

MAINE STATE LEGISLATURE

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SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 2374

H.P. 1731 House of Representatives, February 26, 1988
Reference to the Committee on Energy and Natural
Resources suggested and ordered printed.

EDWIN H. PERT, Clerk

Presented by Representative HOLLOWAY of Edgecomb.

Cosponsored by Senators USHER of Cumberland, LUDWIG of
Aroostook and Representative VOSE of Eastport.

STATE OF MAINE

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

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 1987, c.
7 94, §§1 and 2, is repealed and the following enacted
8 in its place:

1 §435. Shoreland areas; legislative purposes

2 To aid in the fulfillment of the State's role as
3 trustee of its waters and to promote public health,
4 safety and the general welfare, it is declared to be
5 in the public interest that shoreland areas be subject
6 to zoning and land use controls. Shoreland areas
7 include those areas within 250 feet of the normal
8 high-water line of any great pond or river, or within
9 250 feet of a coastal or freshwater wetland. The
10 purposes of these controls are to further the
11 maintenance of safe and healthful conditions; to
12 prevent and control water pollution; to protect fish
13 spawning grounds, aquatic life, bird and other
14 wildlife habitat; to protect buildings and lands from
15 flooding and accelerated erosion; to protect and
16 enhance community values; to protect archaeological
17 and historic resources; to protect commercial fishing
18 and maritime industries; to protect freshwater and
19 coastal wetlands; to control building sites, placement
20 of structures and land uses; to conserve shore cover,
21 and visual as well as actual points of access to
22 inland and coastal waters; to conserve natural beauty
23 and open space; and to anticipate and respond to the
24 impacts of development in shoreland areas.

25 It is further declared that, in accordance with
26 Title 12, section 402, certain river and stream
27 segments, as identified in the Department of
28 Conservation's 1982 Maine Rivers Study and as
29 specifically delineated in section 437, are
30 significant river segments and deserve special
31 shoreland zoning controls designed to protect their
32 natural and recreational features.

33 Zoning ordinances adopted pursuant to this article
34 need not depend upon the existence of a zoning
35 ordinance for all of the land and water areas within a
36 municipality, notwithstanding Title 30, section 4962,
37 as it is the intention of the Legislature to recognize
38 that it is reasonable for municipalities to treat
39 shoreland areas specially and immediately to zone
40 around water bodies rather than to wait until such
41 time as zoning ordinances may be enacted for all of
42 the land within municipal boundaries.

1 Sec. 2. 38 MRSA §436, as amended by PL 1987, c.
2 402, Pt. A, §198, and c. 419, §9, is repealed.

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

4 §436-A. Definitions

5 As used in this chapter, unless the context
6 otherwise indicates, the following terms have the
7 following meanings.

8 1. Coastal wetlands. "Coastal wetlands" means
9 all tidal and subtidal lands; all lands below any
10 identifiable debris line left by tidal action; all
11 lands with vegetation present that is tolerant of salt
12 water and occurs primarily in a salt water or
13 estuarine habitat; and any swamp, marsh, bog, beach,
14 flat or other contiguous low land which is subject to
15 tidal action or normal storm flowage at any time
16 except during periods of maximum storm activity.
17 Coastal wetlands may include portions of coastal sand
18 dunes.

19 2. Commercial fishing activities. "Commercial
20 fishing activities" means activities directly related
21 to commercial fishing and those commercial activities
22 commonly associated with or supportive of commercial
23 fishing, such as the manufacture or sale of ice, bait
24 and nets, and the sale, manufacture, installation or
25 repair of boats, engines and other equipment commonly
26 used on boats.

27 3. Densely developed area. "Densely developed
28 area" means any commercial, industrial or compact
29 residential area of 10 or more acres with a density of
30 at least one principal structure per 2 acres.

31 4. Floodway. "Floodway" means the channel of a
32 river or other water course and the adjacent land
33 areas that must be reserved to allow for the discharge
34 of a 100-year flood without cumulatively increasing
35 the water surface elevation of the 100-year flood by
36 more than one foot.

