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Maine's Subdivision Law and Home Rule

A Report as Required by PL 2001, c. 359
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Executive Summary

Legislative Charge:
Public Law 2001, c 359 §7, required that, at a minimum, the State Planning Office (SPO):

- create a catalog of municipal subdivision definitions; and
- prepare a legislative history of Maine subdivision law with a focus on home rule authority; and
- complete a list of possible strategies to coordinate subdivision review and title search procedures.

Key Findings:
The SPO consulted with the Maine Municipal Association (MMA), the Maine Realtors Association (MRA), the Maine Real Estate Developers Association (MREDA), the Maine Bankers Association (MBA), and the Maine State Housing Authority (MSHA) in reviewing the subdivision law. Developers and those involved in real estate transactions expressed a desire for a uniform definition across municipal boundaries in order to reduce confusion and the uncertainty of getting a clear title to land. They also expressed concern about the impact of customized regulations on the cost of housing. The municipal association expressed the concern of municipalities that want to be able to address local situations through their home rule authority. Some municipalities have felt the effect of incremental development and seek to control unregulated impacts, such as roads not built to a reasonable standard, through stricter definition of subdivision. SPO has attempted to respect the best of the arguments made by each of these groups, and advance good planning.

The SPO has made four key findings. These findings address the Legislative charge and further examine the link between subdivision and growth management.

1. The definition of a subdivision varies widely among municipalities.

   The MMA conducted a survey of all 457 organized communities not under the jurisdiction of the Land Use Regulation Commission, requesting information about their subdivision ordinances. Of these, 225 communities responded (49.2%) and provided copies of their ordinances.

   - 52.4% of the respondents adopted a definition that matched the statutory definition at one point in time, but very few of these match the existing statutory definition.

   - 34.2% of the respondents adopted the statutory definition by blanket reference. (27.3% of those that adopted by reference, referenced sections of statute that have been re-codified and no longer exist)

   - 13.3% of the respondents have exercised their home rule authority and modified the definition of a subdivision.

2. Based on research by MMA, Maine's subdivision law has been frequently amended and litigated since its creation. There are two significant events regarding home rule and the

definition of a subdivision:

- the Law Court's decision in Town of Arundel v. Swain, 374 A.2d 317 (ME 1977), that a town's authority to conduct subdivision reviews is limited to the statutory definition of subdivision.

- LD 2684 of the 113th Legislature's Third Special Session (PL 1987, c. 885), which was a direct answer to the Court's 1977 *Arundel* opinion. The LD included statutory language and a Statement of Fact that clearly indicated the Legislative intent to allow municipalities to amend the definition of a subdivision to review more divisions than required by statute.

3. According to title attorneys and bankers, the ability of title research to accurately assess the clear title to a parcel that has undergone division at some time in the past is difficult due to variable definitions among municipalities and potential changes over time within a municipality.

4. Subdivision law is an important tool for growth management but is no longer required to be consistent with a local comprehensive plan.

Recommendations:
The SPO makes the following four recommendations to improve consistency from municipality to municipality, minimize restriction of home rule authority, ensure that local subdivision definitions don't frustrate title searches and unnecessarily increase the cost of subdivisions, and re-connect an important growth management tool to local comprehensive plans that are consistent with the state's Planning and Land Use Regulation Act. These recommendations, taken together, provide the improved uniformity desired by the real estate community, while protecting the authority of municipalities to more strictly regulate subdivisions in areas less suited for growth. They also put safeguards into place, ensuring that locally adopted definitions are obvious and available to title researchers. Proposed statutory amendments are included at the end of this report, before the attachments.

1. There should be a single statewide minimum definition of a subdivision.

2. Municipalities with a comprehensive plan that is consistent with state law should be allowed to create a local definition of a subdivision for their designated rural areas, as locally defined, that allows the review of more divisions than required by the statutory definition in their rural areas. The minimum state definition should apply in locally designated growth areas, since those are the areas with capacity for growth and are where the municipality has said it wants to direct growth. In municipalities without consistent comprehensive plans, the state definition would apply uniformally.

3. Local subdivision ordinances or regulations should be required to be consistent with local comprehensive plans , documenting the need for a stricter definition.

4. Local changes to the definition of a subdivision should be recorded at the Registry of Deeds for the county in which the municipality exists. A map clearly showing the parcels affected by the local definition should also be recorded at the Registry of Deeds. Without these recordings, the local definition should be deemed invalid.

Maine's Subdivision Law and Home Rule

Study Authorization

The 120th Legislature passed LD 1278, An Act to Implement the Recommendations of the Task Force to Study Growth Management, into on May 30, 2001. On June 6, 2001, Governor King signed the bill into law as PL 2001, c. 359. Section 7 of that law requires that:

> "The Executive Department, State Planning Office shall conduct a study of the status of municipal subdivision ordinances with respect to the local review of subdivisions as defined by municipal ordinance and the process of conducting a title search in the furtherance of a real estate transaction and providing an opinion on the quality of title. At a minimum the study must include: the cataloging of municipal subdivision ordinances according to the definitions of "subdivision" used, an analysis of the legislative history of Maine's subdivision law with a focus on its relationship to home rule authority and a list of possible strategies to coordinate the subdivision review and title search procedures. The office shall consult with interested parties as necessary. The office shall submit its report to the Joint Standing Committee on Natural Resources before December 15, 2001, and the committee is authorized to report out legislation during the Second Regular Session of the 120th Legislature that will properly coordinate the subdivision review and real estate title search procedures."

Summary of Municipal Ordinances

Maine's 457 organized municipalities not located within LURC jurisdiction were asked by the Maine Municipal Association (MMA) to submit their ordinance definition of "subdivision" for the purpose of determining the degree the ordinance definitions deviated from a common statutory definition. Of the 457 organized municipalities, 225 provided their definitions. Attached to this summary is a spreadsheet (Attachment 1) that describes in detail the varying elements of the ordinance definitions that were submitted.

	Number of Municipalities Responding	% of the 225 Respondents
Definition Adopted by blanket reference	77 Municipalities (21 of these 77 reference the 1970s statute)	34.2% (27.2% of the 77 reference the 1970s statute)
Articulated Definition that matched statutory definition at one point in time	118 Municipalities	52.4%
Articulated definition that exercises home rule by being more inclusive (reviewing more divisions) than the statutory definition	30 Municipalities	13.3%

It is apparent that for a variety of reasons the municipal definition of "subdivision" is not uniform among the municipalities. The reasons include:

1. confusion over the legal capacity of municipalities to adopt the statutory definition by blanket reference;

2. a stream of legislative enactments and recodifications that makes it difficult for municipalities to keep current with a common definition;

3. municipal interest in exercising home rule authority to address the need for land development review in the community.

In short, some of the "patchwork quilt" effect is the result of legislative activity and confusion with respect to intent, and some of that effect is the result of the exercise of home rule.

Adoption by Reference**.** Of the 225 municipal ordinances submitted, 77 (34.2%) adopted a definition of subdivision by blanket reference (see Attachment 1 spreadsheet summary). The adoption of an ordinance by unrestricted reference, (i.e, "subdivision" will have the meaning as provided in Title 30-A M.R.S.A. §4401, *as amended from time to time*), is legal, contrary to the attached report by MMA (Attachment 2). It is true that the adoption by reference to an exterior code, with the blanket "as may be adopted from time to time" is not legal; however, in this case the exterior code is a statutory minimum definition.

There are obvious local political and administrative problems that may arise from the adoption of a state mandatory minimum definition by reference, but they do not rise to the level of creating legal problems for the municipality. A municipality that adopts the definition of a subdivision by reference may find that after several years its definition is less inclusive than an amended statutory definition, in which case the statutory definition applies, not the local definition. Conversely, if the statutory definition is amended to be less inclusive than the definition that the municipality adopted, the local definition would apply.

Frequently Amended Statutory Definition. The spreadsheet (Attachment 1) depicts the 20-plus elements of the statutory definition that are the foundation of municipal subdivision ordinances. A review of the spreadsheet reveals that any particular municipal definition of subdivision is frozen at a particular point in time with respect to the constantly evolving statutory definition. For example, 21 (9.3%) of the 225 respondents' definitions still expressly or by their language follow the provision of Title 30 M.R.S.A § 4956, which dates back to the early 1970s. These 21 municipalities include some small towns, but surprisingly also include some larger municipalities with planning staff and significant growth pressures. That definition does not expressly include subdivisions of new structures, subdivisions created by the placement of three or more structures, the division of commercial or industrial use into residential structures, the exemption of "open space" lots, the five-year subsequent conveyance "de-exemption" provisions, and

several other provisions that are now part of the current definition. This means that the local definition is invalid and the current statutory definition applies.

A thorough review of the attached spreadsheet shows that virtually no municipal ordinance that attempts to articulate the definition of subdivision is completely current with respect to state law. The only ordinances that could be said to be completely current are those that adopt the state law definition by blanket reference, which is the advisable method of referencing that statutory definition.

Home Rule**.** Beyond the possible administrative confusion regarding referencing a state definition or the adoption of an articulated definition of subdivision that is no longer current with the statutory definition, the attached spreadsheet reveals examples of the express use of home rule authority. Some examples include:

- Several communities define the term "relative" to narrow the scope of the gift-to-relative exemption. Another creates a ten-year reconveyance window, rather than a five-year subsequent reconveyance period, to "de-exempt" a gift to a relative.

- At least one municipality expressly sweeps the conversion of a multi-family apartment into a condominium into subdivision review.

- Several municipalities expressly sweep malls, mini-malls, and structural subdivision for commercial purposes into the definition of subdivision. Many ordinances deem mobile home parks as subdivisions.

- At least one community defines subdivision as a single division (i.e., the creation of two lots) within a five-year window. At least one municipality defines subdivision as the "functional division" of a tract or parcel.

- At least one municipality only allows the subdivider's retained lot exemption if, after the first dividing, the subdivider has retained both lots as a single family residence for five years.

- One municipal definition of subdivision provides that any parcel within an approved subdivision shall not be further divided in any matter that would alter the approved subdivision plan without Planning Board approval, unless more than five years has elapsed since the most recent approval, including amendments.

- Several municipalities have elected to count lots of up to 200 or more acres for the purpose of subdivision review. Others have elected to count lots of up to 500 acres.

- One municipality limits the class of individuals that are eligible to use the "bona fide interest" exemption to only relatives.

- Several municipalities define subdivision as a division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by:
    - Sale or lease of land
    - Offering to sell or lease land
    - Construction, sale or lease of principal buildings; or
    - Offering to construct, sell, or lease principal buildings

- One ordinance exempts all divisions of land that are accomplished for agricultural purposes.

Legislative History of the Subdivision Law and Home Rule Authority

Based on the actions of the Court in Town of Arundel v. Swain, 374 A.2d 317 (ME 1977) (Attachment 3) and the Legislative response in "An Act to Enhance Land Use Regulation" (PL 1987, c. 885) (Attachment 4), it is clear that the language of the subdivision definition allows for home rule changes to the definition of a subdivision. However, those changes must create a more inclusive definition than state statute (i.e. the municipality reviews more divisions than required by statute). Therefore, there is a partial preemption of home rule authority, but home rule authority clearly exists. A complete Legislative history of subdivision law is given in Attachment 5.

Attachment 2, provided by the Maine Municipal Association, includes an enactment by enactment summary of the subdivision law in Maine from its creation in 1943 to the present. The most pertinent enactments relevant to home rule authority are "An Act to Clarify the Home Rule Authority of Municipalities" (PL 1987, c. 583) (Attachment 6), and "An Act to Enhance Land Use Regulation" (PL 1987, c. 885).

Prior to 1970, municipal authority in Maine was limited to powers expressly or impliedly granted under state statute, a doctrine referred to as Dillon's Rule originally described by Iowa Supreme Court Justice John F. Dillon in 1868 (see Attachment 7 on Home Rule in Maine as of 1985). The enactment of the Home Rule Enabling Act in 1970 (PL 1969, c. 563) changed the relationship between local and state governments. The Home Rule Enabling Act, now codified as Title 30-A M.R.S.A. §3001, provided municipalities with the authority to "exercise any power or function which the Legislature has power to confer upon it, which is not expressly denied or denied by clear implication". The intent of this legislation was to provide municipalities with authority to regulate local matters, unless the legislature preempted that authority.

Home rule authority may be implemented either by charter or through Title 30-A, §3001. Municipalities with a charter can adopt, revise, or amend their charter to provide for home rule authority.

PL 1987, c. 583, "An Act to Clarify the Home Rule Authority of Municipalities", reemphasized the Legislature's commitment to Maine's home rule scheme (Attachment 4). The underlying purpose of the Act was to clarify that the grant of home rule authority did not require additional enabling legislation. This intent was carried out through the enactment of the "standard of preemption" now found in Title 30-A, §3001(3). This standard provides that "the Legislature shall not be held to have implicitly denied any power to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law". This standard is to be used by the courts in determining whether home rule authority has been implicitly preempted. As a result, for a court to find that authority to adopt an ordinance has been preempted, it must determine whether the Legislature has expressly or implicitly prevented the municipality from acting. Therefore, with respect to the question of whether municipalities are preempted form adopting a definition of a subdivision that was more inclusive than the state definition, two analyses must be completed: (1) is there an express preemption of the authority, or (2) is there an implied preemption of the authority?

Express Preemption: No express preemption of municipal home rule authority with respect to subdivision exists. An example of how the Legislature might have preempted municipal authority can be found in Title 30-A, M.R.S.A. §4351, with states that "this subchapter provides express limitations on home rule authority" (subchapter III of Chapter 187 of Title 30-A, governing municipal zoning authority). No such preemption language was enacted by the Legislature with respect to subchapter IV of chapter 187, the subchapter containing the subdivision laws.

Implied Preemption: Because there is no express preemption of home rule authority, the second test is whether there is implied preemption. An implied preemption exists when the state regulatory scheme so completely inhibits the regulatory field that there is no room for municipal regulatory authority, or where municipal ordinances with more inclusive definitions would frustrate state law.

Although the question of implied preemption can be the victim of subjective opinion, and therefore may lead to litigation, implied preemption with respect to subdivision was clearly address by the Law Court in 1977 and the Legislative response to the Court's opinion in 1987.

Despite the passage of Maine's Home Rule Enabling Act in 1970, the Law Court's interpretation of Maine's home rule scheme emphasized the State's supremacy on matters addressed in statute. The 1977 Law Court's opinion in *Town of Arundel v. Swain* (374, A.2d 317 ME 1977) illustrated its position that local authority to write a more inclusive subdivision definition did not exist in state law, because there was no specific enabling legislation on the matter. The Court indicated that the town was bound by legislative definition in enabling statute, creation of a campground was not within the statutory definition of a subdivision into lots, and the town had no jurisdiction over the creation of campgrounds.

PL 1987, c. 885, "An Act to Enhance Land Use Regulation", specifically answered the Law Court's 1977 opinion and reversed it by explicitly enabling and reiterating home rule authority to adopt a more inclusive definition of a subdivision. On its face, PL 1987, c. 885, arguably contains some confusing language that may lead one to assume that the statute implies the preemption of home rule authority with respect to subdivision review and the definition of a subdivision. The specific language of Title 30-A, §4401(4)(H), which is essentially the same as the original language of PL 1987, c. 885, states, in part:

> "Nothing in this subchapter may be construed to prevent a municipality from enacting an ordinance under its home rule authority that:
>
> (1) Expands the definition of subdivision to include the division of a structure for commercial or industrial use; or
>
> (2) Otherwise regulates land use activities."

Opponents of home rule, with respect to subdivision law, argue that since item (1) specifies two areas where the definition of a subdivision can be modified by a municipality, the Legislature has implied a preemption of any other changes to the definition. Proponents of home rule, with respect to subdivision law, argue that item (2) expressly permits municipalities to modify the definition of a subdivision to review divisions in addition to the ones required to be reviewed by the state definition.

The Legislature's intent on the issue of home rule was expressed in the the Statement of Fact in LD 506 in the 113th Legislature's Third Special Session, which became PL 1987, c 885, "An Act to Enhance Land Use Regulation". This law specifically addressed home rule authority with respect to subdivision law. The Statement of Fact says, in part:

> "This express acknowledgement of municipal home rule authority is made to overrule the suggestion in the Law Court's decision in Town of Arundel v. Swain, 374 A.2d 317 (ME 1977), that a town's authority to conduct subdivision reviews is limited by the statutory definition of subdivision. This amendment follows the approach of PL 1987, c. 583, to clarify municipal home rule authority in this area. The subdivision statute is not an 'enabling statute' as suggested by the Court in the Town of Arundel opinion, but is a mandate imposed on municipalities to conduct a review of certain developments. As a statutory mandate, it describes those developments for which municipal review is required but does not restrict the types of developments which municipalities are permitted to review. Interpreted under the standard of review found in the Maine Revised Statutes, Title 30, section 2151-A, the statute does not restrict a municipality's home rule authority to require the review of other developments by including them within the definition of 'subdivision', except where the municipal definition would frustrate the purpose of the state statute."

Subdivision Law and Title Research

Local variations in the definition of a subdivision make the process of certifying title on a parcel difficult. Under current law, municipalities may amend the definition of a subdivision, in order to review more divisions than state law allows. However, municipal

records of modifications to the definition over time can be incomplete, making proper title to parcels in the municipality divided during the time when the municipality had a definition that differed from state law difficult to complete.

Title attorneys review many issues with respect to a property before rendering an opinion on the marketability of a title (Attachment 7). All of the items (liens, mortgages, rights of way, easements, covenants, etc) are a matter of public record, recorded at the Register of Deeds. The one identifiable item that is not a matter of record at the Registry of Deeds is a definition of subdivision that differs from state statute within a municipality. Searching municipal records for a copy of the subdivision ordinance or regulation in effect at the time a parcel was divided, then searching that document for the definition of a subdivision, is an onerous task and may unfortunately prove fruitless since there are cases where municipal records are incomplete. Municipal definitions of a subdivision should be recorded at the Registry of Deeds when they differ from state statute.

Title attorneys and others in the real estate investment community have urged that the Legislature merely repeal the sunset language in Title 30-A, §4401(4)(H). While SPO respects the desire of these groups to create a single statewide definition of a subdivision, without any option for home rule authority to change that definition, we do not feel that repealing the sunset language will accomplish this. Based on the material in this report, it seems obvious that the existing language is vague. The statutory language has been used by developers to point out the lack of home rule authority and has been used by municipalities to claim home rule authority. Simply repealing the sunset language without addressing this ambiguity will leave everyone with the same confusion with which they started.

Subdivision Law and Growth Management

The division of land has a significant long-term impact on development patterns and land uses in a municipality and a region. Lots that have been divided into ten acre or smaller parcels are of little use for rural, resource based, economic activities. Farming, forestry, and mineral extraction generally require larger parcels in order to function. Additionally, once lots surrounding large farm, forest, or mineral extraction lots are divided into smaller sizes and begin to be used for residential purposes, use conflicts often arise making it more an more difficult for traditional rural economic activities to survive.

While zoning and other regulations may regulate lot size, subdivision regulations and definitions can influence development or division decisions. Subdivision regulations may have a negative, neutral, or positive effect on growth management.

Developers and subdividers are most likely to develop and divide in areas where there are fewer requirements. Unfortunately, in many municipalities the local subdivision regulations often require significantly more information and therefore cost in the growth areas of a community. This can have the obvious negative impact of pushing developers away from the growth areas because they produce a smaller profit for more work.

In some municipalities it may be the case that there is little or no difference between the regulations in the growth and rural areas of the municipality. This of course would make the subdivision regulations neutral with respect to the local growth management plan outlined in the local comprehensive plan. However, it is certainly possible for a municipality to use the subdivision laws and definitions to create a differential in the requirements for growth and rural areas that favors the growth areas, instead of the rural areas. By leaving the definition of a subdivision at the statutory minimum in the growth area, and modifying it to allow the review of additional divisions in the rural area, developers and landowners may be more inclined to divide in the growth area. Municipalities can enact stricter reviews where growth may be more sensitive (rural areas); and developers who want the benefits of the uniform standard will have an incentive to develop in the locally designated growth areas.

Recommendations

The State Planning Office (SPO) recommends the following:

1- *There should be a single statewide minimum definition of a subdivision.* This definition should be the currently enacted definition of a subdivision. The legislature should clearly indicate that this is a statutory minimum and home rule authority may not be used to create a definition that results in the review of fewer divisions than would be required under the statutory definition, except as provided in recommendation #2.

2- *The Legislature should allow municipalities with a locally adopted comprehensive plan that is consistent with state law to use their home rule authority to regulate subdivisions more strictly than required by state law.* This should be allowed provided that (a) the stricter regulations, including a more inclusive definition, is consistent with the adopted comprehensive plan which is consistent with state law, and (b) the more inclusive definition shall apply only in areas designated by the comprehensive plan as rural.

3- *The Legislature should require that any changes to the definition of a subdivision made through local home rule authority be recorded at the county Registry of Deeds, in order to be valid. Recorded subdivision plans should have the definition of a subdivision indicated on the plan.* Local variation in subdivision definition, and variation over time within a single municipality, has created a situation where proper title to a parcel may be very difficult to establish with certainty. If modified definitions are required to be on file at the Registry of Deeds, the question of whether or not a division should have had local review and approval will be eliminated. A parcel or assessor's based plan of the town showing the specific parcels in town affected by the modified definition must also be recorded in order for the modifications to be valid. If the municipality

neglected to record the local definition and map, the local definition would be invalid and the state statutory definition would apply.

Proposed Statutory Language

The following language is proposed to accomplish the recommendations above.

Sec. 1 The language of Title 30-A M.R.S.A. §4401(4)(H) is hereby repealed.

Sec. 2 Title 30-A M.R.S.A. §4401(4)(H) shall read:
H. This subsection, defining a subdivision, shall contain the following limits on home rule authority:

1. This definition shall be a minimum definition for all municipalities. Municipalities shall not use their home rule authority to make this definition less inclusive, thereby reviewing fewer divisions than required under the minimum statutory definition.

2. Municipalities that have a local comprehensive plan that is consistent with Title 30-A, Chapter 187, Subchapter II, may modify the definition of a subdivision to make it more inclusive, thereby reviewing more divisions than required under the minimum statutory definition. However:

    a. such modifications shall only apply to the geographic areas of the municipality designated as rural area in accordance with Title 30-A, Chapter 187, Subchapter II, §4326(2)(A); and

    b. the geographic boundary of the rural area shall be clearly mapped on a plan that shows parcel boundaries within the municipality; and

    c. in the case where a parcel is split by the geographic boundary of a rural area, the more inclusive local definition of a subdivision shall apply; and

    d. the municipality shall record the more inclusive local definition and the parcel map clearly indicating the affected parcels at the Registry of Deeds for the county in which the municipality is located. The more inclusive local definition shall not be valid until the date it and the parcel map are recorded at the county Registry of Deeds. Any amendment to the more inclusive local definition shall be enforceable

only upon the recording of the amendment at the county Registry of Deeds.

Sec. 4 A new Title 30-A M.R.S.A. §4408 is created and shall read:

Note on Recorded of Plans or Plats. All approved subdivision plats or plans shall have a note on the plat or plan that indicates the definition of a subdivision in effect in the municipality at the time of the subdivision. The note shall either be the full language of the local definition, a reference to the statutory definition if that is the locally used definition, or a reference to the Book and Page number of the locally adopted definition as recorded at the Registry of Deeds. In no case shall referencing the definition be allowed, except where the definition is the statutory definition or where the local definition is recorded at the Registry of Deeds.

Attachments

Attachment 1

Attachment 1

Summary of Municipal Subdivision Definitions

The text below and the summary spreadsheet in this attachment has been provided by the Maine Municipal Association.

For ease of comprehending the spreadsheet, municipalities that adopted the subdivision ordinance by reference were so indicated by placing the statutory section number in each component of the statute. For example, the spreadsheet will contain a "4956" representing each statutory provision of the now-repealed Title 30 M.R.S.A § 4956.

Municipalities that adopted Title 30-A M.R.S.A. § 4401 have inherently adopted a broader spectrum of definitions than those municipalities that adopted § 4401(4), thereby only adopting the definition of subdivision. The spreadsheet will reflect the adoption of these sections accordingly.

Under Title 30-A M.R.S.A. §4401 (4)(C), municipalities may elect to count lots of 40 or more acres as lots for the purpose of subdivision review. In the spreadsheet under this column, the "E" (for Exempt) represents those ordinances that have elected to expressly exempt lots of this size. The "N" (for Non-exempt) represents municipal ordinances that have elected to review 40 + acre lots. Municipalities that do not have a letter in the blank have not adopted this provision, thus lots of 40 plus acres are exempt from subdivision review.

Section 4401(4)(G) is the only category contained in the spreadsheet that may not represent an accurate snapshot of the trends in subdivision ordinances. This section provides that leased dwelling units are not subject to review, unless the municipality has a site review process that is equally as stringent. Several municipalities have elected to include this language in the subdivision ordinance. It is unclear on the face of the ordinance, however, how or if this measure is implemented.

Biddeford:	The definition of subdivision includes the division of land for a non-residential purpose. The ordinance also provides that subdivision does not include the gift of a tract or parcel or lot of land to a spouse, mother or father, son or daughter, son-in-law, daughter-in-law, brother or sister of the grantor, provided that only one such gift to the same grantee within any five year period is allowed and that the total allowed conveyed gifts from the original tract of the grantor shall be limited to three parcels or lots within any five year period and the grantor must have approval prior to doing so.

Boothbay Harbor: In addition to the statutory language, subdivision includes the sale of an existing three or more unit structure into three or more units of sale within any five-year period.

Buxton: Limits the class of individuals for the bona fide interest exemption. It is limited to relatives.

Castine: Subdivision includes buildings held in separate ownership.

Chapman: Title 30 M.R.S.A § 4551 closely resembles Title 30 M.R.S.A § 4956, thereby defining subdivision as a division of three lots in five years. Similarly, it also provides for the subdivider's retained lot and five-year subsequent reconveyance clause and the exemption of 40+ acres of land. It contains the devise, condemnation and order of court exemption, as well as the gift-to-relative exemption. The final provision is the exemption for transfers of land to an abutter.

Chelsea: This subdivision ordinance only exempts the owner's retained lot if, upon the dividing of the first two lots the owner has retained both lots for his or her own single family residence for a period of five years. (This differs from the statutory language in that the owner must have retained both lots rather than just one lot for the purpose of the single-family residence).

Dresden: In addition to the statutory language, subdivision also occurs by any informal arrangements that result in the functional division of a tract or parcel.

Eastport: In addition to the statutory language, subdivision is the division of a tract or parcel of land into three or more lots within a five-year period for the purpose, immediate or future, of lease, sale, or building development.

East Machias: Subdivision is the division of a tract or parcel of land into three or more lots of 500 acres or less within any five-year period.

Eddington: A division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by:

1. Sale or lease of land
2. Offering to sell or lease land
3. Construction, sale or lease of principal buildings
4. Offering to construct, sell, or lease principal buildings
5. A mobile home park is considered a subdivision

Embden:	Subdivision is a division of a tract or parcel into three or more lots. (There is no five-year window within which subdivision occurs).
Ellsworth:	In addition to the statutory language, subdivision also includes the division of a structure into three or more units for commercial or industrial use within five years.
Fort Fairfield:	In addition to the statutory language, subdivision also includes the division of any structure or structures on a tract or parcel of land into three or more commercial, industrial, or dwelling units or combination thereof within a five-year period.
Georgetown:	In addition to the statutory language, the ordinance also has a provision that provides any parcel within an approved subdivision shall not be further divided by any person in any fashion which would alter the approved Subdivision Plan without Planning Board approval unless more than five years have elapsed since the granting of the most recent approval for the subdivision, including the approval of any amendments to the original subdivision plan, whether or not such approved amendment directly affect the approved lot of which further division is sought.
Greenville:	Any lot up to 500 acres in size shall be counted as a lot, whether or not the parcel from which it was divided is located wholly or partly within any shoreland area.
Greenwood:	All lots of 200 acres or less shall be considered as lots unless exempted by State law.
Knox:	Subdivision includes the division of a parcel of land into three or more lots for the purpose of sale, development or building. (There is no five-year window within which subdivision occurs).
Levant:	A division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by: 1. Sale or lease of land 2. Offering to sell or lease land 3. Construction, sale or lease of principal buildings 4. Offering to construct, sell, or lease principal buildings 5. A mobile home park is considered a subdivision
Liberty:	In addition to the statutory language, subdivision includes the division of a tract or parcel of land into three or more lots within any five-year period or any building project containing three or more dwelling units on a single lot.

Mt. Vernon:	In addition to the statutory language, subdivision also includes the use of a single family dwelling unit into three or more dwelling units within a five- year period.
Naples:	Subdivision includes the division of a tract or parcel of land into three or more lots for the purpose, immediate or future, of lease, sale, development or building, whether this division is accomplished by immediate platting of the land or by sale of the land by metes and bounds.
Newport:	A division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by: 1. Sale or lease of land 2. Offering to sell or lease land 3. Construction, sale or lease of principal buildings 4. Offering to construct, sell, or lease principal buildings 5. A mobile home park is considered a subdivision
Pownal:	Subdivision is the division of land in single ownership into two or more parcels or lots.
So. Berwick:	In addition to the statutory language, subdivision also includes the division of a structure or structures.
Sumner:	Lots of 40 acres but less than 500 acres shall be counted as lots. Subdivision also includes developments with three or more units involved.
Swan's Island:	In addition to the statutory language, subdivision also includes the establishment on a tract or parcel of land of a multi-family dwelling unit, or the division of an existing structure or structures previously used for commercial or industrial use, whether for sale or rent or the establishment on a tract of land of a lodging unit or a dormitory, shall constitute a subdivision.
Topsham:	Subdivision is the division of a tract or parcel of land into three or more lots for the purpose, immediate or future, of lease, sale, development or building, whether this division is accomplished by immediate plotting of the land by metes and bounds
Upton:	Subdivision is the division of a tract or parcel of land into three or more lots for the purpose, whether immediate or future, for sale, transfer, legacy, conveyance or building development, but the provisions of these regulations shall not apply to the division of land for agricultural purposes.

Warren:	The ordinance places a ten-year limit on subsequent transfers of gifted parcels.
Unidentified #7:	The term subdivision includes the division of a tract or parcel of land into three or more lots of 500 acres or less.

Attachment 2

Maine's Subdivision Law and its Home Rule Implications

"A Response to LD 1278, P.L. 2001, Ch. 359"

Prepared by:

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Maine Municipal Association
September, 2001

Executive Summary

There are several elements to the study of the relationship between municipal subdivision ordinances in Maine, the statutory definition of subdivision, and municipal home rule authority.

First, it is clear that municipalities have "home rule" authority to adopt a definition of "subdivision" that is more inclusive than the state definition. This conclusion is drawn from a thorough review of the legislative history of Maine's subdivision law, a full explication of Maine's "home-rule" authority, and an analysis of case law and legislative response involving home rule authority with respect to land use development issues, generally, and subdivision law in particular.

Second, the analysis of the legislative history of subdivision law clearly reveals that the statutory definition of "subdivision" has been amended frequently, almost obsessively, since its inception. The municipal definitions of subdivision cannot possibly keep up with this legislative activity. As a result, each municipality's definition is frozen in some point in time during the last 25 years of legislative enactments. The degree to which the Legislature intended municipalities to adopt each of the "add-on" and exemption provisions found in the state definition is unclear.

Third, a strategy adopted by some municipalities to adopt the state definition of subdivision as that definition may be subsequently amended by the Legislature is legally flawed as an improper delegation of legislative activity.

Finally, it is also the case that a number of municipalities have consciously utilized their home rule authority to tailor the definition of subdivision to meet their land use regulatory needs, particularly by expanding the definition from land division to include structural commercial divisions and to tighten the statutory exemptions to prevent abuse.

An alternative to the current system that should greatly improve the predictability and stability of the subdivision definition at the local level, while at the same time accommodating a home-rule capacity to tailor subdivision review to meet local needs, would be to create a menu of perhaps three definitions of subdivision, including a relatively simple and non-inclusive option, a highly-inclusive option with limited exemptions, and a middle-of-the-road option.

Analysis of Subdivision Law and Home Rule Authority in Maine.

Included in Attachment 1 there is an enactment-by-enactment summary of subdivision law in Maine from its inception in 1943 to the present. As will be noted below, the most pertinent enactments with respect to the issue of home rule authority are "An Act to Clarify the Home Rule Authority of Municipalities", later enacted as PL 1987, c. 583 and " An Act to Enhance Land Use Regulation", later enacted as PL 1987, c. 885.

Until 1970, the legal authority of Maine's municipalities was limited to powers expressly or impliedly granted under State statute. In 1969, Maine's voters approved a public referendum to amend the State Constitution. The resulting amendment is found in Article VIII, Part 2, §1 of the Maine Constitution and provides:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

Shortly thereafter, the Legislature enacted the Home Rule Enabling Act in 1970, (enacted as PL 1969, c. 563) which is today found in 30-A M.R.S.A. § 3001. (See Attachment 2) This implementing statute expressly provided municipalities with the authority to "exercise any power or function which the Legislature has power to confer upon it, which is not expressly denied or denied by clear implication". The unequivocal intent of this legislation was to provide municipalities with plenary authority to regulate local matters.

Despite both constitutional and statutory provisions, the Law Court and other authorities failed to appreciate the underlying principles of home rule authority. (See Law Review article, *Home Rule and the Preemption Doctrine* at Attachment 3). Acting to correct this confusion, the 113th Legislature amended Maine's Home Rule Law in 1987 in an effort to further clarify the existence and extent of municipal home rule authority. [1]

The plain language of Title 30-A, § 3001 provides that home rule authority is to be liberally construed in an effort to fulfill the purposes of the municipality. The same section also has clear language that establishes a rebuttable presumption that any ordinance enacted under § 3001 is deemed to be a valid exercise of home rule authority.

