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SHORELAND ZONING REPORT TO THE 124th LEGISLATURE

Prepared by the Department of Environmental Protection's
Shoreland Zoning Unit

Introduction

This report is submitted to the Maine Legislature pursuant to Title 38 M.R.S.A. section 449. Section 449 requires the Commissioner of Environmental Protection to biennially report on the implementation and impact of local shoreland zoning ordinances. The report must include:

1. a description of the assistance and supervision that the commissioner has provided to the municipalities in carrying out their shoreland zoning responsibilities;
2. a summary of the shoreland zoning violations investigated by municipal code enforcement officers; and
3. any recommendations for legislation relating to shoreland zoning.

Program Description

The Mandatory Shoreland Zoning Act (Act), commonly referred to as the shoreland zoning law, was implemented in the early 1970's. The Act, as amended, requires all organized municipalities to adopt ordinances that regulate land use activities in the shoreland zone. The shoreland zone consists of land areas within 250 feet, horizontal distance, of the normal high-water line of great ponds, rivers and tidal waters; within 250 feet, horizontal distance, of the upland edge of freshwater and coastal wetlands; and within 75 feet, horizontal distance, of streams (outlets of great ponds and second-order streams).

The Board of Environmental Protection (BEP) establishes minimum standards for the municipally adopted shoreland ordinances. Those minimum standards are contained in the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* (Guidelines), Chapter 1000 of the Department's rules. The Act allows a municipality to enact a different set of standards than those of the Guidelines when it documents to the Commissioner that special local conditions warrant lesser standards.

The Commissioner of Environmental Protection must approve all shoreland ordinances and amendments thereto, before they become effective. If a municipality fails to adopt a suitable shoreland zoning ordinance, the Act requires the BEP to adopt an ordinance for the municipality. The BEP-adopted ordinance is referred to as a *State-imposed ordinance*, and must be administered and enforced by the municipality just as if the municipality had adopted it. A State-imposed ordinance consists of the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* and an accompanying zoning map. Both the ordinance text and the map are adopted following the procedures required for rulemaking activities. There are currently 53 State-imposed ordinances in place. (See Appendix A)

The Department's shoreland zoning program is presently administered by three full-time staff members; one in each the Augusta office, the Portland office, and the Bangor office. Some additional field and educational assistance is provided by a staffer at the Department's Presque Isle office, whose primary job is enforcement of the Natural Resources Protection Act, the Site Location of Development Act, and other laws administered directly by the Department.

The primary work of the shoreland zoning unit is that of education and technical assistance. Municipal code enforcement officers and planning board and appeals board members change frequently, resulting in a continual need for training and assistance. The municipal boards are made up of volunteers, many whom do not deal with land use issues on a regular basis. While the Department occasionally initiates enforcement actions against municipalities for failing to adequately administer and enforce local shoreland zoning ordinances, the Department only does so after it becomes clear that less formal involvement will not gain compliance with the Act.

Summary of Municipal Ordinance Updates Following Amendments to the State of Maine Guidelines for Municipal Shoreland Zoning Ordinances

Following the Board of Environmental Protection's amendments to the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* in 2006, municipalities have been updating their respective ordinances to comply with the BEP's established deadline. That deadline, originally being July 1, 2008, was extended to July 1, 2009. The extension was approved primarily due to issues pertaining to freshwater wetlands maps of moderate and high value waterfowl and wading bird habitats. The early maps issued to the municipalities were determined to be less accurate than were initially

believed. Therefore, the Department of Inland Fisheries and Wildlife, through no small effort, reviewed and revised the maps for all organized municipalities. This work was accomplished within a ten-month period, and by the end of October 2008 all municipalities had received the revised and accurate maps.

The Department in consultation with a number of municipalities established the July 1, 2009 revised deadline for adoption and believed that would provide sufficient time for municipalities to update their ordinances and zoning maps. While almost half of the towns had adopted their revised ordinances by this July 1, 2009 deadline, the remaining communities were unable to meet this deadline. The process of map and ordinance amendments requires significant work by municipalities and there was a great deal of public interest at the local level in these changes. This meant that towns took longer than expected.

The Department has not formally extended the deadline but is, rather, waiting until June 2010 after the completion of this year's annual town meeting season to determine how many towns may warrant state-imposed ordinances.