1 5. Freshwater wetlands. "Freshwater wetlands"
2 means freshwater swamps, marshes, bogs and similar
3 areas which are:

4 A. Of 10 or more contiguous acres;

5 B. Characterized predominantly by wetland
6 vegetation; and

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

9 Freshwater wetlands may contain small inclusions of
10 land that do not conform to the criteria of this
11 subsection.

12 6. Functionally water-dependent uses.
13 "Functionally water-dependent uses" means those uses
14 that require, for their primary purpose, location on
15 submerged lands or that require direct access to, or
16 location in, coastal waters and which cannot be
17 located away from these waters. These uses include
18 commercial and recreational fishing and boating
19 facilities, finfish and shellfish processing, fish
20 storage and retail and wholesale marketing facilities,
21 waterfront dock and port facilities, shipyards and
22 boat building facilities, marinas, navigation aids,
23 basins and channels, industrial uses dependent upon
24 water-borne transportation or requiring large volumes
25 of cooling or processing water that cannot reasonably
26 be located or operated at an inland site and uses
27 which primarily provide general public access to
28 marine or tidal waters.

29 7. Great pond. "Great pond" means any inland
30 body of water which in a natural state has a surface
31 area in excess of 10 acres and any inland body of
32 water artificially formed or increased which has a
33 surface area in excess of 30 acres.

34 8. Maritime activities. "Maritime activities"
35 means the construction, repair, storage, loading and
36 unloading of boats, chandlery and other commercial
37 activities designed and intended to facilitate
38 maritime trade.

1 9. Normal high-water line. "Normal high-water
2 line" means that line along the shore of a great pond,
3 river or other nontidal body of water which is
4 apparent from visible markings, changes in the
5 character of soils due to prolonged action of the
6 water or changes in vegetation, and which
7 distinguishes between predominantly aquatic and
8 predominantly terrestrial land. In the case of great-
9 ponds, all land below the normal high-water line shall
10 be considered the bottom of the great pond for the
11 purposes of this subchapter.

12 10. Principal structure. "Principal structure"
13 means a building other than one which is used for
14 purposes wholly incidental or accessory to the use of
15 another building on the same premises.

16 11. River. "River" means a free-flowing body of
17 water from that point at which it provides drainage
18 for a watershed of 25 square miles to its mouth.

19 12. Structure. "Structure" means anything built
20 for the support, shelter or enclosure of persons,
21 animals, goods or property of any kind, together with
22 anything constructed or erected with a fixed location
23 on or in the ground.

24 13. Timber harvesting. "Timber harvesting" means
25 the cutting and removal of trees from their growing
26 site and the attendant operation of cutting and
27 skidding machinery, but not the construction or
28 creation of roads. Timber harvesting does not include
29 the clearing of land for approved construction.

30 Sec. 4. 38 MRSA §438, as enacted by PL 1985, c.
31 481, Pt. A, §91, is repealed.

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

33 §438-A. Municipal authority; state oversight

34 With respect to all shoreland areas described in
35 section 435, municipalities shall adopt zoning and
36 land use control ordinances pursuant to existing

1 enabling legislation and in accordance with the
2 following requirements.

3 1. Land use guidelines. In accordance with Title
4 5, chapter 375, subchapter II, the Board of
5 Environmental Protection shall adopt, and from time to
6 time shall update and amend, minimum guidelines for
7 municipal zoning and land use controls which are
8 designed to carry out the legislative purposes
9 described in section 435 and the provisions of this
10 article. These minimum guidelines shall include
11 provisions governing building and structure size,
12 setback and location, establishment of resource
13 protection, general development, limited residential,
14 commercial fisheries and maritime activities' zones
15 and other zones. Within each zone, the board shall
16 prescribe uses which may be allowed with or without
17 conditions and shall establish criteria for the
18 issuance of permits and nonconforming uses, land use
19 standards and administrative and enforcement
20 procedures. The board shall comprehensively review
21 and update its guidelines and shall reevaluate and
22 update the guidelines at least once every 4 years.