Municipalities may implement home rule authority either by charter or by following Title 30-A § 3001. Municipalities with a charter are eligible to adopt, revise, or amend their

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[1] During the same time the 113th Legislature enacted legislation that clarified the scope of home rule authority, the Legislature also inserted plain language articulating the breadth of this authority in subdivision law with the enactment of PL 1987, Chapter 885, "An Act to Enhance Land Use Regulation". Though home rule authority already existed in the broad sense, the Legislature insured its use in the context of subdivision ordinances with the enactment of this law. Further discussion of PL 1987, Chapter 885 is provided below.

local charters to provide for home rule authority. These municipalities are granted home rule authority from Article VIII, Part 2, Section 1 of the State Constitution. The home rule authority of municipalities that lack a charter is governed by Title 30-A § 3001.

According to the Statement of Fact contained in L.D. 506, "An Act to Clarify the Home Rule Authority of Municipalities" (later enacted as PL 1987, c. 583), the intent of the Act was "to reemphasize the Legislature's commitment to municipal home rule...". (See Attachment 4). The underlying purpose of the Act was to clarify that the grant of home rule authority is a plenary power and thus, no further authorization is necessary. This intent was carried out through the enactment of the "standard of preemption" found in Title 30-A § 3001(3). This standard provides that "the Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law." This standard is to be used by the courts in determining whether home rule authority has been preempted implicitly. As a result, for a court to find that an ordinance has been preempted, it must determine whether the Legislature has expressly or impliedly denied the municipality from acting. Therefore, with respect to the question of whether municipalities are preempted from adopting subdivision ordinance definitions that are more inclusive than the statutory definition, two analyses must be conducted: (1) is there an express preemption of that authority? And (2) is there an implied preemption?

Express preemption: No express preemption of municipal home rule authority with respect to subdivision ordinances exists. On the contrary, home rule authority is expressly recognized at 30-A M.R.S.A. § 4401 (4)(H) to apply to the expanded definition of subdivision "to include the division of a structure for commercial or industrial use *or which otherwise regulates land use activities*."

An example of how the Legislature might have preempted municipal authority in this case is found at 30-A M.R.S.A. § 4351, which provides that "this subchapter (Subchapter III of Chapter 187 of 30-A M.R.S.A., governing *municipal zoning authority*) provides express limitations on home rule authority." No such preemption language was enacted by the Legislature with respect to subchapter IV of Chapter 187, the pertinent subchapter governing *subdivision* ordinances and regulation.

Implied Preemption: Because there is no express preemption of municipal home rule authority, the second leg of the analysis is whether there is an implied preemption. As has been noted, an implied preemption exists when the state regulatory scheme so completely inhabits the regulatory field that there is no room for independent regulatory authority, or municipal ordinances with more inclusive definitions of "subdivision" would be otherwise repugnant to the state regulatory scheme.

Although sometimes prone to subjective opinion, argument and ultimately litigation, (see e.g., *Central Maine Power v Town of Lebanon*, 571 A.2d 1189 (Me., 1990) (implied preemption claim by utility company with respect to municipal roadside herbicide spraying prohibition)), the question of implied preemption with respect to subdivision

ordinances has been directly addressed through court action in 1977 and the legislative response to that court action ten years later.

The underlying issue in *Town of Arundel v Swain* 374, A.2d 317 (Me., 1977) was whether the municipality's local subdivision ordinance interpreting individual campsites as a subdivision was within the confines of the then-controlling law, 30 M.R.S.A.§ 4956, (today 30-A M.R.S.A. § 4401), thereby giving the Town of Arundel jurisdiction to require subdivision approval for the proposed campsites. (See Attachment 5).

After reading the plain language of the statute, the Law Court concluded the statutory definition of subdivision referred to a "division" of an actual "splitting off of an interest in land" that is either accomplished by sale, lease, development, building, or otherwise. *Id.* at 320. The Court held that the temporary occupancy of a several campsites did not fit within the definition of subdivision, and therefore the Town lacked jurisdiction to require an approval process.

In 1987, the 113th Legislature enacted amendments to subdivision law that unmistakably overrules the Law Court's decision in *Town of Arundel v Swain*. (L.D. 2684, "An Act to Enhance Land Use Regulation", later enacted as PL 1987, c. 885). (See Attachment 6). Language in the Act expresses the legislative intent to solidify the authorization of home rule authority. This is evident from the explicit language that articulates the legislative intent to overrule the Law Court's decision in *Town of Arundel v Swain.* The language enacted by LD 2684 exists today in 30-A M.R.S.A. § 4401(H). According to § 4401(H), "Nothing in this subchapter may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expands the definition of subdivision to include the division of a structure for commercial or industrial use *or which otherwise regulates land use activities.*" (emphasis added). It is this section that provides an express prohibition on the preemption of municipal home rule authority, with specific regard to the expansion of the definition of subdivision.

According the Statement of Fact contained in the Committee Amendment:

> This express acknowledgement of municipal home rule authority is made to overrule the suggestion in the Law Court's decision in *Town of Arundel v Swain*, 374 A.2d 317 (Me. 1977), that a town's authority to conduct subdivision reviews is limited by the statutory definition of subdivision. This amendment follows the approach exemplified in PL 1987, Chapter 583, to clarify municipal home rule authority in this area. The subdivision statute is not an "enabling statute" as suggested by the Court in *Town of Arundel* opinion, but is a mandate imposed upon municipalities to conduct a review of certain developments. As a statutory mandate, it describes those developments for which municipal review is required but does not restrict the type of developments which municipalities are permitted to review. Interpreted under the standard of review found in the Maine Revised Statutes, 30 § 2151-A, the statute does not restrict a municipality's home rule authority to require the review of other

developments by including them within the definition of "subdivision," except where the municipal definition would frustrate the purpose of the State statute.

Summary of Municipal Ordinances

Maine's 457 organized municipalities not located within LURC jurisdiction were asked to submit their ordinance definition of "subdivision" for the purpose of determining the degree the ordinance definitions deviated from a common statutory definition. Of the 457 organized municipalities, 225 ordinances were returned.

Attached to this summary is a spreadsheet that describes in detail the varying elements of the ordinance definitions that were submitted.

If the intent of the Legislature were to enact a comprehensive subdivision law that would be adopted and strictly adhered to by all municipalities across the State, then it can easily be said that this intent has failed. It is apparent that for a variety of reasons the municipal definition of "subdivision" is anything but uniform among the municipalities. Some of the reasons include: (1) confusion over the legal capacity of municipalities to adopt the statutory definition by blanket reference; (2) a remarkable number of legislative enactments and recodifications that makes it virtually impossible for municipalities to keep current with a common definition; (3) complete lack of clarity within Maine subdivision law as to whether the various add-ons and exemptions are compulsory; and (4) straight forward municipal interest in exercising home rule authority to address the need for land development review in the community. In short, some of the "patchwork quilt" effect is the result of legislative hyperactivity and carelessness with respect to intent, and some of that effect is the result of the exercise of home rule.

Adoption by Reference. One glace at the spreadsheet illustrates the obvious confusion municipalities have with respect to the adoption of subdivision ordinances by reference. Of the 225 municipal ordinances submitted, 77 adopted a definition of subdivision by blanket reference. The adoption of an ordinance by unrestricted reference, (i.e, "subdivision" will have the meaning as provided in Title 30-A M.R.S.A. §4401, *as amended from time to time*), is a legally inappropriate method of adopting an ordinance. At issue is the improper delegation of legislative authority. Adoption by reference to an exterior code, however that code may be subsequently amended by some other legislature, does not provide the public with the notice necessary to comprehend the actual proposed provisions of the ordinance. Therefore, the subsequently amended definition of subdivision by the State Legislature cannot be said to have been properly adopted by the local legislative body.

For example, in reference to the attached spreadsheet, the notations in the first vertical column note those municipal ordinances that adopt the statutory definition of subdivision as it may be subsequently amended. A simultaneous review of the legislative history shows that the definition of subdivision was substantially changed (since the implementation of home rule authority) in the 1973, 1975, 1987 (in several enactments), 1989 (in several enactments), 1991 and 2001 legislative biennia. The question is whether those municipalities that adopted the state definition in 1985, for example, have legally adopted the subsequent changes to the state law definition. According to the principles of improper delegation of legislative authority, they have not.

The Moving Statutory Target. The spreadsheet depicts the 20-plus elements of the statutory definition that are the foundation of municipal subdivision ordinances. A review of the spreadsheet reveals that any particular municipal definition of subdivision is frozen at a particular point in time with respect to the constantly evolving statutory definition. For example, 21 of the 225 respondent definitions still expressly or by their language follow the provision of Title 30 M.R.S.A § 4956, which dates back to the early 1970's. That definition does not expressly include subdivisions of new structures, subdivisions created by the placement of three or more structures, the division of commercial or industrial use into residential structures, the exemption of "open space" lots, the five-year subsequent conveyance "de-exemption" provisions, and several other provisions that are now part of the current definition.

A thorough review of the attached spreadsheet shows that virtually no municipal ordinance that attempts to articulate the definition of subdivision is completely current with respect to state law. In most cases, it must be assumed that the lack of currency is merely because the municipality has yet to catch up or there is no compelling reason on the local level to upset the current local understanding of what is and what is not a subdivision, which is difficult enough to grasp initially.

The only ordinances that could be said to be completely current are those that adopt the state law definition by blanket reference, which generates its own set of legal problems. (see immediately above).

Add-ons and Exemptions, Compulsory or Voluntary? The statutory definition of subdivision begins with the concept of dividing a parcel of land two or more times into three or more lots over a five-year period. The statute goes on to say that this applies however the dividing may occur (sale, lease, development, building or otherwise) and then lists some "add-ons", including dividing a new structure into three or more dwelling units or converting commercial or industrial space into dwelling units.

Does this mean each municipality must review each of those "add-on" possibilities? A review of the attached spreadsheet shows that approximately 50% of the submitted ordinances make no specific reference to those "additions". Is this a municipal choice?

Alternatively, the state definition subsequently creates several exemptions for subdivision review, including lots retained by the subdivider for his or her own use as a single family residence, conveyances to abutters, gift lots to relatives or the municipality, and lots created by devise, condemnation or court order. While most ordinances contain at least most of these exemptions, some do not, and many others treat some of the exemptions in unique ways, such as by defining what "relative" means, by not including the five-year subsequent transfer "de-exemption" clause, or other variations that either restrict the use of exemptions or liberalize them.

Home Rule. Beyond the legal confusion regarding the blanket adoption of a state definition and beyond the inadvertent adoption of an articulated definition of subdivision that is not current with the statutory definition, the attached spreadsheet reveals examples of the express

use of home rule authority to better meet the land use regulatory needs of the community. Some examples include:

- As mentioned above, several communities define the term "relative" to narrow the scope of the gift-to-relative exemption. Another creates a ten-year reconveyance window, rather than a five-year subsequent reconveyance period, to "de-exempt" a gift to a relative.
- At least one municipality expressly sweeps the conversion of a multi-family apartment into a condominium into subdivision review
- Several municipalities expressly sweep malls, mini-malls, and structural subdivision for commercial purposes into the definition of subdivision. Many ordinances deem mobile home parks as subdivisions.
- At least one community defines subdivision as a single division (i.e., the creation of two lots) within a five-year widow. At least one municipality defines subdivision as the "functional division" of a tract or parcel.
- At least one municipality only allows the subdivider's retained lot exemption if, after the first dividing, the subdivider has retained both lots as a single family residence for five years.
- One municipal definition of subdivision provides that any parcel within an approved subdivision shall not be further divided in any matter that would alter the approved subdivision plan without Planning Board approval, unless more than five years has elapsed since the most recent approval, including amendments.
- Several municipalities have elected to count lots of up to 200 or more acres for the purpose of subdivision review. Others have elected to count lots of up to 500 acres.
- One municipality limits the class of individuals that are eligible to use the "bona fide interest" exemption to only relatives.
- Several municipalities define subdivision as a division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by:
    - Sale or lease of land
    - Offering to sell or lease land
    - Construction, sale or lease of principal buildings; or
    - Offering to construct, sell, or lease principal buildings
- One ordinance exempts all divisions of land that are accomplished for agricultural purposes.

It should be noted that these examples of the utilization of home rule authority are sampled from only half of the 457 municipal subdivision ordinances in Maine.

Notes to Data

For ease of comprehending the spreadsheet, municipalities that adopted the subdivision ordinance by reference were so indicated by placing the statutory section number in each component of the statute. For example, the spreadsheet will contain a "4956" representing each statutory provision of the now-repealed Title 30 M.R.S.A § 4956.

Municipalities that adopted Title 30-A M.R.S.A. § 4401 have inherently adopted a broader spectrum of definitions than those municipalities that adopted § 4401(4), thereby only adopting the definition of subdivision. The spreadsheet will reflect the adoption of these sections accordingly.

Under Title 30-A M.R.S.A. §4401 (4)(C), municipalities may elect to count lots of 40 or more acres as lots for the purpose of subdivision review. In the spreadsheet under this column, the "E" (for Exempt) represents those ordinances that have elected to expressly exempt lots of this size. The "N" (for Non-exempt) represents municipal ordinances that have elected to review 40 + acre lots. Municipalities that do not have a letter in the blank have not adopted this provision, thus lots of 40 plus acres are exempt from subdivision review.

Section 4401(4)(G) is the only category contained in the spreadsheet that may not represent an accurate snapshot of the trends in subdivision ordinances. This section provides that leased dwelling units are not subject to review, unless the municipality has a site review process that is equally as stringent. Several municipalities have elected to include this language in the subdivision ordinance. It is unclear on the face of the ordinance, however, how or if this measure is implemented.

Biddeford:	The definition of subdivision includes the division of land for a non-residential purpose. The ordinance also provides that subdivision does not include the gift of a tract or parcel or lot of land to a spouse, mother or father, son or daughter, son-in-law, daughter-in-law, brother or sister of the grantor, provided that only one such gift to the same grantee within any five year period is allowed and that the total allowed conveyed gifts from the original tract of the grantor shall be limited to three parcels or lots within any five year period and the grantor must have approval prior to doing so.
Boothbay Harbor:	In addition to the statutory language, subdivision includes the sale of an existing three or more unit structure into three or more units of sale within any five-year period.
Buxton:	Limits the class of individuals for the bona fide interest exemption. It is limited to relatives.
Castine:	Subdivision includes buildings held in separate ownership.

Chapman:	Title 30 M.R.S.A § 4551 closely resembles Title 30 M.R.S.A § 4956, thereby defining subdivision as a division of three lots in five years. Similarly, it also provides for the subdivider's retained lot and five-year subsequent reconveyance clause and the exemption of 40+ acres of land. It contains the devise, condemnation and order of court exemption, as well as the gift-to-relative exemption. The final provision is the exemption for transfers of land to an abutter.
Chelsea:	This subdivision ordinance only exempts the owner's retained lot if, upon the dividing of the first two lots the owner has retained both lots for his or her own single family residence for a period of five years. (This differs from the statutory language in that the owner must have retained both lots rather than just one lot for the purpose of the single-family residence).
Dresden:	In addition to the statutory language, subdivision also occurs by any informal arrangements that result in the functional division of a tract or parcel.
Eastport:	In addition to the statutory language, subdivision is the division of a tract or parcel of land into three or more lots within a five-year period for the purpose, immediate or future, of lease, sale, or building development.
East Machias:	Subdivision is the division of a tract or parcel of land into three or more lots of 500 acres or less within any five-year period.
Eddington:	A division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by: 1. Sale or lease of land 2. Offering to sell or lease land 3. Construction, sale or lease of principal buildings 4. Offering to construct, sell, or lease principal buildings 5. A mobile home park is considered a subdivision
Embden:	Subdivision is a division of a tract or parcel into three or more lots. (There is no five-year window within which subdivision occurs).
Ellsworth:	In addition to the statutory language, subdivision also includes the division of a structure into three or more units for commercial or industrial use within five years.
Fort Fairfield:	In addition to the statutory language, subdivision also includes the division of any structure or structures on a tract or parcel of land into three or more commercial, industrial, or dwelling units or combination thereof within a five-year period.

Georgetown:	In addition to the statutory language, the ordinance also has a provision that provides any parcel within an approved subdivision shall not be further divided by any person in any fashion which would alter the approved Subdivision Plan without Planning Board approval unless more than five years have elapsed since the granting of the most recent approval for the subdivision, including the approval of any amendments to the original subdivision plan, whether or not such approved amendment directly affect the approved lot of which further division is sought.
Greenville:	Any lot up to 500 acres in size shall be counted as a lot, whether or not the parcel from which it was divided is located wholly or partly within any shoreland area.
Greenwood:	All lots of 200 acres or less shall be considered as lots unless exempted by State law.
Knox:	Subdivision includes the division of a parcel of land into three or more lots for the purpose of sale, development or building. (There is no five-year window within which subdivision occurs).
Levant:	A division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by: 1. Sale or lease of land 2. Offering to sell or lease land 3. Construction, sale or lease of principal buildings 4. Offering to construct, sell, or lease principal buildings 5. A mobile home park is considered a subdivision
Liberty:	In addition to the statutory language, subdivision includes the division of a tract or parcel of land into three or more lots within any five-year period or any building project containing three or more dwelling units on a single lot.
Mt. Vernon:	In addition to the statutory language, subdivision also includes the use of a single family dwelling unit into three or more dwelling units within a five-year period.
Naples:	Subdivision includes the division of a tract or parcel of land into three or more lots for the purpose, immediate or future, of lease, sale, development or building, whether this division is accomplished by immediate platting of the land or by sale of the land by metes and bounds.

Newport:	A division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by: 1. Sale or lease of land 2. Offering to sell or lease land 3. Construction, sale or lease of principal buildings 4. Offering to construct, sell, or lease principal buildings 5. A mobile home park is considered a subdivision
Pownal:	Subdivision is the division of land in single ownership into two or more parcels or lots.
So. Berwick:	In addition to the statutory language, subdivision also includes the division of a structure or structures.
Sumner:	Lots of 40 acres but less than 500 acres shall be counted as lots. Subdivision also includes developments with three or more units involved.
Swan's Island:	In addition to the statutory language, subdivision also includes the establishment on a tract or parcel of land of a multi-family dwelling unit, or the division of an existing structure or structures previously used for commercial or industrial use, whether for sale or rent or the establishment on a tract of land of a lodging unit or a dormitory, shall constitute a subdivision.
Topsham:	Subdivision is the division of a tract or parcel of land into three or more lots for the purpose, immediate or future, of lease, sale, development or building, whether this division is accomplished by immediate plotting of the land by metes and bounds
Upton:	Subdivision is the division of a tract or parcel of land into three or more lots for the purpose, whether immediate or future, for sale, transfer, legacy, conveyance or building development, but the provisions of these regulations shall not apply to the division of land for agricultural purposes.
Warren:	The ordinance places a ten-year limit on subsequent transfers of gifted parcels.
Unidentified #7:	The term subdivision includes the division of a tract or parcel of land into three or more lots of 500 acres or less.

Preliminary Recommendations:

It is evident from a review of the attached spreadsheet and the foregoing analysis that for several reasons the working definition of "subdivision" at the local level falls far short of uniformity. The predominant reason for the disparity of definition among municipalities is constant legislative activity and an inability or indifference among the municipalities to keep pace. Another reason for the disparity is an apparent interest among a smaller percentage of municipalities to tailor the state definition to better meet the local regulatory needs.

One possible approach to improve the situation for all parties involved, including the municipalities, the subdividers, and the industry that certifies the quality of title to real estate, would be to create a set or perhaps three working definitions of subdivision covering a range of inclusiveness. For the communities that experience little subdivision activity and no commercial development, the definition could be very simple and govern land splits only. At the other end of the spectrum, a definition could be furnished to address the type of single-family, multi-family, planned-use, mixed-use, and intensive commercial development that is occurring in some of Maine's fastest growing communities. A third, middle-of-the-road definition could be crafted that would typically fill the needs of the average growth communities.

Under this system, all municipalities would be expressly authorized to adopt whichever menu option of "subdivision" definition best fit the regulatory need. In fact, the most inclusive of those options would expressly authorize a certain amount of local tailoring, especially with respect to the statutory exemptions. Whichever definition the municipality ultimately adopted, the fact of that adoption would be recorded in the county registry of deeds. This system of recording would insure that all interested parties would be put on notice as to the definition of subdivision in use in that particular community, retain a working semblance of home rule authority, and reestablish a significant uniformity of definitions throughout the State.

ATTACHMENTS

									Exemptions																
Municipality	Statutory Authorization	Definition Subdivision 3 + lots w/in 5 yrs	New structure 3+ dwelling units	Construction or placement of 3+ dwelling units	Division of Commercial or Industrial use into 3+ dwelling units	Division of Any Structure	Division for Residential or Non-Residential Purposes	Resubdivision	Subdivider's retained lot	Open Space	5-Year Ownership Clause prior to 2nd dividing	Lots of 40+ acres are exempt	Devise, condemnation court order	Gift to Relative	Relative Defined	5-Year clause on subsequent transfers	Grandfathering of exempt lots	Gift to municipality	Transfer to abutter	Bona Fide security interest transfers not affecting exemptions	Leased dwelling unit exemption subject to *determination of reviewing authority*	Clause allowing subdivision of land exemptions to apply to dwelling units in a structure analysis	Reference to Statutory Home Rule Authority	Expansion Home Rule Authority	Express list of structures included in subdivision definition
Abbot		x							x		x		x	x					x						
Acton		x							x		x	E	x	x					x						
Albion	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Alfred		x	x		x				x	x	x	E	x	x					x						
Amherst		x	x		x				x	x	x	N	x	x				x	x				x		
Anson	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Arundel		x	x		x				x	x	x	N	x	x		x	x	x	x	x					
Ashland		x							x	x	x	N	x	x		x	x	x	x	x		x	x	x	
Bangor	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Bar Harbor	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)				4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		
Belgrade		x											x	x					x						
Belmont		x	x	x	x				x	x	x	E	x	x		x		x	x	x		x			
Benton	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		x
Berwick		x	x	x	x				x	x	x	N	x	x		x		x	x	x		x			
Bethel	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Biddeford*		x	x		x		x						x	x	x	x		x	x						x
Blaine		x																							
Boothbay Harbor*		x	x	x	x									x	x										
Bowdoin	4956	4956							4956		4956	4956	4956	4956					4956						
Bremen	4956	4956		x					4956		4956	4956	4956	4956					4956						
Bridgton		x	x	x	x				x	x	x	E	x	x		x	x	x	x	x	x	x	x		
Bristol	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Brownfield		x	x		x				x	x	x	E	x	x					x			x			
Burnham		x	x	x	x							N													
Brunswick	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Bucksport		x	x		x				x	x	x	E	x	x		x	x	x	x	x	x	x	x		
Buxton*		x	x		x				x	x	x	E	x	x		x		x	x	x	x				
Calais	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Camden		x	x		x				x	x	x	E					x								
Cape Elizabeth		x							x		x	E	x	x					x						
Caribou		x				x			x	x	x	N	x	x		x	x	x	x	x		x	x	x	
Castine*		x	x		x				x	x	x	E	x	x				x	x			x			
Castle Hill		x				x			x	x	x	E	x	x		x	x	x	x	x		x	x	x	
Chapman	4451	4551							4551		4551	4551	4551	4551					4551						
Chelsea*		x		x	x				x			E													x
Chesterville	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
China	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)				4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		
Clifton		x	x		x				x	x	x	N	x	x				x	x				x		
Clinton	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Corinna		x	x	x	x				x		x	N	x	x					x						x
Cranberry Isles		x						x	x		x	E	x	x					x						x
Cumberland	4401	4401	4401	4401	4401				4401	4401	4401	N	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Cushing		x	x	x	x				x	x	x	E	x	x		x	x	x	x	x	x	x	x		
Deblois	4956	4956							4956		4956	4956	4956	4956					4956						
Deer Isle		x	x		x				x	x	x	N	x	x				x	x			x			
Denmark		x							x		x		x	x					x						
Detroit	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Dexter		x	x	x	x				x	x	x	E	x	x			x	x	x		x	x	x		
Dixfield		x	x		x				x	x	x	E	x	x					x			x	x		
Dixmont		x	x		x				x	x	x	N	x	x					x			x			
Dover-Foxcroft		x	x	x	x				x	x	x	N	x	x		x	x	x	x	x		x			
Dresden*		x										N													x
Eagle Lake	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Easton	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Eastport*		x	x	x	x																				
East Machias*		x											x	x				x	x						
Eddington*		x							x		x	E	x	x					x						x
Edgecomb	4956	4956							4956		4956	4956	4956	4956					4956						
Eliot		x							x		x	E	x	x					x			x			
Ellsworth*		x	x		x				x		x	N	x	x					x						
Embden		x											x	x					x			x			x
Enfield		x	x	x	x				x	x	x	N	x	x		x	x	x	x	x	x		x		
Exeter		x							x		x	N	x	x					x						
Farmington		x										N													x
Fayette																									
Fort Fairfield*		x			x				x	x	x	E	x	x		x	x	x	x	x		x	x	x	
Fort Kent						x			x	x	x	E	x	x		x	x	x	x	x		x	x	x	
Freeport	4956	4956						x	4956		4956	4956	4956	4956					4956						
Frenchville		x	x	x	x				x	x	x	E	x	x		x	x	x	x	x	x	x	x		
Frye Island	4401(4)	x	4401(4)	4401(4)	4401(4)				4401(4)	4401(4)	4401(4)	E	4401(4)	4401(4)		4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		
Fryeburg	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Gardiner	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Georgetown		x							x		x	E	x	x					x						x
Grand Isle	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Gray		x											x	x					x						

									Exemptions																	
					Division of																	Leased				
					Commercial		Division for				5-Year											dwelling unit	Clause allowing			
		Definition		Construction	or Industrial		Residential				Ownership						5-Year				Bona Fide	exemption	subdivision of land			Express list
	Statutory	Subdivision	New structure	or placement	use into 3+	Division of	or Non-		Subdivider's	Open	Clause prior	Lots of 40+	Devise,				clause on	Grandfathering			security interest	subject to	exemptions	Reference to		of structures
Municipality	Authorization	3 + lots w/in 5 yrs	3+ dwelling units	of 3+ dwelling units	dwelling units	Any Structure	Residential Purposes	Resubdivision	retained lot	Space	to 2nd dividing	acres are exempt	condemnation court order	Gift to Relative	Relative Defined	subsequent transfers	of exempt lots	Gift to municipality	Transfer to abutter	transfers not affecting exemptions	*determination of reviewing authority*	to apply to dwelling units in a structure analysis	Statutory Home Rule Authority	Expansion Home Rule Authority	included in subdivision definition
Great Pond	4401-07	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401			
Greenbush		x	x		x				x		x	N	x	x					x						x
Greene		x																							x
Greeneville*	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Greenwood*	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Hamlin	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Hancock	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Harrington	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Harrison		x	x	x	x				x	x	x	E	x	x		x		x	x	x		x			
Hermon	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Hiram		x							x		x	E	x	x					x						
Holden	4401	4401	4401	4401	4401				4401	4401	4401	N	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Hollis		x	x	x	x				x	x	x	N	x	x			x	x	x			x			
Hope	4956	4956							4956		4956	4956	4956	4956					4956						
Houlton		x							x		x	E	x	x					x						
Howland		x							x		x	N	x	x					x						x
Islesboro	4956	x							4956		4956	4956	4956	x					4956						
Jackman		x							x		x	N	x	x											
Jay		x	x	x	x																				
Jefferson	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		x
Jonesport		x							x		x	E	x	x					x						
Kennebunkport		x							x		x	E	x	x					x						
Kingfield	4956	4956							4956		4956	4956	4956	4956					4956						
Kittery	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Knox*																									
Leeds	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Levant*		x	x	x	x				x	x	x		x	x		x		x	x	x		x			x
Liberty*		x							x		x	E	x	x					x						
Limerick	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Lincoln		x							x		x	E	x	x					x						
Lincolnville		x	x	x	x				x	x	x	E	x	x			x	x	x	x	x	x	x		
Lisbon		x							x		x	E	x	x											x
Littleton	4956	4956							4956		4956	4956	4956	4956					4956						
Livermore		x	x	x	x				x	x	x	E	x	x			x	x	x	x	x	x	x		
Livermore Falls	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Long Island*		x	x		x							N													
Lubec	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Lyman		x							x		x	E	x	x					x						
Madawaska	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Madison	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Mapleton		x				x			x	x	x	N	x	x		x	x	x	x	x			x	x	
Medway		x							x		x	E	x	x					x						x
Mexico		x																							x
Millinocket	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)				4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		
Monson		x	x	x	x				x	x	x	E	x	x		x	x	x	x		x	x	x		
Moscow	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Mt. Vernon*		x	x		x			x	x	x	x	E	x	x				x	x			x			x
Naples*							x																		x
New Gloucester	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
New Limerick		x							x		x	E	x	x					x						
Newcastle	4401(4)	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Newport*		x							x		x	E	x	x		x			x						x
Newry	4956	4956							4956		4956	4956	4956	4956					4956						
Nobleboro		x							x		x	E	x	x					x						
Norridgewock		x							x		x	E	x	x											
North Haven	4956	4956							4956		4956	4956	4956	4956					4956						
Norway	4956	4956							4956		4956	4956	4956	4956					4956						x
Old Town		x							x		x	E	x	x					x						
Oqunquit		x					x		x		x	E	x	x					x						x
Orland		x							x	x	x	N	x	x				x	x						
Orrington		x							x		x	E	x	x				x	x						
Otisfield		x	x	x	x				x	x	x	E	x	x		x		x	x	x		x			
Owl's Head	4956	4956							4956		4956	4956	4956	4956					4956						
Oxford		x							x		x	E	x	x					x						
Paris		x					x	x	x		x	N	x	x											x
Parkman		x							x		x		x	x											
Parsonsfield							x																		x
Penobscot		x							x		x	N	x	x					x						
Perry	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401		
Peru	4956	4956							4956		4956	4956	4956	4956					4956						x
Phillips		x							x		x	E	x	x					x						
Phippsburg		x	x	x	x				x	x	x	E	x	x			x	x	x		x	x	x		
Pittsfield		x	x	x					x	x	x		x	x		x		x	x	x		x			
Pittston		x	x		x				x		x	E	x	x				x	x						
Poland																									x

												Exemptions															
Municipality	Statutory Authorization	Definition Subdivision 3 + lots w/in 5 yrs	New structure 3+ dwelling units	Construction or placement of 3+ dwelling units	Division of Commercial or Industrial use into 3+ dwelling units	Division of Any Structure	Division for Residential or Non-Residential Purposes	Resubdivision	Subdivider's retained lot	Open Space	5-Year Ownership Clause prior to 2nd dividing	Lots of 40+ acres are exempt	Devise, condemnation court order	Gift to Relative	Relative Defined	5-Year clause on subsequent transfers	Grandfathering of exempt lots	Gift to municipality	Transfer to abutter	Bona Fide security interest transfers not affecting exemptions	Leased dwelling unit exemption subject to *determination of reviewing authority*	Clause allowing subdivision of land exemptions to apply to dwelling units in a structure analysis	Reference to Statutory Home Rule Authority	Expansion Home Rule Authority	Express list of structures included in subdivision definition
Pownal*																											
Presque Isle	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Randolph		x	x	x	x				x	x	x	E	x	x		x		x	x	x		x				
Raymond	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Richmond	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)				4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)		4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401(4)	4401			
Rockport	4956	4956							4956		4956	4956	4956	4956					4956							
Rockland	4956	4956							4956		4956	4956	4956	4956					4956							
Rumford		x	x	x	x				x	x	x	E	x	x		x	x	x	x	x	x	x	x			
Sabattus	4956	4956							4956		4956	4956	4956	4956					4956							x
Saco	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
St. Albans		x							x		x	E	x	x												
St. George		x							x	x	x	E	x	x		x	x		x		x	x	x			
Sangerville		x											x	x					x							
Scarborough		x											x	x					x							
Searsmont		x							x			E	x	x					x							
Searsport		x							x		x	E	x	x	x				x							
Sebago	4401	4401	4401	4401	4401				4401	4401	4401	N	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			x
Shapleigh	4401	4401	4401	4401	4401				4401	4401	4401	N	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Sherman	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Sidney		x							x		x	E	x	x					x							
Skowhegan		x	x	x	x				x	x	x	E	x	x		x	x	x	x	x	x	x	x			
Smithfield	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
South Berwick*		x	x	x	x				x	x	x	N	x	x			x	x	x		x	x				
South Bristol		x					x	x	x		x	E	x	x												x
South Portland	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
South Thomaston		x	x		x				x	x	x	E	x	x				x	x				x			
Springfield		x			x				x	x	x	N	x	x		x	x	x	x		x		x			
Standish		x										N														
Stetson		x	x		x				x		x	N	x	x				x	x							
Stow*		x					x	x	x	x	x	E	x	x												x
Strong	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Sullivan	4956	4956							4956		4956	4956	4956	4956					4956							
Sumner*		x							x	x	x	N	x	x				x	x							x
Surry		x	x		x				x	x	x											x				
Swan's Island*		x	x	x	x				x	x	x	E	x	x					x			x				x
Sweden		x	x	x	x							N														
Topsham*							x	x																		
Tremont*		x	x	x	x				x	x	x	E	x	x		x	x	x	x			x				
Trenton		x	x		x				x	x	x		x	x				x	x			x				
Upton*																										
Van Buren		x				x			x	x	x	E	x	x		x	x	x	x			x		x		
Vassalboro	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Vienna	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			x
Vinalhaven		x	x	x	x				x		x	N	x	x					x							
Wallagrass	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Warren*		x	x	x	x				x	x	x	E	x	x		x		x	x	x		x				
Washington		x							x		x	N	x	x					x							
Waterville		x	x	x	x				x	x	x	E	x	x				x	x		x					
Wayne	4956	4956							4956		4956	4956	4956	4956					4956							
Westport	4956	4956							4956		4956	4956	4956	4956					4956							
Windham	4401	4401	4401	4401	4401				4401	4401	4401	N	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Windsor		x							x		x	E	x	x												
Winslow		x							x		x	E	x	x					x							
Winter Harbor		x							x		x	E	x	x					x							x
Winthrop	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Woodstock		x							x		x	E	x	x					x							
Woolwich		x	x	x	x				x	x	x	E	x	x		x	x	x	x	x	x	x	x			
Yarmouth		x							x		x	E	x	x												
York		x	x	x	x				x	x	x	N	x	x			x	x	x		x	x				
Unidentified 1									x		x		x	x	x	x		x	x		x					
Unidentified 2		x	x	x	x							N														
Unidentified 3		x							x			E	x	x					x							x
Unidentified 4	4401	4401	4401	4401	4401				4401	4401	4401	4401	4401	4401		4401	4401	4401	4401	4401	4401	4401	4401			
Unidentified 5		x																								x
Unidentified 6		x	x	x	x				x	x	x	E	x	x		x		x	x	x		x				
Unidentified 7*		x											x	x				x	x							x
Unidentified 8																										

Legislative History of Title 30-A Section 4401-4407, Municipal Subdivision Law.

