

# MAINE STATE LEGISLATURE

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REPORT OF THE COMMISSION ON LOCAL LAND USE VIOLATIONS

Members:

Senator Richard Trafton, Chairman

Senator Judy Kany

Representative James Mitchell

Representative David Soule

Madge Baker

Edward Fraher

Peter Lowell

Murrough O'Brien

Kevin Robert

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January 20, 1984

## FORMATION OF THE COMMISSION

Maine is a national leader in the field of environmental legislation. A number of the State's important environmental laws are mandated by the State, but are administered at the local level. These laws include the Mandatory Shoreland Zoning Act, the Subdivision Law, and the Plumbing and Subsurface Wastewater Disposal Rules, commonly referred to as the "plumbing code." Unfortunately, violations of these laws has diminished their effectiveness in many of Maine's 454 municipalities because violations are not prosecuted in the courts.

The passage of the Maine Rivers Act in 1983 provided additional protection for many of Maine's significant rivers by adding new standards to the the Subdivision Law and the Mandatory Shoreland Zoning Act. A number of legislators and citizens were concerned about whether the new standards would be enforced by the respective municipalities. Provision was therefore made to create a Commission on Local Land Use Violations to deal with the enforcement problem.

The Rivers Act became effective on September 23, 1983, and specified that the Commission be composed of 11 members as follows:

"Two members appointed by the President of the Senate, one to be a member of the Joint Standing Committee on Energy and Natural Resources and one to be a Senator knowledgeable about land use issues; two members appointed by the Speaker of the House of Representatives, one to be a member of the Joint Standing Committee

on Judiciary and one to be a Representative knowledgeable about land use issues; and seven members appointed by the Governor, one to be a local elected official, one to be an appointed local official, one to be a representative of the court system, one to be a representative of the Maine Association of Planners, one to be a representative of the Maine Bar Association, one to represent real estate interests, and one to be a representative of the general public, knowledgeable about land use issues."

In accordance with the requirements of the Rivers Act, the following individuals were appointed to the Commission:

Appointed by the President of the Senate:

1. Senator Richard L. Trafton - Chairman, Judiciary Committee and Chairman of the Commission on Local Land Use Violations.
2. Senator Judy C. Kany - Chairman, Joint Standing Committee on Energy and Natural Resources.

Appointed by the Speaker of the House:

1. Representative James Mitchell - Member, Joint Standing Committee on Energy and Natural Resources.
2. Representative David Soule - Member, Joint Standing Committee on Judiciary.

Appointments by the Governor:

1. Edward Fraher - Bremen, local elected official.

2. Peter Lowell - Bridgton, appointed local official.
3. Murrough O'Brien - Portland, representative of the court system.
4. Madge Baker, Shapleigh, representative of the Maine Association of Planners.
5. Richard Hornbeck - Brunswick, representative of the Maine Bar Association.
6. Kevin Robert - Biddeford, representative of real estate interests.
7. Barry Timson - Hallowell, representative of the general public, knowledgeable about land use issues.

At its organizational meeting on September 29, 1983, Senator Trafton was elected by the members to serve as chairman.

The basic charge of the Commission, as set forth in the Act, stated:

"The Commission shall review the use of the state's court system to resolve suspected violations of local ordinances under the mandatory shoreland zoning laws, Title 12, chapter 424; the subdivision laws, Title 30, section 4956; the state plumbing laws, Title 22, section 42; and other land use laws enforced by municipalities. This review shall examine the extent to which such local ordinances are or are not being adequately enforced, especially by small towns, where court action appears to provide the only existing appropriate recourse. The Commission shall determine the causes for any problems uncovered and document examples to support its findings. The commission shall evaluate alternatives to the existing court procedures, including the

establishment of a statewide system of land use hearing examiners. The Commission shall make recommendations to secure just, swift, inexpensive and effective resolution of suspected land use violation cases, especially by small towns, without creating unreasonable burdens for the state's courts system.

The Commission shall report its findings, together with any suggested legislation, to the Second Regular Session of the 111th Legislature on or before January 13, 1984."

The law also directs that the State Planning Office and the Division of Health Engineering in the Department of Human Services provide staff support to the Commission.