23 2. Municipal ordinances. In accordance with a
24 schedule adopted by the board and acting in accordance
25 with a local comprehensive plan, municipalities shall
26 prepare and submit to the board zoning and land use
27 ordinances which are consistent with, or are no less
28 stringent than, the minimum guidelines adopted by the
29 board. When a municipality determines that special
30 local conditions of urbanization within portions of
31 the shoreland zone require a different set of
32 standards than those in the minimum guidelines, the
33 municipality shall document the special conditions and
34 submit them, together with its proposed ordinance
35 provisions, to the board for review and approval.

36 3. Board approval. Municipal ordinances and any
37 amendments shall not be effective unless approved by
38 the board. In determining whether to approve
39 municipal ordinances or amendments, the board shall
40 consider the legislative purposes described in section
41 435, the minimum guidelines and any special local
42 conditions which, in the judgment of the board, justify

1 a departure from the requirements of the minimum
2 guidelines in a manner which is not inconsistent with
3 the legislative purposes described in section 435.
4 Recognizing that the guidelines are intended as
5 minimum standards, the board shall approve a municipal
6 ordinance which imposes more restrictive standards
7 than those in the guidelines.

8 4. Failure to adopt ordinances. If a
9 municipality fails to adopt ordinances as required
10 under this article or if the board determines that an
11 ordinance which a municipality has adopted does not
12 satisfy the requirements and purposes under this
13 article, the board, acting in accordance with Title 5,
14 chapter 375, subchapter II, shall adopt suitable
15 ordinances, or suitable provisions of ordinances, on
16 behalf of the municipality. Following adoption by the
17 board, these ordinances or provisions shall be
18 effective and binding within the municipality and
19 shall be administered and enforced by that
20 municipality.

21 5. Exemptions. Any areas within a municipality
22 which are subject to nonmunicipal zoning and land use
23 controls may be exempted from the operation of this
24 section upon a finding by the board that the purposes
25 of this chapter have been accomplished by nonmunicipal
26 measures.

27 6. Variances. A copy of each request for a
28 variance under an ordinance approved by the Board of
29 Environmental Protection under this article shall be
30 forwarded by the municipality to the commissioner at
31 least 30 days prior to action by the municipality.
32 The material submitted shall include the application
33 plus all supporting information provided by the
34 applicant. The commissioner may comment when the
35 commissioner determines that the municipal issuance of
36 the variance would be in noncompliance with the
37 requirements of state law for a zoning variance or the
38 variance would undermine the legislative purposes
39 declared in section 435. Such comments shall be made
40 part of the record, and shall be considered by the
41 municipality prior to taking action on the variance
42 request.

1 Sec. 6. 38 MRSA §439, as reallocated by PL
2 1985, c. 481, Pt. A, §27, is repealed.

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

4 §439-A. Additional municipal powers, limitations

5 1. Additional controls. In addition to the
6 ordinances required by this chapter, municipalities
7 may adopt zoning and land use controls applicable to
8 other bodies of water as may be required to protect
9 the public health, safety and general welfare and
10 further the purposes of this article.

11 2. Jurisdiction. Notwithstanding the scope of
12 shoreland areas as identified in section 435, the
13 jurisdiction of municipal shoreland zoning and land
14 use control ordinances adopted under this article may
15 include any structure built on, over or abutting a
16 dock, wharf, pier or other structure extending below
17 the normal high-water mark of a water body or within
18 any wetland. Accordingly, municipalities may enact
19 ordinances affecting structures which extend over the
20 water or are placed on lands lying between high and
21 low watermarks or within wetlands.

