

# MAINE STATE LEGISLATURE

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(Governor's Bill)  
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 1617

H.P. 1187 House of Representatives, May 18, 1987  
Reference to the Committee on Energy and Natural  
Resources suggested and ordered printed.  
EDWIN H. PERT, Clerk  
Presented by Representative MURPHY of Kennebunk.  
Cosponsored by Senators GOULD of Waldo and TUTTLE of York.

STATE OF MAINE

IN THE YEAR OF OUR LORD  
NINETEEN HUNDRED AND EIGHTY-SEVEN

1 AN ACT to Extend and Strengthen the State's  
2 Mandatory Shoreland Zoning Laws.  
3

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

6 Sec. 1. 38 MRSA §435, as amended by PL 1985, c.  
7 737, Pt. A, §110, is repealed and the following en-  
8 acted in its place:

9 §435. Shoreland areas; legislative purposes

10 To aid in the fulfillment of the State's role as  
11 trustee of its waters and to promote public health,  
12 safety and the general welfare, it is declared to be  
13 in the public interest that shoreland areas be sub-  
14 ject to zoning and land use control. Shoreland areas

1 shall include those within 250 feet of the normal  
2 high water line of any great pond or river or within  
3 250 feet of a coastal or freshwater wetland. The pur-  
4 poses of such controls are to further the maintenance  
5 of safe and healthful conditions; prevent and control  
6 water pollution; protect fish spawning grounds,  
7 aquatic life, bird and other wildlife habitat; pro-  
8 tect buildings and lands from flooding and acceler-  
9 ated erosion; protect and enhance community values;  
10 protect commercial fishing and maritime industries;  
11 protect freshwater and coastal wetlands and their  
12 habitats; control building sites, placement of struc-  
13 tures and land uses; conserve shore cover and visual  
14 as well as actual points of access to inland and  
15 coastal waters; and conserve natural beauty and open  
16 space.

17 It is further declared that, in accordance with  
18 Title 12, section 402, certain river and stream seg-  
19 ments, as identified in the Department of  
20 Conservation's 1982 Maine Rivers Study and as specif-  
21 ically delineated in section 437, are significant  
22 river segments and deserve special shoreland zoning  
23 controls designed to protect their natural and recre-  
24 ational features.

25 Zoning ordinances adopted pursuant to this arti-  
26 cle need not depend upon the existence of a zoning  
27 ordinance for all the land and water areas within a  
28 municipality, notwithstanding Title 30, section 4962,  
29 to the contrary, it being the intention of the Legis-  
30 lature to recognize that it is reasonable for munici-  
31 palities to treat shoreland areas specially and to  
32 immediately zone around water bodies rather than to  
33 wait until such time as zoning ordinances may be en-  
34 acted for all the land within municipal boundaries.

35 Sec. 2. 38 MRSA §436, as amended by PL 1985, c.  
36 794, Pt. A, §§6 and 7, is repealed.

37 Sec. 3. 38 MRSA §436-A is enacted to read:

38 §436-A. Definitions

39 As used in this chapter, unless the context indi-  
40 cates otherwise, the following terms have the follow-  
41 ing meanings.

1           1. Coastal wetlands. "Coastal wetlands" means  
2 all tidal and subtidal lands; all lands below any  
3 identifiable debris line left by tidal action; all  
4 lands with vegetation present that is tolerant of  
5 salt water and occurs primarily in a salt water or  
6 estuarine habitat; and any swamp, marsh, bog, beach,  
7 flat or other contiguous low land which is subject to  
8 tidal action or normal storm flowage at any time ex-  
9 cept periods of maximum storm activity. Coastal wet-  
10 lands may include portions of coastal sand dunes.

11           2. Commercial fishing activities. "Commercial  
12 fishing activities" means activities directly related  
13 to commercial fishing and those commercial activities  
14 commonly associated with or supportive of commercial  
15 fishing, such as the manufacture or sale of ice, bait  
16 and nets and the sale, manufacture, installation or  
17 repair of boats, engines and other equipment commonly  
18 used on boats.

19           3. Densely developed area. "Densely developed  
20 area" means any commercial, industrial or compact  
21 residential area of 10 or more acres with a density  
22 of at least one principal structure per 2 acres.