#### THE TASK

At its first organizational meeting on September 29, 1983, the Commission reviewed the obstacles that would make its task formidable and challenging: the Rivers Act did not provide any funds for the Commission; its work would have to be completed in just three months, since the final report would have to be submitted by January 13, 1984; and there was little in the way of detailed information on the extent of local land use violations. The members therefore decided to spend two months gathering information, and the remaining month formulating recommendations. The Commission's short timetable required a fast pace, frequent meetings, and hard work on the part of all of the

members. In various work sessions during October and November, the Commission heard from representatives of major environmental organizations, State agencies, local officials, members of the general public, and representatives of the State's court system. The Commission also studied enforcement reports prepared by staff members of the State Planning Office, the Division of Health Engineering, and other agencies and organizations. Three public hearings were also held during November to solicit the views of local officials and the general public on the problems of enforcing State and local land use laws and ordinances. These hearings were held in the evening in Auburn (Nov. 7), Bangor (Nov. 16), and Portland (Nov. 30). The month of December was devoted to analyzing the information and formulating recommendations.

### FINDINGS

On the basis of information obtained from many sources, including reports, studies, surveys, and testimony received at the public hearings, the Commission finds that:

### VIOLATIONS

1. Local land use violations are widespread. There is no way to determine the exact extent to which land use violations occur. Precise documentation for even a single community is extremely difficult, expensive, and time consuming.

A study was conducted in 1981 by Arthur Lerman Associates for the Department of Environmental Protection (funded by Coastal Zone Management funds through the State Planning Office) to analyze the enforcement of four environmental statutes. These laws were the Site Location Act, the Mandatory Shoreland Zoning Act, the Alteration of Coastal Wetlands Act, and the Solid Waste laws. The so-called "Lerman Report" estimated that approximately 10% to 20% of all development activity in the six coastal communities that were studied occurred without the necessary permits or in violation of one or more of the laws.

In 1982, 240 municipalities reported that 17,724 permits were issued for various types of buildings. If 10% to 20% of these are in violation of existing laws, this means that 1,700 to 3,500 buildings per year are constructed in violation of the laws. This estimate does not reflect timber cutting infractions, illegal plumbing, and other types of violations.

The Thompson Lake Association in Southern Maine is one of the few organizations that has collected extensive information on land use violations. The Association has 400 family members, and is concerned with eight miles of shore in four different towns and three different counties. Each year, the Association raises \$6,000 from its members for education purposes and to fund a lake patrol. During the 1983 season, the lake patrol discovered 78 alleged land use violations, three of which involved significant environmental damage. At the

time of the Lake Association's report to the Commission, none of the violations had been prosecuted in court by any of the municipalities, although many of the violations had been brought to the attention of the local officials. If the extent of violations of Thompson Lake is any indication of what is happening statewide, yearly violations may number in the tens of thousands.

2. Few violations have discernable environmental effects. With few exceptions, the violations brought to the attention of the Commission probably have little environmental impact. For example, the construction of a camp 50 feet from the water instead of the required 75 feet seldom results in measurable environmental harm, although the cumulative effect of many such violations may be quite significant. There does not appear to be any way to measure the statewide impact of all violations.
3. Most violations appear to be the result of ignorance. The Thompson Lake Association reported that its members routinely contact violators and try to persuade them to comply with the law. The Association estimates that as many as 90% of the violations are due to ignorance of the law. While this percentage may not be as high in other areas, many local officials reported similar estimates.
4. Unchecked violations undermine the laws. Unchecked violations seem to encourage more violations. The real damage caused by a violation may be its domino effect. If one person gets away with something,

others are more likely to try it. It then becomes more difficult for the municipality to enforce the laws in the future. Individuals who choose to violate laws on a regular basis soon learn about the municipalities that do not enforce the laws. In other areas, fines are considered part of the cost of doing business. Where enforcement is lacking, individuals will question the need to have the law in the first place.

5. Private citizens cannot take action to stop violators. Unless a citizen can demonstrate a particularized injury that is not suffered by others in the community, he or she has no recourse to do anything about a land use violation other than to report it to the municipality or the appropriate State agency. This has led to a frustration and disillusionment among concerned citizens who have supported the laws in the past, and are not able to get the appropriate level of government to resolve reported violations.
  