PL 1943, Chapter 199. "An Act Relating to Municipal Planning and Zoning." This Act provided municipalities with the authority to create a planning board that would be necessary for the future development of the municipality. The planning board was also given the authority of enforcement. This Act required that the plats of a subdivision must be approved by the municipal officers and that approval must be indicated on the plat prior to filing it with the registry of deeds. The Act further stated that an individual may not transfer, sell or otherwise agree or negotiate to sell any land by reference to the plat of a subdivision of land into 5 or more lots prior to that plat being approved by the municipal officers. The Act imposed a $200 penalty for a transfer of land that has not been approved by the planning board.

PL 1945, Chapter 24. "An Act Relating to Municipal Planning and Zoning." This Act amended the law to require that neither a zoning regulation nor an amendment shall be adopted until after a public hearing has been held. The regulations must also have the approval of 2/3 vote of the legislative body in the city, or by the town in the town meeting, prior to being adopted.

PL 1945, Chapter 293. "An Act to Correct Typographical and Clerical Errors in the Revision." Section 15 of this Act corrected a minor word error.

PL 1951, Chapter 266. "An Act to Correct Errors and Inconsistencies in the 1944 Revision and the Session Laws of 1945, 1947, and 1949." Section 98 corrected a statutory citation.

Revised Statutes, Chapter 91, Sections 93-99, "Municipal Planning and Zoning."

PL 1957, Chapter 405. "An Act Revising the General Laws Relating to Municipalities." This Act recodified municipal law to create a new chapter to the Revised Statutes numbered 90-A. Sections 61-63 of that chapter related to Municipal Development. The Act amended the existing law to state that the planning board must continue to approve subdivision plats prior to filing in the registry of deeds, and that approval must be documented on the plat itself. In order to meet approval, the plat must be in compliance with the municipality's ordinances. Should the planning board fail to provide the applicant with written notice within 30 days after the board adjourns, the inaction will result in disapproval. The final amendment to the existing law was the removal of the term "negotiates" from the former prohibition on transferring land by reference to the plan without the approval of the planning board and replaced it with "conveys or agrees to convey".

PL 1961, Chapter 206. "An Act Relating to Municipal Regulation of Subdivisions of Land". This Act repealed the former definition of "subdivision" (division of land into 5 lots) and inserted in its place the following definition, "the division of three or more lots in urban areas or 4 or more lots in rural areas, except this provision shall not apply to any division for agricultural uses, including associated sales, service, processing and storage". The Act further defined the term urban area to include a designated area in the local zoning ordinance, or if the municipality does not have a zoning ordinance, then the areas designated by the State Highway Commission as "urban compact".

PL 1963, Chapter 31. "An Act Relating to Penalty for Conveyance of Land in Plats without Approval." This Act repealed the $200 penalty that was assessed if an individual conveyed land by reference to a plat that had not yet been approved by the planning board and was not recorded by the registry of deeds. This was changed to read that the individual may be enjoined by the municipality rather than fined.

PL 1963, Chapter 123. "An Act Relating to Filing of Approved Subdivision of Land." During the same session, the Legislature also enacted a provision that would require the individual to file the subdivision plot with the municipal clerk rather than filing it in the registry of deeds.

PL 1967, Chapter 401. "An Act Relating to Realty Subdivisions and Dilapidated Buildings in Municipalities". Among other changes in the law, this Act expanded the criteria upon which subdivision approval is based. This new language included a minimum lot size of 15,000 square feet if the lot does not contain either a public sewerage disposal system or a public water supply system.

PL 1969, Chapter 365. "An Act Relating to the Realty Subdivisions." This Act repealed the former 15,000 square foot minimum lot size and replaced it with a 20,000 square foot minimum lot size for those parcels that were not served by public or community sewer. The Act did allow smaller lots for single family housing provided that the land was approved by the Department of Health and Welfare.

1969-1970. The implementation of municipal home rule authority in Maine.

PL 1971, Chapter 454. "An Act Relating to Municipal Regulation of Land Subdivisions." This is the first comprehensive subdivision law. This Act repealed the former definition of a subdivision and redefined it to include the division of a tract or parcel of land into 3 or more lots for the purpose of sale, development or building. The Act expressly provided that when the municipality has established a planning board, agency, or office, that entity may adopt regulations governing subdivision that shall control until superseded by provisions adopted by the legislative body of the municipality. In those instances in which the municipality has not adopted a board, agency or office, then the municipal officers may adopt subdivision regulations which shall control until superseded by provisions adopted by the legislative body of the municipality. The Act provided a list of criteria that should be met in establishing subdivision regulations, or used during the approval process. The Act provided an enforcement element by establishing that no person, firm, corporation, or other legal entity may convey, offer or agree to convey any land in a subdivision which has not been approved by the planning board or agency and recorded in the registry of deeds. The approval must still appear on the plat itself prior to filing in the registry of deeds. The Act implemented a monetary penalty of not more than $1000 for each illegal conveyance. The Attorney General, the municipality or the municipal officers were provided the authority to enjoin any violations.

PL 1973, Chapter 465. "An Act to Amend Municipal Regulation of Land Subdivision Law". This Act repealed the first section of PL 1971, Chapter 454. In its place, the Legislature provided a new definition of subdivision. This definition introduced the five-year window

within which a subdivision may occur. According to the Act, a subdivision is "the division of a tract or parcel of land into 3 or more lots within any 5 year period, whether accomplished by sale, lease, development, building or otherwise, except when the division is accomplished by inheritance, order of court or gift to a relative, unless the intent of such gift is to avoid the objectives of this section". The Act provided guidance for determining when a parcel is actually divided. The language instructed that if the land is divided into three or more parcels, then the land retained by the subdivider for his or her own use as a single-family residence for a period of at least five years is not to be included in the count. It also clarified that the sale or lease of any parcel that is 40 acres or more is not considered a subdivision, unless the intent of such sale or lease is to avoid legislative intent. The Act also amended PL 1971 with respect to the enforcement provisions. The amendment expressly included any person, firm corporation, or other legal entity who sells, leases, or conveys for consideration, offers or agrees to sell, lease or convey for consideration any land in a subdivision which has not been approved. The Act established a provision that excluded proposed subdivisions approved by the planning board or municipal officials prior to the date of September 23, 1971. It also excluded a division of a tract or parcel by sale, gift, inheritance, lease or order of court into three or more lots and upon which lots permanent dwelling structures legally existed prior to the September 23, 1971 date. These divisions do not constitute a subdivision for the purposes of this Act.

PL 1973, Chapter 700. "An Act to Clarify the Real Estate Subdivision Law." This Act provided that a lot shall not include a transfer or an interest in land to an abutting landowner. The Act also established the owner of a lot which, at the time of this creation, was not part of a subdivision, need not get municipal approval for the lot in the event that either the subsequent actions of the prior owner or his successor in interest create a subdivision of which the lot is a part. The municipal reviewing authority may consider the existence of the previously created lot in making its determination of approval of the proposed subdivision.

PL 1975, Chapter 468. "An Act to Amend the Subdivision Law to Provide for More Housing in the State." This Act required the municipal reviewing authority to issue the applicant written notice indicating whether the application is complete or whether more information is required. This notice must be given within 30 days of the receipt of the application.

PL 1975, Chapter 475. "An Act to Clarify the Municipal Regulation of Land Subdivision Law." The definition of subdivision is amended to include "the division of a tract or parcel of land into three or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise". The language created an exemption for lots conveyed by devise, condemnation, order of court, gifts to relative, and transfers to an abutter.

The Act also provided some guidance as to when the parcel is actually divided. According to the language, a tract or parcel of land is divided into three or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first two lots and the next dividing of either of the first two lots, by whomever accomplished, unless otherwise exempted, shall be considered to create a third lot, unless both dividings are accomplished by a subdivider who shall have retained one of the lots for his or her own use as a single family residence for a period of at least five years prior to the second dividing. The Act further defined

a tract or parcel of land as all contiguous land in the same ownership, provided that the land located on opposite sides of a public or private road shall be considered a separate tract or parcel of land unless the road was established by the owner of land on both sides.

Finally, the Act also required the submission of a survey plan of the property showing the permanent markers set at all the corners of the parcel.

PL 1975, Chapter 703. " An Act to Revise Requirements for Permanent Markers under the Land Subdivision Law." This Act removed the prerequisite that required permanent markers on all corners of the property prior to recording the plot in the registry of deeds. The Act also allowed the municipality, municipal planning board or the municipal officers to recover attorney's fees in the instance in which the court determines that there has been a violation associated with recording. The Act allowed the planning board to institute action for injunctive relief.

PL 1977, Chapter 315. "An Act Requiring Permanent Markers Prior to the Sale or Conveyance of Land in an Approved Subdivision." This Act reinstated the requirement of permanent markers prior to seeking approval from the municipal reviewing authority.

PL 1977, Chapter 564. "An Act to Make Additional Corrections of Errors and Inconsistencies in the Laws of Maine." The prohibition against dividing the parcel without the municipal reviewing authority's approval is expanded by this Act to include the terms "develop" and "build upon".

PL 1977, Chapter 696. "An Act to Make Additional Corrections of Errors and Inconsistencies in the Laws of Maine." The Act redesigned the penalties assessed for not receiving approval and registering the subdivision plat with the registry of deeds. The new language stated that violations shall be punished by a fine of not more than $1000 per occurrence.

PL 1979, Chapter 435. "An Act to Permit the Consideration of Solar Access Issues when Approving Any Subdivision. " This Act authorized the municipal planning board or reviewing authority, in the interest of protecting and assuring access to direct sunlight for solar energy systems, to restrict, prohibit, or control development through the use of subdivision regulations. The Act allowed regulations to require development plans containing restrictive covenants, height restrictions, side-yard, and setback requirements.

PL 1979, Chapter 472. "An Act Relating to the Protection of Ground Water." In 1979, the Legislature added another criterion to be considered in reviewing and approving a proposed subdivision. The reviewing authority must give consideration to the quality and quantity of the ground water.

PL 1981, Chapter 195. "An Act Further Amending the Planning and Zoning Statute." This Act required that all subdivision plats or plans to have the name and address of the person that is responsible for preparing the plat or plan.

PL 1985, Chapter 176. "An Act Concerning Revision or Amendment of Approved Subdivision Plans". This Act established that any revisions or amendments to an existing plat or plan must identify the original subdivision plan that is to be revised or amended. The registry of deeds must make a notation in the index that the original plan has been superseded.

PL 1985, Chapter 794. "An Act to Enhance the Sound Use and Management of Maine's Coastal Resources." This Act amended the guidelines that must be followed when making the determination to approve a subdivision. The amendment included new language that required the reviewing panel to consider the adverse effects on the scenic beauty of the area. The new language required consideration of public rights for physical or visual access to the shoreline. The new language also required the subdivider to determine if the parcel is located in a flood zone. If so, then the developer must determine the 100-year flood elevation and flood hazard boundaries within the subdivision. The plat required that principal structures on lots in the subdivision shall be constructed with their lowest floor, (including the basement) at least one foot above the 100-year flood elevation.

PL 1987, Chapter 182. "An Act to Require Recording of Certain Subdivision and Zoning Variances." This Act established the requirement that any variance from the applicable subdivision standards be noted on the plan that is recorded in the registry of deeds.

PL 1987, Chapter 514. "An Act to Enhance Local Control of Community Growth and Strengthen Maine's Land Use Laws." This Act provided that lots located wholly or partially in any shoreland zone may be reviewed by the municipality provided the average lot depth to shore frontage ratio is greater than five to one. The Act further established that development of three or more 40-acre lots must be filed with the registry of deeds.

PL 1987, Chapter 737. "An Act to Recodify the Laws on Municipalities and Counties". Among other technical changes, this Act recodified subdivision law without substantive changes.

PL 1987, Chapter 810. "An Act to Establish a Resource Protection Law." This Act established an exemption for land in the context of subdivision review that is given to the municipality, unless that gift was done to avoid the objectives of the statute. It also amended the means necessary for determining whether a tract or parcel of land was divided. According to the new language, the first dividing of the tract is considered to create the first two lots and the next dividing will create the third lot (regardless of who divides it), unless the subdivider retained one of the lots for his or her own use as a single-family residence. The new provision created an exemption if the subdivider retained one of the lots for "open space" land for a period of at least five years prior to the second dividing. The Act changed the language of the 40 acre exemption to hold that the tract shall not be counted as a lot unless the lot from which it was divided is located wholly or in part within any shoreland area or the municipality elected to count lots of 40 acres or more in size as subdivision lots. Further amendments allowed for a multi-stage application or review process consisting of no more than three stages. These stages included a preapplication sketch plan, preliminary plan and the final plan. Other amendments to Title 30 § 4956 included a requirement that upon receiving the application, the reviewing authority must notify all abutting property owners of the proposed subdivision specifying its location. Under the criteria necessary for considering subdivision applications, the plan must be in accordance

with the subdivision regulation or ordinance. The new language clarified that it is the municipal reviewing authority that has the authority to interpret the ordinances and plans.

PL 1987 Chapter 864. "An Act to Clarify the Application of the Resource Protection Law and the Site Location Law." This Act clarified that PL 1987, Chapter 810 applied to any divisions of land that occurred after April 19, 1988. It also applied to any applications for subdivision approval submitted after that date.

PL 1987, Chapter 885. "An Act to Enhance Land Use Regulation." This Act responded to two Maine Supreme Court decisions (*Town of York v Cragin*, 541 A.2d 932 (Me. 1998) and *Town of Arundel v Swain*, 374 A.2d 317 (Me. 1977)). The amendment further expanded the definition of subdivision to include the division of a new structure or structures on a tract or parcel of land into three or more dwelling units within a five-year period and the division of an existing structure or structures previously used for commercial or industrial use into three or more dwelling units within a five year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purpose of this paragraph.

Further language was created to expressly state that nothing in this section may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expanded the definition of subdivision to include the division of a structure for commercial or industrial use or which otherwise regulates land use activities.

The Act also defined the term "dwelling unit" to mean any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, condominiums, time-share units, and apartments. Leased dwelling units are not subject to subdivision review if the units are otherwise subject to municipal review at least as stringent as that required under this section.

Finally, the enforcement clause is amended to include the term dwelling unit.

PL 1989, Chapter 104. "An Act to Correct Errors In the County and Municipal Law Recodification". This emergency legislation enacted Title 30-A, Municipalities and Counties. The amended language defined "subdivision" to mean "a division into three or more lots within 5 years beginning on or after September 23, 1971".

New language defined "new structure or structures". This included any structure for which construction begins on or after September 23, 1988. It also included the area in the expansion of an existing structure. (Section 4401(5)).

The Act also outlined the outstanding river segments. (Section 4401 (7)).

The remainder of the Act provided a timeline under which the municipal reviewing authority must review subdivision plans. It also provided the review criteria that should be considered in the review of the application. (Section 4404).

The Act stated that a building inspector may not issue a permit for a building or use within a land subdivision unless the subdivision has been approved. Any violations are punished according to the enforcement section.

The Act further required that any application for an amendment or a revision to a subdivision that has been previously approved, needs to indicate the proposal to amend an approved subdivision. Once registered, that amended/revised plan or plat must indicate the index for the original plat that was superseded by the other plan.

The Act further amended the monetary penalties under the enforcement section. The minimum penalty for starting construction, undertaking a land use activity without the necessary permit or a specific violation is $100 and the maximum is $2500. The Act also authorizes ordering the violator to correct and abate the violations, unless abatement would result in a health threat, etc. If the municipality wins in court, it may be awarded reasonable attorney's fees and costs, if the defendant wins, he/she may receive the fees and costs. The Act established considerations for how to set the penalty. The maximum penalty may exceed $2500 but may not exceed $25,000.

PL 1989, Chapter 104. "An Act to Correct Errors in the County and Municipal Law Recodification." Among other technical changes, this Act established the legislation was to take effect on February 28, 1989.

PL 1989, Chapter 497. "An Act to Clarify the Subdivision Laws." This Act amends Title 30-A § 4401 to include a new definition of the term "principal structure". The term included "any building or structure in which the main use of the premises takes place".

The Act also amended the definition of "subdivision" found in Title 30-A § 4401(4). The new language defined a subdivision as "the division of a new structure or structures on a tract or parcel of land into three or more dwelling units within a 5 year period or the construction of 3 or more dwelling units on a single tract or parcel of land".

Section G of 4401 (4) is amended to provide that despite these provisions, leased dwelling units are not subject to subdivision review if the municipal reviewing authority has determined that the units are otherwise subject to municipal review at least as stringent as that required.

This Act further provided that if any portion of a subdivision crossed municipal boundaries, then the reviewing authorities from each municipality must meet jointly to discuss the application.

Finally, this Act modified the public hearing process and the decision process, and added the consideration of Municipal Solid Waste impacts to the list of review criteria.

PL 1989, Chapter 326. "An Act to Clarify Provisions of the Subdivision Law." Among other technical changes, this Act amended the time period in which a variance must be filed prior to having legal effect. The recording must occur within the first 90 days after subdivision approval or the variance is void.

PL 1989, Chapter 404. "An Act to Further Protect Freshwater Wetlands". This Act defined "freshwater wetland" and required all potential freshwater wetlands within the proposed subdivision to be identified on any maps submitted at the time of application, regardless of the size of the wetland.

PL 1989 Chapter 429. "An Act to Regulate Development Along Certain Water Bodies." Among other technical changes, this Act defined the terms "river, stream, or brook".

PL 1989, Chapter 762. "An Act to Prohibit the Development of Spaghetti-lot Subdivision." This emergency legislation created the definition of "spaghetti-lot". A spaghetti-lot is defined as "a parcel of land with a lot depth to shore frontage ratio greater than 5 to 1". Shore frontage referred to land abutting a river, stream, brook, coastal wetland or great pond. The prohibition on spaghetti lots was enacted both with respect to subdivision law and land use law in the unorganized territories under the jurisdiction of LURC.

With respect to subdivision law, Title 30-A Section 4404 (17) was enacted to prohibit spaghetti-lots. If any lots in the proposed subdivision have shore frontage on a river, stream, brook, great pond or coastal wetland, then none of the lots created within the subdivision may have a lot depth to shore frontage ratio greater than 5 to 1. The enactment did apply to any pending applications for subdivision approval.

PL 1989, Chapter 878. "An Act to Correct Errors and Inconsistencies in the Laws of Maine." Part A-85 of this Act amended the section on "flood areas". If the subdivision or any part of it is in a flood prone area, then the subdivider shall determine the 100-year flood elevation and the flood hazard boundaries within the subdivision. There is a condition of approval that required the principal structures in the subdivision to be constructed with their lowest floor, including the basement, at least one foot above the 100-year flood elevation. Title 30-A section 4404 (16) was enacted to require the proposed subdivision to provide for adequate storm water management.

This Act also repealed the former definition of freshwater wetlands and enacted the following: "All freshwater wetlands within the proposed subdivision have been identified on any maps submitted as part of the application, regardless of the size of these wetlands".

PL 1989, Chapter 772. "An Act to Correct the Subdivision Laws." This Act amended the definition of subdivision to include the terms "or placement" of 3 or more dwelling units on a single tract or parcel of and the division of an existing structure(s) previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The Act also enacted language that provided transfers made by devise, condemnation, order or court, gift to a relative or municipality or transfers to the abutter do not create a lot unless the intent of the transferor was to avoid the objectives of this section. The Act placed a 5-year recapture period on real estate transfers made by a gift to a person related to the donor by blood, marriage or adoption. If the real estate was transferred within that five-year period to someone not meeting these prerequisites, then a lot is created.

The Act also amended the definition of freshwater wetlands by removing the term "potential" freshwater wetlands, to simply read "freshwater wetlands".

PL 1991, Chapter 500. "An Act to Amend the Exemption of Certain Divisions from the Definition of Subdivision". This Act governed the subsequent transfer of an exempt subdivision lot (gift to a relative, subdivider's own use, conveyance to an abutter) within the five-year period that normally de-exempts those conveyed lots and triggers review. Under the terms of this Act, the de-exemption does not occur with the conveyance of a "bona fide security interest."

PL 1991, Chapter 838. "An Act to Further Enhance and Protect Maine's Great Ponds." In addition to several non-substantive changes to subdivision law, this Act created new language that added "Lake phosphorous concentration" to the criteria that should be considered by the planning board.

PL 1995, Chapter 93. " An Act to Amend the Municipal Subdivision Laws Regarding Application Requirements". This Act required that the municipal reviewing authority may not accept or approve final plans or final documents that have not been sealed and signed by the professional land surveyor that prepared the plan/document.

PL 1997, Chapter 51. "An Act to Exempt Public Airports with Approved Airport Layout Plans from Subdivision Review." This Act provided that an airport may be exempt from the subdivision review process provided that it has an approved airport layout plan and has received final approval from the airport sponsor (the DOT and FAA).

PL 1997, Chapter 199. " An Act to Provide Notification of Utility Services". This Act established that a public utility may not install services in a subdivision unless written authorization has been issued by the appropriate municipal officials, or other written arrangements have been made between the municipal officials and the utility.

PL 1997, Chapter 226. " An Act to Amend the Law Concerning Municipal Review and Regulation of Subdivisions". This Act provided that if any portion of a subdivision crossed municipal boundaries then all meetings and hearings to review the application must be held jointly by the reviewing authorities from each municipality. All review hearings under Section 4407 must be done jointly. The municipal officials may waive the requirement for a joint hearing.

Pursuant to this process, this Act provided that any proposed subdivision that crosses into another municipality will not cause unreasonable traffic congestion or unsafe conditions within the existing public ways located in both municipalities.

PL 1997, Chapter 323. " An Act to Impose a Statute of Limitations for Violations of Municipal Subdivision Ordinances". This Act provided that the subdivision review and approval process does not apply to subdivisions that have existed for 20 years unless (1) a subdivision has been enjoined pursuant to section 4406, (2) subdivision approval was expressly denied by the municipal reviewing authority and record of the denial has been recorded in the appropriate registry of deeds, (3) a subdivision lot owner was denied a building permit under section 4406 and record of the denial was recorded in the appropriate registry or (4) the subdivision has been

the subject of an enforcement action or order, and record of the action or order was recorded in the registry of deeds.

PL 1999, Chapter 761. "An Act to Improve Public Water Supply Protection." This Act required the municipal reviewing authority to notify the public drinking water supplier by mail once they have received an application for a subdivision that is located within a source water protection area.

PL 2001, Chapter 40. "An Act to Remove Redundant Written Authorization Requirements." This Act amended the process governing the approval of utility installations in possible subdivisions. According to this provision, once the first utility has obtained the necessary permits from the appropriate municipal officials, then subsequent public utilities need not receive written authorization to install services to a lot or dwelling unit in the subdivision.

PL 2001, Chapter 359. "An Act to Implement the Recommendations of the Task Force to Study Growth Management." This Act made substantive changes to Maine's subdivision law with respect to the statutory definition of "subdivision". The Act contained a retroactivity clause which established its effective date as June 1, 2001.

In order to discount the subdivider's residential lot from a subdivision, the Act clarified that the exempt lot must have been the conveyer's principal residence for a minimum of five years prior to the subdivision. In order for certain gift lots to escape subdivision review when conveyed to a relative, the Act required that the person conveying the property must have owned the land for at least five years prior to the "gift" conveyance to the relatives, and the Act further required that the "gift" lot cannot be discounted from subdivision review if it is conveyed to the relative for more than 50% of its assessed value. Finally, a conveyance to an abutter will trigger subdivision review if that lot is subsequently reconveyed to a third party (unattached from the merged lot) within the five-year period of time.

This Act also established a moratorium on the ability of a municipality to adopt a definition of "subdivision" which is different from the definition of "subdivision" in Maine law. This moratorium is lifted as of October 1, 2002. Those municipalities that currently use a different definition of subdivision are "grandfathered" and their definitions will remain legal.

The Act directed the State Planning Office to undertake several tasks: 1) catalog municipal subdivision ordinances according to the definitions of "subdivisions" used; 2) to analyze the legislative history of Maine's subdivision law with emphasis on the relationship to home rule authority, and 3) to develop a list of the possible strategies to coordinate the subdivision review and title search procedures.

SUBPART 4

ORDINANCE AUTHORITY AND LIMITATIONS

Chapter		Section
141.	Ordinances	3001

CHAPTER 141
ORDINANCES

Section
3001. Ordinance power.
3002. Enactment procedure.
3003. Adoption of codes by reference.
3004. Revision, codification and publication.
3005. Ordinances available.
3006. Proof of ordinances.
3007. Specific ordinance provisions.
3008. Cable television ordinances.
3009. Authority of municipal officers to enact ordinances.
3010. Consumer rights and protection.
3011. Regulation of sport shooting ranges.

§ 3001. Ordinance power

Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.

1. **Liberal construction.** This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.

2. **Presumption of authority.** There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.

3. **Standard of preemption.** The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

4. **Penalties accrue to municipality.** All penalties established by ordinance shall be recovered on complaint to the use of the municipality.

1987, c. 737, § A, 2.

Historical and Statutory Notes

Derivation:

R.S.1954, c. 90-A, § 3; R.S.1954, c. 91, §§ 86, 87; Laws 1957, c. 405, § 1; Laws 1957, c. 429, § 78-A; Laws 1959, c. 260; Laws 1959, c. 267, § 1; Laws 1959, c. 317, § 52; Laws 1959, c. 337, § 1, 2; Laws 1961, c. 192; Laws 1961, c. 258; Laws 1961, c. 317, § 242; Laws 1961, c. 327, § 3; Laws 1963, c. 48; Laws 1965, c. 27; Laws 1965, c. 31; Laws 1965, c. 259; Laws 1965, c. 377; Laws 1965, c. 513, § 61; Laws 1967, c. 218, §§ 2, 3; Laws 1967, c. 416, § 1; Laws 1969, c. 504, § 46; Laws 1971, c. 622, §§ 96-A, 96-B, 97 to 100; Laws 1973, c. 536, § 12; Laws 1973, c. 676, §§ 2, 3; Laws 1973, c. 681, § 10; Laws 1975, c. 16, § 5; Laws 1975, c. 430, §§ 69 to 72; Laws 1975, c. 623, § 45-C; Laws 1977, c. 696, § 224; Laws 1979, c. 304; Laws 1979, c. 371, § 2; Laws 1979, c. 472, § 6; Laws 1981, c. 308; Laws 1981, c. 446; Laws 1981, c. 587; Laws 1983, c. 114, § 4; Laws 1983, c. 133; Laws 1983, c. 337, § 2; Laws 1983, c. 802, §§ 1 to 4; Laws 1987, c. 298, §§ 5, 6; Laws 1987, c. 390, § 5; Laws 1987, c. 582, §§ A, 28 to 36; Laws 1987, c. 583, §§ 12, 13; Laws 1987, c. 737, § A, 1; former 30 M.R.S.A. §§ 2151, 2151-A.

Cross References

Air pollution control, municipal ordinances, see 38 M.R.S.A. § 597.
Air rights leases as subject to applicable municipal ordinances, see 30-A M.R.S.A. § 3552.
Animal welfare ordinances, see 7 M.R.S.A. § 3950.
Automobile graveyards, junkyards, etc., municipal ordinances, see 30-A M.R.S.A. § 3755.
Borrow pits, ordinances, see 30-A M.R.S.A. § 3105; 38 M.R.S.A. § 490-I.
Building permits required by ordinance, see 30-A M.R.S.A. § 4101 et seq.
Business directional signs, see 23 M.R.S.A. §§ 1906, 1922.
Capitol Area master plan, consideration of ordinances of City of Augusta, see 5 M.R.S.A. § 299.
Cemetery burying grounds, municipal powers concerning receipt of funds, see 13 M.R.S.A. § 1262.
Chimneys, fireplaces, vents, enactment of municipal ordinances, see 25 M.R.S.A. § 2465.
Condominiums, municipal ordinances, see 33 M.R.S.A. §§ 1601-106, 1604-111.
Construction and effect of amendments or repeals of ordinances, see 1 M.R.S.A. § 302.
Contracts with counties, ordinance required, see 30-A M.R.S.A. § 107.
Criminal provisions or civil penalties for substance abuse, limitations on provisions of ordinances, see 5 M.R.S.A. § 20051.
Dams, ordinances regulating water levels, see 38 M.R.S.A. § 843.
Declaratory judgment proceedings involving validity of ordinance, municipality as party, see 14 M.R.S.A. § 5963.
Direct initiative and people's veto, effective date of ordinance, see M.R.S.A. Const. Art. 4, Pt. 3, § 21.
Electrical installations,
  Bylaws or ordinances in effect on Aug. 6, 1949, see 30-A M.R.S.A. § 4153.
  Ordinances requiring inspection, see 30-A M.R.S.A. § 4171.
Emergency location of local government, establishment by ordinance, see 1 M.R.S.A. § 761.
Employment agencies, municipal regulation, see 26 M.R.S.A. § 612-A.
Explosives and inflammable materials, municipal ordinances, see 25 M.R.S.A. § 2441.
Farm operations, submission of proposed ordinances to Commissioner of Agriculture, Food and Rural Resources, see 17 M.R.S.A. § 2805.
Fire prevention ordinances, proceedings concerning validity, municipality as part, see 25 M.R.S.A. § 2361.
Firearms ordinances, see 25 M.R.S.A. § 2011.
Food inspectors, ordinances governing eating establishments, see 22 M.R.S.A. §§ 2171, 2499.
Forest harvesting practices, municipal powers, see 12 M.R.S.A. § 8869.
Forestry spray projects, municipal power to prohibit in settlement corridors, see 12 M.R.S.A. § 8425.
General assistance programs, see 22 M.R.S.A. § 4305.
Ground water protection ordinances, see 38 M.R.S.A. § 401.
Harbor masters, municipal ordinances, see 38 M.R.S.A. § 7.
Hazardous waste facility siting, ordinances, see 38 M.R.S.A. § 1319-R.
Hazardous wastes, ordinances for control and abatement, see 38 M.R.S.A. § 1319-P.

HOME RULE AND THE PRE-EMPTION DOCTRINE: THE RELATIONSHIP BETWEEN STATE AND LOCAL GOVERNMENT IN MAINE

I. INTRODUCTION

The legal relationship between a state government and a municipal government determines the powers and responsibilities of these two political entities.[1] In Maine this relationship is complex and uncertain due to ambiguities in the constitutional and statutory scheme governing it[2] and due to the Maine Supreme Judicial Court's narrow and inconsistent interpretation of that scheme.[3] This Comment discusses the various methods for delegating power to municipalities,[4] including the traditional method which was used in Maine prior to 1970.[5] In addition, this Comment examines the "home rule" scheme enacted in 1970[6] and its subsequent judicial interpretation and application.[7]

Any statutory or common law framework for distributing the state's police power between state and local government should at-

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1. D. MARTIN, RUNNING CITY HALL 11 (1982). "Municipality" is derived from the Latin word *municipia*. Roman colonies received special privileges in order to secure and hold territory subdued by Roman arms. Although these inhabitants were Roman citizens, they were granted the privilege to be governed by their own laws. These privileged colonies were *municipia*. J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 3 (5th ed. 1911).

Traditionally, state governments in the United States did not provide for local or municipal governmental autonomy. *See infra* notes 53-62 and accompanying text. Legislative or constitutional adjustments in the traditional relationship allowed some local autonomy, hence the term home rule. *See infra* notes 63-115 and accompanying text. As one commentator noted: "As a political symbol 'home rule' is generally understood to be synonomous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of state government." Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964). The same term, however, is also used as a shorthand for any constitutional, legislative, or common law doctrine or scheme which governs the relationship between state and local governments. As Professor Sandalow put it, "as a legal doctrine, by contrast, home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments . . . ." *Id.* at 645. This Comment will use the term home rule to describe any constitutional or legislative schemes that replaced traditional common law relationships between state and local governments.

2. *See infra* notes 143-91 and accompanying text.
3. *See infra* notes 192-324 and accompanying text.
4. *See infra* notes 63-115 and accompanying text.
5. *See infra* notes 116-42 and accompanying text.
6. *See infra* notes 143-91 and accompanying text.
7. *See infra* notes 192-324 and accompanying text.

tempt to accommodate three policy considerations. First, in what could be referred to as the "certainty" principle, the relationship should be clearly defined to allow the machinery of both state and local government to operate smoothly, efficiently, and with minimum uncertainty as to each other's responsibilities.[8] Second, a state legislature must be able to retain ultimate control over municipal government to avoid the disruptive effects of municipalities operating with impunity within the state sovereign's borders: the "supremacy" principle.[9] Finally, local government must be free to address local problems left unresolved by the state legislature: the "governmental role" principle.[10]

Maine's home rule scheme, adopted in 1970, adequately accommodates each of these three policy considerations. However, the Maine Law Court's interpretation of the scheme emphasizes the supremacy principle at the expense of the other two. This emphasis results in the invalidation of much municipal legislation, thus creating doubt as to the scope of municipal government's authority and decreasing its ability to effectively legislate in the local population's public interest. This Comment suggests that the Legislature should take action to temper the court's emphasis on the supremacy principle and thus help restore certainty and assure the effectiveness of local government.[11]

II. THE NATURE OF MUNICIPAL POWER

Local political institutions embody essential values in our society. Freedom of association and the right of local democratic control are indispensible components of the sovereignty of the people.[12] As

8. As Justice Wathen of the Maine Supreme Judicial Court explained: "A large part of the difficulty and complexity [in municipal law] is caused by the fact that a municipality in Maine does not have a clearly defined area in which it is free to exercise its authority." Address by Justice Daniel E. Wathen to the Maine Municipal Association (Oct. 19, 1983).

