free to determine what criteria are important to the community.

2) What should be the public notice and hearing requirements?

They should be the same as the local development review criteria on other projects. Consistency in codes is important. The broader reach of impacts from a large scale retail project justifies a longer distance for abutter notices, but the determination of what the appropriate distance should be, should be made by the community based on local circumstances and zoning. As to the reach of market area for notifying neighboring communities, land use decisions should be made locally, not regionally or at the state level. If a project impacts the transportation network in a neighboring community it is already being dealt with through the traffic movement permit process.

3) How should consultants be selected?

They should be qualified by education, training and experience as noted in the IGA. Having an SPO approved list unfairly limits the choices of qualified consultants.

4) Should the methodology used for conducting the study be detailed in the Act? Should it be Dr. Lawton's methodology?

The issues to be addressed should be detailed in the Act; the methodology to answer the questions should be up to the consultant. It should be noted that a fatal flaw of the Act is that perspective is absent from the discussion of evaluation. For examples:

a. If a new store comes to town with lower prices and adversely impacts sales at existing stores is that a good thing or bad thing? Existing stores have lower sales but consumers get lower prices and perhaps broader choices.

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b. If a new store comes to town and pays a lower wage than the prevailing rate but creates 75 new jobs and adds \$2 million in payroll to the local economy is that good or bad? That depends on whether you already have a job or are looking for a job.

c. What if the new retailer pays the prevailing wage or a higher wage, or offers benefits when others don't? That would be good for local employees but could be bad for other retailers.

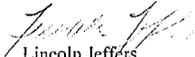
5) Should municipalities, as part of their local ordinance, have to issue a finding of undue adverse impact in order to qualify for the exemption?

No. Communities should be able to make their own determinations of what they want and don't want built in their communities. The IGA dictates from above, trying to paint the entire state with the same brush and color, not recognizing that there are areas of the state where big box retail is appropriate and desired. If a community wishes to work toward that goal they shouldn't have to prove an adverse impact to qualify to get an exemption to create a local ordinance to meet the requirements of a law it does not support the premise of.

The language in §4371 should establish that local procedures, standards and definitions need not be identical to those specified in the IGA. Communities should have the freedom to qualify for the exemption by creating an ordinance with comprehensive economic and community impact criteria that are important to the community. Not being able to waive the IGA requirements for large scale retail to be developed downtown is an example of why municipalities should be able to develop ordinances that reflect the unique circumstances and desires of the community.

Thank you for the opportunity to comment on this inquiry. As noted in the beginning of this letter, the City would prefer an opt out provision be available. Absent that, the City appreciates the opportunity to comment on issues related to the exemption language.

Sincerely;


Lincoln Jeffers

AN ORDINANCE PERTAINING TO ZONING AND LAND USE PERFORMANCE
STANDARDS RELATIVE TO LARGE-SCALE RETAIL DEVELOPMENT

THE CITY OF LEWISTON HEREBY ORDAINS:

APPENDIX A

ZONING AND LAND USE CODE

ARTICLE XIII. DEVELOPMENT REVIEW AND STANDARDS

Section 14. Additional standards for large-scale retail development.

In addition to the criteria set forth in Article XIII, Section 4, applications for large scale retail development as defined below, shall meet the following additional standards of this section.

(a) Purpose.

The State of Maine passed the Informed Growth Act (30-A MRSA Chapter 187, Sub-Chapter 3-A) to add additional development review criteria that evaluate the economic impact of large scale retail development. Subsection 4371 of the Informed Growth Act provides an exemption to municipalities that have "adopted economic and community impact review criteria that apply to large scale-retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration among other evidence in applying the review criteria to the application." The following ordinance provisions meet that criteria, exempting large-scale retail projects proposed in Lewiston from 30-A MRSA Chapter 187, Sub-Chapter, 3-A.

(b) Definitions.