6. Citizen attitudes vary in the acceptance of land use laws. There is a strong tradition in Maine of "I'll do what I damned well please with my own land." This attitude varies from town to town, between age groups, and according to one's knowledge of environmental issues. In general, southern Maine residents are more supportive of regulations, possibly because there are more examples of environmental damage. Some laws also enjoy wider support than others. For example, Maine citizens seem more willing to accept a 100-foot setback requirement for subsurface sewage disposal systems than a prohibition

against building a deck on the front of a camp that is less than the required distance from the water.

#### LOCAL RESPONSE

7. Few communities monitor land use violations. In many, if not most communities, there is little or not routine surveillance of the community to detect land use violations. As a result, many violations, particularly along water bodies subject to shoreland zoning, go unchecked.
  
8. Many local officials are ignorant of land use laws. There is a constant turnover of local officials in many of Maine's 454 cities and towns. Selectmen and planning board members often assume office virtually unaware of some or all of the State's land use regulations. One Piscataquis County selectman recently informed a DEP staff member that the town did not have a shoreland zoning ordinance, and therefore did not require any permits, when in fact a local shoreland zoning ordinance had been enacted several years previously. The officials of one Waldo County town were apparently unaware that their shoreland zoning ordinance contained timber harvesting standards and that several recent timber cutting practices near the shore had to comply with those requirements. In many communities there has been no attempt on the part of municipal officials to educate the public about various land use laws.

9. Prosecution of violations is a low municipal priority.

Administration and enforcement of land use laws is often far down on the municipal agenda. In some communities, technical violations of regulations are not seen as a threat to public health and safety, or the environment, so they are ignored. In some cases, the attitudes of local officials may simply reflect the attitudes and values of local residents.

10. Most small towns do not have the money to prosecute violators. In

most small towns, the planning board members and code enforcement officer donate their services. Things function reasonably well until someone defies one of the laws and it becomes necessary to spend money to prosecute. At that point, municipal officers may draw the line and refuse to spend the necessary funds, as was the case recently in one southern Maine community. In many small towns, there is no money to hire an attorney to take enforcement action.

Statutory or ordinance provisions for recovering legal costs do not seem to encourage action. The voters may support land use regulations but are unwilling, or have not been asked, to appropriate money for enforcement. Some small towns simply don't have the money for enforcement or anything else. However, it is very difficult to distinguish between unwillingness to fund and inability to pay.

11. In many small towns, prosecution of violators may result in social

difficulties. In some communities, virtually everyone is either related to everyone else, or knows everybody else, making it awkward

to prosecute. Few people want to hassle their neighbors and friends. Individuals may actually suffer reprisals when they do try to enforce. Enforcement of a local ordinance is particularly difficult when violations of State laws such as the Great Ponds Act appear to go unpunished.

12. Local officials perceive the court system to be unworkable. Many local officials perceive with considerable justification that the State's court system is extremely cumbersome and expensive, and that excessive delays make effective enforcement virtually impossible. Some officials reported to the Commission that judges seem unsympathetic to land use laws. Municipal officials seldom receive much assistance from district attorneys in the prosecution of land use violations, primarily because district attorneys have a high case load, and must give priority to more serious offenses. Several instances of unusual delay and expense have been reported to the Commission. For example, one former official reported that his municipality has waited for almost two years to get a court hearing to enjoin a zoning violation. Another municipality recently prosecuted a violation at a cost of over \$7,000. In cases that do get to court, penalties appear insignificant compared to the effort and expense of prosecuting the violation. For example, in one recently reported case of illegal beach building, the owner was summoned to court and fined \$25. In another instance, an individual bulldozed 300 feet of a stream and also received a \$25 fine. In both cases, the violation itself was not corrected.

13. The powers of local enforcement officials are not spelled out by law.

Prosecution of violators is impeded by the fact that local officials do not know if they have the authority to enter private property to inspect it for compliance with land use laws and ordinances. It is also unclear whether or not a local official, such as a code enforcement officer or plumbing inspector, can represent the municipality in court, or whether a municipal attorney or district attorney must prosecute the violator.