23           4. Floodway. "Floodway" means the channel of a  
24 river or other water course and the adjacent land ar-  
25 ees that must be reserved to allow for the discharge  
26 of a 100-year flood without cumulatively increasing  
27 the water surface elevation of the 100-year flood by  
28 more than one foot.

29           5. Freshwater wetlands. "Freshwater wetlands"  
30 means freshwater swamps, marshes, bogs and similar  
31 areas which are:

32           A. Of 10 or more contiguous acres;

33           B. Characterized predominantly by wetland vege-  
34 tation; and

35           C. Not considered part of a great pond, coastal  
36 wetland, river, stream or brook.

37 Freshwater wetlands may contain small inclusions of  
38 land that does not conform to the criteria of this  
39 subsection.

1           6. Functionally water-dependent uses. "Functionally  
2 water-dependent uses" means those uses that re-  
3 quire, for their primary purpose, location on sub-  
4 merged lands or that require direct access to, or lo-  
5 cation in, coastal waters and which cannot be located  
6 away from these waters. These uses include, but are  
7 not limited to, commercial and recreational fishing  
8 and boating facilities, finfish and shellfish pro-  
9 cessing, fish storage and retail and wholesale mar-  
10 keting facilities, waterfront dock and port facili-  
11 ties, shipyards and boat building facilities,  
12 marinas, navigation aids, basins and channels, indus-  
13 trial uses dependent upon water-borne transportation  
14 or requiring large volumes of cooling or processing  
15 water that cannot reasonably be located or operated  
16 at an inland site and uses which primarily provide  
17 general public access to marine or tidal waters.

18           7. Great pond. "Great pond" means any inland  
19 body of water which in a natural state has a surface  
20 area in excess of 10 acres and any inland body of wa-  
21 ter artificially formed or increased which has a sur-  
22 face area in excess of 30 acres.

23           8. Maritime activities. "Maritime activities"  
24 means the construction, repair, storage, loading and  
25 unloading of boats, chandlery and other commercial  
26 activities designed and intended to facilitate mari-  
27 time trade.

28           9. Normal high water line. "Normal high water  
29 line" means that line along the shore of a great  
30 pond, river or other nontidal body of water which is  
31 apparent from visible markings, changes in the char-  
32 acter of soils due to prolonged action of the water  
33 or changes in vegetation and which distinguishes be-  
34 tween predominantly aquatic and predominantly terres-  
35 trial land. In the case of great ponds, all land be-  
36 low the normal high water line shall be considered  
37 the bottom of the great pond for the purposes of this  
38 subchapter.

39           10. Principal structure. "Principal structure"  
40 means a building other than one which is used for  
41 purposes wholly incidental or accessory to the use of  
42 another building on the same premises.

1           11. River. "River" means a free flowing body of  
2 water from that point at which it provides drainage  
3 for a watershed of 25 square miles to its mouth.

4           12. Structure. "Structure" means anything built  
5 for the support, shelter or enclosure of persons, an-  
6 imals, goods or property of any kind, together with  
7 anything constructed or erected with a fixed location  
8 on or in the ground.

9           13. Timber harvesting. "Timber harvesting" means  
10 the cutting and removal of trees from their growing  
11 site and the attendant operation of cutting and  
12 skidding machinery, but not the construction or cre-  
13 ation of roads. Timber harvesting does not include  
14 the clearing of land for approved construction.  
15 Within the strip extending 50 feet inland from the  
16 normal high watermark, a cleared opening or openings  
17 not greater than 30 feet in width for every 100 feet  
18 of shoreline may be created, provided that, when  
19 openings are combined, there shall be no single open-  
20 ing along the shore wider than 60 feet, and there  
21 shall be no more than one 60-foot opening along 200  
22 feet of shoreline.

23           Sec. 4. 38 MRSA §438, as enacted by PL 1985, c.  
24 481, Pt. A, §91, is repealed.

25           Sec. 5. 38 MRSA §438-A is enacted to read:

26           §438-A. Municipal authority; state oversight

27           With respect to all shoreland areas described in  
28 section 435, cities and towns, in this article re-  
29 ferred to as municipalities, shall adopt zoning and  
30 land use control ordinances pursuant to existing en-  
31 abling legislation and in accordance with the follow-  
32 ing requirements.