- 1) Comprehensive economic impact area means the geographic area affected by a proposed large scale retail development. The area includes Lewiston and may include abutting municipalities.
- 2) Comprehensive economic impact study means a study that estimates the effects of a large scale retail development on the local economy, downtown and community. It will identify the economic effects of large scale retail development on existing retail operations; supply and demand for retail space; number and locations of existing retail establishments where there is overlap of goods and services offered; projected net job creation/loss; projected net retail related payroll increase/decrease; captured share of existing retail sales; sales revenue retained and reinvested in the comprehensive economic impact area; municipal revenues generated; increased municipal costs caused by the development's construction and operation, including municipal costs of roads, water, sewer, police, and fire; and the costs or return on investment of any public subsidies including tax increment financing; and public water, sewer and solid waste disposal capacity.

- 3) Land Use Permit means approval granted by the Planning Board for major developments pursuant to Article XIII, Section 3(b) and (c) of this code. This definition of Land Use Permit applies to any large scale retail development approved by the Planning Board prior to September 20, 2007.
- 4) Large scale retail development means any single retail business establishment having a gross floor area of 75,000 square feet or more in one or more building at the same location and any expansion or renovation of an existing building that will result in a single retail business having a gross floor area of 75,000 square feet or more except when the expansion or renovation is 20,000 square feet or less.

(c) Preparation of comprehensive impact study

As part of its review of a land use permit application for a large scale retail development the Planning Board shall require the preparation and submittal of a comprehensive impact study.

- 1) Qualified Preparer. A comprehensive economic impact study must be prepared by a person or firm, other than the applicant, that is qualified by education, training and experience to prepare such a study.
- 2) Selection of Preparer. The applicant shall choose the preparer and directly pay the preparer for their services.
- 3) Peer review. The City may choose to have the study peer reviewed, at the applicant's expense, by a consultant of the City's choice

(d) Public Hearing

- 1) Public hearing required. As part of the development review process the Planning Board shall provide the public with at least one public hearing to be heard prior to the approval of a land use permit for a large scale retail development.
- 2) Notice. Notice of the public hearing on the land use permit application for a large scale retail development must state that the comprehensive economic impact study will be presented at the hearing and that the planning board will take testimony on the comprehensive impact of the proposed project. The notice shall advertise said public hearing in a newspaper of general circulation in the city at least two (2) times, the date of the first publication to be at least six (6) days prior to the date of the hearing. Notice of the hearing will be sent by regular mail to abutters within 1,000 feet of the proposed development and to the municipal officers of abutting municipalities.

(e) Land Use Permit Process Approval

The applicant must complete and submit for Planning Board review and findings a comprehensive impact study. At the applicants option, the study can be completed and submitted for Planning Board review and determination prior to or concurrent with other development review criteria set forth in Article XIII. If the study is submitted independently of other development review criteria, the development review process will be a two step process. Each step of the two step processes must meet the above referenced notice requirements.

(f) Land Use Permit Approval

In addition to other applicable development review criteria required by this Code, the Planning Board shall evaluate the impacts of the proposed large scale retail development based on the comprehensive economic impact study, other materials submitted to the planning board by the city's peer review consultant, and other persons and entities, including the applicant, state agencies, nonprofit organizations and members of the public; and testimony received during the public hearing to determine whether the overall negative effects of the proposed project outweigh the overall positive effects. The planning board may deny the land use permit on the basis of economic impact only if it determines that there is likely to be a significant adverse impact.

REASON FOR PROPOSED AMENDMENT

The State of Maine passed the Informed Growth Act (30-A MRSA Chapter 187, Sub-Chapter. 3-A) to add additional development review criteria that evaluate the economic impact of large scale retail development. Subsection 4371 of the Informed Growth Act provides an exemption to municipalities that have "adopted economic and community impact review criteria that apply to large scale-scale retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration among other evidence in applying the review criteria to the application." The following ordinance provisions meet that criteria, exempting large-scale retail projects proposed in Lewiston from 30-A MRSA Chapter 187, Sub-Chapter. 3-A and will provide Lewiston the ability to process large scale development applications.