22 3. Soil evaluation reports. Any other law
23 notwithstanding, when a zoning ordinance adopted in
24 conformity with this article requires a written report
25 of soil suitability for subsurface waste disposal or
26 commercial or industrial development, that report
27 shall be prepared and signed by a duly qualified
28 person who has made an on-the-ground evaluation of the
29 soil properties involved. Persons qualified to
30 prepare these reports shall be certified by the
31 Department of Human Services and shall include Maine
32 State Certified Soil Scientists, Maine Registered
33 Professional Engineers, Maine State Certified
34 Geologists and other persons who have training and
35 experience in the recognition and evaluation of soil
36 properties and can provide proof of this training and
37 experience in a manner specified by the Department of
38 Human Services. That department may promulgate rules
39 for the purpose of establishing training and experience

1 standards required by this subsection.

2 4. Setback requirements. Notwithstanding any
3 provision in a local ordinance to the contrary, all
4 new principal and accessory structures and
5 replacements and substantial expansions of such
6 structures within the shoreland zone as established by
7 section 435 must meet the water setback requirements
8 approved by the board, except structures which require
9 direct access to the water as an operational
10 necessity, such as piers and docks. For purposes of
11 this subsection, a substantial expansion of a building
12 shall be an expansion which increases either the
13 volume or floor area by 30% or more. This subsection
14 is not intended to prohibit a municipal board of
15 appeals from granting a variance, subject to the
16 requirements of this article and Title 30, section
17 4963, nor is it intended to prohibit a less than
18 substantial expansion or replacement of an accessory
19 structure attached to a legally existing nonconforming
20 structure, provided that the expansion or replacement
21 does not create further nonconformity with the water
22 setback requirement.

23 5. Timber harvesting. Municipal ordinances shall
24 regulate timber harvesting within the shoreland area.
25 These regulations shall be consistent with the board's
26 guidelines which shall be no less restrictive than the
27 following: Within the strip of land extending 50 feet
28 inland from the normal high-water mark, a cleared
29 opening not greater than 30 feet in width for every
30 100 feet of shoreline may be created, provided that,
31 when openings are combined, there shall be no single
32 opening along the shore wider than 60 feet, and there
33 shall be not more than one 60-foot opening along any
34 200 feet of shoreline. Timber harvesting is prohibited
35 in the area extending 250 feet inland from the normal
36 high water mark in those areas zoned for resource
37 protection in the shoreland area abutting a pond.

38 6. Vegetation. Within the shoreland zone,
39 municipal ordinances shall provide for effective
40 vegetative screening between buildings and
41 shorelines. These ordinances must be consistent with
42 the board's guidelines which shall not be less
43 restrictive than the following: Clear-cutting of

1 vegetation shall not be permitted, except that
2 openings not greater than 30 feet in width for every
3 100 feet of shoreline may be created. Selective
4 cutting of no more than 40% of the trees 4 inches or
5 more in diameter, measured at 4 1/2 feet above ground
6 level, is allowed in any 10-year period, provided that
7 a well-distributed stand of trees and other natural
8 vegetation remains.

9 Sec. 8. 38 MRSA §442, as enacted by PL 1985, c.
10 481, Pt. A, §92, is repealed.

11 Sec. 9. 38 MRSA §443, as enacted by PL 1985, c.
12 481, Pt. A, §93, is repealed.

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

14 §443-A. Cooperation; enforcement

15 1. Consultation with state agencies. All
16 agencies of State Government shall cooperate to
17 accomplish the objectives of this article. To that
18 end, the department shall consult with the governing
19 bodies of municipalities and with other state agencies
20 to achieve the purposes of this article, and shall
21 extend to municipalities all possible technical and
22 other assistance for that purpose.

23 2. Legal actions. In any legal action in which
24 the pleadings challenge the validity or legality of
25 any ordinance adopted pursuant to this article, the
26 Attorney General shall be made a party until removed
27 by the Attorney General's consent.

28 3. Remedies. Any municipality which fails to
29 adopt, administer or enforce zoning and land use
30 ordinances as required under this article shall be
31 subject to the enforcement procedures, equitable
32 remedies and civil penalties set forth in sections 347
33 to 349.