As of the end of December 2009, 240 municipalities had updated the text of their ordinances, some of which still need to include amendments to their zoning maps. Of the 240 approved ordinances, 106 received conditional approvals to address deficiencies in those ordinances. The Act permits the Commissioner of DEP to approve ordinances with conditions to bring them fully into compliance with the Guideline standards. Appendix B visually displays the progress municipalities have made toward updating local ordinances.

In addition to the necessary freshwater wetlands zoning amendments that municipalities must undertake, the extent of future regulation of timber harvesting activities must be determined by each municipality. The State has developed a set of "State-wide timber harvesting standards" that will only become effective after 252 of the 336 towns (75%) that have the most timber harvesting activities choose to adopt the state-wide standards or choose to repeal local regulation of timber harvesting in the shoreland zone. Towns that keep their existing standards will not count toward the threshold for implementation of the state-wide timber harvesting standards in shoreland areas.

When the state-wide timber harvesting standards become effective they will also be effective in unorganized municipalities and will be enforced by the Department of Conservation (DOC). The DOC will also be responsible for administering the standards in those organized towns that have chosen to repeal local regulation of timber harvesting in the shoreland zone. As of March 9, 2010, eighty-two (82%) of the 244 municipalities that have decided how they will deal with timber harvesting activities in the shoreland zone have chosen one of the options that will lead to the implementation of the state-wide timber harvesting standards. Twenty-five (25) percent have chosen to adopt the state-wide standards and fifty-seven (57) percent have chosen to repeal local regulation of timber harvesting in the shoreland zone. Only eighteen (18) percent of the municipalities have chosen to keep their existing timber harvesting standards.

Assistance to Municipalities and Other Organizations

Municipal assistance makes up the core of the Department's shoreland zoning efforts and is accomplished in numerous ways. The following are some of the activities that were undertaken during the past two-year period to assist municipalities with their shoreland zoning responsibilities.

1. Training. The Department continues to work cooperatively with the State Planning Office's *Code Enforcement Officer (CEO) Certification and Training Program*. All code enforcement officers who administer and enforce municipal shoreland zoning ordinances must be certified by the State Planning Office (SPO) as being qualified in shoreland zoning issues. The Shoreland Zoning Unit conducts the annual day-long training of code officers for SPO's certification program. In 2008, staff conducted training in Belfast, Lewiston, Milbridge, Orono, Presque Isle and Wells. In 2009 training was held in Auburn, Bangor, Machias, Portland and Presque Isle. The training included discussions on non-conformance issues, necessary district amendments due to the requirement to zone areas adjacent to moderate and high value waterfowl and wading bird habitats as Resource Protection districts, water and wetland setback requirements, vegetation clearing standards, timber harvesting rules, the permitting process, and enforcement issues. The sessions in 2008 included classroom and field work, whereas, in 2009 all training was held in the classroom. As in past years, approximately 200 code enforcement officers attend these sessions each year.

The shoreland zoning staff also rewrote the State Planning Office's test that prospective code officers must pass in order to become certified. The test had become outdated and several questions and answers were unclear.

The Department also spoke at regional code enforcement officer association meetings in Camden and Presque Isle, as well as the Androscoggin Valley Council of Government's Planning Day for planning boards and other town officials in the region.

Workshops and other educational efforts were also provided for various other interest groups, such as the Lincoln County Board of Realtors, Hancock County realtors, Maine Association of Professional Soil Scientists, the Maine Association of Wetland Scientists, licensed surveyors, and the Maine Forest Service's forest ranger academy. Several other educational presentations were conducted for lake associations, usually at their annual meetings.

2. Educational Materials. The Department has updated its handbook for shoreland property owners titled *Maine Shoreland Zoning*. This document is available in both hardcopy and electronic format and is a popular educational publication used by the public and town officials. It summarizes in words and diagrams the Mandatory Shoreland Zoning Act and the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*.

Town officials have received five issues of the *Shoreland Zoning Newsletter*. The Newsletter is published by the shoreland zoning unit approximately two-three times a year, and serves to update town officials on changes in the program, as well as a general training publication. It is the primary tool used to provide information to all of the organized municipalities that have enacted shoreland zoning ordinances. The Newsletter, as well as the shoreland zoning unit's five Issue Profiles and the handbook for shoreland property owners, are available on the Department's web page.

Each year the shoreland zoning unit publishes the "highest annual tide" levels on the Department's web page to assist landowners, code officers, surveyors and other parties in determining the upland edge of

coastal wetlands. These elevations change from year to year and the Department publishes those elevations at the beginning of each year, with guidance from the Maine Geological Survey.