33           1. Minimum guidelines. In accordance with Title  
34 5, chapter 375, subchapter II, the Board of Environ-  
35 mental Protection shall adopt, and from time to time  
36 shall update and amend, minimum guidelines for munic-  
37 ipal zoning and land use controls which are designed  
38 to carry out the legislative purposes described in  
39 section 435 and the provisions of this article. The  
40 minimum guidelines shall include, but not be limited

1 to, provisions governing building and structure size,  
2 setback and location, establishment of resource pro-  
3 tection, general development, limited residential,  
4 commercial fisheries and maritime activity zones and  
5 other zones. Within each zone, there shall be pre-  
6 scribed uses which may be allowed with or without  
7 conditions. There shall be established criteria for  
8 the issuance of permits and for nonconforming uses,  
9 land use standards and administrative and enforcement  
10 procedures. The board shall comprehensively review  
11 and update its guidelines beginning on January 1,  
12 1988, and shall reevaluate and update the guidelines  
13 at least once every 4 years thereafter.

14 2. Zoning; land use ordinances; adoption. In  
15 accordance with a schedule adopted by the board and  
16 acting in accordance with a local comprehensive plan,  
17 municipalities shall prepare and submit to the board  
18 zoning and land use ordinances which are consistent  
19 with, or are no less stringent than, the minimum  
20 guidelines, or amendments to the minimum guidelines,  
21 adopted by the board. Where a municipality deter-  
22 mines that special local conditions of urbanization  
23 within portions of the shoreland zone require a dif-  
24 ferent set of standards than those in the minimum  
25 guidelines, it shall document such special conditions  
26 and submit those conditions, together with its pro-  
27 posed ordinance provisions, to the board for review  
28 and approval.

29 3. Approval of municipal ordinances; amendments.  
30 Municipal ordinances and any amendments to those or-  
31 dinances shall not be effective unless approved by  
32 the board. In determining whether to approve munic-  
33 ipal ordinances or amendments to those ordinances, the  
34 board shall consider the legislative purposes de-  
35 scribed in section 435, the minimum guidelines and  
36 any special local conditions which, in the judgment  
37 of the board, justify a departure from the require-  
38 ments of the minimum guidelines in a manner which is  
39 not inconsistent with the legislative purposes de-  
40 scribed in section 435. Recognizing that the guide-  
41 lines are intended as minimum standards, the board  
42 shall approve a municipal ordinance which imposes  
43 more restrictive standards than those in the guide-  
44 lines.

1           4. Failure to adopt satisfactory ordinances. If  
2 a municipality fails to adopt ordinances as required  
3 under this article, or if the board determines that  
4 an ordinance which a municipality has adopted does  
5 not satisfy the requirements and purposes of this ar-  
6 ticle, the board shall, acting in accordance with Ti-  
7 tle 5, chapter 375, subchapter II, adopt suitable or-  
8 dinances, or suitable provisions of ordinances, on  
9 behalf of the municipality. Following adoption by  
10 the board, the ordinances or provisions of the ordi-  
11 nances shall be effective and binding within the mu-  
12 nicipality and shall be administered and enforced by  
13 that municipality.

14           5. Areas subject to nonmunicipal zoning; land  
15 use control. Any areas within a municipality which  
16 are subject to nonmunicipal zoning and land use con-  
17 trols may be exempted from the operation of this sec-  
18 tion upon a finding by the board that the purposes of  
19 this chapter have been accomplished by the  
20 nonmunicipal measures.

21           Sec. 6. 38 MRSA §439, as reallocated by PL 1985,  
22 c. 481, Pt. A, §27, is repealed.

23           Sec. 7. 38 MRSA §439-A is enacted to read:

24           §439-A. Additional municipal powers; limitations

25           1. Additional ordinances applicable to other  
26 bodies of water. In addition to the ordinances re-  
27 quired by this chapter, municipalities may adopt zon-  
28 ing and land use controls applicable to other bodies  
29 of water as may be required to protect the public  
30 health, safety and general welfare and further the  
31 purposes of this chapter.