9. The Maine Law Court has stated: "A city may not legislate without limit; it is subordinate to the state. 'As well might we speak of two centers in a circle as two sovereign powers in a state.'" Burkett v. Youngs, 135 Me. 459, 465, 199 A. 619, 622 (1938) (quoting State *ex. rel.* Mueller v. Thompson, 149 Wis. 488, 501, 137 N.W. 20, 26 (1912)).

10. "A municipality may enact police power ordinances for the following purposes: . . . Promoting the general welfare; preventing disease and promoting health; providing for the public safety." ME. REV. STAT. ANN. tit. 30, § 2151(1)(A) (1978).

11. *See infra* notes 324-27 and accompanying text.

12. J. ROUSSEAU, THE SOCIAL CONTRACT 59-62, 95 (M. Cranston trans. 1968). *See also* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1031 n.18 (1985) (Powell, J., dissenting) ("The Framers recognized that the most effective democracy occurs at local levels of government, where people with first hand knowledge of local problems have more ready access to public officials responsible for dealing with them."); Frug, *The City As A Legal Concept*, 93 HARV. L. REV. 1059, 1105-107 (1980).

the scope of municipal autonomy as articulated in the amendment. The statute permits the Legislature to deny power to municipalities either "expressly or by clear implication." This ability to foreclose municipal action is not limited to non-local subject matter areas. To the extent that the amendment confers a degree of insulation from legislative interference in local matters, section 1917 purports to remove the Legislature's disability.[188] Thus, while the scheme's purpose to increase municipal autonomy in the disposition of local affairs remains clear, its conflicting language leaves unclear the means by which that purpose will be effectuated.

Taken together, the constitutional amendment and section 1917 radically altered the longstanding relationship between municipalities and the state[189] by replacing the grant approach to municipal power. The constitutional amendment which grants municipal governments the power to legislate in local matters,[190] and section 1917 which creates the assumption that plenary municipal power is restrained only by limiting state legislation,[191] operate on inconsistent presumptions as to both the potential scope of municipal power and how state and local functions are to be delineated. As one might expect, the courts have been called upon to interpret the issues and ambiguities arising from the internally inconsistent scheme.

V. Judicial Interpretation of Home Rule in Maine

The Maine Legislature's failure to define adequately the relationship between state and local government presented the Maine Supreme Judicial Court with the task of defining home rule. The home rule scheme adopted in Maine created a range of possible judicial interpretations of the concept. An examination of the cases decided subsequent to the scheme's enactment reflects the court's narrow

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local matters. *See supra* text accompanying note 167.

188. May the Legislature constitutionally enact statutes that either narrow or broaden the amendment? Two factors suggest yes. First, Me. Const., art. IV, pt. 3, § 14 provides that municipal corporations shall always be subject to the general laws of the state. *See supra* note 15. Second, while the drafters of the constitutional amendment proposed a pure *imperium in imperio* model, the subsequent alterations strongly suggest that the Legislature intended to maintain control over the machinery governing the relationship between state and local government. *See supra* notes 162-65 and accompanying text.

Although the constitutionality of § 1917 has never been tested, the Law Court has never invalidated a municipal ordinance strictly on the ground that it purported to regulate other than "local matters;" nor has it upheld an ordinance in the face of a state statute denying power to municipalities to legislate on a "local matter." This Comment will assume the state constitutionality of § 1917 and attempt to reconcile the various aspects of Maine's home rule scheme.

189. This alteration effectively reverses the presumption of municipal powerlessness. *See supra* notes 101-103 and accompanying text.

190. *See supra* notes 150-76 and accompanying text.

191. *See supra* notes 177-88 and accompanying text.

conception of the scope of a municipal government's authority.

A. *Early Cases*

The early decisions construing the scope of municipal power under Maine's home rule scheme indicate a reluctance to recognize the new home rule scheme at all.[192] In *Town of Windham v. LaPointe*[193] and *Town of Waterboro v. Lessard*[194] the Maine Supreme Judicial Court expressly applied the grant approach to examine municipal ordinances despite the then three-year-old home rule scheme.[195] This tendency to require specific enabling statutes for the exercise of specific municipal powers while ignoring the basic home rule scheme continued beyond the early 1970's.[196] As late as 1977,

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192. *See, e.g.*, Town of Windham v. LaPointe, 308 A.2d 286 (Me. 1973); Town of Waterboro v. Lessard, 287 A.2d 126 (Me. 1972).

193. 308 A.2d 286 (Me. 1973).

194. 287 A.2d 126 (Me. 1972).

195. In *Town of Windham v. LaPointe*, the Law Court held unconstitutional an ordinance which delegated power to approve the locations for house trailer parks to the town's Selection and Planning Board because the ordinance provided no standards to guide the discretion of the enforcement authority. 308 A.2d at 293. However, the court found, utilizing a typical grant approach to municipal power, that the ordinance was within the scope of ME. REV. STAT. ANN. tit. 30, § 2151(4)(A) (1964) (current version at ME. REV. STAT. ANN. tit. 30, § 2151(4)(A) (1978 & Supp. 1984-1985)) (granting general police power to municipalities), stating that a municipality "may exercise only such powers as are expressly conferred upon it by the Legislature or as are necessarily implied from those expressly so conferred." 308 A.2d at 290.

In *Town of Waterboro v. Lessard*, the Law Court also ignored the new home rule scheme when it found a municipal ordinance, which prohibited construction within twenty feet of a boundary line, ultra vires since it did not fall within the express grants of police or zoning power, ME. REV. STAT. ANN. tit. 30, §§ 2151, 4954 (1964) (current version at ME. REV. STAT. ANN. tit. 30, §§ 2151, 4954 (1978 & Supp. 1984-1985)). 287 A.2d at 130. The court premised its holding on " 'an accepted rule that when a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified.' " 287 A.2d at 129 (quoting State v. Brown, 135 Me. 36, 38-39, 188 A. 713, 714-15 (1936)). The court's lack of reliance upon the newly enacted home rule scheme may reflect the degree to which the grant approach to municipal power has dominated legal thinking in the area. Commentators have expressed surprise at the vagueness of the constitutional amendments, and/or statutes which ended the firmly entrenched grant approach reign in many jurisdictions. *See* Sandalow, *supra* note 71, at 658; Schmandt, *supra* note 63, at 387; Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1, 13-16 (1948).

196. Many Law Court decisions to this day premise the exercise of municipal power on specific enabling statutes especially when the validity of such exercise is not at issue. *See, e.g.*, Crosby v. Inhabitants of Ogunquit, 468 A.2d 996, 999 (Me. 1983); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1067 (Me. 1978). Such stipulations may be expedient when the main issue is the federal constitutionality of the ordinance, but they allow the home rule scheme to fall into disuse. As far as the Law Court's interpretation of home rule is concerned, out of sight *is* out of mind. This tendency to ignore the home rule scheme is likely to build on itself since both the Justices and the attorneys arguing before them are " 'steeped in the traditions of Dillon's Rule.' " Starn, *Municipal Home Rule*, MAINE TOWNSMAN, Jan. 1983, at 11.

the court invalidated a municipal subdivision ordinance passed pursuant to a specific enabling statute because the ordinance covered campsites and therefore exceeded the regulatory scope contemplated by that specific enabling statute.[197] The court never explained why municipal authority could not be based on the more broadly drawn home rule scheme. In fact, it did not even mention home rule. Instead the court simply reiterated the principle that "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition."[198]

Roy v. Inhabitants of Augusta[199] is another clear example of the Law Court's disinclination to recognize the existence of the municipal home rule scheme.[200] Pursuant to statute,[201] municipalities are charged with licensing suitable persons to keep billiard rooms in "any place where it will not disturb the peace and quiet of a family."[202] The Augusta City Council enacted an ordinance providing that "[n]o person shall operate a bowling alley, shooting gallery, pool or billiard room without obtaining a license from the municipal officers."[203] Furthermore, "[s]uch license shall be granted only if the *location* is in such a place that it will not disturb the peace and quiet of a family . . . ."[204] The court found that the ordinance's language "delineates a criterion of regulation broader than is authorized by the statute. . . . [T]he excess of the Ordinance which must be held a nullity lies in the extent to which the Ordinance allows the *location* of the billiard room, . . . rather than the nature of the activity of playing billiards itself to be deemed capable of constituting a disturbance."[205] The court did not inquire whether the state statute

197. Town of Arundel v. Swain, 374 A.2d 317, 318, 320 (Me. 1977). The court phrased the issue as "whether the proposed campground is a 'subdivision' within the meaning of 30 M.R.S.A. § 4956." *Id.* at 319. The statute provided in pertinent part: "All requests for subdivision approval shall be reviewed by the municipal planning board . . . ." ME. REV. STAT. ANN. tit. 30, § 4956(2)(A) (1964) (current version at ME. REV. STAT. ANN. tit. 30, § 4956(2)(A) (1978 & Supp. 1984-1985)). The local ordinance in question, construed by the local planning board to encompass the campground in question, required local approval of subdivision developments. Town of Arundel v. Swain, 374 A.2d at 318. The court agreed with the plaintiffs who sought to build commercial campsites and held that the local ordinance was ultra vires to the extent it regulated "campsites" as opposed to "subdivisions." *Id.* at 321.

198. Town of Arundel v. Swain, 374 A.2d at 319 n.3 (citing Stoker v. Town of Irvington, 71 N.J. Super. 370, 378, 177 A.2d 61, 66 (1961)).

199. 387 A.2d 237 (Me. 1978).

200. The United States District Court for the District of Maine also failed to acknowledge the new home rule scheme as the basis for municipal power in Dupler v. City of Portland, 421 F. Supp. 1314, 1320 n.8 (D. Me. 1976).

201. ME. REV. STAT. ANN. tit. 8, § 2 (1964) (current version at ME. REV. STAT. ANN. tit. 8, § 2 (1980)).

202. *Id.*

203. Roy v. Inhabitants of Augusta, 387 A.2d at 238.

204. *Id.* (emphasis added).

205. *Id.* at 240 (emphasis in original).

Attachment 3

denied further regulation of billiard rooms to municipalities either expressly or by clear implication;[206] nor did it determine whether regulation of billiard rooms is local and municipal in character.[207] Rather, the court invalidated the ordinance because there was no specific grant of authority in the state statutes which could support the town's regulation.[208]

In 1979, the Law Court faced another home rule issue in *Clardy v. Town of Livermore*.[209] The municipal ordinance in question set minimum lot frontage as a condition to building upon a lot.[210] Homeowners contended that the ordinance violated the grant approach doctrine as set out in *Town of Waterboro v. Lessard*.[211] The town argued that the advent of home rule in Maine rendered the homeowners' adherence to the grant approach inapplicable to the case at bar.[212] Although the court did not reach the question of whether the ordinance was a valid exercise of municipal power,[213] its dicta is instructive:

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206. *See* ME. REV. STAT. ANN. tit. 30, § 1917 (1978).

207. *See* ME. CONST., art. VIII, pt. 2, § 1.

208. In *Roy*, the Law Court strained to avoid a federal constitutional issue and, to reach the same result, erred on the home rule question by failing to address the municipality's scope of authority under the home rule scheme. Certainly the tenet of statutory construction is well established that if "one among alternative constructions would involve serious constitutional difficulties [it] is reason to reject that interpretation in favor of another." 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1973); *see also* State v. Davenport, 326 A.2d 1 (Me. 1974). However, this tenet presumes the validity of the two interpretations.

209. 403 A.2d 779 (Me. 1979).

210. *Id.* at 779-80.

211. *Id.* at 780. In *Lessard*, the Law Court held invalid an ordinance prohibiting the construction of a building within 20 feet of a boundary line. The court found that the ordinance went beyond the authority granted by ME. REV. STAT. ANN. tit. 30, § 2151 (1964). The court, in deciding the case, ignored the home rule scheme. Instead it applied the

> "well established rule" that when a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified. . . . And it is held that if a by-law or ordinance as drawn is outside the scope of the grant and exceeds the powers to legislate conferred upon the municipality, it is invalid.

Town of Waterboro v. Lessard, 287 A.2d 126, 129 (Me. 1972) (quoting State v. Brown, 135 Me. 36, 38-39, 188 A. 713, 714-15 (1936)).

212. Clardy v. Livermore, 403 A.2d at 781. "Municipal home-rule," the town argued, "reverses this prior foundational doctrine; under home-rule, without need for additional legislative enabling action, every municipality is taken to possess, inherently, all powers the Legislature could validly confer, except such as the Legislature has otherwise denied either expressly or by clear implication." *Id.*

213. The Law Court held that since the ordinance in question became effective after the plaintiffs had purchased their land and had only prospective applicability, it could not be applied to force the removal of the building then situated on the plaintiffs' land. The validity of the ordinance was not addressed. Clardy v. Town of Livermore, 403 A.2d at 782.

> We agree with defendant Town that the issues it raises in this case are important as portents of many, and major, transformations that have been wrought by the advent of municipal home-rule in the legal framework which has governed, for so long, the interrelations of State and municipal authority.[214]

Thus, the *Clardy* court acknowledged the existence of home rule in Maine, but it left the issue of its meaning and effect for future consideration.[215]

B. The Court's "Pre-emption" Analysis

1. Theoretical Basis

The legislative history and the language of the home rule constitutional amendment reflect two legislative purposes for the amendment. First, the alterations of the drafters' original proposal prior to passage demonstrate the Legislature's intent to maintain control over the method of distributing power between state and local government.[216] A comparison of the grant approach with the constitutional amendment which replaced it reflects a second legislative purpose. The grant approach presumed municipal impotence unless specific enabling statutes authorized specific municipal action.[217] The constitutional amendment passed in 1969 contained ambiguous language which left unclear the details of the relationship between state and local government.[218] However, the amendment made one thing clear; it replaced the grant approach presumption with a presumption that municipal governments are empowered to act in some areas *notwithstanding the absence of legislative grants of authority*. So, municipalities in Maine should be presumed authorized to act in a given subject matter area unless the Legislature decides to dictate otherwise. The Legislature articulated this conclusion by

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214. *Id.* at 781. While the court agreed that the issues raised by the town were important, it failed to articulate the role that the "local and municipal" language of the amendment plays in the new home rule scheme, perhaps retaining the undefined language as a residual source of authority to maintain control over municipal legislation in future cases.

Similarly, in Bird v. Town of Old Orchard Beach, 426 A.2d 370 (Me. 1981), the court blended the constitutional amendment and the home rule statute, but retained the option to define "local and municipal in character" independently of legislative intendment:

> Thus, reading the constitutional and statutory provisions together, we can say that municipalities *in local and municipal affairs* may exercise any power or function granted them by the State Constitution, the general law or the municipal charter, not otherwise prohibited or denied expressly or by clear implication by the constitution, the general law, or the charter itself.

Id. at 372 (emphasis added).

215. Clardy v. Town of Livermore, 403 A.2d at 781.

216. *See supra* notes 163-65 and accompanying text.

217. *See supra* notes 53-62 and accompanying text.

218. *See supra* notes 150-76 and accompanying text.

stating, in section 1917, that a municipality may "exercise any power or function which the Legislature has the power to confer upon it which is not denied" to it by the Legislature.[219] Therefore, Maine's home rule scheme appears intended by the Legislature to embody the limitation approach to municipal power.

The Supreme Judicial Court, in tacit recognition of this conclusion, has recently applied a limitation approach, or "pre-emption" analysis to municipal home rule issues.[220] The court properly de-emphasized the "local and municipal in character" limitation in the constitutional amendment, and as a result, that language rarely furnishes the controlling rule of law.[221] Instead, the court has determined a municipality's ability to legislate in a particular subject matter area by examining relevant state legislation.[222] If the court determines that the Legislature intended to pre-empt or "occupy" an area of regulation, then the court will invalidate any municipal ordinance which sets different standards of conduct in the same regulatory field.[223] This analysis is based on the limiting language in the home rule statute which provides for plenary municipal power "unless denied expressly or by clear implication."[224]

Conforming a pre-emption analysis to the limitation approach engenders simplicity and accommodates the certainty principle.[225] Judges, lawyers, and municipal officials may presume a given ordinance valid and then seek state statutes which deny that power to municipalities. Most importantly, reading the home rule scheme as an example of the limitation approach reflects the court's recogni-

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219. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *See supra* text accompanying note 180.

220. *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983).

221. The court has not based its holding in any case after 1970 strictly on a judicial determination that a particular subject matter is statewide rather than local in character. *See, e.g.*, Schwanda v. Bonney, 418 A.2d 163 (Me. 1980). However, the court's decision in School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979) comes very close to such a determination. *See infra* notes 295-307 and accompanying text.

222. *See, e.g.*, Schwanda v. Bonney, 418 A.2d 163 (Me. 1980). For a discussion of *Schwanda* see *infra* notes 287-94 and accompanying text.

223. When the municipal ordinance is more restrictive than the enabling statute "occupying" the area of regulation, it is invalid. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 160 (Me. 1983). There are no cases where the ordinance is less restrictive than the statute "occupying the field," but under current pre-emption analysis, it is unlikely such an ordinance would be upheld. *Cf.* Bookland of Maine, Inc. v. City of Lewiston, No. CV-83-307, slip op. at 7 (Me. Super. Ct., And. Cty., Oct. 25, 1983). For a discussion of *Bookland* see *infra* notes 282-85 and accompanying text.

224. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983). For a discussion of *Ullis* see *infra* notes 228-37 and accompanying text, and *infra* notes 278-80.

225. *See supra* text accompanying note 8.

tion of the legislative purpose to change the manner by which municipalities receive their power. No longer must a specific statute authorize a municipal act; the Legislature intended that the municipalities possess plenary legislative power until such power is *denied* to them by the Legislature. So long as the limitation approach[226] to municipal authority is maintained, a town may presume it has the power to act unless it is pre-empted by the Legislature.

Nevertheless, although the court purports to rely on the limitation approach to examine municipal legislation, its analysis continues, on occasion, to reflect a grant approach to municipal power.[227] The area of liquor control provides the best illustration of the court's continuing struggle between the grant and limitation approaches to the state-local relationship.

In *Ullis v. Inhabitants of Boothbay Harbor*[228] the defendant municipality passed a "victualer's ordinance" which imposed licensing requirements on restaurants that served liquor.[229] The ordinance prohibited the granting of a liquor license if a restaurant was situated within 1200 feet of a preexisting licensee.[230] The town believed that the close proximity of two or more taverns caused "unnecessary noise and public disturbances," as well as parking problems.[231] The court held the ordinance invalid because "[b]y enacting the comprehensive, statewide liquor licensing scheme . . . the legislature by clear implication has denied to municipalities the right to legislate in the area of liquor sales."[232] The court found that while no statute specified the standards to be used by municipalities in granting or denying license applications,[233] nor expressly denied to municipalities the power to legislate in the liquor control area, liquor control nonetheless was pre-empted by the state. The court stated:

> A broader reading of the entire statutory scheme regulating liquor licenses in the state of Maine, however, yields the conclusion that, except in certain situations addressed by specific statutory provisions, the legislature did not intend municipal officials to impose additional local requirements on top of the statewide requirements set by the legislature and the State Liquor Commission for all license applicants.[234]

According to the court, the state's "pre-emption" of liquor regula-

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226. *See supra* notes 99-115 and accompanying text.

227. *See* Crosby v. Inhabitants of Ogunquit, 468 A.2d 996 (Me. 1983). *See infra* notes 238-74 and accompanying text.

228. 459 A.2d 153 (Me. 1983).

229. *Id.* at 155.

230. *Id.*

231. *Id.* at 155 n.1.

232. *Id.* at 159.

233. *See* ME. REV. STAT. ANN. tit. 28, § 252 (1974) (current version at ME. REV. STAT. ANN. tit. 28, § 252-A (Supp. 1984-1985)).

234. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d at 158.

tion denies "by clear implication"[235] the power of municipalities to legislate. Thus, although the court found the exercise of municipal power to be invalid and unenforcible, the court's analysis reinforced the home rule scheme's most basic functional component: "A municipality in Maine may exercise 'any power or function which the legislature has the power to confer upon it, which is not denied either expressly or by clear implication.' "[236] Accordingly, the home rule scheme is distinct from the grant approach since home rule requires that a denial of authority exist in order to invalidate a municipal ordinance rather than requiring that a grant of authority exist in order to validate a municipal ordinance.[237]

The court, however, in its most recent decision in the liquor regulation area, ignored the home rule scheme by returning to a grant approach analysis. In *Crosby v. Inhabitants of Ogunquit*,[238] the municipality passed a "Special Amusement Ordinance" setting standards for the issuance of amusement permits to liquor licensees.[239] State law required liquor-licensed establishments offering entertainment to possess such a special amusement permit.[240] Further, the statute delegated the authority for issuing such permits to the municipality in which the applicant is located.[241] Ogunquit's ordinance limited the type of entertainment permitted in a liquor establishment to "music . . . transmitted without the aid of amplification or electronic devices or instruments,"[242] and required licensees to post a $10,000 bond naming the town as beneficiary.[243] The ostensible

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235. *Id.* at 159. The court based its holding of denial by clear implication on a finding that the ordinance "works at cross purposes to the state's liquor licensing statutes, therefore impermissibly conflicts with them." *Id.*

236. *Id.* at 159. Although the *Ullis* decision properly follows the limitation approach analysis, it finds an implied denial of power to municipalities in a statute which merely sets minimum standards of conduct. ME. REV. STAT. ANN. tit. 28, § 201 (1974) (current version at ME. REV. STAT. ANN. tit. 28, § 201 (Supp. 1984-1985)) provides eligibility criteria for liquor license applicants. It forbids the issuance of licenses in certain circumstances but does not mandate the issuance of licenses in any circumstance. The court's analysis reflects a determination that when certain persons or things are specified in a statute, an intention to exclude all others from its operation may be inferred. But as one court stated: "The ancient maxim *expressio unius est exclusio alterius* is a dangerous road map with which to explore legislative intent." Wachovia Bank and Trust Co., N.A. v. National Student Marketing Corp., 650 F.2d 342, 354-55 (D.C. Cir. 1980), *cert. denied* 425 U.S. 954 (1981). Thus, although adherence to the limitation approach may preserve local autonomy in theory, expansive interpretation of state statutes may extinguish it in reality. *See infra* notes 275-322 and accompanying text.

237. *See supra* notes 216-19 and accompanying text.

238. 468 A.2d 996 (Me. 1983).

239. *Id.* at 997-98.

240. ME. REV. STAT. ANN. tit. 28, § 702(1) (Supp. 1984-1985).

241. *Id.*

242. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 998.

243. *Id.* at 1001.

goal of the ordinance was noise control, presumably a valid object of police power regulation.[244]

The court held that the entertainment limitation was unconstitutional as violative of the due process clause of the United States Constitution,[245] and that the bond requirement was invalid as exceeding the municipality's power.[246] The court's analysis of municipal power in *Crosby* was twofold. The court first examined the ordinance's limitation on entertainment and sought to define "the extent to which municipalities may exercise the general police power of the State."[247] The court then focused specifically on whether municipalities have the "authority to require a bond as a prerequisite to the issuance of an amusement permit."[248] However, in doing so, the court failed to apply the pre-emption analysis it had so recently reaffirmed in *Ullis*.[249]

The *Crosby* court's analysis differed from the functional pre-emption test articulated in *Ullis* in two ways. First, the court in *Crosby* did not begin its analysis on the conditional assumption that "any municipality may . . . exercise any power . . . which the legislature has the power to confer upon it . . . ."[250] Certainly this includes the state's general police power.[251] Instead, with respect to the entertainment limitation, the *Crosby* court, citing *Ullis*, stated: "In interpreting the liquor licensing laws, we recently held that the State had delegated only certain enumerated licensing powers to the municipalities, retaining all residuary powers."[252] While not a completely erroneous statement of the holding in *Ullis*, the language which speaks of a "delegation" of power suggests a grant approach analysis. The *Ullis* court had not held that the state's liquor regulat-

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244. *Id.* at 1000.

245. The court's due process analysis followed that in State v. Rush, 324 A.2d 748 (Me. 1974). An exercise of police power does not violate due process if 1) the object of the exercise provides for the public welfare; 2) the legislative means employed are appropriate to the achievement of the ends sought; 3) the manner of exercising the power is not arbitrary or capricious. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 (citing State v. Rush, 324 A.2d at 753). The court ruled that Ogunquit's ordinance was unconstitutional because the means, the prohibition of electronically generated music, were inappropriate to the end of noise control. The court also declared the ordinance was arbitrary in its application. *Id.* at 1000.

246. *Id.* at 1001-1002.

247. *Id.* at 998-99.

248. *Id.* at 1001.

249. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153 (Me. 1983). *See supra* notes 228-37.

250. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *Compare* Crosby v. Inhabitants of Ogunquit, 468 A.2d at 1001 n.6 *with* Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983).

251. *See* ME. REV. STAT. ANN. tit. 30, § 2151 (1978) (granting municipalities authority to exercise police power to promote general welfare).

252. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 (citing Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 158-60 (Me. 1983)).

ing scheme delegated anything to local government; rather, it found that "the legislature by clear implication has *denied* to municipalities the right to legislate in the area of liquor sales."[253]

Second, the *Crosby* court did not address the question whether power to enact the ordinance was denied by clear implication because it "works at cross purposes to the state's liquor licensing statutes, and therefore impermissibly conflicts with them."[254] Thus, the court strayed further from the limitation approach enunicated in *Ullis*. The *Crosby* court, continuing with its grant approach, looked to other possible sources of municipal power rather than to limitations on presumed authority.[255]

> In the present context we need not determine whether the State has retained all residuary powers and has delegated only limited powers to the municipalities with respect to regulating entertainment in establishments selling liquor. We assume for purposes of this appeal that the municipality exercised general police powers, rather than limited statutory powers, in enacting . . . the ordinance.[256]

The *Crosby* court should have determined whether Ogunquit's power to legislate in this regard had been *denied* by the legislature.

In the second part of its opinion, dealing with the ordinance's bond requirement, the *Crosby* court continued its grant approach analysis.[257] In a footnote the court stated:

> In Part II of this opinion we assumed, without deciding, that Ogunquit exercised the general police power in enacting [the ordinance] to limit the permitted forms of entertainment. The overlap between 30 M.R.S.A. § 2151 (1978) (a general grant of authority to enact ordinances to promote the general welfare and provide for the public safety) and 28 M.R.S.A. § 702 (a specific grant of authority to license entertainment and to impose such other limitations as may be required to protect the public health, safety and welfare) *leaves in doubt the question whether a specific statutory power or the general police power is the source of municipal authority in this regard.* The bond requirement imposed by [the ordinance], however, does not evolve from the general police power and is not a limitation on entertainment. If the authority exists it must be derived from 28 M.R.S.A. § 702 or the "home rule" grant contained in 30 M.R.S.A. § 1917 (1978) ("municipality may . . . exercise any power . . . which the Legislature has power to confer upon it, which is not denied . . . by clear implication . . . .)".[258]

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253. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983) (emphasis added).

254. *See id.*

255. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 n.3.

256. *Id.* at 999 (footnotes omitted).

257. *Id.* at 1001-1002.

258. *Id.* at 1001 n.6.

Certainly, before the enactment of the home rule scheme, many possible sources of municipal power existed, and the overlap and confusion discussed above by the court was a distinct possibility.[259] The home rule scheme, however, provided a basis for plenary municipal police power, and thus the proper question for the *Crosby* court was whether this plenary power was limited in any way. Instead, the court considered three possible sources of authority for a bonding requirement:[260] (1) the general grant of police power to municipalities;[261] (2) the special amusement statute;[262] and (3) the home rule grant.[263] The court eliminated the general police power grant and the home rule grant from consideration without providing any rationale for doing so,[264] and settled on the special amusement statute as the source of authority. Finding no authorization for a bonding requirement within that statute, the court held that the bonding requirement was ultra vires.[265] The court chose to forego the simplicity and certainty of the limitation approach when it reduced the home rule scheme to simply one among many grants of specific authority rather than a broad presumption of plenary authority.[266] The practical effect of the *Crosby* court's analysis is the reintroduction of the grant approach.[267]

The court's reasoning in *Crosby* reflects the tradition of the grant approach in municipal law.[268] In other cases, such as *Roy v. Inhabi-*

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259. The most obvious problem with searching for "grants" of municipal authority is that there are so many statutes on the books purporting to grant municipalities power in certain circumstances that confusion is bound to occur. *See* Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 & n.2, 1001 & n.6. For example, if a town wished to enact a particular ordinance, the court could at least look to the general police power grant in ME. REV. STAT. ANN. tit. 30, § 2152 (1978 & Supp. 1984-1985) and any specific enabling statute which covered the subject matter of the proposed ordinance. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 2315 (1974) (municipalities granted power to establish and abolish municipal offices "as it may deem necessary for the proper and efficient conduct of the affairs of the municipality"); ME. REV. STAT. ANN. tit. 30, § 4352 (1974) (municipalities granted power to construct public sewers at the expense of the town "when they deem it necessary for public convenience and health").

260. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 1001 n.6.

261. ME. REV. STAT. ANN. tit. 30, § 2151 (1978 & Supp. 1984-1985).

262. ME. REV. STAT. ANN. tit. 28, § 702 (1974 & Supp. 1984-1985).

263. ME. REV. STAT. ANN. tit. 30, § 1917 (1978).

264. The general police power grant and the home rule scheme overlap to a large extent. "The home rule power is at least as broad as the police power under 30 M.R.S.A. § 2151 (1978), which for many years has authorized municipalities to impose by ordinance fines recoverable for their own benefit." Inhabitants of Boothbay Harbor v. Russell, 410 A.2d 554, 559 (Me. 1980).

265. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 1001-1002.

266. *See supra* notes 99-115 and accompanying text.

267. Recall that the limitation approach to home rule becomes meaningless if it does not reverse the grant approach presumption of municipal impotence. *See supra* notes 99-115 and accompanying text.

268. *See supra* notes 195-96.

tants of Augusta,[269] the court began its analysis by searching for grants of municipal authority sufficient to enable the municipal act.[270] The huge volume of enabling statutes passed before and after home rule's inception provides multiple sources of municipal authority.[271] Confusion results when the court asks whether a municipal ordinance fits within a specific enabling statute rather than whether the ordinance is *denied* by a specific pre-emptive statute. By returning to the grant approach to the state-local relationship, the court extinguishes not only the meaning but the very essence of Maine's home rule scheme.[272] However, when the court adheres to the limitation approach as articulated in section 1917,[273] Maine's home rule scheme retains its functional component. Adherence to this structure promotes the advantages of the limitation approach.[274]

2. Factors Indicating "Pre-emption"

Assuming that cases such as *Crosby* and *Roy* are anomalous, and that section 1917's limitation approach expresses the intended relationship between state and local government in Maine, the court's focus should be on whether a state statute denies to municipalities the power to act either expressly or by clear implication. The dispositive question is whether the effectuation of legislative purpose requires a denial of municipal power in a given subject matter area.[275]

Legislative intent to pre-empt municipal power is most obvious when the Legislature enacts a statute expressly directing municipalities to act in a certain manner.[276] It is less clear, however, how to identify a legislative intent to deny municipalities authority by clear implication. The court has cited the existence of a comprehensive state regulatory scheme, the need for uniform state regulation in a particular subject matter area, legislative history, and historical considerations as factors indicating an intention to deny municipal

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269. 387 A.2d 237 (Me. 1978). *See also* Lynch v. Town of Kittery, 473 A.2d 1277 (Me. 1984).

270. Roy v. Inhabitants of Augusta, 387 A.2d at 238.

271. *See* ME. REV. STAT. ANN. tit. 30, §§ 1901-5401 (1978 & Supp. 1984-1985).

272. *See supra* note 153.

273. ME. REV. STAT. ANN. tit. 30, § 1917 (1978).

274. These advantages include certainty in the legal relationship, maintenance of legislative supremacy over local government and flexibility to allow local government to perform its governmental role. *See supra* notes 99-115 and accompanying text.

275. *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983). Effectuation of legislative purpose requires pre-emption where a local ordinance "works at cross purposes to the state's . . . statutes, and therefore impermissibly conflicts with them." *Id.*

276. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 2001-A (Supp. 1984-1985) (providing specific requirements for perambulating boundary lines between municipalities). An ordinance most clearly conflicts with a statute when it expressly permits what the statute expressly prohibits or vice versa. Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 744 (1959).

power by clear implication.[277]

Frequently, the court finds a pre-emption of municipal authority when an extensive state legislative scheme regulates conduct in a particular subject matter area. For example, in *Ullis v. Inhabitants of Boothbay Harbor*[278] the court examined a municipal ordinance that was more restrictive than the state's licensing requirements. While no statute expressly denied the municipality authority to impose extra licensing requirements, the court ruled that a "broader reading of the entire statutory scheme"[279] demonstrated that the Legislature intended that municipalities merely apply unaltered the state's licensing criteria.[280] In addition, a comprehensive statutory

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277. These factors reflect considerations similar to those relied on in the federal pre-emption context. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983). Congressional intent to supersede state law may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable inference that Congress left no room for the States to supplement it.' " *Id.* at 204 (quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). However, " 'historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* at 206 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). *See infra* note 325.

278. 459 A.2d 153 (Me. 1983).