3. Ordinance Update Process. All newly adopted ordinances and amendments to those ordinances must be approved by the Commissioner of DEP before they become effective. As noted earlier in this report, amendments to the Department's guidelines for municipal shoreland zoning ordinances were adopted by the Board of Environmental Protection in 2006, and municipalities are now in the process of amending local ordinances. During the past two years the Department has met individually with forty-three (43) town planning boards to discuss the necessary changes. In addition, staff has held twenty-three (23) regional workshops where more than one town attended. These workshops are important for rural towns that do not have professional planning staff.
4. Miscellaneous Technical Assistance. A very significant portion of staff's time is spent responding, either through site visits, written correspondence, or by telephone, to requests and inquiries from town officials and the public. Many site visits were conducted, mostly at the request of local code enforcement officers. Staff's policy is to respond to all site visit requests within 14 days of the request.

Other Initiatives and Activities

In February of 2008, the Department contracted with Elizabeth Della Valle and Normandeau Associates to review the effectiveness of the shoreland zoning program. The intent of the review was to evaluate the programmatic aspects of the shoreland zoning law both on the municipal and state level. Most importantly, the Department was seeking to evaluate the overlapping aspects of the Mandatory Shoreland Zoning Act and the Natural Resources Protection Act. There have always be some overlaps in jurisdiction with these laws but the recent amendments to the NRPA pertaining to the regulation of waterfowl and wading bird habitats have significantly increased the overlap of the two laws. The Department sought recommendations on how to best eliminate statutory and regulatory conflicts, yet maintain adequate protection of the important natural resources. Unfortunately, the State's finances soured before the contract work was initiated and the Department was forced to dissolve the contract. The Department is now planning to conduct a review with in-house staff.

Enforcement and Permit Related Activities

One of the Department's responsibilities is to ensure that municipalities are adequately administering and enforcing their respective ordinances. In doing so, Department staff sometimes takes an active role in an enforcement matter. Below are summaries of three significant cases in which DEP staff invested a substantial effort to assist the municipality in obtaining a suitable resolution.

- Town of Lebanon- In this matter the landowner hired a certified arborist to remove trees on a parcel of land within the shoreland zone adjacent to Spaulding Pond. Twenty-five out of 30 trees were removed from within the vital 100-foot shoreland buffer area and the owner violated several vegetation removal provisions within the Town of Lebanon's ordinance. The clearing also violated the State's Mandatory Shoreland Zoning Act.

After some prodding by the Department, the Town initiated enforcement action and sought informal resolution with the owner, including violation mitigation through replanting and a monetary penalty. The owner refused to agree to the terms, and further argued that all the trees removed were "hazard trees" and were at risk of falling and damaging personal property, including a small camp structure that is located more than 100 feet from the shoreline. Later, the owner removed all the tree stumps and graded the site with topsoil and planted a grass lawn down to within a few feet of the shoreline.

With the Department's assistance, the Town obtained photographs of the trees prior to their removal. Having substantial evidence, the Department encouraged the Town to file a complaint with the court. The court ruled in favor of the Town and ordered the landowner to replant a number of trees and shrubs and to pay a \$4000 fine, plus attorney fees. The owner unsuccessfully appealed to the Maine Supreme Judicial Court and we expect the necessary mitigation to be completed during spring 2010.

- The Town of Cushing- In 2006 the Department initiated formal enforcement action for excessive cutting of vegetation in the shoreland zone at Gaunt Neck in Cushing . This matter, which

involved the creation of a nearly 100 foot-wide cleared opening to the Meduncook River in the town of Cushing, resulted in the violator paying the State a \$20,000 fine and planting replacement trees. The Town of Cushing also filed suit against the landowner, seeking further planting and fines. In addition to other testimony, the Town used the expertise of Department staff and William Ostrofsky, the Department of Conservation's forest pathologist, in presenting its case to the court that the cutting was done in violation of the Town's shoreland zoning ordinance. The court ruled that the owner had "attempted to profit from wrongful conduct, which has irreversibly and unnecessarily marked the area." The responsible party was ordered to replant forty trees and was further ordered to pay attorney fees, as well as a civil penalty of \$137,000. Unfortunately, the Department understands that the town has thus far been unable to collect the penalty or its attorney fees because the limited liability corporation that owned the development project was dissolved during this enforcement process.