14. The lack of uniformity in shoreland zoning standards causes confusion.

The lack of uniformity in shoreland zoning standards from town to town has caused some confusion. One of the more serious inconsistencies is that some municipalities require a setback from the normal high water mark for only the principal structure, while others require that all structures meet the setback requirement except those which require direct access to the water as an operational necessity, such as piers, docks, and retaining walls. A second inconsistency is the manner in which timber harvesting standards are interpreted. The State's model shoreland zoning ordinance, upon which most municipal ordinances are based, states that a cleared opening no greater than 30 feet in width for every 100 feet of shoreline may be created in the strip extending 50 feet inland from the normal high water mark and paralleling the shoreline. Some municipalities and individuals have interpreted this to mean that 30 percent of the shoreline may be cleared, rather than 30 feet. This interpretation has resulted in some clearcuts of several hundred feet along the shoreline, with significant environmental and aesthetic damage.

## STATE PROBLEMS

15. The plumbing code appears to be working better than shoreland zoning.

The State Planning Office provides a portion of one person's time for shoreland zoning assistance to municipal officials. This commitment is not adequate to provide adequate training, education, support, and day-to-day assistance to local officials, and to conduct a public education effort on shoreland zoning. By contrast, four full-time professionals and support staff in the Department of Human Services administer the State's "Plumbing Code," which is also State-mandated but administered at the local level. This level of staff commitment allows the staff to work on a one-to-one basis with local officials. Other differences may also account for the fact that the "plumbing code" appears to be working better than shoreland zoning: (a) local plumbing inspectors are certified by the State; (b) local plumbing inspectors are paid a portion of the fee that is charged for a plumbing permit, whereas code enforcement officers may be volunteers who receive no pay; (c) the "plumbing code" is more widely accepted because it relates to public health, rather than environmental considerations; and (d) there is a central State agency that local plumbing inspectors can turn to for assistance on a day-to-day basis, whereas no State agency provides such help to local code enforcement officers.

16. Enforcement of State laws is also a problem. Violations of State laws, and subsequent enforcement, is also a serious problem. For

example, over 700 violations have been reported to the Land Use Regulation Commission since 1980. The Commission has been able to respond to only half of these, and only 120 have been resolved. The Warden Service of the Department of Inland Fisheries and Wildlife spends about 5% of its time enforcing violations of the Great Ponds Act. Not all violations can be prosecuted because time spent on violations is time taken from regular duties. Court action is time-consuming, and has sometimes resulted in token fines for violations.

The Land Quality Bureau of the Department of Environmental Protection places a high priority on responding to citizen complaints, which have risen from 400 in 1981 to 950 in 1983. As a result, the staff is able to conduct very few follow-up inspections of board orders. The staff does not have the authority to issue a court summons, but must rely upon the warden services, the Attorney General, and the use of consent agreements to obtain compliance. The Department does not have direct control over the cases that will be prosecuted.

Referrals of minor violations to the Attorney General's Office are kept to a minimum because of the likelihood they will be a low priority item and will not be prosecuted promptly, if at all.

17. Selective prosecution undermines land use laws. The Attorney General's Office is not able to prosecute all violations administered by the State. Consequently, priority is given to those cases involving significant environmental damage or a threat to the public

health and safety. In addition, the Attorney General's Office does not provide enforcement assistance to municipalities, and has not taken general steps to require more vigorous enforcement of State-mandated laws which are administered at the local level.

Limited enforcement of land use violations may be the only practical alternative to a heavy caseload and a cumbersome court system, but it also erodes environmental laws by signaling that minor violations will probably not be prosecuted. In addition, if the State is selective in its prosecution of land use violations, it cannot blame municipalities for acting likewise.

A number of local officials testified that lack of commitment to enforcement by the State encourages a complacent attitude at the local level.

#### COURT SYSTEM

18. The court system does not keep statistics on local or state land use violations. The State's court system does not compile statistics on land use cases. Consequently, there is no readily available information on the types of cases that are taken to court, and their ultimate disposition.
  
