

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAWN R. GALLAGHER
COMMISSIONER

**State Regulatory Involvement
In The
Protection of Maine's Sand Dune Systems**

Maine Department of Environmental Protection

March 25, 2003

The Legislature first enacted legislation to protect Maine's coastal sand dune systems in 1979. An amendment to the then Alteration of Coastal Wetland Law, included language to require a permit for any activity which involved bulldozing, removing, adding or displacing sand, or building any permanent structure in, on or over any coastal sand dune. The amendment was in reaction to damage to coastal properties as a result of storm activity in the late 70s. The amendment required the Department to assess regulated activities in sand dunes for impacts to wildlife habitat, existing recreational uses, sand movement, and flood hazards to the sand dune as well as to structures. The Department first adopted specific rules, Chapter 355, Coastal Sand Dune Rules, regulating those activities in sand dunes in 1983. The rules have been amended subsequently to address sea level rise, erosion hazards, damage to buildings from ocean storms and velocity zones.

Beginning in the mid 1990s, the Department and the Office of the Attorney General became increasingly concerned with the issue of regulatory takings as it pertained to the prohibition in the Sand Dune Rules against construction of new buildings in frontal dune areas. The Department initiated rulemaking in 1995 to add a hardship variance provision to the Rules that would have allowed an individual to apply for a permit. There was overwhelming opposition to the proposed rule and the Department concluded the rulemaking effort without taking any action.

In 1997, the Department, in conjunction with the State Planning Office and the Maine Geological Survey, convened the Southern Maine Beach Stakeholder Group to look at current beach management issues and to provide recommendations on how to address those issues. The stakeholder group was comprised of property owners, business interests, environmental interests, municipal officials and State agencies. Issues addressed by the group included beach erosion, at risk properties, wildlife habitat, public access and regulatory issues. Specific recommendations addressed the need for additional geologic information, continued efforts to protect rare and endangered species, economic data to assess the value of beaches, additional support for local municipalities, and the need to develop specific beach management plans for selected beaches.

Subsequent efforts by representatives of the communities of Saco, Old Orchard Beach and Scarborough produced the Saco Bay Regional Beach Management Plan. A similar effort was undertaken by the Town of Wells, resulting in the Wells Bay Regional Beach Management Plan. State agencies and representatives from Maine Audubon participated in these local and regional efforts. In general the recommendations contained in these plans mirror those of the larger stakeholder process, although the issue of prohibiting the reconstruction of storm damaged structures was a significant point of contention in the Wells Bay Plan.

Concurrent with the working of these local and regional efforts, the Department began efforts to initiate rulemaking on the Sand Dune Rules. There was a multitude of issues that the Department wanted to have addressed. These included the need to reformat the rules to improve readability and clarity for staff, the public and municipal officials. Secondly, the Board of Environmental had urged the Department to add a specific requirement that all new reconstructed buildings in frontal dune areas be required to elevate those structures on post or pile foundations. And thirdly, the Department, again with the urging of the Attorney General's Office, wanted to address the issue of providing regulatory relief from the potential for unconstitutional taking by allowing applicants to apply for a variance to construct on vacant frontal dune lots. The Department delayed initiating the formal rulemaking effort until the recommendations in the Wells Bay and Saco Bay Management Plans were completed in order to address those concerns in the rulemaking effort.

The Board of Environmental Protection held a public hearing on the Department's proposed Sand Dune Regulations in the Town of Wells in August, 2002. The public hearing generated an exceptional amount of comments from the public. Most of those comments focused on the issue of the variance provision in the proposed rules that would allow an individual to apply for a variance to reconstruct a structure in a V zone that had been damaged by more than 50% by an ocean storm. The current rule prohibits such an activity with no variance provision. Most, if not all, of the individuals commenting on this aspect of the rule were unaware that the prohibition in the rule already existed and was not being newly proposed in the draft rules. Regardless, the Department considered their concerns and suggested amendments to the proposed rules to address those concerns. During this process, Department staff sought the guidance of the Board of Environmental Protection. The Board of Environmental Protection held a second public hearing on the revised proposed rules on March 6, 2003. The comment period on the proposed rules ended on March 20.