279. *Id.* at 158.

280. *Id.* The court's conclusion follows from its test which required than an ordinance "conflict" or work "at cross purposes" to the state statute. *Id.* at 159. This test was elaborated on by both the Maine Municipal Association and the Attorney General of Maine in amicus curiae briefs filed in Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1978). They both argued that state legislation in a particular subject area does not automatically prohibit further and more comprehensive action by the municipality. Brief of an Amicus Curiae, The Maine Municipal Association, at 9, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975); Brief of the Attorney General, Amicus Curiae, at 8, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975). In *Maineland*, the Attorney General argued further that there must be some finding of frustration of state purpose of "actual conflict between the ordinance and the statute which renders it impossible for a person falling within their respective purviews to comply with both." Brief of Attorney General, Amicus Curiae, at 8, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975).

The Maine Municipal Association argued that a local ordinance is valid under the home rule scheme " '[i]n the absence of any express legislative intent to forbid local activities consistent with the purpose of the State's . . . legislation, and in the absence of any circumstances from which it appears any legislative purpose will be frustrated.' " Brief of an Amicus Curiae, The Maine Municipal Association, at 11, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975) (quoting Bloom v. City of Worcester, 363 Mass. 136, 160, 293 N.E.2d 268, 283 (1973)). The *Maineland* court did not reach the issue addressed in these briefs of whether the municipal ordinance in question was invalid and unenforceable. Instead, the court reversed a summary judgment by the superior court on the ground that outstanding issues of material fact remained unresolved. Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d at 1351. Despite the *Maineland* court's lack of guidance, it seems reasonable that to the extent that the ordinance effectuates the policies embodied in the statute, it should not be pre-empted. *See* Note, *supra* note 276, at 748-49. If a statute is

scheme need not contain multiple provisions in order to reflect legislative intent to pre-empt the subject matter area. A single, but sufficiently specific and detailed statute may be enough to indicate a pre-emptive, comprehensive regulatory scheme.[281]

This test also works in reverse: where there is no comprehensive regulatory scheme, courts generally find no pre-emption unless the statute expressly denies power to local government. In *Bookland of Maine, Inc. v. City of Lewiston*,[282] for example, the defendant municipality passed an ordinance regulating the display and dissemination of "obscene" materials to minors.[283] The same subject matter was addressed by the Legislature in title 17, sections 2911-2912 of

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prohibitive in nature, a stricter municipal ordinance should not be beyond the municipal government's scope of authority. *Id.* at 749.

Ohio has adopted a head-on clash theory to determine when a municipal ordinance impermissibly conflicts with a state statute. Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923). There can be no conflict by inconsistency alone. A conflict exists only when one authority permits an act forbidden by the other. *Id.* at 268, 140 N.E. at 521. *See also* Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 26 (1948).

One example in Maine of a municipal ordinance more restrictive than a corresponding prohibitive statute is addressed in State v. Lewis, 406 A.2d 886 (Me. 1979). In *Lewis*, the defendant was convicted of maintaining an automobile graveyard in violation of the City of Eastport's ordinance regulating such establishments. *Id.* at 887. State statutes established a comprehensive regulatory scheme that defined "automobile graveyard" and set forth unlawful locations for such graveyards. ME. REV. STAT. ANN. tit. 30, § 2451-B (1978). Eastport's ordinance defined "automobile graveyard" more expansively than did the state statute. State v. Lewis, 406 A.2d at 888 n.5. The statute defined an automobile graveyard in part as "a place of storage . . . for 3 or more unserviceable, discarded, worn-out or junked motor vehicles," ME. REV. STAT. ANN. tit. 30, § 2451-B(1) (1978), while Eastport included in its definition any place where *two* or more *unregistered* vehicles are kept. State v. Lewis, 406 A.2d at 888 n.5 (emphasis added). Despite the state's comprehensive legislative scheme, the court held that the ordinance was valid and enforceable since the more stringent local requirements "incorporate[d] the concept of 'discarded or junked vehicles.'" *Id.*

Lewis demonstrates that the court may not find that enacted legislation pre-empts municipal ordinances which further the policies of the state legislation, such as that in *Lewis* prohibiting a nuisance. ME. REV. STAT. ANN. tit. 30, § 2451 (1978).

The rationale in *Lewis* appears anomalous however. For example, in *Ullis v. Inhabitants of Boothbay Harbor*, a municipal ordinance regulating liquor more restrictively than state law was at "cross purposes," despite the liquor statutes' presumably "prohibitive" character. 459 A.2d 153, 159 (Me. 1983). Similarly, in *Schwanda v. Bonney*, a more restrictive concealed weapons ordinance was invalid and unenforceable despite restrictive policies embodied in the state statute. 418 A.2d 163, 167 (Me. 1980). The result in *Ullis* is perhaps better explained by the existence of a comprehensive regulatory scheme, and historical state control of liquor regulation. The court's rationale in *Schwanda* included the need for statewide uniformity in the area of concealed weapons licensing. *See infra* notes 287-94 and accompanying text.

281. In James v. Inhabitants of West Bath, 437 A.2d 863 (Me. 1981) and Schwanda v. Bonney, 418 A.2d 163 (Me. 1980), one statute was sufficient to occupy the field and pre-empt the municipal ordinance.

282. No. CV-83-307 (Me. Super. Ct., And. Cty., Oct. 25, 1983).

283. *Id.* at 1, 12-13.

the Maine Revised Statutes.[284] Nonetheless, the court found no pre-emption:

> While regulatory in nature, this legislation does not appear to be exclusive. It lacks the ordinary characteristics of a comprehensive statutory scheme. It is brief and general in its tone. It deals with a subject that is of deep, but varying, local concern. Urban areas, with an infusion of commercial interests and a highly mobile, unrestricted youth population, may wish to afford special protection to minor children by providing a shield, of purely local design, against obscene influences. It does not appear that the State intended to preclude such local action.[285]

A second factor cited by courts finding pre-emption by clear implication is the perceived need for uniform regulation in a particular subject matter area.[286] Two recent Maine decisions clearly reflect the importance of this consideration. In *Schwanda v. Bonney*[287] the court asked whether the Legislature "pre-empt[ed] the field respecting regulatory requirements in the issuance of concealed weapons licenses to the exclusion of the municipalities that perform the actual task of their issuance . . . ."[288] State law required a license for persons to carry concealed weapons, and it delegated the licensing authority to the municipalities.[289] The statute's operative language

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284. ME. REV. STAT. ANN. tit. 17, § 2911(2) (1983 & Supp. 1984-1985) provides in part that: "[A] person is guilty of disseminating obscene matter to a minor if he knowingly distributes, or exhibits or offers to distribute or exhibit to a minor, any obscene matter declared obscene, in an action to which he was a party, pursuant to subsection 3." ME. REV. STAT. ANN. tit. 17, § 2912 (1983) provides in part: "No book, magazine or newspaper containing obscene material on its cover and offered for sale shall be displayed in a location accessible to minors unless the cover of that book, magazine or newspaper is covered with an opaque material sufficient to prevent the obscene material from being visible." Lewiston's ordinance read in part: "It shall be unlawful for any person knowingly to exhibit . . . at any place . . . where juveniles are invited as part of the general public: (1) Any book, pamphlet, magazine . . . which depicts sexually explicit [material] which is harmful to juveniles." LEWISTON, ME., REV. CODE § 19-102(e) (1983). Certain publications, not obscene under state law, could be considered "harmful to juveniles" under the ordinance. "The measures required to comply with the ordinance, short of total elimination from inventory, would necessarily involve segregation or isolation of non-obscene, but 'harmful to juveniles' materials and tend to call attention to a potential buyer." Bookland of Maine, Inc. v. City of Lewiston, No. CV-83-307, at 2 (Me. Super. Ct., And. Cty., Oct. 25, 1983). While the ordinance was held not pre-empted by state law, it was held unconstitutional. *Id.* at 17, 19.

285. Bookland of Maine, Inc. v. City of Lewiston, No. CV-83-307 (Me. Super. Ct., And. Cty., Oct. 25, 1983).

286. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 241-44 (1959); Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980); School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979).

287. 418 A.2d 163 (Me. 1980).

288. *Id.* at 165.

289. ME. REV. STAT. ANN. tit. 25, § 2031 (1974), *repealed and replaced by* ME. REV.

permitted a municipality to issue a concealed weapon permit to "any legal resident of such city or town of good moral character."[290] The town of Freeport passed an ordinance which imposed criteria in addition to the statute's "good moral character" requirement.[291] Specifically, the ordinance required the applicant to certify in writing that a concealed weapon was "required for the personal safety and protection of the licensee or required in connection with the employment of the licensee."[292] The court's interpretation of the statute depended on the legislative purpose behind the enactment.[293] The court reasoned that the Legislature could not have intended the anomalous result which would follow if the town of Freeport could impose its own requirements in addition to the "good moral character" requirement of the statute.

> It is undisputed that a license granted by the municipality of residence entitles the licensee to carry a concealed weapon anywhere in the State. Thus, an individual obtaining a license from another town in the State could carry a concealed weapon anywhere in Maine, including Freeport, even though he could not qualify under Freeport's ordinance requirements. A resident of Freeport, on the other hand, who did meet the statutory condition but lacked the additional eligibility standard of the ordinance could not carry a concealed weapon anywhere in the State. Obviously, the need for uniform application of the concealed weapons law precludes local regulation resulting in such inconsistencies.[294]

The third factor considered by the Law Court in pre-emption analysis is the historical context of the ordinance or statute. The traditional relationship between the respective responsibilities of state and local government may offer guideposts for the construction of legislative purpose. For example, in *School Committee of Wins-*

STAT. ANN. tit. 25, §§ 2031-2032 (Supp. 1984-1985).

290. *Id.* This section was completely rewritten in 1981 as §§ 2031 and 2032, *see* Act of Sept. 18, 1981, ch. 119, 1981 Me. Laws 148 (codified at ME. REV. STAT. ANN. tit. 25, §§ 2031-2032 (Supp. 1984-1985)), which now provides much more specific criteria for licensing, but still does not require the additional showing which Freeport's ordinance specified.

291. Schwanda v. Bonney, 418 A.2d at 164.

292. *Id.* (quoting Freeport's Concealed Weapons Ordinance).

293. *Id.* at 165-66 ("Legislative intendment always controls; this is a fundamental precept of statutory construction.").

294. *Id.* at 166.

In 1979, there were five concealed weapon licensees in the City of Portland; by Feb. 1, 1984, that number had increased to 155. Although the ostensible reason for these weapons is hunting and trapping, the tremendous growth in licensing appears to be a peculiarly urban phenomenon. Portland Evening Express, Apr. 9, 1984, at 1. This fact may decrease the vitality of the uniformity rationale, since one of the earliest reasons for providing a degree of autonomy for municipalities was the existence of unique conditions in urban society. *See supra* notes 22-36 and accompanying text.

low v. Inhabitants of Winslow,[295] the court reviewed a municipal charter amendment that changed the term of office for school committee members from three to two years.[296] The Legislature had granted Winslow a charter in 1969, thus creating a "municipality" and terminating its "town meeting" form of government.[297] The charter provided for members of the municipal school committee to serve three-year terms.[298] In 1977, the Town Council proposed, and the voters approved by referendum, amendments to the town charter which included reducing school committee members' terms of office from three to two years.[299] The plaintiff school committee members argued that the amendments were beyond the scope of municipal power since educational matters were reserved to the state and were not "local and municipal in character."[300] The defendant municipality argued principally that the state law requiring three-year terms for "town" school committee members[301] did not apply to chartered "municipalities."[302]

The court found that a consistent line of authority developed over the last century in Maine clearly reflected the "preeminence of the State in educational matters, vis-a-vis local government."[303] Furthermore, the court found that "[a] 'definite pattern' emerges from an investigation of our Legislature's action . . . . [T]he clear thrust of every action by the Legislature in this regard suggests an intention to occupy the field . . . and to preempt inconsistent local regulation."[304] Therefore, even though Winslow was no longer a town but rather was a municipality, "this would not entitle it to pursue its own wishes with respect to what is clearly a state matter."[305] The

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295. 404 A.2d 988 (Me. 1979).

296. *Id.* at 993-94.

297. *Id.* at 989.

298. *Id.*

299. *Id.*

300. *Id.* at 991. *See also* Squires v. Inhabitants of Augusta, 155 Me. 151, 167, 153 A.2d 80, 89 (1959) ("The State has always maintained general control of education . . . .").

301. ME. REV. STAT. ANN. tit. 20, §§ 471-472 (1965), *repealed and replaced by* ME. REV. STAT. ANN. tit. 20-A, §§ 2302, 2304 (1983 & Supp. 1984-1985).

302. School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 991. ME. REV. STAT. ANN. tit. 20, §§ 471-472 (1965) envisioned election of school board members at town meetings. School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 933. Winslow abandoned town meetings in 1969 with the adoption of a municipal charter. *Id.* The town argued that the statute was therefore inapplicable to school boards serving chartered municipalities. *Id.* at 991. The court rejected this argument stating: "The issue here, however, is not the power to select by municipal election rather than town meeting, but the power to prescribe the term of office." *Id.* at 993.

303. *Id.*

304. *Id.* at 993 (citation and footnote omitted).

305. *Id.* The court's analysis leads to gaps in regulatory authority. "Winslow may fall within a statutory gap not contemplated by the Legislature." School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 993. A gap occurs when no state

court therefore declared the ordinance invalid and unenforceable.[306] Thus, *Winslow* demonstrates that historical distinctions between "state" and "local" responsibilities continue to influence the determination of legislative purpose in a given area.[307]

Similarly, in *James v. Inhabitants of West Bath*[308] the court focused on historical considerations in reviewing a municipal ordinance which required a local license in order to dig marine worms in the town's tidal flat.[309] A state statute also required persons to obtain a license to dig marine worms on the Maine coast.[310] The court

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legislation exists and municipal government's hands are tied since the matter is not local and municipal in character. *See supra* note 113. The United States Supreme Court found the existence of such a regulatory gap in federal legislation regulating the licensing of nuclear power generation. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm., 461 U.S. 190, 207-208 (1983). While the Nuclear Regulatory Commission has authority over national security, public health and safety matters, it "was not given authority over the generation of power itself, or over the economic question of whether a particular plant should be built." *Id.* at 207. "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments." *Id.* at 207-208. Thus, the Supreme Court found the existence of gaps in legislative schemes sufficient to deny pre-emptive effect to such schemes. *But see* School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 993.

306. School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 993-94.

307. Maine court decisions have, up to now, rarely attempted to define a subject matter area as local and municipal in character when no state statute purported to govern the same area as the municipal ordinance in question. The court's reluctance to make an independent judgment as to the character of a subject matter area despite the apparent constitutional mandate to do so, *see* ME. CONST., art. VIII, pt. 2, § 1, is noteworthy. It reflects the court's desire to permit the Legislature to dictate the political relationship between municipalities and state government. *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983); Bird v. Town of Old Orchard Beach, 426 A.2d 370, 372 (Me. 1981); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1067-68 (Me. 1978). In these cases the court has limited pre-emption analysis to an examination of potentially conflicting state statutes and has not extended it to an independent examination by the court to determine whether an ordinance regulates subject matter local and municipal in character.

However, the court has found state pre-emption even in the absence of an articulated legislative intention when the local legislation in question purports to regulate in traditionally statewide areas. In effect, the Legislature may occupy a field of regulation without specific language to that effect in areas that the court independently considers non-local. *See, e.g.*, School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979). This kind of judicial activism clouds the relatively clear division of state and local responsibility engendered by the limitation approach. A deemphasis of historical considerations will permit the Legislature to decide through its enactments what areas are local or statewide in character, and provide a clearer picture of the relative responsibilities of state and local government. This would free municipal governments to legislate in the public interest without fear of having their enactments declared void and unenforceable by the court.

308. 436 A.2d 863 (Me. 1981).

309. *Id.* at 865.

310. ME. REV. STAT. ANN. tit. 12, § 6751 (1981 & Supp. 1984-1985) (section 6751 may or may not have been repealed on January 1, 1985 by its own terms, *see* L.D.

expressly declined to make an independent judgment whether marine worm digging was local and municipal in character.[311] Nevertheless, the court held that the Legislature had pre-empted the field even though no statute expressly denied the town the power to regulate marine worm digging.[312] The court based its holding of pre-emption upon both the state licensing statute and the public trust doctrine.[313] The court noted that "[a] consistent theme in the decisional law is the concept that Maine's tidal lands and resources . . . are held by the State in a public trust for the people of the State."[314] The Legislature's historical role as the guardian of the public trust creates in effect a presumption of pre-emption of public trust resources regulation.[315]

An examination of the Law Court's pre-emption analysis leads to a few tentative conclusions. First, despite the statutory requirement to liberally construe the home rule scheme in favor of the municipalities,[316] the court shows little inclination to allow municipalities to deviate from specific statutory grants of power. The court adds an extensive gloss to "denied . . . by clear implication" through its willingness to impute pre-emptive legislative purpose in circumstances where no such language appears in the statutes or legislative history. This results in a very broad construction of that phrase. Dozens of existing enabling statutes purport to "grant" municipalities authority in specific areas,[317] and each one potentially "pre-empts" variant municipal legislation. Little room is left for home rule in this situation.[318]

Second, the court is reluctant to invalidate municipal enactments on the basis that they are not local and municipal in character absent state legislation in that area. However, the presence of *any* state statute in a traditionally non-local area will usually be sufficient to invalidate a variant municipal ordinance.[319] This analysis

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972, Statement of Fact (112th Me. Legis. 1985)).

311. James v. Inhabitants of West Bath, 437 A.2d at 865 n.3.

312. *Id.* at 865.

313. *Id.*

314. *Id. See generally* M. Tannenbaum, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 MAINE L. REV. 105 (1985).

315. James v. Inhabitants of West Bath, 437 A.2d at 866.

316. ME. REV. STAT. ANN. tit. 30, § 1920 (1978).

317. *See generally* ME. REV. STAT. ANN. tit. 30, §§ 1901-5404 (1978 & Supp. 1984-1985).

318. *But see* Merrill v. Town of Hampden, 432 A.2d 394 (Me. 1981) (per curiam). The Law Court in *Merrill* held that a grant of power to municipalities allowing the appointment of tree wardens did not restrict the warden's function as to care and control of public shade trees. The court noted that the applicable statute, ME. REV. STAT. ANN. tit. 30, § 3901 (1978) "is permissive only, and by its terms it plainly does not limit the broad home rule powers of a municipality." 432 A.2d at 395.

319. *See, e.g.*, Crosby v. Inhabitants of Ogunquit, 468 A.2d 996 (Me. 1983). *See*

follows from a heavy reliance on the ancient maxim *expressio unis est exclusio alterius* to imply a legislative prohibition on all powers related to but omitted from specific grants of power to municipalities.[320]

Third, once the court deems a subject matter area pre-empted, apparently the grant approach operates within that area. As a result, for a municipality to exercise power within the occupied area, the court requires a specific delegation or grant of power from the Legislature to enable the municipality to legislate in that area.[321] A broadly interpreted pre-emption analysis which focuses on the existence of state statutes and requires express grants of power within the pre-empted area effectively neutralizes home rule in all but those few areas where *no* state statutes are present. Ironically, most of the specific enabling statutes contained in title 30 of the Maine Revised Statutes were hard-won grants of power to municipalities before the adoption of home rule. Nevertheless, these grants of power now haunt municipalities as evidence of possibly pre-empted areas.[322]

Finally, if the *Crosby v. Inhabitants of Ogunquit*[323] decision indicates a trend, the limitation approach to delegating state power to municipalities will be lost in favor of the grant approach.[324] The broadly construed "pre-emption" analysis in Maine eliminates most substantive gains municipalities may have expected through adoption of home rule. However, if the grant approach is re-established then the fundamental concept of home rule is lost.

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supra notes 238-67 and accompanying text.

320. *See supra* note 236.

321. *Id.*

322. The Supreme Judicial Court of Massachusetts recognized this irony as problematic. Its solution may be an appropriate guide for Maine's Law Court. In *Bloom v. City of Worcester* the court stated:

> Many pre-Home Rule Amendment general laws were necessary to grant powers to municipalities under the now discarded policy that a municipality "has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges." Obviously, many pre-Home Rule Amendment statutes granting authority to municipalities were rendered unnecessary by the Home Rule Amendment. We are not inclined to attribute to permissive statutes of that type a limiting function upon the powers of municipalities . . . . *Were we to infer such a limiting function from the existence of such permissive statutes, the result would be that the legislative powers of municipalities would be restricted precisely to those which they had at the time of the adoption of the Home Rule Amendment. That was not the purpose of the voters in adopting the Home Rule Amendment, and no such purpose can be found in [legislation passed since its adoption].*

363 Mass. 136, 157, 293 N.E.2d 268, 281 (1973) (emphasis added).

323. 468 A.2d 996 (Me. 1983).

324. *See supra* notes 238-67 and accompanying text.

VI. Conclusion

The grant approach, dating back to this nation's earliest days, became the established method for delegating power to municipalities because it curbed the tendency for local corruption and tyranny, and was judicially administrable. The role of the courts was very limited in this area since boundaries of municipal power were clear-cut. Thus, the legislature, the courts, and municipal officials understood the state and local government relationship. However, the price for certainty in allocating power between the state and municipalities was high. The grant approach placed a tremendous burden on the state legislatures, which were forced into the unenviable task of writing great quantities of legislation granting municipalities specific powers. Furthermore, at least in Maine, the Legislature periodically had to revise charters for each chartered town.

Maine's home rule scheme, developed and implemented between 1968 and 1970, demonstrated the desire of the people of Maine to establish responsible and effective local government. Unfortunately, the Legislature used two non-complementary home rule models in developing Maine's home rule scheme. The resulting confusion created uncertainty as to the substance of this new relationship between state and local government.

Constitutional and statutory ambiguities created the need for judicial interpretation. The Maine Supreme Judicial Court has generally adopted a pre-emption approach to examine the validity of municipal legislation. Although the court purports to interpret the "denied . . . by clear implication" language of section 1917 in home rule cases, it frequently finds that the slightest entry by the Legislature into a subject matter area is enough to occupy the field and preclude municipal legislation.[325] Once the court recognizes the occupation, then the municipality is limited to those powers granted expressly by statute or necessary to carry out such grant.

The court frustrates the legislative purpose for home rule in Maine by its reluctance to part with traditional ideas. Adherence to this interpretation will result in the end of meaningful home rule in Maine. This result is assured, for as municipalities compare the language of the home rule scheme with the court decisions interpreting the scheme, their conclusion must be that the scope of municipal power is a great deal less than suggested by the words of the consti-

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325. The concept of occupying the field is suggested in many federal pre-emption cases. *See, e.g.*, Kelly v. Washington, 302 U.S. 1 (1937). Though the concept met with disfavor in that context, Hines v. Davidowitz, 312 U.S. 52 (1941) (expression "occupying the field" does not provide constitutional test; rather the Supreme Court's "primary function is to determine whether [the State law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67), it remains a part of the Maine court's pre-emption test. *See supra* note 260. *See, e.g.*, School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979).

Attachment 3

tutional and legislative provisions. So convinced, municipal leaders again will approach the legislature, hat in hand, seeking specific grants of authority for local projects. In this way, the functional benefits of the home rule concept erode from disuse.

To re-establish the limitation approach, and thus re-establish certainty while providing a meaningful role for municipal government, the Legislature may need to clarify the purpose of the home rule scheme. Perhaps the great quantity of specific authorizing statutes[326] purporting to grant powers to the municipalities should be prefaced by a preamble. These statutes, contained for the most part in title 30 of the Maine Revised Statutes, are superfluous in light of the broad basis for municipal power contained in section 1917. This preamble to title 30 could state that no statute purporting to grant power to municipalities shall be read as pre-empting the municipalities from passing legislation within the same subject matter area, unless otherwise stated in the language of the specific statute. This preamble would clarify the status of these pre-home rule grants. Thus a grant, the purpose of which was to permit municipal activity under the grant approach, could not then acquire a new purpose to "occupy" a particular subject matter area under the limitation approach. The preamble would allow state and local government to coextensively legislate in the public interest unless an overriding state policy requires a single standard of conduct. In this way, municipalities would retain their govermental role. Ironically, the Legislature must refrain from acceding to municipal requests for specific authorizing statutes and instead refer local government to the general grant of power in section 1917. Municipalities too must refrain from seeking specific enabling legislation. For with each new statute, local government directly contributes to the demise of the home rule scheme.[327] The greater the number of potential sources of municipal power the greater the temptation by the court to avoid the limitation approach. The desirability of autonomous local government is not at issue; rather, the question is how to implement the purposes home rule scheme. Inefficiency and confusion will plague this vital governmental relationship until Maine adheres to its home rule scheme.

Robert W. Bower, Jr.

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326. ME. REV. STAT. ANN. tit. 30, §§ 1901-5404 (1978 & Supp. 1984-1985).
327. *See* Sandalow, *supra* note 1, at 653, 670.

Enacted as
PL 1987 c. 583

(EMERGENCY)
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document NO. 506

H.P. 384 House of Representatives, February 23, 1987

Reported by Representative CARROLL from the Committee on State and Local Government. Sent up for concurrence and ordered printed. Approved by the Legislative Council on April 15, 1986.

Reported from the Joint Standing Committee on State and Local Government under Joint Rule 19.

EDWIN H. PERT, Clerk

STATE OF MAINE

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

AN ACT to Clarify the Home Rule Authority of Municipalities.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, several court decisions have shown that municipal home rule is not being implemented to the extent originally intended by the Legislature; and

Whereas, the effective implementation of municipal home rule is of vital importance to municipalities in the State, as well as, to the health, safety and well being of the citizens of the State; and

Attachment 4

This Act shall not apply to any action or proceeding pending on or filed after the effective date of this Act and which arises out of any action or failure to act occurring before the effective date of this Act.

All actions taken in compliance with provisions repealed or amended by this Act shall be deemed to have been taken in compliance with the provisions of this Act. All ordinances, regulations, bylaws or other official action taken under provisions repealed or amended by this Act shall continue in effect until repealed or amended, except for those which are contrary to the provisions of this Act.

All officers, officials or other persons elected, appointed, hired or otherwise selected to act in any capacity under provisions repealed or amended by this Act shall continue in that capacity under the provisions of this Act.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

STATEMENT OF FACT

This bill is a result of a Legislative study conducted by the former Joint Standing Committee on Local and County Government to revise the local government laws. As part of that study, the committee investigated the status of municipal home rule and considered ways in which to clarify its application. This bill is a companion bill to the bill which recodifies the local government laws, and contains the statutory revisions thought necessary by the committee to clarify the application of municipal home rule in Title 30.

The purpose of this bill is to reemphasize the Legislature's commitment to municipal home rule, and to rewrite the provisions of Title 30 to reflect that commitment. Confusion over the extent of a municipality's home rule powers has resulted largely from the Legislature's failure to integrate pre-home

rule statutes with the concept of local control embodied in home rule. This bill attempts to achieve that integration by rewriting the provisions of Title 30 against the broad backdrop of the concept of home rule.

The committee's guiding principle in drafting this bill was the idea that the grant of home rule ordinance power to municipalities in the current Title 30, section 1917, is a plenary grant of power; no further grants of power need be given to municipalities. The only legislative action that should be taken concerning municipalities is to determine when that power should be limited. This bill attempts to implement that concept through 3 basic methods:

1. The bill repeals all asserted grants of power to municipalities that do not contain a limitation on that power, except where the grant may serve as an example of how a municipality may choose to use its home rule power;

2. Provisions which do not limit home rule power, but may serve as a useful guide to municipalities are retained, but with an express recognition of municipal home rule authority to act otherwise; and

3. Finally, express limitations on home rule authority are retained wherever they represent a legitimate state interest. Former limitations which do not further legitimate state interests are repealed to allow municipalities freedom to act under their home rule authority.

It is not the intent of this bill to deny municipalities any power which they currently have under their home rule authority. This bill retains many statutory provisions as examples to provide guidance to a municipality in exercising its home rule authority. This bill also retains many provisions where a municipality's home rule authority is recognized as the source of power to perform a certain action. These changes are not intended to deny a municipality's home rule authority to enact ordinances in any area in which they presently may act. They are intended to clarify a municipality's present

home rule authority, not to reduce it. It is the intent of the Legislature that the standard of review established under section 13 of this bill shall be followed in determining when an implied denial of power to municipalities exists. Consistent with this intent, express acknowledgement of a municipality's home rule powers in one area is not to be interpreted as an implied denial of power to act in any other area; nor is the appearance of a model which municipalities may follow under their home rule authority to be interpreted as a denial of power to act otherwise.

One additional method of clarifying home rule power applied in this bill was to redraft the original grant of home rule power in an attempt to clarify its plenary grant of authority. This includes the addition of a standard of review by which the concept of home rule will be interpreted by the judiciary. That standard first provides a presumption that any action taken by a municipality is a valid exercise of its home rule authority. The court starts from the base that the municipality does have the power to enact any given ordinance. Second, the court will move from this base and invalidate a municipal ordinance only where the municipal ordinance will frustrate the purpose of any state law, or where the Legislature expressly denies a municipality the power to act in some area. This standard reaffirms the fundamental principle of home rule, that municipalities have been given a plenary grant of power, while recognizing that this authority is subject to the State's ability to limit that power in the furtherance of legitimate state interests. Only where the municipal ordinance prevents the efficient accomplishment of a defined state purpose should a municipality's home rule power be restricted, otherwise they are free to act to promote the well-being of their citizens.

Section 1 of the bill reenacts a provision of the Maine Revised Statutes, former Title 30, section 2151, which is repealed under section 12 of this bill. That provision provides that things which exist in accordance with municipal ordinances, such as street signs and utility poles, are not defects in a public way. This section reallocates that provision to the laws dealing with highway defects so it will be more readily found.

Sections 2 and 3 reenact the provisions contained in Title 30, chapter 215, subchapter IV which are repealed by section 31 of this bill. In order to better reflect the application of municipal home rule, these provisions were moved to Title 26 where employment agencies are regulated. The provisions provide an express legislative recognition that the Title 26 statutes do not preempt municipal home rule authority to enact additional regulations of employment agencies which do not frustrate the state policies expressed in Title 26.

Section 4 provides a general definition of "home rule authority" as that term is used in Title 30, Part 2. It recognizes the basic home rule grants found in the Constitution of Maine, and Title 30, chapter 201-A and Title 30, section 2151-A of this bill. Section 2151-A is enacted by section 13 of this bill and replaces the provisions of Title 30, section 1917 which is repealed by section 9 of this bill.

Sections 5 and 6 rewrite language which assertedly grants a municipality the power to receive gifts in trust or conditional gifts, with certain restrictions on their use. Since a municipality already has these powers under its home rule authority, it is not necessary to "give" a municipality these powers again. These sections rewrite the language as a limitation on a municipality's general home rule authority.

Section 7 replaces language in the provisions governing the submission of a municipal charter commission's final report. The present language requires that the report be accompanied by an attorney's opinion that the proposed charter "is not in conflict with" the general laws or the Constitution of Maine. The actual standard set out in the Constitution of Maine, Article VIII, Part Second is that a charter may not "contain any provision prohibited by" the Constitution of Maine or the general laws. This section replaces the present language with language tracking the constitutional provisions.

Section 8 similarly replaces the present "in conflict with" language with language tracking the Con-

stitution of Maine for legal opinions accompanying a proposed amendment to a municipal charter.

Section 9 repeals the present grant of home rule ordinance authority to municipalities contained in Title 30, section 1917. It is redrafted and reenacted by section 13 of this bill.

Section 10 recognizes that a municipality already has the power to appropriate funds to a council of governments under its home rule authority. The grant language in the present provision is amended by adding an explicit reference to the true source of the authority, municipal home rule.

Section 11 amends the present statutory provision governing the qualifications and method of election of town officials. It provides an express legislative recognition that a municipality has the power to alter these statutory requirements through municipal charter provisions adopted under its home rule authority.

Section 12 repeals Title 30, section 2151. This section of the statutes is perhaps the worst offender in terms of failing to recognize the adoption of home rule for municipalities. It contains most of the former legislative grants of ordinance power which were necessary before home rule. The adoption of home rule has rendered major portions of it totally obsolete. Those provisions which represent limitations on municipal home rule authority were retained; most are reenacted by sections 14 and 16 of this bill. Provisions which are not reenacted, but are repealed in their entirety since they are already included in the grant of home rule authority, include the following provisions of Title 30, section 2151:

1. Subsection 1, which contains the general police power grant of authority;

2. Subsection 2, paragraph A, which grants power to regulate public ways and other public property;

3. Subsection 2, paragraph B, which grants power to regulate things placed on public ways and

other public property, except that subparagraph (1) was moved to another section of the statutes under section 1 of this bill;

4. Subsection 2, paragraph C, which grants power to regulate pedestrian traffic and sidewalks, except that subparagraphs (1) and (2) are retained under sections 14 and 16 , respectively, of this bill;

5. Subsection 2, paragraph E, which grants power to control Dutch Elm disease;

6. Subsection 2, paragraph G, which grants power to protect and preserve historical buildings and places;

7. Subsection 5, paragraph A, which grants power to regulate pawnbrokers and secondhand dealers;

8. Subsection 5, paragraph B, which grants power to regulate junkyards and the sale of junk;

9. Subsection 5, paragraph D, which grants power to regulate dance halls;

10. Subsection 5, paragraph E, which grants power to require a license and fee for certain commercial operations; and

11. Subsection 5, paragraph F, which grants power to regulate itinerant vendors.

Section 13 enacts the new version of former Title 30, section 1917, which is repealed under section 9 of the bill. The new provisions contain the same original grant of home rule authority that currently appears in section 1917, but are moved to place them under chapter 209. This was done to reemphasize that the grant of ordinance home rule power is a separate and distinct aspect of a municipality's total home rule power in Maine. The Constitution of Maine, Article VIII, Part Second, contains the general charter home rule grant of authority. Title 30, chapter 201-A contains the implementing laws for the charter home rule grant. Despite its current placement in the midst of chapter 201-A, the ordinance home rule

grant is not part of the charter home rule implementing legislation. It stands on its own as a separate legislative grant of home rule authority to enact ordinances for any purpose not denied by the Legislature. Its placement in Title 30, chapter 209, which contains the provisions related to municipal ordinance authority, is designed to reflect the two-fold composition of municipal home rule in Maine, charter home rule and ordinance home rule.