19. There is no simple procedure for prosecuting land use violations. There is no clear-cut, simple procedure for resolving alleged land use

violations in either District or Superior Court. Filing suit in Superior Court is a complex procedure which requires the services of an attorney for even simple violations. Taking action in District Court usually requires the cooperation of the district attorney which, in many cases, is not forthcoming. Many local officials have reported that their district attorney would not assist them in prosecuting violations.

20. There is a backlog of cases in Superior Court which impedes prosecution of land use violations. There is a significant backlog of criminal and civil cases at the Superior Court level. As of this writing, it would take 11 judges approximately one year to resolve these cases. The average case now takes over 500 days from date of filing to date of resolution and priority goes to criminal cases. By contrast, the 33 courts of the District Court system have been able to keep up with the caseload.
  
21. District Court cannot provide equity relief in land use violation cases. The District Court does not have authority to grant equity relief. The court may impose a fine, but cannot order that a violation be abated or corrected, even though correcting a violation may be more important than recovering a fine. Therefore, some violations may require action in both District and Superior courts; action in District Court to recover a fine, and action in Superior Court to obtain an injunction, an administrative search warrant, or equity relief. Taking action in two different courts is inefficient, expensive, and often time-consuming.

22. Penalties for violations of land use laws are not uniform. There is no uniform penalty provision for violations of State or local land use laws and ordinances. Most laws and ordinances have maximum penalty provisions, but few contain minimum penalties. No State laws, and no known municipal ordinances, contain standards to guide the judiciary in setting penalties. Therefore, court penalties in most cases are entirely a matter for the discretion of the court.

Some laws are enforced at only one level. For example, when Game Wardens prosecute violations of the Great Ponds Act, it is at the District Court level, where the only relief that can be obtained is a fine. For many great ponds violations, it would be more desirable to correct the problem, rather than impose a fine. Under the Alteration of Rivers, Streams, and Brooks Act, which is administered by the Department of Inland Fisheries and Wildlife, the only prosecution remedy is for the Attorney General to file suit to enjoin further violations and to compel restoration. Game wardens, who may prosecute violations of a law (the Great Ponds Act) administered by another agency (the Department of Environmental Protection) are not empowered to prosecute violations of a law administered by their own agency.

## RECOMMENDATIONS

During December of 1983, the Commission met extensively to develop and refine recommendations aimed at resolving some of the problems set forth in the previous section. The Commission considered, and finally rejected, the establishment of a single agency for the administration of all the State's land use laws. Such a reorganization might make sense in the long run, but could divert attention from the more immediate land use enforcement problems. The Commission also considered and rejected the establishment of a State-wide system of land use hearing examiners, primarily because: (1) a number of constitutional problems were raised concerning separation of powers; (2) such a system could create an additional step in the prosecution of land use violations without resolving problems in the court system, which would have to handle any appeals; (3) it made sense to consider improving the existing court system prior to establishing a new system; (4) representatives of the State's judicial system were supportive of changes to improve the enforcement of land use laws, and felt that the District Court could handle land use cases; and (5) a system of land use hearing examiners could be costly.

The specific recommendations of the Commission are as follows:

1. Expand District Court jurisdiction. Legislation should be enacted to expand the jurisdiction of District Court to provide equity relief in cases involving alleged violations of State and local land use laws and ordinances. District Court already has equity jurisdiction in a number of

areas, including divorce, workmen's compensation cases, landlord/tenants rights, and unfair trade practices. The equity jurisdiction powers of District Court have been expanded in virtually every session in recent years.

2. Adopt District Court Rule for Land Use Violations. Following enactment of legislation to expand the jurisdiction of the District Court, the Maine Judicial Court should adopt rules governing the prosecution of alleged land use violations. These rules should establish a summary procedure that is similar to that for traffic infractions. Arguments should be heard orally; there should be limited or no discovery procedures; local officials should be authorized to represent the municipality in court; there should be a separate land use docket in each of the State's 33 District Courts; and there should be a uniform land use citation and complaint, similar to a traffic ticket, which the local or state officials could use to cite alleged violators. To assist in the implementation of this recommendation, the Commission has drafted a new rule, rule 80K, for consideration by the Maine Judicial Court.
  