- Town of Lamoine- After the Town of Lamoine approved a subdivision plan, the realtor sold the wrong piece of land to a landowner. The new landowner hired foresters to clear the lot, but the wrong lot was cleared because of the realtor's error. The clearing was done in violation of the shoreland zoning ordinance, but the town was hesitant to proceed with enforcement because of the complexity of the issue. DEP staff assisted in the drafting of the Notice of Violation and participated in the discussion and review of the replanting plan to alleviate the violation. In the end, the cutters (and landowners) took responsibility and corrected the violation through a revegetation plan. Survival of the revegetation will be determined in 2010 growing season, with additional planting if necessary.

3. Reports from Municipal Code Enforcement Officers

As of March 9, 2010, two hundred and thirty nine municipal code enforcement officers filed biennial reports with the Department. This is a response rate of 53%. While more reports are expected, this rate of return is in line with the past ten-year period in which the overall response rate is approximately 60%.

Fifty-one (21%) of the towns reported no activities in the shoreland zone that required permits. The majority of these responses were from rural towns with low populations.

The permit data pertaining to new principal structures indicates that a significant drop in the number of permits has occurred over the last two-year period. Between 2002 and 2005, with approximately half of the municipalities reporting, more than 1000 new principal structures were permitted in the shoreland zone. With 53 percent of the towns reporting for the years 2008 and 2009, the number of permits for principal structures dropped to 632. This drop is likely due to the downturn in the economy.

The number of permits issued for building expansions has remained stable, with 1100 issued. This is not a significant change from the period 2002 through 2007.

Table 1. Types of permits issued in the shoreland zone over four reporting periods.

| Permit | 2002-2003 (62% reporting) | | 2004-2005 (54% reporting) | | 2006-2007 (39% reporting) | | 2008-2009 (53% reporting) | |
|----------------------|------------------------------|------------------|------------------------------|------------------|------------------------------|------------------|------------------------------|------------------|
| | Total Number | Average per Town | Total Number | Average per Town | Total Number | Average per Town | Total Number | Average per Town |
| Principal Structures | 1255 | 4.5 | 1124 | 4.6 | 667 | 3.8 | 632 | 2.6 |
| Replacements | 254 | 0.9 | 296 | 1.2 | 277 | 1.6 | 388 | 1.6 |
| Relocations | 125 | 0.5 | 91 | 0.4 | 112 | 0.65 | 115 | .48 |
| Expansions | 1488 | 5.4 | 1451 | 5.9 | 1088 | 6.3 | 1297 | 5.4 |
| Accessory Structures | 1285 | 4.6 | 1214 | 5.0 | 822.5 | 4.8 | 1110 | 4.6 |

Variations

The number of variance applications received, and the percentage of variances granted in the years 2008-2009 were at the lowest level since 2002. In 2002 and 2003, 127 variances (55%) were granted out of 232 applications submitted to reporting municipalities. During 2004 and 2005, 91 variances (64%) were granted out of 143 applications submitted, and for the years 2006 and 2007, 54 variances (50%) were granted out of 107 applications. The reported number of variance applications in this biennial reporting period dropped to 96, and only 45% were granted by the municipal boards of appeals. The Department is pleased with the lower level of variance approvals, but still believes that many variances are granted that do not meet the statutory criteria for obtaining a zoning variance.

Violations and Enforcement

Between 2008 and 2009, 584 violations were confirmed as a result of 1474 complaint investigations. Thus, approximately 39% of all complaints were determined to be violations of the towns' Shoreland Zoning Ordinance. From these 584 violations, 74 cases were solved through consent agreements (13%), while only 22 court actions were initiated (4%). It is clear that most violations were resolved through informal actions.