32           2. Jurisdiction over structures extending over  
33 water or lying between high and low wetlands or with-  
34 in wetlands. Notwithstanding the scope of shoreland  
35 areas as identified in section 435, the jurisdiction  
36 of municipal shoreland zoning and land use control  
37 ordinances adopted under this article may include any  
38 structure built on, over or abutting a dock, wharf,  
39 pier or other structure extending below the normal  
40 high water mark of a water body or within any  
41 wetland. Accordingly, municipalities may enact ordi-



1 nances affecting structures which extend over the wa-  
2 ter or are placed on lands lying between high and low  
3 watermarks or within wetlands.

4 3. Report of soil suitability; persons qualified  
5 to prepare such reports. Any other law notwithstand-  
6 ing, when a zoning ordinance adopted in conformity  
7 with this article requires a written report of soil  
8 suitability for subsurface waste disposal or commer-  
9 cial or industrial development, the report shall be  
10 prepared and signed by a duly qualified person who  
11 has made an on-the-ground evaluation of the soil  
12 properties involved. Persons qualified to prepare  
13 the reports shall be certified by the Department of  
14 Human Services and shall include Maine certified soil  
15 scientists, Maine registered professional engineers,  
16 Maine certified geologists and other persons who have  
17 training and experience in the recognition and evalu-  
18 ation of soil properties and can provide proof of the  
19 training and experience in a manner specified by the  
20 Department of Human Services. That department may  
21 promulgate rules for the purpose of establishing  
22 training and experience standards required by this  
23 subsection.

24 4. Water set-back requirements; variances. Not-  
25 withstanding any provision in a local ordinance to  
26 the contrary, all new principal and accessory struc-  
27 tures, and replacements and substantial expansions of  
28 such structures, within the shoreland zone as estab-  
29 lished by section 435 shall meet the water set-back  
30 requirements approved by the board, except structures  
31 which require direct access to the water as an opera-  
32 tional necessity, such as piers and docks. For pur-  
33 poses of this subsection, a substantial expansion of  
34 a building shall be an expansion which increases ei-  
35 ther the volume or floor area by 30% or more. This  
36 subsection is not intended to prohibit a municipal  
37 board of appeals from granting a variance, subject to  
38 the requirements of this article and of Title 30,  
39 section 4963, nor is it intended to prohibit a less  
40 than substantial expansion of, or a replacement of an  
41 accessory structure attached to, a legally existing,  
42 nonconforming structure, provided that the expansion  
43 or replacement does not create further nonconformity  
44 with the water set-back requirement.

1           5. Timber harvesting. Municipal ordinances  
2 shall regulate timber harvesting within the shoreland  
3 area. The regulation shall be consistent with the  
4 board's guidelines which shall be no less restrictive  
5 than the following: Within the strip of land extend-  
6 ing 50 feet inland from the normal high water mark, a  
7 cleared opening not greater than 30 feet in width for  
8 every 100 feet of shoreline may be created, provided  
9 that, when openings are combined, there shall be no  
10 single opening along the shore wider than 60-feet and  
11 there shall be no more than one 60-foot opening along  
12 any 200 feet of shoreline.

13           6. Vegetative screening. Within the shoreland  
14 zone, municipal ordinances shall provide for effec-  
15 tive vegetative screening between buildings and  
16 shorelines. The ordinances shall be consistent with  
17 the board's guidelines which shall be no less re-  
18 strictive than the following: No clear cutting of  
19 vegetation may be permitted, except that openings not  
20 greater than 30 feet in width for every 100 feet of  
21 shoreline may be created. Selective cutting of no  
22 more than 40% of the trees 4 inches or more in diame-  
23 ter measured at 4 1/2 feet above ground level is al-  
24 lowed in any 10-year period, provided that a  
25 well-distributed stand of trees and other natural  
26 vegetation remains.