3. Establish uniform penalty provisions. Legislation should be enacted to establish a uniform penalty provision for violations of State and local land use laws and ordinances. This legislation should establish minimum and maximum fines; prescribe standards for imposing fines; require abatement or correction of the violation; and, where the action is brought in the name of the municipality, should specify that any fines levied shall be paid to the municipality. The penalty provisions of various land use laws should be amended to be consistent with this uniform penalty provision.

4. Consider citizen's right to sue bill. Consideration should be given to a bill to give citizens standing to sue to correct or abate land use violations even though a particular harm to the citizen cannot be shown. The Commission has not taken a position on this bill. This proposed legislation would allow concerned citizens, lake associations, and others to take corrective action when the State or the municipality fails to prosecute a violation. Currently, there is no recourse for citizens and groups such as lake associations where violations are not prosecuted by the appropriate level of government.
  
5. Establish a central agency for shoreland zoning. Because the success of shoreland zoning depends upon effective local enforcement, legislation should be enacted to establish a central division with the Department of Environmental Protection that would provide training, assistance, and support to local officials in the enforcement of shoreland zoning ordinances and prosecution of violations, and establish a related public education program. This division should also be responsible for establishing a certification program for local code enforcement officers. The Division's responsibilities should be focused on providing assistance to code enforcement officers, and should not include the type of technical assistance that is provided by regional planning commissions for local planning boards, such as drafting ordinance changes and reviewing permit applications.

Enactment of this change will require a shift in responsibilities from the State Planning Office to the Department of Environmental Protection. The

State Planning Office has administered the program quite well, considering its limited resources. However, it is not an enforcement agency, and is not as well suited to providing enforcement assistance as the DEP. The Department should be required to report annually to the Joint Standing Committee on Energy and Natural Resources on its enforcement assistance efforts which should include a summary of enforcement problems and recommendations for improved enforcement of land use laws.

6. Clarify right of entry. Legislation should be enacted to clarify the right of State and local officials to enter private property at reasonable hours to determine conformance with land use laws.
  
7. Strengthen shoreland setbacks. The Mandatory Shoreland Zoning Act should be amended to require that all structures be subject to the setback requirements from the normal high water mark, except structures which require direct access to the water as an operational necessity. Enactment of this provision will bring a greater degree of uniformity to shoreland setbacks throughout the State, and will minimize the damage that can be caused by accessory structures being located too close to the water, thereby better protecting shoreland areas.
  
8. Clarify timber harvesting requirements. The Mandatory Shoreland Zoning Act should be amended to clarify the fact that cleared openings 30 feet in width for every 100 feet of shore may be created, but that a clearcut of 30 percent of the shoreline, which could result in openings several hundred feet in width, is prohibited.

9. Establish requirements for municipal code enforcement officers. Legislation should be enacted to amend the Mandatory Shoreland Zoning Act to require that each municipality appoint a code enforcement officer, who may also be a plumbing inspector. This legislation should specify that the code enforcement officer be certified by the Department of Environmental Protection, and that he or she be paid by keeping a portion of the fee charged for all permits issued by the code enforcement officer or planning board in the 250-foot shoreland area. A portion of the fee would be used to support a Coordination Division within the Department of Environmental Protection. The specific duties of the code enforcement officer should also be spelled out, and should include a requirement to keep a record of all permits issued, and to forward a copy of all permits to the Coordination Division. The legislation should be structured so as to allow the municipality to keep a greater percentage of the permit fee if it has a full-time code enforcement officer or uses the services of a full-time regional code enforcement officer, thereby encouraging the use of professional, full-time code enforcement officers. Enactment of this provision would increase the level of professionalism and competence among local code enforcement officers.
10. Provide additional legal support. Legislation should be enacted to provide additional legal support for both the Department of Environmental Protection and the Department of Human Services. The additional legal staff for DEP should be directed to enforce or assist in the enforcement of shoreland zoning ordinances and other land use laws. The additional legal staff for the Department of Human Services should be directed to give first priority to the Division of Health Engineering for the enforcement of the Plumbing and Subsurface Wastewater Disposal Rules.