CONFORMANCE WITH COMPREHENSIVE PLAN

Streamline process related to the financing, development review and permitting of economic development projects. . .(see Economy, Policy 1, p. 38).

Ensure that police, fire, and rescue services continue to efficiently and cost effectively meet the needs of the community. . . (see Public Facilities, Policy 2, p. 85).

Encourage orderly growth and development in appropriate areas of the City, while protecting the City's rural character, making efficient use of public services and preventing development sprawl. . . (see Land Use, Goals, p. 123).

***Appendix E – Stakeholders’ Comments – Citizens Protecting
Cumberland’s Character***

November 10, 2008

Ms. Jody Harris
Director of Program Services
State Planning Office
38 State House Station
Augusta, ME 04333

Dear Ms. Harris,

The Town of Cumberland recently attempted to pass an ordinance to avoid compliance with the State of Maine Informed Growth Act (IGA). The language of the proposed ordinance was structured to weaken the provisions of the act at the time when the Town Council was considering a Contract Zone amendment allowing for big box retail development on Route 1 between the towns of Falmouth and Yarmouth. Citizens opposing the planned development retained council and pointed out the specific wording that weakened the intent of the IGA. The developer subsequently withdrew the application for the Contract Zone amendment.

However the experience pointed out the weakness in the IGA that allows towns to write their own interpretation of the law. We think it is important that the objective of the IGA be applied evenly and uniformly in the State of Maine. Any other interpretation or the existence of a loophole will create a situation where the proliferation of big box retail stores will be at the whim of municipalities and could result in many unintended consequences.

Please convey this information to the legislative committee considering any amendments to the IGA that would weaken this important law or maintain the existence of the ability of municipalities to write their own statute.

Sincerely,

Tom Foley
President, Citizens Protecting Cumberland’s Character

Appendix E – Stakeholders’ Comments – Maine Association of Planners

Jody Harris
Maine State Planning Office
38 State House Station
Augusta, ME 04333

Re: Comments of the Maine Association of Planners Regarding SPO’s Draft Report on Municipal Exclusion under the Informed Growth Act

Dear Jody:

Thank you for providing the Maine Association of Planners (MAP) with the opportunity to offer our thoughts about the options presented in SPO’s draft discussion of the municipal exemption provision of the Informed Growth Act (IGA). It is our understanding that, among other things, you would like MAP’s opinion as to whether the “possible amendments” included in the draft accomplish the “intended outcome.”

MAP’s Findings

The draft report provides a clear and concise description of the issues surrounding LD 1962 and responds appropriately to the request from the State and Local Government Committee of the Legislature.

The draft report accurately reflects the range of outcomes for the municipal exemption provision and correctly concludes that differences of opinion as to which outcome is preferred “stems from different beliefs about the purpose of the Act and from diverse philosophical views” of stakeholders.

Outcome 3⁴ most closely meets the intent of the Informed Growth Act and best incorporates sound planning principles while adhering to established traditions for state and local control over land use. MAP agrees that “the exemption language would benefit from revisions to provide clear definitions, procedures, review criteria, and decision-making standards.”⁵

However, MAP believes the proposed language to amend the exemption provision under **Option 3**⁶ is not sufficient to accomplish the intended outcome. That language generally succeeds in requiring municipalities to follow the Act with regards to principles of informed decision-making, but does not succeed in providing clear definitions, procedures, review criteria, and decision-making standards.

Discussion

Generally municipalities should be (and under Maine law are) empowered to regulate land use within their borders. This allows communities to develop and apply criteria that fit the scale and the culture of that community and allows those with first-hand knowledge of local conditions to respond to the local

⁴ “The exemption provides for local ordinances to be based on locally-determined review factors, but that they follow the Act with regards to other principles of informed decision-making.”