In addition to simply moving the grant of ordinance home rule authority, section 13 of this bill also retains the original requirement that its provisions be construed liberally. By moving this provision into a new chapter, it is isolated from the provision requiring liberal construction found in Title 30, section 1920. That requirement is written into the new section 2151-A. A presumption that any municipal ordinance is a valid exercise of a municipality's home rule authority was also added in this section, and a standard of preemption was added which requires that a court must find that a municipal ordinance frustrates the purpose of a state law before it may invalidate the ordinance as being implicitly denied by the Legislature. These provisions establish a standard of review to be applied by the courts in resolving home rule questions. Finally, the provision that all penalties established by ordinance will accrue to the municipality was moved here from the present Title 30, section 2151. The requirement that a municipality must impose fines for the violation of any ordinance authorized by that section of the laws was deleted since there is no legitimate state interest to be served by such a provision.

Section 14 reenacts those provisions of present Title 30, section 2151 which serve as limitations on municipal home rule authority. The limitation on changes relating to certain municipal officers contained in present Title 30, section 1917 was moved to this new section in order to isolate the grant of home rule authority in the section enacted under section 13 of this bill, and to collect those provisions which limit that authority in the new statutory section enacted by this section of the bill. Provisions which are reenacted in this section as limitations on a municipality's home rule authority include the following provisions of Title 30, section 2151:

1. Subsection 2, paragraph D, which limits a municipality's home rule authority regarding parking meters;

2. Subsection 2, paragraph H, which limits a municipality's home rule authority regarding public pedestal telephones;

3. Subsection 2, paragraph K, which limits a municipality's home rule authority regarding handicapped parking ordinances;

4. Subsection 4, paragraph D, which limits a municipality's home rule authority regarding ordinances to protect persons and property from damage due to falling ice and snow;

5. Subsection 5, paragraph C which limits a municipality's home rule authority regarding the regulation of hawking and peddling of certain merchandise at retail; and

6. Those provisions of subsection 2, paragraph C, subparagraph (2) and subsection 4, paragraph E, subparagraph (1), which provide that violations of certain ordinances are declared to be public nuisances.

Section 14 also provides that the provisions relating to municipal pension systems presently found in Title 30, section 2152, subsection 1, are collected with other limitations on municipal ordinance home rule authority under the new Title 30, section 2151-B.

Section 15 repeals the present Title 30, section 2152 which contains the provisions concerning ordinances regulating municipal pension systems and administrative regulation of police and fire departments. Since there are no limitations on the power to enact ordinances establishing regulations on police and fire departments, those provisions are simply repealed since they are included within the home rule authority of municipalities. The provisions dealing with pension systems do limit home rule authority, and are reenacted under section 14 of this bill which places them in the new Title 30, section 2151-B, which collects limitations on a municipality's ordinance home rule authority.

Section 16 enacts a new Title 30, section 2152-C which collects those ordinance powers which are given by statute to the municipal officers of a municipality. These provisions may use grant language without violating the principle of home rule since they actually do grant power because they give it to the municipal officers rather than the municipality. Provisions which are moved under this section since they are grants of ordinance power to the municipal officers, include the following provisions of Title 30, section 2151:

1. Subsection 2, paragraph C, subparagraph (1), which allows them to establish certain procedural provisions regarding the enforcement of pedestrian traffic ordinances;

2. Subsection 3, which allows them to regulate the operation of vehicles on the public way and the operation of vehicles for hire; and

3. Subsection 7, which allows them to regulate the operation of motor vehicles on icebound inland lakes.

Section 17 eliminates language purportedly granting municipalities the power to adopt ordinances which incorporate certain codes by reference. Since a municipality has the home rule authority to do this already, the section actually acts as a limitation on home rule authority by defining which types of codes may be incorporated by reference. For that reason it is retained, but language is added to explicitly recognize that the ordinances are enacted under a municipality's home rule authority.

Section 18 enacts a new subsection to the statutory section governing the existence and filling of vacancies in municipal offices. The new provisions recognize a municipality's home rule authority to provide additional or different regulations in this area, subject to certain limitations. Any change in the statutory provisions governing vacancies in the office of municipal officer must be done by charter, but a change in the statutory provisions can be done by charter or ordinance in the case of any other municipal official. This distinction was made to en-

sure that any change regarding the terms and office of the chief municipal officials, the municipal officers, will not be made lightly, but are subject to the more stringent charter adoption or amendment process.

Section 19 replaces language purporting to grant a municipality the ordinance power to provide for "all necessary municipal functions" which are not provided for under law. Because the provision may serve to advise municipalities of this power, it is retained in the laws; however, since a municipality already has this power under its home rule authority, the new language explicitly recognizes that home rule is the source of this power, and also allows a municipality to provide for municipal functions by charter as well as ordinance. The latter change is probably required by the provisions of the Constitution of Maine, Article VIII, Part Second, in any event. Finally, the word "necessary" is deleted. There is no substantial state interest served by limiting a municipality's ability to deal with its problems to situations where it is "necessary." The municipality itself is best suited for determining the desirability of undertaking municipal functions; the State need not impose any higher standard.

Section 20 repeals a section of the statutes that purports to grant towns the ordinance power to provide for any municipal functions necessary to conduct the town's business after adoption of the town manager plan provided in Title 30, chapter 213, subchapter II-A. This section is superfluous in light of a municipality's home rule authority, as described in Title 30, section 2256, as amended by section 19 of this bill.

Section 21 replaces language purporting to grant a municipality the power to pay a clerk a salary. That authorization is no longer needed since the adoption of home rule, so the law is rewritten to avoid the grant language.

Section 22 replaces a reference to a statutory section repealed by section 15 of this bill. The statute purports to grant municipalities the power to enact ordinances establishing regulations for police

and fire departments. That power is included within the broad home rule authority or municipalities to enact ordinances, so the statutory cross reference is replaced with a simple reference to any "municipal ordinance," which may be enacted under its home rule authority.

Section 23 recognizes a municipality's home rule authority to limit the powers of a police officer by charter, as well as by ordinance, as presently allowed.

Section 24 adds a provision acknowledging municipal home rule authority to determine the powers of special police officers by charter, as well as by ordinance, as presently allowed.

Section 25 adds language expressly acknowledging municipal home rule as the source of a municipality's power to establish a board of appeals. This section also amends present law which allows the method of appointment and compensation of the board members to be established by charter by allowing these changes to be accomplished by ordinance as well. There does not appear to be any compelling reason to limit the method of altering these provisions to charter provisions, and to so limit that ability denies the power to towns that do not have a charter, but do have general home rule ordinance powers.

Section 26 replaces grant language concerning the appointment of associate members of a board of appeals with an explicit reference to a municipality's general home rule authority. This change makes this provision consistent with other municipal powers regarding boards of appeal by allowing the provisions to be enacted in a municipality's charter, as well as by ordinance, as presently allowed, correcting the inconsistency which presently exists.

Section 27 also maintains consistency regarding a municipality's ability to enact provisions applicable to a board of appeals by allowing a municipality to define the appellate jurisdiction of the board by charter, as well as by ordinance, as presently allowed. Language referring to Title 30, section 2411 as the source of a municipality's power to adopt a

board of appeals is deleted since the source of that power is actually the municipality's home rule authority.

Section 28 adds language which expressly references as municipality's home rule authority in a provision of the automobile graveyard and junkyard law that permits municipalities to regulate those junkyards by ordinances.

Section 29 reenacts a provision of the present Title 30, section 2151 which is repealed by section 12 of this bill. It is moved to the municipal licensing chapter of Title 30 because it deals with the municipal licensing authority, not a municipality's ordinance power.

Section 30 reenacts the provisions of Title 30, section 2151, subsection 4, paragraphs A through C and moves them to the municipal licensing chapter of Title 30 because they deal with the permit procedure for building regulations. The language is redrafted to clarify that these provisions do not regulate the adoption of home rule ordinances that regulate buildings, rather they actually regulate certain aspects of the permit procedure to be employed in this area.

Section 31 adds language to clarify that a municipality's source of power to require electrical inspections is its home rule authority.

Section 32 repeals the provisions relating to municipal licensing of employment agencies. Those provisions are redrafted and moved to Title 26 under sections 2 and 3 of this bill.

Sections 33 and 34 add language explicitly recognizing that the source of power enabling municipalities to enact waste water disposal ordinances is their home rule authority and replace language which asserted that those ordinances were enacted under the authority of that specific statutory section.

Section 35 repeals the statutory provision purporting to give municipalities the power to acquire property for recreational purposes and to conduct recreational programs, independently or jointly.

This power is inherent in a municipality's general home rule authority; no further grant is needed. Since no limitation on that authority appears in the law, and it is not useful as a model for municipalities, it is repealed entirely.

Section 36 repeals a law purportedly authorizing municipalities to hire a historian. This power is inherent in a municipality's home rule authority. Since no limitation appears and the law is not useful as a model for municipalities, it is repealed entirely.

Sections 37, and 39 through 41 repeal statutory provisions dealing with the establishment and operation of municipal forests. A municipality already has this power under its home rule authority and the limitations contained in the provisions, such as requiring a 2/3 vote to establish the forest, providing that a municipal forester need not be a resident of the town and requiring general fiscal restrictions to apply, do not serve any overriding state interests. For these reasons, the provisions were repealed, but a new statutory section is enacted by section 38 of this bill to serve as a model for municipalities in this area. That section provides that a municipality may acquire lands for a municipal forest under its home rule authority, but does not limit a municipality's home rule authority to define how to acquire and maintain those lands. The new provisions provide an example of how municipalities may choose to exercise their home rule authority, but leave the municipalities free to work out the details for themselves on a local basis to meet local needs.

Sections 42, 43 and 44 parallel the changes made regarding police officers in sections 22, 23 and 24 of this bill, establishing consistency among the provisions. Section 42 adds an explicit recognition that municipalities may set a term of office for fire chiefs by charter provision, as well as by ordinance, as presently allowed. Section 43 similarly recognizes a municipality's ability to define the duties of a fire chief by charter, as well as by ordinance. Section 44 does the same regarding limitations on providing assistance in extinguishing fires in other municipalities.

Section 45 repeals a statutory provision which purports to authorize municipalities to accept and hold land for open areas and public parks and playgrounds in the municipality. This authority is already included within a municipality's home rule authority. The section imposes no limitations on the municipality's acceptance and use of these lands and is not useful as a model for municipalities so it is repealed entirely.

Sections 46 and 47 amend the statutory sections regarding conservation and energy commissions by adding an explicit acknowledgement that home rule is the source of a municipality's authority to create such commissions. Although the statutory sections are not intended to preempt or limit a municipality's home rule authority to act otherwise in this area, they do serve as a useful model of how a municipality may choose to exercise its home rule powers and are retained for that reason.

Section 48 repeals a statutory section that purports to grant municipalities the power to appropriate money to compensate tree wardens and to acquire and care for shade trees. This power is inherent in a municipality's home rule authority. The section does not contain any limitation on that authority nor serve as a useful model for municipal action, so it is repealed entirely.

Section 49 adds language which replaces a purported grant of power to enact ordinances which require landowners to connect with municipal sewer lines. The new language recognizes municipal home rule as the source of the power to enact such an ordinance.

Section 50 updates a provision of the Revenue Producing Municipal Facilities Act which declared that its provisions were additional and supplemental to all other municipal powers. This section adds language replacing grant language and providing that the Revenue Producing Municipal Facilities Act will not be construed to preempt municipal home rule authority.

Section 51 simply replaces existing language which recognizes municipal home rule as the source of authority in regard to zoning ordinances with the term "home rule authority," a definition of which is provided in section 4 of this bill.

Section 52 adds language which recognizes home rule as the source of a municipality's power to enact a zoning ordinance with limitations on the granting of a variance additional to those imposed by the State.

Section 53 is intended to clarify that the adoption of home rule authority gives municipalities the power to appropriate money for any valid public purpose. This section does not add an explicit reference to a municipality's home rule authority because a municipality's ability to raise money has been largely preempted by the State, removing its home rule authority to act in that area; however, no such preemption has occurred with respect to a municipality's ability to appropriate money. The various purposes listed in Title 30, sections 5101 to 5108, with only a few exceptions which actually do establish limitations on a municipality's spending authority, are merely examples of proper municipal public purposes for which municipal funds may be expended. There was no legislative intent behind the enactment of these sections to limit a municipality's ability to expend funds under its home rule authority to only those purposes actually enumerated in Title 30, sections 5101 to 5108. This section amends section 5101 to explicitly recognize a municipality's power under its home rule authority to appropriate and expend funds for any valid public purpose. It also clarifies that the purposes listed in the statutes are merely examples, except where specific limitations on the expenditure of municipal funds are explicitly stated.

Sections 54 to 56 repeal specific limitations on municipal spending powers that no longer serve any useful state interest. They repeal the provisions that limit the amount of money a municipality can spend on advertising the resources of the State and the municipality, propagating and protecting fish and assisting conventions in the municipality. These

limitations are repealed since the State has no compelling reason to limit these expenditures by any municipality that chooses to make them. How a municipality decides to spend its tax income is best left up to the persons who contributed those taxes, and that is done best on a local level.

Section 57 replaces language which purports to grant municipalities the power to accept grants with neutral language that avoids any suggestion that a grant of power is intended. A municipality already has this power under its home rule authority.

Section 58 replaces language which grants plantations the same powers that "are granted to municipalities" under Title 30, chapter 239, subchapters V and VI, regarding planning and zoning. Those statutory provisions do not actually grant municipalities any power; the power to enact those ordinances is inherent in a municipality's home rule authority. All that those statutory provisions do is limit a municipality's home rule authority to enact planning and zoning ordinances. In order to carry out the original intent of this section, the language is replaced to simply grant plantations similar powers to enact planning and zoning ordinances, subject to the same statutory restrictions that apply to cities and towns. The grant of power is necessary in this instance since plantations, unlike cities and towns, do not have general home rule powers.

Sections 59 enacts new sections which reenact provisions repealed or rewritten elsewhere in this bill to avoid home rule complications for cities and towns; however, because plantations do not have home rule authority, whenever a home rule problem was resolved, it often reduced a plantations's powers in those sections of Title 30 which apply to plantations, as well as to towns and cities. This section is intended to restore those powers to plantations.

Section 60 reenacts the provisions of Title 30, section 2151, subsection 6, dealing with municipal ground water ordinances, which were repealed under section 12 of this bill. These provisions were moved to the ground water law in Title 38 and rewritten to explicitly recognize municipal home rule as the source of the power.

Section 61 provides a general savings clause to ensure a smooth transition upon enactment of this bill. The purpose of the savings clause is to ensure that:

1. The passage of this bill will have no legal effect, procedural or substantive, upon any event that occurred before the bill's effective date;

2. No official action taken by any municipality before the effective date of this bill, including the selection of municipal officials and employees, will be affected in any way by the passage of this bill, except as provided below; and

3. The provisions of this bill, including the new standard of review created for municipal ordinances enacted under the municipality's home rule authority, will apply to any case which arises out of operative events which occur after the effective date of this bill, regardless of when the ordinance in question was enacted.

This section will ensure that ordinances and regulations adopted by municipalities before the effective date of this bill will not be voided by the passage of this bill, and that municipal officials and employees will not be inadvertently displaced by the passage of this bill. It also ensures that the new substantive home rule provisions will apply to all actions which arise out of events occurring after the bill's effective date.

ling and determinative of the issue concerning the 1965 agreement. See: *Lausier v. Lausier,* 123 Me. 530, 124 A. 582 (1924); *Plummer v. Plummer,* 137 Me. 39, 14 A.2d 705 (1940); *Coe v. Coe,* 145 Me. 71, 71 A.2d 514 (1950). Cf. *Doherty v. Russell,* 116 Me. 269, 101 A. 305 (1917).[9]

Plaintiffs were correctly awarded summary judgment in their favor on count one of defendant's counterclaim.

The entry is:

Appeal denied.

All Justices concurring.

TOWN OF ARUNDEL

v.

Morrill and Frances SWAIN.

Supreme Judicial Court of Maine.

June 8, 1977.

Town brought action to enjoin landowners from violation of local subdivision ordinance. The Superior Court, York County, entered judgment for the landowners and the town appealed. The Supreme Judicial Court, Delahanty, J., held that: (1) town was bound by legislative definition of subdivision in enabling statute; (2) creation of a campground was not within the statutory definition of a subdivision into lots, and (3) town had no jurisdiction over creation of campgrounds.

Appeal denied.

1. Zoning ⇐5

Municipalities taking advantage of zoning powers granted by statute are bound by legislative definitions.

2. Zoning ⇐278

Creation of specified number of campsites did not constitute a division into lots contemplated by statute empowering municipalities to make zoning laws respecting approval of a "subdivision." 30 M.R.S.A. § 4956.

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⇐181(1)

That construction should be placed on statute as may best answer intention which legislators had in view, and when determinable and ascertained, courts must give effect to it.

4. Municipal Corporations ⇐43

Statute relating to approval of subdivisions by municipalities and speaking of a "division" into lots contemplates the splitting off of an interest in land and creation, by means of one of various disposition modes recited in statute, of an interest in another.

See publication Words and Phrases for other judicial constructions and definitions.

5. Statutes ⇐188

Words are to be given their plain and natural meaning and are to be construed according to their natural import in common and approved usage.

9. We do not read *Carey v. Mackey,* 82 Me. 516, 20 A. 84 (1890) as inconsistent with our analysis here.

In *Carey* this Court interpreted a silent Florida divorce decree as leaving intact a previous separation agreement. Several factors, however, diminish the relevance of *Carey* for present purposes. First, while the Court held the agreement untouched by the Florida decree, it modified the agreement itself by crediting amounts paid under the decree to amounts due under the contract. Second, Florida apparently did not then recognize separation agreements as valid, so the Florida divorce court could not have modified what was to it an illegal contract. Third, for the same reason there was no Florida statutory equivalent of § 61.14 to clarify the issues raised in *Carey.* Fourth, it could be argued that the lump sum awarded by the decree was not inconsistent with the contractual provision of periodic payments.

6. Municipal Corporations ⇐43

Campground was not composed of requisite "lots" referred to in statute relating to municipality's approval of a subdivision defined as a division into "lots." 30 M.R.S.A. § 4956.

See publication Words and Phrases for other judicial constructions and definitions.

7. Statutes ⇐181(2), 184, 208

Absent legislative definition terms must be given meaning consistent with overall statutory context and must be construed in light of subject matter, purpose of statute, occasion and necessity for law, and consequences of particular interpretation.

Smith, Elliott, Wood & Nelson, P.A. by Alan S. Nelson, Saco, for plaintiff.

Reagan, Ayer & Adams by Wayne T. Adams, Kennebunk, for defendants.

Before DUFRESNE, C. J., and POMEROY, WERNICK, ARCHIBALD, DELAHANTY and GODFREY, JJ.

DELAHANTY, Justice.

By its complaint, the Town of Arundel (the Town) sought to enjoin defendants, Morrill and Frances Swain (the Swains), from violation of a local subdivision ordinance. From judgment entered for defendants, the Town appeals. We deny the appeal.

Pursuant to 30 M.R.S.A. § 4956,[1] the Town enacted a subdivision ordinance on March 17, 1972 which required local approval of subdivision developments. Although they believed that their proposed campground was not a subdivision and that, therefore, the Arundel Planning Board (the Board) had no jurisdiction over their endeavor, the Swains nevertheless submitted their plan to the Board on January 25, 1975. Under their preliminary plan, they sought permission to construct a campground, containing 101 campsites, with an operating season extending from Memorial Day to Labor Day. A camper would pay a fee to the Swains in return for the right to occupy a campsite for "a period of one day, several days or a longer period." Each campsite would have its own electrical, water, and sewer outlets and, in addition, all campers would have access to certain common facilities including toilets, showers and washing machines.

The Swains' plan was approved on May 5, 1975. But then on May 27, 1975 that approval was rescinded, allegedly in order to hold an additional public hearing as required by the Town subdivision ordinance. On June 9, 1975 the Town filed a complaint alleging that the respondents had willfully disregarded the rescission and had proceeded with the construction of roads and buildings for the campground without the requisite approval. Averring that irreparable injury would be suffered if the subdivision ordinance were permitted to be so openly violated, plaintiff asked that the Swains be enjoined from continuing with their endeavor.

On October 28, 1975 the defendants, pursuant to the camping area licensing provisions contained in 22 M.R.S.A. §§ 2491 *et seq.*, were granted a license from the State Department of Health and Welfare to operate a campground of seventy-five sites. The license provided that an additional twenty-six sites could be requested if an adequate water supply were established. On December 2, 1975, the Swains submitted to the Board a revised plan for 101 sites, although they specifically stated therein that they were not recognizing Board jurisdiction over the proposed campground.

Approximately two months later, on February 3, 1976, the Board granted approval for seventy-five campsites, but it limited its approval to only twenty-five campsites in the first year, with construction of an additional twenty-five sites in the second year and twenty-five in the third year being dependent upon certain factors such as the

1. 30 M.R.S.A. § 4956 provides in pertinent part:

2. Municipal review and regulation.

A. Reviewing authority. All requests for subdivision approval shall be reviewed by the municipal planning board . . ..

impact of the campground on road conditions and traffic safety.

On May 26, 1976 the Town moved to amend its original complaint, inserting a claim that the respondents had begun development of and intended to operate more than twenty-five campsites in the first year. Plaintiff asked that an order be issued requiring the Swains to comply with the Board conditions of February 3, 1976.

The presiding Justice issued an order denying the Town's motion, finding that the Town had failed to show a "sufficient jurisdictional basis for the granting of such extraordinary relief" and that "there has been no showing of irreparable harm." In response to plaintiff's motion for findings of fact and conclusions of law, the court filed a decree in which it said:

> The Court concludes as a matter of law that a campground is not a "subdivision" within the meaning of Title 30 M.R.S.A. Section 4956 as amended and, therefore that Petitioner lacks jurisdiction over the proposed development of a campground by respondents.

A final judgment was entered on May 10, 1977.[2]

[1] The sole question to be resolved in this case is whether the proposed campground is a "subdivision" within the meaning of 30 M.R.S.A. § 4956. If it is a subdivision, then the local ordinance enacted pursuant to § 4956 is applicable and the Town has jurisdiction over the proposed use.[3]

[2] A "subdivision" is defined in the statute as ". . . the division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by sale, lease, development, building or otherwise . . .." We do not believe that the creation of a specified number of campsites is the type of "division" into "lots" which was contemplated by the legislature when it enacted § 4956. Although we intend to intimate no opinion on the issue, we recognize that a campground might fall within the scope of the phrase "development, building or otherwise." However, since we find lacking the prescribed "division" into "lots," we remain convinced that a campground does not qualify as a "subdivision" within the purview of § 4956.

[3] In construing the statute, we must bear in mind the fundamental rule that

> [s]uch a construction ought be put upon a statute as may best answer the intention which the Legislators had in view, and when determinable and ascertained, the courts must give effect to it. *In re Spring Valley Development*, Me., 300 A.2d 736, 741 *citing King Resources Co. v. Environmental Improvement Commission*, Me., 270 A.2d 863, 869 (1970).

See also Natale v. Kennebunkport Board of Zoning Appeals, Me., 363 A.2d 1372 (1976); *Emple Knitting Mills v. City of Bangor*, 155 Me. 270, 153 A.2d 118 (1959). In *Blier v. Inhabitants of Town of Fort Kent*, Me., 273 A.2d 732 (1971) we said:

> Legislative expression must be read in the light of the lawmakers' purpose as

2. For clarification purposes, we note that the presiding Justice ordered the Town's motion for a temporary and permanent injunction denied on June 23, 1976. Judgment was entered accordingly. However, no order affirmatively granted relief for defendants until May 10, 1977 when, upon stipulation of counsel at oral argument and by leave of Court, a judgment of July 23, 1976 was finally filed. That judgment not only denied petitioner's motion but also directed that "final judgment upon the Complaint is ordered for the Defendants."

3. The local subdivision ordinance enacted by the Town has not been made a part of the record on appeal. However, since we are in accord with those jurisdictions which have held that the definition in the enabling statute controls, we can safely assume that the definition of subdivision is identical in both the ordinance and the enabling statute, 30 M.R.S.A. § 4956. *See The Peninsula Corp. v. Planning & Zoning Comm'n*, 149 Conn. 627, 183 A.2d 271 (1962); *Pratt v. Adams*, 229 Cal.App.2d 602, 40 Cal. Rept. 505 (1964); *Stoker v. Town of Irvington*, 71 N.J.Super. 370, 177 A.2d 61 (1961); *see generally* 3 A. Rathkopf, The Law of Zoning and Planning § 4 (3d ed. 1972). We fully agree with the principle that "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition." *Stoker, supra*, 71 N.J.Super. at 378, 177 A.2d at 66.

the object the statute designs to accomplish oftentimes furnishes the right key to the true meaning of any statutory clause or provision. *Id.* at 734 *citing Middleton's Case*, 136 Me. 108, 3 A.2d 434 (1939).

Ofttimes cited as a fundamental purpose of subdivision legislation is the protection of the purchaser or lessee of land from unscrupulous developers. *See, e. g.*, 3 A. Rathkopf, The Law of Zoning and Planning § 2 (3d ed. 1972). This goal is obviously only relevant when land is purchased or leased from a developer.[4]

Some enlightenment as to the lawmakers' intent can be gleaned from a reading of the enforcement section, 30 M.R.S.A. § 4956, which provides that a fine shall be charged against

> [a]ny person, firm, corporation or other legal entity who *sells, leases, or conveys for consideration, offers or agrees to sell, lease or convey for consideration* any land in a subdivision which has not been approved as required by this section . . . (emphasis added).

Since the sanctions are aimed at those who sell, lease or convey for consideration (or those who offer or agree to do so), it may reasonably be inferred that the legislature intended to protect only purchasers, lessees, or those receiving land for consideration.

[4] Accordingly, it is our judgment that when the statute speaks of a "division," it contemplates the splitting off of an interest in land and the creation, by means of one of the various disposition modes recited in § 4956, of an interest in another. This does *not* happen when a camper temporarily occupies a campsite.

[5, 6] We also believe that a campground is not composed of the requisite "lots" prescribed in the statute. Words are to be given their "plain and natural meaning" and are to be construed according to their "natural import in common and approved usage." *Moyer v. Board of Zoning Appeals*, Me., 233 A.2d 311, 317 (1967) *citing* 1 E. Yokley, Zoning Law & Practice § 184 (2d ed. 1953). A "lot" has been defined as "a measured parcel of land having fixed boundaries." Webster's Third New International Dictionary 1338 (1971). Nowhere in the stipulated facts before us is it stated that the campsites have clearly delineated or fixed boundaries, and we cannot assume that they are so precisely measured off.[5] *Pelletier v. Dwyer*, Me., 334 A.2d 867 (1975); *Trafton v. Hill*, 80 Me. 503, 15 A. 64 (1888).

Here, a single tract of land is involved, whether before or after its use as a campground. The situation is akin to the renting or occupying of space in an exhibition hall, a parking lot, or a drive-in theater. Of course, in all of these situations, land is somewhat parceled off, each customer being given a certain space to occupy for a certain period of time. But in our opinion this is not the type of "division" into "lots" which the legislature intended to regulate when it enacted § 4956.

[7] In our analysis we attempt to implement the sound principle of construction that

4. Specifically speaking of Maine's subdivision law, one commentator has noted that the state and municipality are interested in

> accurate surveying, monumenting and legal description of properties to prevent fraud, to facilitate the marketing and conveyancing of and to enable accurate tax assessment and collection[,]

considerations relevant only when land is bought and sold. O. Delogu, "Suggested Revisions in Maine's Planning and Land Use Control Legislation Part II," 21 Maine L.Rev. 151, 158 (1969).

5. Although, in our estimation, a campground is not divided into "lots" within the meaning of § 4956, this conclusion is not based upon our holding in *Robinson v. Board of Appeals*, Me., 356 A.2d 196 (1976), a case strongly relied upon by defendants. According to the Swains, *Robinson* held that "the application of lot size requirements to campgrounds is absurd." It is important to point out that our decision not to apply lot size requirements there was bottomed on an initial finding that a campground was not a "dwelling" to which the local zoning law would be applicable. Our holding today that a campground is not divided into "lots" is based solely on what we consider to be the common and natural meaning of the word. Defendants' reliance on *Robinson* is misplaced.

[a]bsent a legislative definition, the terms ["divide" and "lot"] must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation. *Finks v. Maine State Highway*, Me., 328 A.2d 791, 798 (1974) *citing Grudnosky v. Bislow*, 251 Minn. 496, 88 N.W.2d 847 (1958).

Having found the inherent policies of the subdivision law heavily directed toward protection of one taking an interest in land (as well as promotion of planned regulation of community growth), we conclude that a campground is not a subdivision within the scope of § 4956 and that therefore the Arundel Planning Board has no jurisdiction over the Swains' proposed endeavor.

The entry must be

Appeal denied.

All Justices concur.

STATE of Maine

v.

Kim CHARBONNEAU.

Supreme Judicial Court of Maine.

June 9, 1977.

Defendant was found guilty, after jury-waived trial, of attempted escape and he moved for judgment of acquittal. The Superior Court, Knox County, denied the motion and entered judgment on the verdict and appeal was filed. The Supreme Judicial Court held that defendant went far beyond preparation stage and was guilty of attempted escape where "dummy" was found in defendant's cell, defendant was in an unauthorized area attempting to conceal his presence and rope ladder was found in paper bag close to where defendant was concealed.

Appeal denied.

1. Criminal Law ⇐44

An "attempt" represents a positive action which exceeds preparation and is directed towards the execution of crime.

See publication Words and Phrases for other judicial constructions and definitions.

2. Escape ⇐5½

Inmate went far beyond preparation stage and was guilty of attempted escape where "dummy" was found in his cell, he was in unauthorized area attempting to conceal his presence and rope ladder was found in paper bag close to where he was concealed. 17 M.R.S.A. § 3401A, Laws 1971, c. 539, § 19.

Charles K. Leadbetter, Asst. Atty. Gen., Augusta, Frank F. Harding, Dist. Atty., Rockland, for plaintiff.

Robert J. Levine, Rockland, for defendant.

Before DUFRESNE, C. J., and POMEROY, WERNICK, ARCHIBALD, DELAHANTY and GODFREY, JJ.

PER CURIAM.

After a jury-waived trial appellant was found guilty of the crime of attempted escape from Maine State Prison. He moved for a judgment of acquittal. The court denied the motion and entered judgment on the verdict. It is from this judgment that the appeal was seasonably filed.

We deny the appeal.

The facts surrounding the attempted escape are not complex. Appellant had been convicted of armed robbery (former 17 M.R.S.A. § 3401–A). At the time of the incident which occasioned this appeal, he was in the lawful custody of the warden of the Maine State Prison in execution of sentence imposed upon the armed robbery conviction.

(EMERGENCY)
THIRD SPECIAL SESSION

H-814

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document NO. 26

H.P. 1981 House of Representatives, September 12, 198

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Received by the Clerk of the House on September 9, 1988. Referred to the Committee on Energy and Natural Resources and ordered printed pursuant to Joint Rule 14.

EDWIN H. PERT, Clerk

Presented by Speaker MARTIN of Eagle Lake.

Cosponsored by Representative MICHAUD of East Millinocket, Senators PERKINS of Hancock and CLARK of Cumberland.

STATE OF MAINE

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

AN ACT to Enhance Land Use Regulation.

Emergency preamble. Whereas, Acts of Legislature do not become effective until 90 after adjournment unless enacted as emergencies; an

Whereas, a recent decision of the Maine Su Judicial Court has construed the state law requ the review of subdivisions not to require review condominium, motel or multi-unit rental development

L.D. 2684

(Filing No. H-814)

STATE OF MAINE
HOUSE OF REPRESENTATIVES
113TH LEGISLATURE
THIRD SPECIAL SESSION

COMMITTEE AMENDMENT "A" to H.P. 1981, L.D. 2684, Bill, "AN ACT to Enhance Land Use Regulation."

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

'Sec. 1. 12 MRSA §682, sub-§2, as repealed and replaced by PL 1987, c. 810, §1, is amended to read:

2. Subdivision. A ~~subdivision is~~ "Subdivision" means a division of an existing parcel of land into 3 or more parcels or lots within any 5-year period, whether this division is accomplished by platting of the land for immediate or future sale, or by sale of the land by metes and bounds or by leasing.

The term "subdivision" shall also include the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this paragraph.

The creation of a lot or parcel more than 500 acres in size shall not be counted as a lot for the purpose of

~~land~~ real estate or subdivided ~~land~~ real estate recorded in violation of this section may recover the purchase price, at interest, together with damages and costs in addition to any other remedy provided by law.

Sec. 6. 30 MRSA §4956, sub-§1, as amended by PL 1987, c. 810, §2, is further amended to read:

1. Defined. A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise, provided that a division accomplished by devise, condemnation, order of court, gift to a person related to the donor by blood, marriage or adoption or a gift to a municipality, unless the intent of that gift is to avoid the objectives of this section, or by transfer of any interest in land to the owner of land abutting thereon, snall not be considered to create a lot or lots for the purposes of this section.

The term "subdivision" shall also include the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this paragraph.

Nothing in this section may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expands the definition of subdivision to include the division of a structure for commercial or industrial use or which otherwise regulates land use activities.