34 Sec. 11. Effective date. This Act shall take
35 effect on January 1, 1989.

1

STATEMENT OF FACT

2 This bill significantly strengthens and updates
3 the State's mandatory shoreland zoning laws.
4 Originally enacted in 1973, these laws are in need of
5 major revisions at this time because of the
6 substantial growth and development which has occurred
7 and which will continue to occur in the State's
8 shoreland areas. This growth is having potentially
9 significant impacts upon natural, scenic, historic,
10 wildlife and community values of great importance to
11 the citizens of Maine. Yet the State's shoreland
12 zoning and land use laws, as they are currently
13 composed, provide insufficient scope, oversight and
14 enforcement capability to protect the public's
15 interest in these areas of major statewide concern.

16 Section 1 of the bill amends the Maine Revised
17 Statutes, Title 38, section 435, in order to extend
18 minimum shoreland zoning protection to areas around
19 coastal and freshwater wetlands in addition to those
20 around bodies of water and to more specifically
21 express the Legislature's purposes in terms of
22 protecting a variety of natural and cultural values in
23 shoreland areas. Other changes are the result of
24 rearranging the shoreland zoning statutes in order to
25 give them a more coherent organization, and do not
26 reflect substantive changes.

27 Section 2 repeals Title 38, section 436.

28 Section 3 provides a number of new and revised
29 definitions and organizational improvements, including:

30 1. A definition of coastal wetlands, the areas
31 around which will be protected by zoning under this
32 bill. This definition is drawn from Alteration of
33 Coastal Wetlands, Title 38, section 472;

34 2. A definition of freshwater wetlands, the areas
35 around which will be protected by zoning under this
36 bill. This definition mirrors that in Freshwater
37 Wetlands, Title 38, section 407-A;

1 3. A definition of great pond consistent with
2 that term as it is defined in other statutes
3 administered by the Board of Environmental Protection;

4 4. The deletion of a definition of screening as
5 unnecessary. For organizational clarity, the
6 substantive portion of the old definition is placed in
7 section 439-A, subsection 6;

8 5. Changes in the definition of structure in
9 order to better describe the meaning of this term.
10 The remainder of this subsection has been moved to
11 section 439-A, subsection 4, for organizational
12 clarity; and

13 6. Other minor clarification changes to existing
14 law.

15 In sections 4 and 5, existing law is rewritten in
16 order to provide a rational process by which the board
17 will oversee the development of shoreland zoning
18 ordinances by municipalities. As a part of this
19 process, the existing, bifurcated role of the board
20 and the Maine Land Use Regulation Commission has been
21 streamlined. Specifically, this section provides a
22 process and criteria by which the Board of
23 Environmental Protection shall adopt minimum
24 guidelines for municipal shoreland zoning ordinances,
25 and provides for periodic updating of these
26 guidelines; provides that municipalities shall prepare
27 their own shoreland zoning ordinances, allowing local
28 municipalities to depart from the state guidelines
29 where special local conditions of urbanization
30 warrant; provides a process and criteria by which the
31 Board of Environmental Protection shall review
32 municipal shoreland zoning ordinances and amendments;
33 allows the Board of Environmental Protection to
34 develop a state-level ordinance for a municipality
35 which has failed to adopt its own; and includes
36 provisions by which the Department of Environmental
37 Protection will comment on variances issued by
38 municipalities under their shoreland zoning
39 ordinances, to prevent continued problems as
40 experienced under the current program where some
41 municipalities have used variances to defeat the

1 intent of the shoreland zoning program.

2 In sections 6 and 7, a number of provisions of the
3 existing shoreland zoning law have been clarified,
4 updated and reorganized within section 439-A.

5 In section 8, Title 38, section 442, is repealed
6 as unnecessary. The subject matter of this section is
7 more effectively addressed in new section 438-A.

8 In section 9, Title 38, section 443, of the
9 shoreland zoning law is repealed.

10 In section 10, Title 38, section 443-A, provides
11 clarified enforcement procedures by incorporating the
12 enforcement sections generally applicable to laws
13 administered by the Board of Environmental Protection.

14 Section 11 provides an effective date of January
15 1, 1989, in order to allow for a transition period.

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