⁵ Found on page 9, under the heading “Possible Amendments to the Informed Growth Act.”

⁶ Found on page 10 of the draft report.

needs and concerns. But this principle of local control only goes so far – when local control has the effect of undermining important state goals it is appropriate for the state to assert its role.

The IGA is an expression of an important state goal – preservation of the economic vitality of existing service centers, downtowns and central business districts - and the economic impact to a community and a region from development of large-scale retail is a legitimate consideration in the review process. To achieve this goal the IGA sets out some principles fundamental to the purpose of the Act, which the draft report identifies and discusses. These are:

- Public involvement through a transparent process, including disclosure of the applicant’s name, was cited by several stakeholders as critical to the Act’s objectives.
- Requirement that the economic impact study be conducted by an independent preparer to provide objective information.
- Requirement that municipalities consider development in a regional context thereby encouraging regional planning and cooperation.

A comprehensive economic impact study should provide “public policy makers with a systematic way of listing the likely effects of a proposed change and a way of relating those effects to the collective goals it is their responsibility to pursue.”⁷ It is not a tool that automatically produces some theoretically ‘correct’ answer nor is there any one ‘correct’ methodology for conducting a comprehensive economic impact study.

A number of municipalities have already enacted detailed site plan and major land development review processes that incorporate some of the review factors listed in the IGA. These municipalities feel that the IGA is unnecessarily burdensome on boards as well as applicants and that the obligatory comprehensive economic impact review process may hinder economic development that local citizens have already identified as desirable.

MAP believes that if a municipality, through its legislative process, has made the decision that large-scale retail development can be accommodated, and it has a process in place that evaluates the economic impact of a proposed large-scale retail development project through consideration of appropriate factors and adequate public notice and discussion, then that municipality should be eligible for an exemption from the IGA.

Outcome 3 best strikes this balance of supporting local planning decisions while supporting important state land use goals by meeting the intent of the IGA. It would allow for local determination of standards, as long as they meet the broad intent of the IGA, and would ensure a rigorous review and decision-making process⁸, which is at the heart of the IGA.

⁷ Statement of Dr. Charles Lawton, found on page 8 of the report.

⁸ The informed decision-making elements at the heart of the Act include:

- requiring an independent study of the impact of large-scale (i.e. 75,000 square feet) retail development townwide;
- requiring an assessment of the regional impact of development (i.e. on abutting municipalities);

Outcome 3 suggests that municipalities could determine their own measures pertaining to:

- the review criteria for determining impact on existing retail establishments and municipal services; and
- the standard for determining when the impacts are detrimental to the community.

However it is here that the devil is truly in the details. The proposal that municipalities determine their own measures begs the question:

- To what extent must the municipality's review criteria and the standard for determining when impacts are unduly adverse, match those of the IGA for the town to earn an exemption?

And the closely related question:

- What is the process for determining that a municipality is exempt and who makes that determination?

The exemption language proposed in **Option 3** does not sufficiently address these questions. MAP recommends that exemptions (or any grandfathering for municipalities that have adopted their own economic impact provisions) be conditioned on parameters that are likely to direct growth to appropriate areas within the region and that indicate the community has the capacity to assess unintended economic impacts of large-scale retail development.

For instance, the exemption might be tied to comprehensive planning that includes the issue of large-scale development and develops policy to guide the community in its deliberations or zoning provisions, including specifying a zone or zones that are appropriate for large-scale retail development. It may also be tied to whether the community has the support of professional staff with the capacity to assess the impacts of large-scale development. But these are details on which MAP has not reached consensus.

If Outcome 3 is determined by the legislative committee to be the desired outcome, then MAP is prepared to engage in a process to determine what it sees as the two unanswered elements of that desired outcome – to what extent must a municipality replicate the review criteria and determination criteria of the IGA; and by what process is an exemption granted.