In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first 2 lots and the next dividing of either of the first 2 lots, by whomever accomplished, unless otherwise exempted herein, shall be considered to create a 3rd lot, unless both those dividings are accomplished by a

purpose of recording shall appear in writing on the plat or plan. No public utility, water district, sanitary district or any utility company of any kind may install services to any lot or dwelling unit in a subdivision, unless written authorization attesting to the validity and currency of all local permits required under this chapter has been issued by the appropriate municipal officials. Following installation of service, the company or district shall forward the written authorization to the municipal officials indicating that installation has been completed.

Any person, firm, corporation or other legal entity who sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision which has not been approved as required by this section shall be penalized in accordance with section 4966. The Attorney General, the municipality or the planning board of any municipality may institute proceedings to enjoin the violations of this section.

All subdivision plats and plans required by this section shall contain the name and address of the person under whose responsibility the subdivision plat or plan was prepared.

Sec. 9. Savings clause. All otherwise valid subdivision permits or approvals for developments which would require review under this Act and which were granted prior to the effective date of this Act and any conditions or requirements of those permits or approvals remain valid and enforceable.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.'

STATEMENT OF FACT

This amendment is intended to restore Maine's subdivision law to the construction generally given to it before the Town of York v. Cragin decision. It

rewrites the subdivision law to clarify that condominiums and multi-unit rental structures are subject to review under the same criteria applicable to conventional land subdivisions. Condominiums and multi-unit rental structures have become an increasingly frequent method of development in the State. Since the impact upon the environment and town services of a 50-unit condominium is virtually indistinguishable from the impact of a 50-unit land subdivision, logic dictates that if review of one project is necessary to prevent harmful consequences, the other project must be reviewed as well.

Recognizing that some municipalities have regulated these forms of development through other means, most notably site review ordinances, this legislation excludes rental units from subdivision review when the municipality has adopted other adequate land use review requirements.

This amendment also provides an express legislative acknowledgement of municipal home rule authority to include within the municipality's subdivision review ordinance the division of a structure for uses other than those specified in the statute. It does not require municipalities to review these other forms of division but simply acknowledges their home rule authority to require such reviews if the municipality chooses to.

This express acknowledgement of municipal home rule authority is made to overrule the suggestion in the Law Court's decision in Town of Arundel v. Swain, 374 A.2d 317 (Me. 1977), that a town's authority to conduct subdivision reviews is limited by the statutory definition of subdivision. This amendment follows the approach exemplified in PL 1987, c. 533, to clarify municipal home rule authority in this area. The subdivision statute is not an "enabling statute" as suggested by the Court in the Town of Arundel opinion, but is a mandate imposed upon municipalities to conduct a review of certain developments. As a statutory mandate, it describes those developments for which municipal review is required but does not restrict the type of developments which municipalities are permitted to

review. Interpreted under the standard of review found in the Maine Revised Statutes, Title 30, section 2151-A, the statute does not restrict a municipality's home rule authority to require the review of other developments by including them within the definition of "subdivision," except where the municipal definition would frustrate the purpose of the state statute.

The use of the term "unit" in the definition of "dwelling unit" does not necessarily require the delineation of precise boundaries. It is expected that the Law Court will continue to construe the law as it did in Planning Board of the Town of Naples v. Michaud, 444 A.2d 40 (Me. 1982), to apply to any reasonable identifiable area of the real estate for which a possessory interest is created.

The amendment also makes parallel changes to the subdivision laws administered by the Maine Land Use Regulation Commission.

The amendment also provides a savings clause to ensure that subdivision permits issued to "non-land subdivisions" before the Town of York v. Cragin decision remain valid and enforceable. These provisions ensure that, to the extent possible, the correct interpretation of the subdivision law will apply to all subdivision developments in the State.

It is the intent of the Legislature that existing exemptions for certain lots, such as transfers to abutters and gifts to family members, also apply to dwelling units.

Reported by the Committee on Energy and Natural Resources
Reproduced and distributed under the direction of the Clerk of the House
9/16/88 (Filing No. H-814)

Attachment 3

ling and determinative of the issue concerning the 1965 agreement. See: *Lausier v. Lausier,* 123 Me. 530, 124 A. 582 (1924); *Plummer v. Plummer,* 137 Me. 39, 14 A.2d 705 (1940); *Coe v. Coe,* 145 Me. 71, 71 A.2d 514 (1950). Cf. *Doherty v. Russell,* 116 Me. 269, 101 A. 305 (1917).[9]

Plaintiffs were correctly awarded summary judgment in their favor on count one of defendant's counterclaim.

The entry is:

Appeal denied.

All Justices concurring.

TOWN OF ARUNDEL

v.

Morrill and Frances SWAIN.

Supreme Judicial Court of Maine.

June 8, 1977.

Town brought action to enjoin landowners from violation of local subdivision ordinance. The Superior Court, York County, entered judgment for the landowners and the town appealed. The Supreme Judicial Court, Delahanty, J., held that: (1) town was bound by legislative definition of subdivision in enabling statute; (2) creation of a campground was not within the statutory definition of a subdivision into lots, and (3) town had no jurisdiction over creation of campgrounds.

Appeal denied.

1. Zoning ⇐5

Municipalities taking advantage of zoning powers granted by statute are bound by legislative definitions.

2. Zoning ⇐278

Creation of specified number of campsites did not constitute a division into lots contemplated by statute empowering municipalities to make zoning laws respecting approval of a "subdivision." 30 M.R.S.A. § 4956.

See publication Words and Phrases for other judicial constructions and definitions.

3. Statutes ⇐181(1)

That construction should be placed on statute as may best answer intention which legislators had in view, and when determinable and ascertained, courts must give effect to it.

4. Municipal Corporations ⇐43

Statute relating to approval of subdivisions by municipalities and speaking of a "division" into lots contemplates the splitting off of an interest in land and creation, by means of one of various disposition modes recited in statute, of an interest in another.

See publication Words and Phrases for other judicial constructions and definitions.

5. Statutes ⇐188

Words are to be given their plain and natural meaning and are to be construed according to their natural import in common and approved usage.

9. We do not read *Carey v. Mackey,* 82 Me. 516, 20 A. 84 (1890) as inconsistent with our analysis here.

In *Carey* this Court interpreted a silent Florida divorce decree as leaving intact a previous separation agreement. Several factors, however, diminish the relevance of *Carey* for present purposes. First, while the Court held the agreement untouched by the Florida decree, it modified the agreement itself by crediting amounts paid under the decree to amounts due under the contract. Second, Florida apparently did not then recognize separation agreements as valid, so the Florida divorce court could not have modified what was to it an illegal contract. Third, for the same reason there was no Florida statutory equivalent of § 61.14 to clarify the issues raised in *Carey.* Fourth, it could be argued that the lump sum awarded by the decree was not inconsistent with the contractual provision of periodic payments.

6. Municipal Corporations ⇐43

Campground was not composed of requisite "lots" referred to in statute relating to municipality's approval of a subdivision defined as a division into "lots." 30 M.R.S.A. § 4956.

See publication Words and Phrases for other judicial constructions and definitions.

7. Statutes ⇐181(2), 184, 208

Absent legislative definition terms must be given meaning consistent with overall statutory context and must be construed in light of subject matter, purpose of statute, occasion and necessity for law, and consequences of particular interpretation.

Smith, Elliott, Wood & Nelson, P.A. by Alan S. Nelson, Saco, for plaintiff.

Reagan, Ayer & Adams by Wayne T. Adams, Kennebunk, for defendants.

Before DUFRESNE, C. J., and POMEROY, WERNICK, ARCHIBALD, DELAHANTY and GODFREY, JJ.

DELAHANTY, Justice.

By its complaint, the Town of Arundel (the Town) sought to enjoin defendants, Morrill and Frances Swain (the Swains), from violation of a local subdivision ordinance. From judgment entered for defendants, the Town appeals. We deny the appeal.

Pursuant to 30 M.R.S.A. § 4956,[1] the Town enacted a subdivision ordinance on March 17, 1972 which required local approval of subdivision developments. Although they believed that their proposed campground was not a subdivision and that, therefore, the Arundel Planning Board (the Board) had no jurisdiction over their endeavor, the Swains nevertheless submitted their plan to the Board on January 25, 1975. Under their preliminary plan, they sought permission to construct a campground, containing 101 campsites, with an operating season extending from Memorial Day to Labor Day. A camper would pay a fee to the Swains in return for the right to occupy a campsite for "a period of one day, several days or a longer period." Each campsite would have its own electrical, water, and sewer outlets and, in addition, all campers would have access to certain common facilities including toilets, showers and washing machines.

The Swains' plan was approved on May 5, 1975. But then on May 27, 1975 that approval was rescinded, allegedly in order to hold an additional public hearing as required by the Town subdivision ordinance. On June 9, 1975 the Town filed a complaint alleging that the respondents had willfully disregarded the rescission and had proceeded with the construction of roads and buildings for the campground without the requisite approval. Averring that irreparable injury would be suffered if the subdivision ordinance were permitted to be so openly violated, plaintiff asked that the Swains be enjoined from continuing with their endeavor.

On October 28, 1975 the defendants, pursuant to the camping area licensing provisions contained in 22 M.R.S.A. §§ 2491 *et seq.*, were granted a license from the State Department of Health and Welfare to operate a campground of seventy-five sites. The license provided that an additional twenty-six sites could be requested if an adequate water supply were established. On December 2, 1975, the Swains submitted to the Board a revised plan for 101 sites, although they specifically stated therein that they were not recognizing Board jurisdiction over the proposed campground.

Approximately two months later, on February 3, 1976, the Board granted approval for seventy-five campsites, but it limited its approval to only twenty-five campsites in the first year, with construction of an additional twenty-five sites in the second year and twenty-five in the third year being dependent upon certain factors such as the

1. 30 M.R.S.A. § 4956 provides in pertinent part:

2. Municipal review and regulation.

A. Reviewing authority. All requests for subdivision approval shall be reviewed by the municipal planning board . . ..

impact of the campground on road conditions and traffic safety.

On May 26, 1976 the Town moved to amend its original complaint, inserting a claim that the respondents had begun development of and intended to operate more than twenty-five campsites in the first year. Plaintiff asked that an order be issued requiring the Swains to comply with the Board conditions of February 3, 1976.

The presiding Justice issued an order denying the Town's motion, finding that the Town had failed to show a "sufficient jurisdictional basis for the granting of such extraordinary relief" and that "there has been no showing of irreparable harm." In response to plaintiff's motion for findings of fact and conclusions of law, the court filed a decree in which it said:

> The Court concludes as a matter of law that a campground is not a "subdivision" within the meaning of Title 30 M.R.S.A. Section 4956 as amended and, therefore that Petitioner lacks jurisdiction over the proposed development of a campground by respondents.

A final judgment was entered on May 10, 1977.[2]

[1] The sole question to be resolved in this case is whether the proposed campground is a "subdivision" within the meaning of 30 M.R.S.A. § 4956. If it is a subdivision, then the local ordinance enacted pursuant to § 4956 is applicable and the Town has jurisdiction over the proposed use.[3]

[2] A "subdivision" is defined in the statute as ". . . the division of a tract or parcel of land into three or more lots within any five-year period whether accomplished by sale, lease, development, building or otherwise . . .." We do not believe that the creation of a specified number of campsites is the type of "division" into "lots" which was contemplated by the legislature when it enacted § 4956. Although we intend to intimate no opinion on the issue, we recognize that a campground might fall within the scope of the phrase "development, building or otherwise." However, since we find lacking the prescribed "division" into "lots," we remain convinced that a campground does not qualify as a "subdivision" within the purview of § 4956.

[3] In construing the statute, we must bear in mind the fundamental rule that

> [s]uch a construction ought be put upon a statute as may best answer the intention which the Legislators had in view, and when determinable and ascertained, the courts must give effect to it. *In re Spring Valley Development*, Me., 300 A.2d 736, 741 *citing King Resources Co. v. Environmental Improvement Commission*, Me., 270 A.2d 863, 869 (1970).

See also Natale v. Kennebunkport Board of Zoning Appeals, Me., 363 A.2d 1372 (1976); *Emple Knitting Mills v. City of Bangor*, 155 Me. 270, 153 A.2d 118 (1959). In *Blier v. Inhabitants of Town of Fort Kent*, Me., 273 A.2d 732 (1971) we said:

> Legislative expression must be read in the light of the lawmakers' purpose as

2. For clarification purposes, we note that the presiding Justice ordered the Town's motion for a temporary and permanent injunction denied on June 23, 1976. Judgment was entered accordingly. However, no order affirmatively granted relief for defendants until May 10, 1977 when, upon stipulation of counsel at oral argument and by leave of Court, a judgment of July 23, 1976 was finally filed. That judgment not only denied petitioner's motion but also directed that "final judgment upon the Complaint is ordered for the Defendants."

3. The local subdivision ordinance enacted by the Town has not been made a part of the record on appeal. However, since we are in accord with those jurisdictions which have held that the definition in the enabling statute controls, we can safely assume that the definition of subdivision is identical in both the ordinance and the enabling statute, 30 M.R.S.A. § 4956. *See The Peninsula Corp. v. Planning & Zoning Comm'n*, 149 Conn. 627, 183 A.2d 271 (1962); *Pratt v. Adams*, 229 Cal.App.2d 602, 40 Cal. Rept. 505 (1964); *Stoker v. Town of Irvington*, 71 N.J.Super. 370, 177 A.2d 61 (1961); *see generally* 3 A. Rathkopf, The Law of Zoning and Planning § 4 (3d ed. 1972). We fully agree with the principle that "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition." *Stoker, supra*, 71 N.J.Super. at 378, 177 A.2d at 66.

the object the statute designs to accomplish oftentimes furnishes the right key to the true meaning of any statutory clause or provision. *Id.* at 734 *citing Middleton's Case*, 136 Me. 108, 3 A.2d 434 (1939).

Ofttimes cited as a fundamental purpose of subdivision legislation is the protection of the purchaser or lessee of land from unscrupulous developers. *See, e. g.*, 3 A. Rathkopf, The Law of Zoning and Planning § 2 (3d ed. 1972). This goal is obviously only relevant when land is purchased or leased from a developer.[4]

Some enlightenment as to the lawmakers' intent can be gleaned from a reading of the enforcement section, 30 M.R.S.A. § 4956, which provides that a fine shall be charged against

> [a]ny person, firm, corporation or other legal entity who *sells, leases, or conveys for consideration, offers or agrees to sell, lease or convey for consideration* any land in a subdivision which has not been approved as required by this section . . . (emphasis added).

Since the sanctions are aimed at those who sell, lease or convey for consideration (or those who offer or agree to do so), it may reasonably be inferred that the legislature intended to protect only purchasers, lessees, or those receiving land for consideration.

[4] Accordingly, it is our judgment that when the statute speaks of a "division," it contemplates the splitting off of an interest in land and the creation, by means of one of the various disposition modes recited in § 4956, of an interest in another. This does *not* happen when a camper temporarily occupies a campsite.

[5, 6] We also believe that a campground is not composed of the requisite "lots" prescribed in the statute. Words are to be given their "plain and natural meaning" and are to be construed according to their "natural import in common and approved usage." *Moyer v. Board of Zoning Appeals*, Me., 233 A.2d 311, 317 (1967) *citing* 1 E. Yokley, Zoning Law & Practice § 184 (2d ed. 1953). A "lot" has been defined as "a measured parcel of land having fixed boundaries." Webster's Third New International Dictionary 1338 (1971). Nowhere in the stipulated facts before us is it stated that the campsites have clearly delineated or fixed boundaries, and we cannot assume that they are so precisely measured off.[5] *Pelletier v. Dwyer*, Me., 334 A.2d 867 (1975); *Trafton v. Hill*, 80 Me. 503, 15 A. 64 (1888).

Here, a single tract of land is involved, whether before or after its use as a campground. The situation is akin to the renting or occupying of space in an exhibition hall, a parking lot, or a drive-in theater. Of course, in all of these situations, land is somewhat parceled off, each customer being given a certain space to occupy for a certain period of time. But in our opinion this is not the type of "division" into "lots" which the legislature intended to regulate when it enacted § 4956.

[7] In our analysis we attempt to implement the sound principle of construction that

4. Specifically speaking of Maine's subdivision law, one commentator has noted that the state and municipality are interested in

> accurate surveying, monumenting and legal description of properties to prevent fraud, to facilitate the marketing and conveyancing of and to enable accurate tax assessment and collection[,]

considerations relevant only when land is bought and sold. O. Delogu, "Suggested Revisions in Maine's Planning and Land Use Control Legislation Part II," 21 Maine L.Rev. 151, 158 (1969).

5. Although, in our estimation, a campground is not divided into "lots" within the meaning of § 4956, this conclusion is not based upon our holding in *Robinson v. Board of Appeals*, Me., 356 A.2d 196 (1976), a case strongly relied upon by defendants. According to the Swains, *Robinson* held that "the application of lot size requirements to campgrounds is absurd." It is important to point out that our decision not to apply lot size requirements there was bottomed on an initial finding that a campground was not a "dwelling" to which the local zoning law would be applicable. Our holding today that a campground is not divided into "lots" is based solely on what we consider to be the common and natural meaning of the word. Defendants' reliance on *Robinson* is misplaced.

[a]bsent a legislative definition, the terms ["divide" and "lot"] must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation. *Finks v. Maine State Highway,* Me., 328 A.2d 791, 798 (1974) *citing Grudnosky v. Bislow,* 251 Minn. 496, 88 N.W.2d 847 (1958).

Having found the inherent policies of the subdivision law heavily directed toward protection of one taking an interest in land (as well as promotion of planned regulation of community growth), we conclude that a campground is not a subdivision within the scope of § 4956 and that therefore the Arundel Planning Board has no jurisdiction over the Swains' proposed endeavor.

The entry must be

Appeal denied.

All Justices concur.

STATE of Maine

v.

Kim CHARBONNEAU.

Supreme Judicial Court of Maine.

June 9, 1977.

Defendant was found guilty, after jury-waived trial, of attempted escape and he moved for judgment of acquittal. The Superior Court, Knox County, denied the motion and entered judgment on the verdict and appeal was filed. The Supreme Judicial Court held that defendant went far beyond preparation stage and was guilty of attempted escape where "dummy" was found in defendant's cell, defendant was in an unauthorized area attempting to conceal his presence and rope ladder was found in paper bag close to where defendant was concealed.

Appeal denied.

1. Criminal Law ⇐44

An "attempt" represents a positive action which exceeds preparation and is directed towards the execution of crime.

See publication Words and Phrases for other judicial constructions and definitions.

2. Escape ⇐5½

Inmate went far beyond preparation stage and was guilty of attempted escape where "dummy" was found in his cell, he was in unauthorized area attempting to conceal his presence and rope ladder was found in paper bag close to where he was concealed. 17 M.R.S.A. § 3401A, Laws 1971, c. 539, § 19.

Charles K. Leadbetter, Asst. Atty. Gen., Augusta, Frank F. Harding, Dist. Atty., Rockland, for plaintiff.

Robert J. Levine, Rockland, for defendant.

Before DUFRESNE, C. J., and POMEROY, WERNICK, ARCHIBALD, DELAHANTY and GODFREY, JJ.

PER CURIAM.

After a jury-waived trial appellant was found guilty of the crime of attempted escape from Maine State Prison. He moved for a judgment of acquittal. The court denied the motion and entered judgment on the verdict. It is from this judgment that the appeal was seasonably filed.

We deny the appeal.

The facts surrounding the attempted escape are not complex. Appellant had been convicted of armed robbery (former 17 M.R.S.A. § 3401–A). At the time of the incident which occasioned this appeal, he was in the lawful custody of the warden of the Maine State Prison in execution of sentence imposed upon the armed robbery conviction.

Attachment 4

LAWS

OF THE

STATE OF MAINE

THIS VOLUME CONTAINS

Public Laws and Constitutional Resolutions

AS PASSED AT THE
THIRD AND FOURTH SPECIAL SESSIONS
OF THE
ONE HUNDRED AND THIRTEENTH LEGISLATURE
AND

Private and Special Laws and Resolves

AS PASSED AT THE
FIRST REGULAR SESSION
DECEMBER 3, 1986 TO JUNE 30, 1987
FIRST SPECIAL SESSION
OCTOBER 9, 1987 TO OCTOBER 10, 1987
SECOND SPECIAL SESSION
OCTOBER 21, 1987 TO NOVEMBER 20, 1987
SECOND REGULAR SESSION
JANUARY 6, 1988 TO MAY 5, 1988
THIRD SPECIAL SESSION
SEPTEMBER 15, 1988 TO SEPTEMBER 16, 1988
AND THE
FOURTH SPECIAL SESSION
NOVEMBER 28, 1988

	1988-89
PREVENTIVE HEALTH AND HEALTH SERVICE BLOCK GRANT	
TOTAL	$ 0

Sec. 7. **Allocation.** In order to provide for the necessary expenses of operation and administration of the Bureau of Alcoholic Beverages and the State Liquor Commission, the following amount is allocated from the revenues derived from operations of the fund:

	1988-89
FINANCE, DEPARTMENT OF	
Alcoholic Beverages — General Operations	
Personal Services	$ 1,935
DEPARTMENT OF FINANCE TOTAL	$ 1,935

Sec. 8. **Legislative intent.** It is the intent of the Legislature that the reclassifications and range changes represented by the appropriation and allocation amounts identified in this Part shall be considered effective upon approval of this Act.

It is also the intent of the Legislature that the appropriation and allocation of funds in this Part shall be construed as an extraordinary funding of reclassifications and range changes, shall not be construed as setting precedent and shall not be regarded as past practice in labor-management relations.

PART C

Sec. 1. 3 MRSA §225, sub-§5, as enacted by PL 1977, c. 605, §1, is repealed.

Sec. 2. 30 MRSA §1997-A, as enacted by PL 1985, c. 765, §5, is amended by adding at the end a new paragraph to read:

No department, agency or instrumentality of the State may provide any funds, grants, gifts or services to any commission which does not provide the results of any financial audit of any of its operations, including those of its subsidiary corporations, to any of its constituent municipalities.

Sec. 3. 30-A MRSA §2325, sub-§3 is enacted to read:

3. Prohibition. No department, agency or instrumentality of the State may provide any funds, grants, gifts or services to any commission which does not provide the results of any financial audit of any of its operations, including those of its subsidiary corporations, to any of its constituent municipalities.

Sec. 4. 38 MRSA §357, as enacted by PL 1987, c. 349, Pt. H, § 28, is amended to read:

§357. Procedure

Within 90 days of the completion of litigation or settlement for which compensation for legal expenses is available under section 356, a municipality may apply to the Board of Environmental Protection for reimbursement of such of those expenses as have not been awarded to it by the court and paid pursuant to Title 30, section 4966, subsection 3, paragraph D. The board shall make an award of compensation that it determines to be just under the circumstances. In order to be awarded compensation, it shall not be necessary that the municipality shall have prevailed in the litigation or the settlement, but only that its position be determined by the board to have been reasonable. Awards shall be made on a first-come first-served basis.

Sec. 5. **Transfer of funds.** The Governor, upon recommendation by the State Budget Officer, is authorized to transfer funds from the appropriate salary plan in order to provide funding to meet the costs of authorized market salary adjustments in accordance with the Maine Revised Statutes, Title 5, section 7065.

Sec. 6. **Effective date.** Section 2 of this Part is repealed on March 1, 1989 and section 3 of this Part shall take effect on March 1, 1989.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective September 23, 1988, unless otherwise indicated.

CHAPTER 885

H.P. 1981 — L.D. 2684

AN ACT to Enhance Land Use Regulation.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, a recent decision of the Maine Supreme Judicial Court has construed the state law requiring the review of subdivisions not to require reviews of condominium, motel or multi-unit rental developments; and

Whereas, this decision permits such developments to proceed in many cases without any review as to their potential harmful effects on the environment and municipal services; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 12 MRSA §682, sub-§2, as repealed and

replaced by PL 1987, c. 810, §1, is amended to read:

2. Subdivision. ~~A subdivision is~~ "Subdivision" means a division of an existing parcel of land into 3 or more parcels or lots within any 5-year period, whether this division is accomplished by platting of the land for immediate or future sale, or by sale of the land by metes and bounds or by leasing.

The term "subdivision" shall also include the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this paragraph.

The creation of a lot or parcel more than 500 acres in size shall not be counted as a lot for the purpose of this subsection.

The creation of a lot or parcel of at least 40 but not more than 500 acres in size shall not be counted as a lot for the purpose of this subsection except when the lot or the parcel from which it was divided is located wholly or partly within the shoreland area as defined in Title 38, section 435 and except as provided in paragraph A.

A. When 3 or more lots containing at least 40 but not more than 500 acres are created within a 5-year period from a parcel which is located wholly outside the shoreland area as defined in Title 38, section 435, a plan showing the division of the original parcel must be filed by the person creating the 3rd lot with the registry of deeds, the commission and the State Tax Assessor within 60 days of the creation of that lot. Any subsequent division of a lot created from the original parcel within 10 years of the filing of the plan in the registry of deeds shall be considered a subdivision. Failure to file the plan required by this paragraph is a violation of this chapter subject to the penalties provided in section 685-C, subsection 8.

B. The commission shall submit a report by March 15th, annually, to the joint standing committee of the Legislature having jurisdiction over energy and natural resources. The report shall indicate the number and location of lots for which a plan was filed under paragraph A and the number and location of subsequent divisions requiring review by the commission.

Sec. 2. **12 MRSA §682, sub-§§11 and 12** are enacted to read:

11. Dwelling unit. "Dwelling unit" means any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, condominiums, time-share units, and apartments.

12. Real estate. "Real estate" means land and structures attached to it.

Sec. 3. **12 MRSA §685-B, sub-§1, ¶B**, as amended by PL 1973, c. 569, §11, is further amended to read:

B. No person ~~shall~~ may commence development of or construction on any lot ~~or~~, parcel or dwelling unit within any subdivision or sell or offer for sale any interest in any lot ~~or~~, parcel or dwelling unit within any subdivision without a permit issued by the commission.

Sec. 4. **12 MRSA §685-B, sub-§2, ¶A**, as amended by PL 1973, c. 569, §11, is further amended to read:

A. A plan of the proposed structure, subdivision or development showing the intended use of the ~~land~~ real estate, the proposed change, the details of the project and such other information as may be required by the commission to determine conformance with applicable land use standards; and

Sec. 5. **12 MRSA §685-B, sub-§6**, as amended by PL 1973 c. 569, §11, is further amended to read:

6. Recording of approved proposals. A copy of each application, marked approved or disapproved, shall be retained in the commission files and shall be available to the public during normal business hours.

In the event the commission approves an application for subdivision approval, a copy of an approved plat or plan and a copy of the conditions required by the commission to be set forth in any instrument conveying an interest within the subdivision attested to by an authorized commission signature shall be filed with the appropriate registry of deeds in the county in which the ~~land~~ real estate lies.

A registrar of deeds shall not record a copy of conditions or any plat or plan purporting to subdivide ~~land~~ real estate located within the unorganized and deorganized lands of the State, unless the commission's approval is evidenced thereon.

The grantee of any conveyance of unrecorded subdivided ~~land~~ real estate or subdivided ~~land~~ real estate recorded in violation of this section may recover the purchase price, at interest, together with damages and costs in addition to any other remedy provided by law.

Sec. 6. **30 MRSA §4956, sub-§1**, as amended by PL 1987, c. 810, §2, is further amended to read:

1. Defined. A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise, provided that a division accomplished by devise, condemnation, order of court, gift to a person related to the donor by blood, marriage or adoption or a gift to a municipality, unless the intent of that gift is to avoid the objectives of this section, or by transfer of

any interest in land to the owner of land abutting thereon, shall not be considered to create a lot or lots for the purposes of this section.

The term "subdivision" shall also include the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this paragraph.

Nothing in this section may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expands the definition of subdivision to include the division of a structure for commercial or industrial use or which otherwise regulates land use activities.

In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first 2 lots and the next dividing of either of the first 2 lots, by whomever accomplished, unless otherwise exempted herein, shall be considered to create a 3rd lot, unless both those dividings are accomplished by a subdivider who shall have retained one of the lots for his own use as a ~~single family~~ single-family residence or for open space land as defined in Title 36, section 1102 for a period of at least 5 years prior to that 2nd dividing.

A lot of at least 40 acres shall not be counted as a lot, except:

A. Where the lot or parcel from which it was divided is located wholly or partly within any shoreland area as defined in Title 38, section 435; or

B. When a municipality has, by ordinance, or the municipal reviewing authority has, by regulation, elected to count lots of 40 acres or more in size as lots for the purposes of this subsection where the parcel of land being divided is located wholly outside any shoreland area as defined in Title 38, section 435.

In determining the number of dwelling units in a structure, the provisions regarding the determination of the number of lots shall apply, including exemptions from the definition of a subdivision of land.

For the purposes of this section, a tract or parcel of land is defined as all contiguous land in the same ownership, provided that lands located on opposite sides of a public or private road shall be considered each a separate tract or parcel of land unless such road was established by the owner of land on both sides thereof.

A "densely developed area" is defined as any commercial, industrial or compact residential area of 10 or more acres with an existing density of at least one principal structure per 2 acres. A principal structure is defined as any building other than one which is used for purposes wholly incidental or accessory to the use of another building on the same premises.

A "dwelling unit" means any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, condominiums, time-share units, and apartments. Notwithstanding the provisions of this paragraph, leased dwelling units are not subject to subdivision review if the units are otherwise subject to municipal review at least as stringent as that required under this section.

Sec. 7. 30 MRSA §4956, sub-§3, ¶N, as enacted by PL 1985, c. 794, Pt. A, §2, is amended to read:

N. The subdivider will determine, based on the Federal Emergency Management Agency's Flood Boundary and Floodway Maps and Flood Insurance Rate Maps, whether the subdivision is in a flood-prone area. If the subdivision, or any part of it, is in such an area the subdivider will determine the 100-year flood elevation and flood hazard boundaries within the subdivision. The proposed subdivision plan shall include a condition of plat approval requiring that principal structures ~~on lots~~ in the subdivision shall be constructed with their lowest floor, including the basement, at least one foot above the 100-year flood elevation.

Sec. 8. 30 MRSA §4956, sub-§4, as amended by PL 1985, c. 206, §2, is further amended to read:

4. Enforcement. No person, firm, corporation or other legal entity may sell, lease, develop, build upon or convey for consideration, offer or agree to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision which has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and recorded in the proper registry of deeds, nor shall such person, firm, corporation or other legal entity sell or convey any land in ~~such~~ an approved subdivision unless at least one permanent marker is set at one lot corner of the lot sold or conveyed. The term "permanent marker" includes but is not limited to the following: A granite monument, a concrete monument, an iron pin or a drill hole in ledge. No subdivision plat or plan shall be recorded by any register of deeds which has not been approved as required. Approval for the purpose of recording shall appear in writing on the plat or plan. No public utility, water district, sanitary district or any utility company of any kind may install services to any lot or dwelling unit in a subdivision, unless written authorization attesting to the validity and currency of all local permits required under this chapter has been issued by the appropriate municipal officials. Following installation of service, the company or district shall forward the written authorization to the municipal officials indicating that installation has been completed.

Any person, firm, corporation or other legal entity who

sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision which has not been approved as required by this section shall be penalized in accordance with section 4966. The Attorney General, the municipality or the planning board of any municipality may institute proceedings to enjoin the violations of this section.

All subdivision plats and plans required by this section shall contain the name and address of the person under whose responsibility the subdivision plat or plan was prepared.

Sec. 9. Savings clause. All otherwise valid subdivision permits or approvals for developments which would require review under this Act and which were granted prior to the effective date of this Act and any conditions or requirements of those permits or approvals remain valid and enforceable.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

Effective September 23, 1988.

CHAPTER 886

H.P. 1990 — L.D. 2692

AN ACT Relating to Horse Racing and Racing Facilities.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, harness racing is one of Maine's most important recreational activities; and

Whereas, harness racing is vital for the continued prosperity of those agricultural societies which conduct pari-mutuel wagering; and

Whereas, the harness racing industry is in jeopardy because of increased costs of maintenance and labor and is in immediate need of relief; and

Whereas, this Act should become effective immediately to provide additional funds for the State Harness Racing Commission to operate efficiently; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

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

Sec. 1. 8 MRSA §268, as repealed and replaced by PL 1975, c. 309, is amended by adding at the end a new paragraph to read:

The commission may make rules allowing interstate simulcasting at a licensee's race track during any regular meeting.

Sec. 2. 8 MRSA §275, first ¶, as amended by PL 1987, c. 759, §5, is further amended to read:

Beginning January 1, 1983, each person, association or corporation licensed to conduct a race meet under this chapter shall pay to the Treasurer of State, to be credited to the General Fund of the State, a sum equal to .50% of the total contributions of regular wagers and 2.27% of the total contributions of exotic wagers to all pari-mutuel pools conducted or made at any race or race meet licensed under this chapter. If the total of the regular and exotic wagers exceeds $37,000,000 for any calendar year, 72% of the revenue credited to the General Fund under this section attributable to this excess shall be returned by the Treasurer of State to commercial meet licensees. As used in this chapter, the term "commercial meet" means any meeting where harness racing is held with an annual total of more than 25 racing days duration with pari-mutuel wagering. This payment shall be divided in the proportion that the contributors of regular and exotic wagers of pari-mutuel pools made or conducted at the commercial meets of each licensee during the calendar year bear to the total contributions of regular and exotic wagers to pari-mutuel pools made or conducted at the commercial meets of all licensees during that calendar year. Licensees sharing in this distribution shall use 1/2 of the funds so received for the purpose of supplementing purse money. The other 1/2 of this distribution is to be used by the commercial licensees for improving ~~its~~ their racing facilities for the benefit of the public, horse owners, horsemen and horsewomen, and to increase the revenue to the State from the increase in pari-mutuel wagering resulting from such improvements. For the purpose of this section, "improvements" means the amount paid out for new buildings or for permanent improvements made to improve the facilities utilized by the licensee for conduct of its racing meetings; or the amount expended in restoring property or in improving the facility or any part of the facility which results in the addition or replacement of a fixed asset. In general, the amounts referred to as improvements include amounts paid which add to the value, improve or substantially prolong the useful life of the race track utilized by the licensee for the conduct of its racing meeting. Amounts paid or incurred for repairs and maintenance of property, interest expense or lease payments in connection with the capital improvements are not improvements within the meaning of this section. In addition, 9% of the revenue credited to the General Fund under this section attributable to this excess shall be distributed to the stipend fund provided by Title 7, section 62. Further, 9% of the revenue credited to the General Fund under this section attributable to this excess shall be paid to the commission to be credit-

(EMERGENCY)
THIRD SPECIAL SESSION

H-814

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document NO. 26

H.P. 1981 House of Representatives, September 12, 198

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 26.