Specifically, the major amendments to the rules as currently being proposed include:

- The reconstruction of structures and new structures in frontal dune and unstable back dune areas would be required to elevate those structures on post or pile foundations. This provision would significantly improve the ability of sand and water to move freely within the beach system and would significantly improve the ability of those structures to withstand coastal flood hazards.
- The current exemption for second story additions or the addition of dormers is eliminated. All such construction would require a permit and would be required to

meet the requirements for post or pile foundations. A variance provision has been added to allow for other types of foundations to address undue hardship.

- The exemption in the existing rules for maintenance and repair as well as the prohibition for reconstruction of buildings damaged by more 50% by an ocean storm relies on a determination of appraised market value. The proposed rule allows for a building's value to be determined in either of two ways. The value of a building may be the assessed value as established by the municipality and adjusted by the State's certified ratio or it may be the appraised value as established by an appraised market value assessment completed by a State certified appraiser within the previous five years prior to the date an application is received by the Department.
- Exemptions have been included to allow for the construction of ramps, fire escapes and other structures in frontal dunes to meet Americans With Disabilities Act and local fire code requirements.
- A provision has been included to allow for new residential structures to be constructed on vacant lots in areas where the surrounding lots are already developed. The provision is applicable whenever there is a structure located within 100 feet on either side of a vacant lot. The building would be required to have a post or pile foundation and would be limited to 20% of the lot with limited areas for parking and walkways.
- A variance provision has been included to allow for applications to be filed with the Department for building on vacant lots in frontal dunes in less developed areas and for building in V zones. An applicant would need to demonstrate that a hardship would exist in order to obtain a permit.
- A provision has been included that would allow for the one time reconstruction of buildings in V zones that have been damaged by more than 50% by an ocean storm.

The Department believes that the proposed rules represent an appropriate balance between the protection of the sand dunes and individual property rights. The new regulatory requirement to elevate all reconstructed buildings, including the addition of second stories, and new structures on post or pile foundations will allow for the natural processes of wave and wind action to occur relatively unimpeded. Should buildings in V zones be damaged by more than 50% by an ocean storm more than once, those buildings will not be allowed to be reconstructed.

Regarding the introduction of a variance provision to allow new construction in frontal dune areas, staff conducted an investigation of the southern Maine beach areas extending from Kittery to Hunnewell Beach in Phippsburg. Our assessment indicates that approximately 77 vacant lots exist in frontal dune areas. Of these, approximately 7 lots would be considered to be located in developed areas. These areas are defined as having existing residential buildings located within 100 feet on either side of the vacant lot. Development on these lots would not require variances but would need to meet the siting requirements in the rules. Of the remaining 70 or so lots, an applicant would have to meet the hardship criteria contained in the variance section and the criteria for all development in the rules in order to construct a building. Of the 70 or so remaining lots, eleven of these are publicly owned or are protected under conservation easements. Twelve lots contain

essential or significant wildlife habitat for threatened and endangered bird species. An Essential Habitat Evaluation is required by the Department of Inland Fisheries and Wildlife for projects in these areas in order to determine that a project will not unreasonably harm the habitat. Approximately ten additional lots are located in coastal wetlands and are essentially precluded from development under the Department's Wetland Protection Rules, Chapter 310. Approximately twenty two additional lots are located in a very old subdivision on Hunnewell Beach in Phippsburg. The legal status of some of the lots is in question. Some of the lots on the municipality's tax maps are indicated by question marks instead of lot numbers. Of the remaining lots, many are located in resource protection zones under local shoreland zoning regulations or are owned by landowners on the other side of the street. Given the universe of potential properties, the Department would not expect that many of the owners of these properties would apply for hardship variances or could meet the criteria for obtaining a variance.

As indicated earlier, the public hearing record on the proposed rules ended March 20. Department staff has begun to assess the comments and testimony that has been received. The Department estimates that it will present a final draft of the rules for the Board of Environmental Protection's consideration in late May or early June.