Table 2. Variance and Enforcement activity in the shoreland zone over four reporting periods.

| | 2002-2003 (62% reporting) | | 2004-2005 (54% reporting) | | 2006-2007 (39% reporting) | | 2008-2009 (53% reporting) | |
|-------------------------------------|--------------------------------------|-------------------------------------|--------------------------------------|-------------------------------------|--------------------------------------|-------------------------------------|--------------------------------------|-------------------------------------|
| | Total Number | Biennial Average (%) | Total Number | Biennial Average (%) | Total Number | Biennial Average (%) | Total Number | Biennial Average (%) |
| Variances Granted | 127 | 55 | 91 | 64 | 54 | 50 | 43 | 45 |
| Violation | 556 | | 612 | | 499 | | 584 | |
| Consent Agreement Enforcement | 87 | 15 | 82 | 13 | 38 | 7.6 | 74 | 13 |
| Court Action Enforcement | 15 | 2.7 | 20 | 3.3 | 11 | 2.2 | 22 | 3.8 |

Recommendations for Legislation

1. Title 38 MRSA section 438-A(1-B)(A), Notification to Landowners

Title 38 MRSA section 438-A(1-B)(A) states a municipality shall provide written notification to landowners whose property is being considered by the municipality for placement in a resource protection zone. Notification must be by first-class mail to the person against whom property tax is assessed. That section also states that “the municipality must send notice no later than 14 days before its planning board votes to establish a public hearing on adoption or amendment of zoning ordinance or map that places the landowners’ property in the resource protection zone”.

The Department believes that the above requirement is flawed for two reasons. First in some municipalities the planning board is not the entity

that proposes or oversees changes to the zoning ordinance. It may be an ordinance review committee, the selectmen, or another town committee. Secondly, the Department contends that a more practical notification requirement is warranted. Rather than requiring the written notification to be sent 14 days before the appropriate board or committee votes to establish a public hearing on the change, the Department recommends that the notice be sent out at least 14 days before the actual hearing on the change. The recommended amendment to the language in Section 438-A(1-B)(A) is as follows:

A. In addition to the notice required by Title 30-A, section 4352, subsection 9, a municipality shall provide written notification to landowners whose property is being considered by the municipality for placement in a resource protection zone. Notification to landowners must be made by first-class mail to the last known addresses of the persons against whom property tax on each parcel is assessed. The municipal officers shall prepare and file with the municipal clerk a sworn, notarized certificate indicating those persons to whom notice was mailed and at what addresses, and when, by whom and from what location notice was mailed. This certificate constitutes prima facie evidence that notice was sent to those persons named in the certificate. The municipality must send notice not later than 14 days before ~~its planning board votes to establish it holds a~~ public hearing on adoption or amendment of a zoning ordinance or map that places the landowners' property in the resource protection zone. Once a landowner's property has been placed in a resource protection zone, individual notice is not required to be sent to the landowner when the zoning ordinance or map is later amended in a way that does not affect the inclusion of the landowner's property in the resource protection zone.

(Legislative action needed)

2. State Cost of Administering State-imposed Ordinances

Title 38 MRSA section 438-A(4) states that when a municipality fails to adopt an ordinance as required, the Board of Environmental Protection shall adopt a suitable ordinance for that municipality. These BEP-adopted ordinances are called State-imposed Ordinances, and must be administered by the municipalities as if they had been adopted locally. Amendments to state-imposed ordinances, however, can only be undertaken by the Board of Environmental Protection.

There are currently 50 fully state-imposed ordinances and three supplemental state-imposed ordinances. The cost of the BEP's adoption of a state-imposed ordinance is currently absorbed by the Department of Environmental Protection. Furthermore, the Department bears the costs of any future amendments that are made to the Ordinances, whether it is the ordinance text or the zoning map. Adoption of ordinances and amendments to them require public notice in Newspapers, at a significant cost to the Department. The Department believes that it is unfair to the nearly 400 municipalities that have met the requirements of the Mandatory Shoreland Zoning Act and have incurred local costs of ordinance adoption, to not recover the Board of Environmental Protection's costs of ordinance adoption and amendment for municipalities with state-imposed ordinances. However, there is currently no legislative authority to collect those costs from the respective municipalities.

The Department recommends that the Mandatory Shoreland Zoning Act be amended authorizing the Department to collect its costs related to the adoption of state-imposed ordinances. Such authorization could extend to all of the Department's costs including personnel costs and costs of drafting a suitable zoning map, as well as public notice costs. These costs, including staff time, could approach \$1000 per town if all costs of adopting a full state-imposed ordinance are to be recovered. The Department does not recommend charging a flat fee because the amount of time expended on each municipality varies significantly.

If it is decided that the Department should not seek recovery of all costs, the Department believes strongly that, at a minimum, the public notice costs (approximately \$300.00) should be recovered from the municipality. Cost recovery would provide a stronger incentive for the towns to enact a suitable local ordinance consistent with the requirements of the Act. **(Legislative action needed)**