Sincerely,

Hugh Coxe
Maine Association of Planners
847-9299
hcoxe@newenglandplanning.com

-
- requiring a preparer qualified by education, training, and experience;
 - disclosing the applicant and conducting a public hearing on the study results, with proper public notice; and
 - considering the findings of the study when reviewing any land use permit application.

Appendix F – Attorney General’s Opinion – Exemption Requirements

From: Macirowski, Nancy
Sent: Monday, November 03, 2008 10:33 AM
To: Harris, Jody
Subject: RE: Informed Growth Act, Public Law 2007, Chapter 347

Jody,

My response to your questions 1 to 4 are no. In order to qualify for the exemption, “economic and community impact review criteria” that study “comprehensive economic and community impacts”, a municipality need not follow the letter of the definitions and criteria set forth in the Informed Growth Act. The reason for my response is that, if municipalities were required to follow the letter of the definitions and criteria set forth in the Informed Growth Act, the exemption would be meaningless.

If the legislature wants the Exemption to require a municipality to adopt the economic and community impact review criteria set forth in section 4367(4) in order to be exempt, the Exemption should expressly state so.

With respect to your question no. 5, the Exemption does not cite what a municipal ordinance needs to provide for findings of undue adverse impact. These may be gaps in Act.

Let me know if this answers your questions, or if you would like to discuss in more detail.

Nancy Macirowski, Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
626-8868
626-8828 (fax)
nancy.macirowski@maine.gov

From: Harris, Jody
Sent: Thursday, October 30, 2008 11:16 AM
To: Macirowski, Nancy
Subject: Informed Growth Act, Public Law 2007, Chapter 347

Hi Nancy

The Legislature has asked the State Planning Office to evaluate the municipal exemption clause in the law (30-A MRSA §4371). Our study of this provision raises some interesting legal questions, on which I am hoping you can advise us so that we may respond back to the Legislature.

The exemption provision reads:

§ 4371. Exemption: The provisions of this subchapter do not apply to a municipality that has adopted economic and community impact review criteria that apply to large-scale retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application.

The questions that arise relate to what exactly a municipality must do to qualify for an exemption. Must they enact in their local ordinances the same definitions and study standards that apply to municipalities following the Informed Growth Act?

1. The Act provides definitions of "comprehensive economic impact area," "comprehensive economic impact study," "land use permit," and "large-scale retail development," among others. Must a municipal ordinance contain these exact definitions to qualify for an exemption?
2. The current language reads that, "to qualify for an exemption, a municipality needs to adopt economic and community impact review criteria." The Informed Growth Act does not define "economic and community impact review criteria" or provide explicit language about what these criteria should be. Section 30-A MRSA §4367 (4) identifies a list of impacts on which analyses are to be performed, but does not specifically refer to these impacts as "review criteria." Must a municipality enact review criteria that mirror Section 4367 to qualify for an exemption?
3. Also, to be exempt, a municipality must require a study of the comprehensive economic and community impacts of the proposed development. While a comprehensive economic impact study is currently defined in 30-A MRSA §4366 (2), it is not clear if the exemption language refers to the specific study defined in the Act. How would you advise us?
4. The exemption language is silent on the qualifications of, timeline for completing, payment for, and method of selecting a consultant to prepare the impact study, as well as any on specific public participation process or notice requirements and the area to be studied. Must these be included in the municipal ordinance? Must they be the same as the Informed Growth Act?
5. Finally, the exemption provision does not require municipalities, as part of their local ordinance, to issue a finding of undue adverse impact or forbid the issuance of a land use permit if the study reveals undue adverse impact (such as contained in the Act for non-exempt municipalities). The Act states only that a municipality must consider the study of impacts among other evidence in applying the review criteria to the land use permit application. To qualify for an exemption, would a municipal ordinance need to provide for findings of undue adverse impact?

I appreciate your help!

Here is a link to the full Informed Growth Act:

<http://janus.state.me.us/legis/ros/lom/LOM123rd/PUBLIC347.asp>

Jody L. Harris
State Planning Office