27           **Sec. 8. 38 MRSA §442, as enacted by PL 1985, c.**  
28 **481, Pt. A, §92, is repealed.**

29           **Sec. 9. 38 MRSA §443, as enacted by PL 1985, c.**  
30 **481, Pt. A, §93, is repealed.**

31           **Sec. 10. 38 MRSA §443-A is enacted to read:**

32 **§443-A. Cooperation; enforcement**

33           **1. Agencies of State Government to cooperate;**  
34 **assistance to municipalities. All agencies of State**  
35 **Government shall cooperate to accomplish the objec-**  
36 **tives of this article. To that end, the department**  
37 **shall consult with the governing bodies of municipal-**  
38 **ities and with other state agencies to secure**  
39 **achievement of the purposes of this article and shall**  
40 **extend to municipalities all possible technical and**  
41 **other assistance for that purpose.**

1           2. Attorney General to be party in legal actions  
2 challenging validity of ordinances. In any legal ac-  
3 tion in which the pleadings challenge the validity or  
4 legality of any ordinance or portion of an ordinance  
5 adopted pursuant to this article, the Attorney Gener-  
6 al shall be made a party until removed as such by his  
7 consent.

8           3. Enforcement for failure to adopt, administer  
9 or enforce ordinances. Any municipality which fails  
10 to adopt, administer or enforce zoning and land use  
11 ordinances as required under this article shall be  
12 subject to the enforcement procedures, equitable rem-  
13 edies and civil penalties set forth in sections 347  
14 to 349.

15           Sec. 11. 38 MRSA §445, first ¶, as enacted by PL  
16 1985, c. 481, Pt. A, §94, is amended to read:

17           In addition to the guidelines adopted under sec-  
18 tion 438 438-A, the following guidelines for the  
19 protection of the shorelands shall apply along sig-  
20 nificant river segments identified in section 437.  
21 These guidelines are intended to maintain the special  
22 values of these particular river segments by protect-  
23 ing their scenic beauty and undeveloped character.

24           Sec. 12. 38 MRSA §446, as enacted by PL 1985, c.  
25 481, Pt. A, §95, is amended to read:

26           §446. Municipal ordinance review and certification

27           Each municipality with shorelands along signifi-  
28 cant river segments, as identified in section 438  
29 437, shall review the adequacy of the zoning on these  
30 shorelands to protect the special values cited for  
31 these river segments by the Department of  
32 Conservation's 1982 Maine Rivers Study and for con-  
33 sistency with the guidelines established under sec-  
34 tion 445. Prior to December 15, 1984, each such mu-  
35 nicipality shall certify to the Board of Environmen-  
36 tal Protection either that its existing zoning for  
37 these areas is at least as restrictive as the guide-  
38 lines established under section 445, or that it has  
39 amended its zoning for this purpose. This certifica-  
40 tion shall be accompanied by the ordinances and zon-  
41 ing maps covering these areas. Failure to accomplish

1 the purposes of this subsection shall result in adop-  
2 tion of suitable ordinances for these municipalities,  
3 as provided for in section 442 438-A.

4 Sec. 13. Effective date. This Act shall take  
5 effect January 1, 1988.

6 STATEMENT OF FACT

7 This bill significantly strenghtens and updates  
8 the State's mandatory shoreland zoning laws. Orig-  
9 nally enacted in 1973, these laws are in need of ma-  
10 jor revisions at this time because of the substantial  
11 growth and development which has occurred and which  
12 will continue to occur in the State's shoreland ar-  
13 eas. This growth is having potentially significant  
14 impacts upon natural, scenic, historic, wildlife and  
15 community values of great importance to the citizens  
16 of this State. Yet the State's shoreland zoning and  
17 land use laws, as they are currently composed, pro-  
18 vide insufficient scope, oversight and enforcement  
19 capability to protect the public's interest in these  
20 areas of major statewide concern.

21 Section 1. In this section of the bill, the  
22 Maine Revised Statutes, Title 38, section 435, has  
23 been rewritten in order to extend minimum shoreland  
24 zoning protection to areas around coastal and  
25 freshwater wetlands in addition to those around  
26 bodies of water. Section 435 has also been expanded  
27 to more specifically express the Legislature's pur-  
28 poses in terms of protecting a variety of natural and  
29 cultural values and responding to cumulative impacts  
30 of development in shoreland areas. Other changes in  
31 section 435 are the result of rearranging the shore-  
32 land zoning laws in order to give them a more  
33 coherent organization and do not reflect substantive  
34 changes.

35 Sections 2 and 3. These sections of the bill re-  
36 peal Title 38, section 436, and enact Title 38, sec-  
37 tion 436-A, making changes in the existing law in or-  
38 der to provide a number of new and revised defini-  
39 tions and organizational improvements:

1 Section 436-A, subsection 1, is a definition of  
2 coastal wetlands, the areas around which would be  
3 protected by zoning under this bill. This defi-  
4 nition is drawn from the Alteration of Coastal  
5 Wetlands, Title 38, section 472.

6 Section 436-A, subsection 2, includes minor clar-  
7 ifications to existing law.

8 Section 436-A, subsection 5, is a definition of  
9 freshwater wetlands, the areas around which would  
10 be protected by zoning under this bill. This  
11 definition mirrors that in the Freshwater Wet-  
12 lands law, Title 38, section 407-A.

13 Section 436-A, subsection 7, amends the defini-  
14 tion of great pond to be consistent with that  
15 term as it is defined in other laws administered  
16 by the Board of Environmental Protection.

17 Section 436-A, subsection 8, includes minor cor-  
18 rections in the definition of maritime activi-  
19 ties.

20 Section 436-A, subsection 9, provides a defini-  
21 tion of normal high water line.

22 The definition of "screening," as it appears in  
23 existing law of section 436, subsection 4, is de-  
24 leted as unnecessary. For organizational clari-  
25 ty, the substantive portion of this subsection is  
26 placed in section 439-A, subsection 6.

27 Section 436-A, subsection 12, includes changes in  
28 the definition of "structure" in order to better  
29 describe the meaning of this term. The remainder  
30 of this subsection has been moved to section  
31 439-A, subsection 4, for organizational clarity.

32 Substantive portions of section 436, subsection  
33 13, have been moved to section 439-A, subsection  
34 5, for organizational clarity.

35 Sections 4 and 5. In these sections of the bill,  
36 section 438 is repealed and section 438-A is enacted  
37 in order to provide a rational process by which the  
38 board will oversee the development of shoreland zon-

1 ing ordinances by municipalities. As a part of this  
2 process, the existing, bifurcated role of the board  
3 and the Maine Land Use Regulation Commission has been  
4 streamlined.

5 Section 438-A, subsection 1, provides a process  
6 and criteria by which the Bureau of Environmental  
7 Protection shall adopt minimum guidelines for mu-  
8 nicipal shoreland zoning ordinances. It also  
9 provides for periodic updating of these guide-  
10 lines.

11 Section 438-A, subsection 2, provides that munic-  
12 ipalities shall prepare their own shoreland zon-  
13 ing ordinances. This subsection allows local mu-  
14 nicipalities to depart from the state guidelines  
15 where special local conditions of urbanization  
16 warrant.

17 Section 438-A, subsection 3, provides a process  
18 and criteria by which the Bureau of Environmental  
19 Protection shall review municipal shoreland zon-  
20 ing ordinances and amendments.

21 Section 438-A, subsection 4, allows the Board of  
22 Environmental Protection to develop a state level  
23 ordinance for a municipality which has failed to  
24 adopt its own.

25 Section 438-A, subsection 5, is retained from ex-  
26 isting law.

27 Sections 6 and 7. In these sections, a number of  
28 provisions of the existing shoreland zoning law have  
29 been clarified, updated and reorganized within sec-  
30 tion 439-A.

31 Section 8. In this section, title 38, section  
32 442 is repealed. The subject matter of this section  
33 is more effectively addressed in section 438-A.

34 Sections 9 and 10. In these sections, section  
35 443 of the shoreland zoning law is repealed and is  
36 reorganized and rewritten as section 443-A. In addi-  
37 tion, section 443-A, subsection 3, provides clarified  
38 enforcement procedures by incorporating the enforce-  
39 ment sections generally applicable to laws adminis-  
40 tered by the Board of Environmental Protection.

1           Sections 11 and 12 correct statutory references  
2 in existing law to reflect new sections.

3           Section 13. An effective date of January 1,  
4 1988, is provided in order to allow for a transition  
5 period.

6

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