Received by the Clerk of the House on September 9, 1988. Referred to the Committee on Energy and Natural Resources and ordered printed pursuant to Joint Rule 14.

EDWIN H. PERT, Clerk

Presented by Speaker MARTIN of Eagle Lake.

Cosponsored by Representative MICHAUD of East Millinocket, Senators PERKINS of Hancock and CLARK of Cumberland.

STATE OF MAINE

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

AN ACT to Enhance Land Use Regulation.

Emergency preamble. Whereas, Acts of Legislature do not become effective until 90 after adjournment unless enacted as emergencies; an

Whereas, a recent decision of the Maine Su Judicial Court has construed the state law requ the review of subdivisions not to require review condominium, motel or multi-unit rental development

L.D. 2684

(Filing No. H-814)

STATE OF MAINE
HOUSE OF REPRESENTATIVES
113TH LEGISLATURE
THIRD SPECIAL SESSION

COMMITTEE AMENDMENT "A" to H.P. 1981, L.D. 2684, Bill, "AN ACT to Enhance Land Use Regulation."

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

'Sec. 1. 12 MRSA §682, sub-§2, as repealed and replaced by PL 1987, c. 810, §1, is amended to read:

2. Subdivision. A ~~subdivision is~~ "Subdivision" means a division of an existing parcel of land into 3 or more parcels or lots within any 5-year period, whether this division is accomplished by platting of the land for immediate or future sale, or by sale of the land by metes and bounds or by leasing.

The term "subdivision" shall also include the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this paragraph.

The creation of a lot or parcel more than 500 acres in size shall not be counted as a lot for the purpose of

~~land~~ real estate or subdivided ~~land~~ real estate recorded in violation of this section may recover the purchase price, at interest, together with damages and costs in addition to any other remedy provided by law.

Sec. 6. 30 MRSA §4956, sub-§1, as amended by PL 1987, c. 810, §2, is further amended to read:

1. Defined. A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise, provided that a division accomplished by devise, condemnation, order of court, gift to a person related to the donor by blood, marriage or adoption or a gift to a municipality, unless the intent of that gift is to avoid the objectives of this section, or by transfer of any interest in land to the owner of land abutting thereon, snall not be considered to create a lot or lots for the purposes of this section.

The term "subdivision" shall also include the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this paragraph.

Nothing in this section may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expands the definition of subdivision to include the division of a structure for commercial or industrial use or which otherwise regulates land use activities.

In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first 2 lots and the next dividing of either of the first 2 lots, by whomever accomplished, unless otherwise exempted herein, shall be considered to create a 3rd lot, unless both those dividings are accomplished by a

purpose of recording shall appear in writing on the plat or plan. No public utility, water district, sanitary district or any utility company of any kind may install services to any lot or dwelling unit in a subdivision, unless written authorization attesting to the validity and currency of all local permits required under this chapter has been issued by the appropriate municipal officials. Following installation of service, the company or district shall forward the written authorization to the municipal officials indicating that installation has been completed.

Any person, firm, corporation or other legal entity who sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision which has not been approved as required by this section shall be penalized in accordance with section 4966. The Attorney General, the municipality or the planning board of any municipality may institute proceedings to enjoin the violations of this section.

All subdivision plats and plans required by this section shall contain the name and address of the person under whose responsibility the subdivision plat or plan was prepared.

Sec. 9. Savings clause. All otherwise valid subdivision permits or approvals for developments which would require review under this Act and which were granted prior to the effective date of this Act and any conditions or requirements of those permits or approvals remain valid and enforceable.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.'

STATEMENT OF FACT

This amendment is intended to restore Maine's subdivision law to the construction generally given to it before the Town of York v. Cragin decision. It

rewrites the subdivision law to clarify that condominiums and multi-unit rental structures are subject to review under the same criteria applicable to conventional land subdivisions. Condominiums and multi-unit rental structures have become an increasingly frequent method of development in the State. Since the impact upon the environment and town services of a 50-unit condominium is virtually indistinguishable from the impact of a 50-unit land subdivision, logic dictates that if review of one project is necessary to prevent harmful consequences, the other project must be reviewed as well.

Recognizing that some municipalities have regulated these forms of development through other means, most notably site review ordinances, this legislation excludes rental units from subdivision review when the municipality has adopted other adequate land use review requirements.

This amendment also provides an express legislative acknowledgement of municipal home rule authority to include within the municipality's subdivision review ordinance the division of a structure for uses other than those specified in the statute. It does not require municipalities to review these other forms of division but simply acknowledges their home rule authority to require such reviews if the municipality chooses to.

This express acknowledgement of municipal home rule authority is made to overrule the suggestion in the Law Court's decision in Town of Arundel v. Swain, 374 A.2d 317 (Me. 1977), that a town's authority to conduct subdivision reviews is limited by the statutory definition of subdivision. This amendment follows the approach exemplified in PL 1987, c. 533, to clarify municipal home rule authority in this area. The subdivision statute is not an "enabling statute" as suggested by the Court in the Town of Arundel opinion, but is a mandate imposed upon municipalities to conduct a review of certain developments. As a statutory mandate, it describes those developments for which municipal review is required but does not restrict the type of developments which municipalities are permitted to

review. Interpreted under the standard of review found in the Maine Revised Statutes, Title 30, section 2151-A, the statute does not restrict a municipality's home rule authority to require the review of other developments by including them within the definition of "subdivision," except where the municipal definition would frustrate the purpose of the state statute.

The use of the term "unit" in the definition of "dwelling unit" does not necessarily require the delineation of precise boundaries. It is expected that the Law Court will continue to construe the law as it did in Planning Board of the Town of Naples v. Michaud, 444 A.2d 40 (Me. 1982), to apply to any reasonable identifiable area of the real estate for which a possessory interest is created.

The amendment also makes parallel changes to the subdivision laws administered by the Maine Land Use Regulation Commission.

The amendment also provides a savings clause to ensure that subdivision permits issued to "non-land subdivisions" before the Town of York v. Cragin decision remain valid and enforceable. These provisions ensure that, to the extent possible, the correct interpretation of the subdivision law will apply to all subdivision developments in the State.

It is the intent of the Legislature that existing exemptions for certain lots, such as transfers to abutters and gifts to family members, also apply to dwelling units.

Reported by the Committee on Energy and Natural Resources
Reproduced and distributed under the direction of the Clerk of the House
9/16/88 (Filing No. H-814)

Attachment 5

Legislative History of Title 30-A Section 4401-4407, Municipal Subdivision Law.

PL 1943, Chapter 199. "An Act Relating to Municipal Planning and Zoning." This Act provided municipalities with the authority to create a planning board that would be necessary for the future development of the municipality. The planning board was also given the authority of enforcement. This Act required that the plats of a subdivision must be approved by the municipal officers and that approval must be indicated on the plat prior to filing it with the registry of deeds. The Act further stated that an individual may not transfer, sell or otherwise agree or negotiate to sell any land by reference to the plat of a subdivision of land into 5 or more lots prior to that plat being approved by the municipal officers. The Act imposed a $200 penalty for a transfer of land that has not been approved by the planning board.

PL 1945, Chapter 24. "An Act Relating to Municipal Planning and Zoning." This Act amended the law to require that neither a zoning regulation nor an amendment shall be adopted until after a public hearing has been held. The regulations must also have the approval of 2/3 vote of the legislative body in the city, or by the town in the town meeting, prior to being adopted.

PL 1945, Chapter 293. "An Act to Correct Typographical and Clerical Errors in the Revision."
Section 15 of this Act corrected a minor word error.

PL 1951, Chapter 266. "An Act to Correct Errors and Inconsistencies in the 1944 Revision and the Session Laws of 1945, 1947, and 1949." Section 98 corrected a statutory citation.

Revised Statutes, Chapter 91, Sections 93-99, "Municipal Planning and Zoning."

PL 1957, Chapter 405. "An Act Revising the General Laws Relating to Municipalities." This Act recodified municipal law to create a new chapter to the Revised Statutes numbered 90-A. Sections 61-63 of that chapter related to Municipal Development. The Act amended the existing law to state that the planning board must continue to approve subdivision plats prior to filing in the registry of deeds, and that approval must be documented on the plat itself. In order to meet approval, the plat must be in compliance with the municipality's ordinances. Should the planning board fail to provide the applicant with written notice within 30 days after the board adjourns, the inaction will result in disapproval. The final amendment to the existing law was the removal of the term "negotiates" from the former prohibition on transferring land by reference to the plan without the approval of the planning board and replaced it with "conveys or agrees to convey".

PL 1961, Chapter 206. "An Act Relating to Municipal Regulation of Subdivisions of Land". This Act repealed the former definition of "subdivision" (division of land into 5 lots) and inserted in its place the following definition, "the division of three or more lots in urban areas or 4 or more lots in rural areas, except this provision shall not apply to any division for agricultural uses, including associated sales, service, processing and storage". The Act further defined the term urban area to include a designated area in the local zoning ordinance, or if the municipality does not have a zoning ordinance, then the areas designated by the State Highway Commission as "urban compact".

PL 1963, Chapter 31. "An Act Relating to Penalty for Conveyance of Land in Plats without Approval." This Act repealed the $200 penalty that was assessed if an individual conveyed land by reference to a plat that had not yet been approved by the planning board and was not recorded by the registry of deeds. This was changed to read that the individual may be enjoined by the municipality rather than fined.

PL 1963, Chapter 123. "An Act Relating to Filing of Approved Subdivision of Land." During the same session, the Legislature also enacted a provision that would require the individual to file the subdivision plot with the municipal clerk rather than filing it in the registry of deeds.

PL 1967, Chapter 401. "An Act Relating to Realty Subdivisions and Dilapidated Buildings in Municipalities". Among other changes in the law, this Act expanded the criteria upon which subdivision approval is based. This new language included a minimum lot size of 15,000 square feet if the lot does not contain either a public sewerage disposal system or a public water supply system.

PL 1969, Chapter 365. "An Act Relating to the Realty Subdivisions." This Act repealed the former 15,000 square foot minimum lot size and replaced it with a 20,000 square foot minimum lot size for those parcels that were not served by public or community sewer. The Act did allow smaller lots for single family housing provided that the land was approved by the Department of Health and Welfare.

1969-1970. The implementation of municipal home rule authority in Maine.

PL 1971, Chapter 454. "An Act Relating to Municipal Regulation of Land Subdivisions." This is the first comprehensive subdivision law. This Act repealed the former definition of a subdivision and redefined it to include the division of a tract or parcel of land into 3 or more lots for the purpose of sale, development or building. The Act expressly provided that when the municipality has established a planning board, agency, or office, that entity may adopt regulations governing subdivision that shall control until superseded by provisions adopted by the legislative body of the municipality. In those instances in which the municipality has not adopted a board, agency or office, then the municipal officers may adopt subdivision regulations which shall control until superseded by provisions adopted by the legislative body of the municipality. The Act provided a list of criteria that should be met in establishing subdivision regulations, or used during the approval process. The Act provided an

enforcement element by establishing that no person, firm, corporation, or other legal entity may convey, offer or agree to convey any land in a subdivision which has not been approved by the planning board or agency and recorded in the registry of deeds. The approval must still appear on the plat itself prior to filing in the registry of deeds. The Act implemented a monetary penalty of not more than $1000 for each illegal conveyance. The Attorney General, the municipality or the municipal officers were provided the authority to enjoin any violations.

PL 1973, Chapter 465. "An Act to Amend Municipal Regulation of Land Subdivision Law". This Act repealed the first section of PL 1971, Chapter 454. In its place, the Legislature provided a new definition of subdivision. This definition introduced the five-year window within which a subdivision may occur. According to the Act, a subdivision is "the division of a tract or parcel of land into 3 or more lots within any 5 year period, whether accomplished by sale, lease, development, building or otherwise, except when the division is accomplished by inheritance, order of court or gift to a relative, unless the intent of such gift is to avoid the objectives of this section". The Act provided guidance for determining when a parcel is actually divided. The language instructed that if the land is divided into three or more parcels, then the land retained by the subdivider for his or her own use as a single-family residence for a period of at least five years is not to be included in the count. It also clarified that the sale or lease of any parcel that is 40 acres or more is not considered a subdivision, unless the intent of such sale or lease is to avoid legislative intent. The Act also amended PL 1971 with respect to the enforcement provisions. The amendment expressly included any person, firm corporation, or other legal entity who sells, leases, or conveys for consideration, offers or agrees to sell, lease or convey for consideration any land in a subdivision which has not been approved. The Act established a provision that excluded proposed subdivisions approved by the planning board or municipal officials prior to the date of September 23, 1971. It also excluded a division of a tract or parcel by sale, gift, inheritance, lease or order of court into three or more lots and upon which lots permanent dwelling structures legally existed prior to the September 23, 1971 date. These divisions do not constitute a subdivision for the purposes of this Act.

PL 1973, Chapter 700. "An Act to Clarify the Real Estate Subdivision Law." This Act provided that a lot shall not include a transfer or an interest in land to an abutting landowner. The Act also established the owner of a lot which, at the time of this creation, was not part of a subdivision, need not get municipal approval for the lot in the event that either the subsequent actions of the prior owner or his successor in interest create a subdivision of which the lot is a part. The municipal reviewing authority may consider the existence of the previously created lot in making its determination of approval of the proposed subdivision.

PL 1975, Chapter 468. "An Act to Amend the Subdivision Law to Provide for More Housing in the State." This Act required the municipal reviewing authority to issue the applicant written notice indicating whether the application is complete or whether more information is required. This notice must be given within 30 days of the receipt of the application.

PL 1975, Chapter 475. "An Act to Clarify the Municipal Regulation of Land Subdivision Law." The definition of subdivision is amended to include "the division of a tract or parcel of land into three or more lots within any 5-year period, which period begins after September 22, 1971, whether accomplished by sale, lease, development, buildings or otherwise". The language created an exemption for lots conveyed by devise, condemnation, order of court, gifts to relative, and transfers to an abutter.

The Act also provided some guidance as to when the parcel is actually divided. According to the language, a tract or parcel of land is divided into three or more lots, the first dividing of such tract or parcel, unless otherwise exempted herein, shall be considered to create the first two lots and the next dividing of either of the first two lots, by whomever accomplished, unless otherwise exempted, shall be considered to create a third lot, unless both dividings are accomplished by a subdivider who shall have retained one of the lots for his or her own use as a single family residence for a period of at least five years prior to the second dividing. The Act further defined a tract or parcel of land as all contiguous land in the same ownership, provided that the land located on opposite sides of a public or private road shall be considered a separate tract or parcel of land unless the road was established by the owner of land on both sides.

Finally, the Act also required the submission of a survey plan of the property showing the permanent markers set at all the corners of the parcel.

PL 1975, Chapter 703. " An Act to Revise Requirements for Permanent Markers under the Land Subdivision Law." This Act removed the prerequisite that required permanent markers on all corners of the property prior to recording the plot in the registry of deeds. The Act also allowed the municipality, municipal planning board or the municipal officers to recover attorney's fees in the instance in which the court determines that there has been a violation associated with recording. The Act allowed the planning board to institute action for injunctive relief.

PL 1977, Chapter 315. "An Act Requiring Permanent Markers Prior to the Sale or Conveyance of Land in an Approved Subdivision." This Act reinstated the requirement of permanent markers prior to seeking approval from the municipal reviewing authority.

PL 1977, Chapter 564. "An Act to Make Additional Corrections of Errors and Inconsistencies in the Laws of Maine." The prohibition against dividing the parcel without the municipal reviewing authority's approval is expanded by this Act to include the terms "develop" and "build upon".

PL 1977, Chapter 696. "An Act to Make Additional Corrections of Errors and Inconsistencies in the Laws of Maine." The Act redesigned the penalties assessed for not receiving approval and registering the subdivision plat with the registry of deeds. The new language stated that violations shall be punished by a fine of not more than $1000 per occurrence.

PL 1979, Chapter 435. "An Act to Permit the Consideration of Solar Access Issues when Approving Any Subdivision. " This Act authorized the municipal planning board or reviewing authority, in the interest of protecting and assuring access to direct sunlight for solar energy systems, to restrict, prohibit, or control development through the use of subdivision regulations. The Act allowed regulations to require development plans containing restrictive covenants, height restrictions, side-yard, and setback requirements.

PL 1979, Chapter 472. "An Act Relating to the Protection of Ground Water." In 1979, the Legislature added another criterion to be considered in reviewing and approving a proposed subdivision. The reviewing authority must give consideration to the quality and quantity of the ground water.

PL 1981, Chapter 195. "An Act Further Amending the Planning and Zoning Statute." This Act required that all subdivision plats or plans to have the name and address of the person that is responsible for preparing the plat or plan.

PL 1985, Chapter 176. "An Act Concerning Revision or Amendment of Approved Subdivision Plans". This Act established that any revisions or amendments to an existing plat or plan must identify the original subdivision plan that is to be revised or amended. The registry of deeds must make a notation in the index that the original plan has been superseded.

PL 1985, Chapter 794. "An Act to Enhance the Sound Use and Management of Maine's Coastal Resources." This Act amended the guidelines that must be followed when making the determination to approve a subdivision. The amendment included new language that required the reviewing panel to consider the adverse effects on the scenic beauty of the area. The new language required consideration of public rights for physical or visual access to the shoreline. The new language also required the subdivider to determine if the parcel is located in a flood zone. If so, then the developer must determine the 100-year flood elevation and flood hazard boundaries within the subdivision. The plat required that principal structures on lots in the subdivision shall be constructed with their lowest floor, (including the basement) at least one foot above the 100-year flood elevation.

PL 1987, Chapter 182. "An Act to Require Recording of Certain Subdivision and Zoning Variances." This Act established the requirement that any variance from the applicable subdivision standards be noted on the plan that is recorded in the registry of deeds.

PL 1987, Chapter 514. "An Act to Enhance Local Control of Community Growth and Strengthen Maine's Land Use Laws." This Act provided that lots located wholly or partially in any shoreland zone may be reviewed by the municipality provided the average lot depth to shore frontage ratio is greater than five to one. The Act further established that development of three or more 40-acre lots must be filed with the registry of deeds.

PL 1987, Chapter 737. "An Act to Recodify the Laws on Municipalities and Counties". Among other technical changes, this Act recodified subdivision law without substantive changes.

PL 1987, Chapter 810. "An Act to Establish a Resource Protection Law." This Act established an exemption for land in the context of subdivision review that is given to the municipality, unless that gift was done to avoid the objectives of the statute. It also amended the means necessary for determining whether a tract or parcel of land was divided. According to the new language, the first dividing of the tract is considered to create the first two lots and the next dividing will create the third lot (regardless of who divides it), unless the subdivider retained one of the lots for his or her own use as a single-family residence. The new provision created an exemption if the subdivider retained one of the lots for "open space" land for a period of at least five years prior to the second dividing. The Act changed the language of the 40 acre exemption to hold that the tract shall not be counted as a lot unless the lot from which it was divided is located wholly or in part within any shoreland area or the municipality elected to count lots of 40 acres or more in size as subdivision lots. Further amendments allowed for a multi-stage application or review process consisting of no more than three stages. These stages included a preapplication sketch plan, preliminary plan and the final plan. Other amendments to Title 30 § 4956 included a requirement that upon receiving the application, the reviewing authority must notify all abutting property owners of the proposed subdivision specifying its location. Under the criteria necessary for considering subdivision applications, the plan must be in accordance with the subdivision regulation or ordinance. The new language clarified that it is the municipal reviewing authority that has the authority to interpret the ordinances and plans.

PL 1987 Chapter 864. "An Act to Clarify the Application of the Resource Protection Law and the Site Location Law." This Act clarified that PL 1987, Chapter 810 applied to any divisions of land that occurred after April 19, 1988. It also applied to any applications for subdivision approval submitted after that date.

PL 1987, Chapter 885. "An Act to Enhance Land Use Regulation." This Act responded to two Maine Supreme Court decisions (*Town of York v Cragin*, 541 A.2d 932 (Me. 1998) and *Town of Arundel v Swain*, 374 A.2d 317 (Me. 1977)). The amendment further expanded the definition of subdivision to include the division of a new structure or structures on a tract or parcel of land into three or more dwelling units within a five-year period and the division of an existing structure or structures previously used for commercial or industrial use into three or more dwelling units within a five year period. The area included in the expansion of an existing structure is deemed to be a new structure for the purpose of this paragraph.

Further language was created to expressly state that nothing in this section may be construed to prevent a municipality from enacting an ordinance under its home rule authority which expanded the definition of subdivision to include the division of a structure for commercial or industrial use or which otherwise regulates land use activities.

The Act also defined the term "dwelling unit" to mean any part of a structure which, through sale or lease, is intended for human habitation, including single-family and multifamily housing, condominiums, time-share units, and apartments. Leased dwelling units are not subject to subdivision review if the units are otherwise subject to municipal review at least as stringent as that required under this section.

Finally, the enforcement clause is amended to include the term dwelling unit.

PL 1989, Chapter 104. "An Act to Correct Errors In the County and Municipal Law Recodification". This emergency legislation enacted Title 30-A, Municipalities and Counties. The amended language defined "subdivision" to mean "a division into three or more lots within 5 years beginning on or after September 23, 1971".

New language defined "new structure or structures". This included any structure for which construction begins on or after September 23, 1988. It also included the area in the expansion of an existing structure. (Section 4401(5)).

The Act also outlined the outstanding river segments. (Section 4401 (7)).

The remainder of the Act provided a timeline under which the municipal reviewing authority must review subdivision plans. It also provided the review criteria that should be considered in the review of the application. (Section 4404).
The Act stated that a building inspector may not issue a permit for a building or use within a land subdivision unless the subdivision has been approved. Any violations are punished according to the enforcement section.

The Act further required that any application for an amendment or a revision to a subdivision that has been previously approved, needs to indicate the proposal to amend an approved subdivision. Once registered, that amended/revised plan or plat must indicate the index for the original plat that was superseded by the other plan.

The Act further amended the monetary penalties under the enforcement section. The minimum penalty for starting construction, undertaking a land use activity without the necessary permit or a specific violation is $100 and the maximum is $2500. The Act also authorizes ordering the violator to correct and abate the violations, unless abatement would result in a health threat, etc. If the municipality wins in court, it may be awarded reasonable attorney's fees and costs, if the defendant wins, he/she may receive the fees and costs. The Act established considerations for how to set the penalty. The maximum penalty may exceed $2500 but may not exceed $25,000.

PL 1989, Chapter 104. "An Act to Correct Errors in the County and Municipal Law Recodification." Among other technical changes, this Act established the legislation was to take effect on February 28, 1989.

PL 1989, Chapter 497. "An Act to Clarify the Subdivision Laws." This Act amends Title 30-A § 4401 to include a new definition of the term "principal structure". The term included "any building or structure in which the main use of the premises takes place".

The Act also amended the definition of "subdivision" found in Title 30-A § 4401(4). The new language defined a subdivision as "the division of a new structure or structures on a tract or parcel of land into three or more dwelling units within a 5 year period or the construction of 3 or more dwelling units on a single tract or parcel of land".

Section G of 4401 (4) is amended to provide that despite these provisions, leased dwelling units are not subject to subdivision review if the municipal reviewing authority has determined that the units are otherwise subject to municipal review at least as stringent as that required.

This Act further provided that if any portion of a subdivision crossed municipal boundaries, then the reviewing authorities from each municipality must meet jointly to discuss the application.

Finally, this Act modified the public hearing process and the decision process, and added the consideration of Municipal Solid Waste impacts to the list of review criteria.

PL 1989, Chapter 326. "An Act to Clarify Provisions of the Subdivision Law." Among other technical changes, this Act amended the time period in which a variance must be filed prior to having legal effect. The recording must occur within the first 90 days after subdivision approval or the variance is void.

PL 1989, Chapter 404. "An Act to Further Protect Freshwater Wetlands". This Act defined "freshwater wetland" and required all potential freshwater wetlands within the proposed subdivision to be identified on any maps submitted at the time of application, regardless of the size of the wetland.

PL 1989 Chapter 429. "An Act to Regulate Development Along Certain Water Bodies." Among other technical changes, this Act defined the terms "river, stream, or brook".

PL 1989, Chapter 762. "An Act to Prohibit the Development of Spaghetti-lot Subdivision." This emergency legislation created the definition of "spaghetti-lot". A spaghetti-lot is defined as "a parcel of land with a lot depth to shore frontage ratio greater than 5 to 1". Shore frontage referred to land abutting a river, stream, brook, coastal wetland or great pond. The prohibition on spaghetti lots was enacted both with respect to subdivision law and land use law in the unorganized territories under the jurisdiction of LURC.

With respect to subdivision law, Title 30-A Section 4404 (17) was enacted to prohibit spaghetti-lots. If any lots in the proposed subdivision have shore frontage on a river, stream, brook, great pond or coastal wetland, then none of the lots created within the

subdivision may have a lot depth to shore frontage ratio greater than 5 to 1. The enactment did apply to any pending applications for subdivision approval.

PL 1989, Chapter 878. "An Act to Correct Errors and Inconsistencies in the Laws of Maine." Part A-85 of this Act amended the section on "flood areas". If the subdivision or any part of it is in a flood prone area, then the subdivider shall determine the 100-year flood elevation and the flood hazard boundaries within the subdivision. There is a condition of approval that required the principal structures in the subdivision to be constructed with their lowest floor, including the basement, at least one foot above the 100-year flood elevation. Title 30-A section 4404 (16) was enacted to require the proposed subdivision to provide for adequate storm water management.

This Act also repealed the former definition of freshwater wetlands and enacted the following: "All freshwater wetlands within the proposed subdivision have been identified on any maps submitted as part of the application, regardless of the size of these wetlands".

PL 1989, Chapter 772. "An Act to Correct the Subdivision Laws." This Act amended the definition of subdivision to include the terms "or placement" of 3 or more dwelling units on a single tract or parcel of and the division of an existing structure(s) previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period. The Act also enacted language that provided transfers made by devise, condemnation, order or court, gift to a relative or municipality or transfers to the abutter do not create a lot unless the intent of the transferor was to avoid the objectives of this section. The Act placed a 5-year recapture period on real estate transfers made by a gift to a person related to the donor by blood, marriage or adoption. If the real estate was transferred within that five-year period to someone not meeting these prerequisites, then a lot is created.

The Act also amended the definition of freshwater wetlands by removing the term "potential" freshwater wetlands, to simply read "freshwater wetlands".

PL 1991, Chapter 500. "An Act to Amend the Exemption of Certain Divisions from the Definition of Subdivision". This Act governed the subsequent transfer of an exempt subdivision lot (gift to a relative, subdivider's own use, conveyance to an abutter) within the five-year period that normally de-exempts those conveyed lots and triggers review. Under the terms of this Act, the de-exemption does not occur with the conveyance of a "bona fide security interest."

PL 1991, Chapter 838. "An Act to Further Enhance and Protect Maine's Great Ponds." In addition to several non-substantive changes to subdivision law, this Act created new language that added "Lake phosphorous concentration" to the criteria that should be considered by the planning board.

PL 1995, Chapter 93. " An Act to Amend the Municipal Subdivision Laws Regarding Application Requirements". This Act required that the municipal reviewing authority

may not accept or approve final plans or final documents that have not been sealed and signed by the professional land surveyor that prepared the plan/document.

PL 1997, Chapter 51. "An Act to Exempt Public Airports with Approved Airport Layout Plans from Subdivision Review." This Act provided that an airport may be exempt from the subdivision review process provided that it has an approved airport layout plan and has received final approval from the airport sponsor (the DOT and FAA).

PL 1997, Chapter 199. " An Act to Provide Notification of Utility Services". This Act established that a public utility may not install services in a subdivision unless written authorization has been issued by the appropriate municipal officials, or other written arrangements have been made between the municipal officials and the utility.

PL 1997, Chapter 226. " An Act to Amend the Law Concerning Municipal Review and Regulation of Subdivisions". This Act provided that if any portion of a subdivision crossed municipal boundaries then all meetings and hearings to review the application must be held jointly by the reviewing authorities from each municipality. All review hearings under Section 4407 must be done jointly. The municipal officials may waive the requirement for a joint hearing.

Pursuant to this process, this Act provided that any proposed subdivision that crosses into another municipality will not cause unreasonable traffic congestion or unsafe conditions within the existing public ways located in both municipalities.

PL 1997, Chapter 323. " An Act to Impose a Statute of Limitations for Violations of Municipal Subdivision Ordinances". This Act provided that the subdivision review and approval process does not apply to subdivisions that have existed for 20 years unless (1) a subdivision has been enjoined pursuant to section 4406, (2) subdivision approval was expressly denied by the municipal reviewing authority and record of the denial has been recorded in the appropriate registry of deeds, (3) a subdivision lot owner was denied a building permit under section 4406 and record of the denial was recorded in the appropriate registry or (4) the subdivision has been the subject of an enforcement action or order, and record of the action or order was recorded in the registry of deeds.

PL 1999, Chapter 761. "An Act to Improve Public Water Supply Protection." This Act required the municipal reviewing authority to notify the public drinking water supplier by mail once they have received an application for a subdivision that is located within a source water protection area.

PL 2001, Chapter 40. "An Act to Remove Redundant Written Authorization Requirements." This Act amended the process governing the approval of utility installations in possible subdivisions. According to this provision, once the first utility has obtained the necessary permits from the appropriate municipal officials, then subsequent public utilities need not receive written authorization to install services to a lot or dwelling unit in the subdivision.

PL 2001, Chapter 359. "An Act to Implement the Recommendations of the Task Force to Study Growth Management." This Act made substantive changes to Maine's subdivision law with respect to the statutory definition of "subdivision". The Act contained a retroactivity clause which established its effective date as June 1, 2001.

In order to discount the subdivider's residential lot from a subdivision, the Act clarified that the exempt lot must have been the conveyer's principal residence for a minimum of five years prior to the subdivision. In order for certain gift lots to escape subdivision review when conveyed to a relative, the Act required that the person conveying the property must have owned the land for at least five years prior to the "gift" conveyance to the relatives, and the Act further required that the "gift" lot cannot be discounted from subdivision review if it is conveyed to the relative for more than 50% of its assessed value. Finally, a conveyance to an abutter will trigger subdivision review if that lot is subsequently reconveyed to a third party (unattached from the merged lot) within the five-year period of time.

This Act also established a moratorium on the ability of a municipality to adopt a definition of "subdivision" which is different from the definition of "subdivision" in Maine law. This moratorium is lifted as of October 1, 2002. Those municipalities that currently use a different definition of subdivision are "grandfathered" and their definitions will remain legal.

The Act directed the State Planning Office to undertake several tasks: 1) catalog municipal subdivision ordinances according to the definitions of "subdivisions" used; 2) to analyze the legislative history of Maine's subdivision law with emphasis on the relationship to home rule authority, and 3) to develop a list of the possible strategies to coordinate the subdivision review and title search procedures.

Attachment 6

Enacted as
PL 1987 c. 583

(EMERGENCY)
FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document NO. 506

H.P. 384 House of Representatives, February 23, 1987

Reported by Representative CARROLL from the Committee on State and Local Government. Sent up for concurrence and ordered printed. Approved by the Legislative Council on April 15, 1986.

Reported from the Joint Standing Committee on State and Local Government under Joint Rule 19.

EDWIN H. PERT, Clerk

STATE OF MAINE

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

AN ACT to Clarify the Home Rule Authority of Municipalities.

Emergency preamble. Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, several court decisions have shown that municipal home rule is not being implemented to the extent originally intended by the Legislature; and

Whereas, the effective implementation of municipal home rule is of vital importance to municipalities in the State, as well as, to the health, safety and well being of the citizens of the State; and

This Act shall not apply to any action or proceeding pending on or filed after the effective date of this Act and which arises out of any action or failure to act occurring before the effective date of this Act.

All actions taken in compliance with provisions repealed or amended by this Act shall be deemed to have been taken in compliance with the provisions of this Act. All ordinances, regulations, bylaws or other official action taken under provisions repealed or amended by this Act shall continue in effect until repealed or amended, except for those which are contrary to the provisions of this Act.

All officers, officials or other persons elected, appointed, hired or otherwise selected to act in any capacity under provisions repealed or amended by this Act shall continue in that capacity under the provisions of this Act.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

STATEMENT OF FACT

This bill is a result of a Legislative study conducted by the former Joint Standing Committee on Local and County Government to revise the local government laws. As part of that study, the committee investigated the status of municipal home rule and considered ways in which to clarify its application. This bill is a companion bill to the bill which recodifies the local government laws, and contains the statutory revisions thought necessary by the committee to clarify the application of municipal home rule in Title 30.

The purpose of this bill is to reemphasize the Legislature's commitment to municipal home rule, and to rewrite the provisions of Title 30 to reflect that commitment. Confusion over the extent of a municipality's home rule powers has resulted largely from the Legislature's failure to integrate pre-home

rule statutes with the concept of local control embodied in home rule. This bill attempts to achieve that integration by rewriting the provisions of Title 30 against the broad backdrop of the concept of home rule.

The committee's guiding principle in drafting this bill was the idea that the grant of home rule ordinance power to municipalities in the current Title 30, section 1917, is a plenary grant of power; no further grants of power need be given to municipalities. The only legislative action that should be taken concerning municipalities is to determine when that power should be limited. This bill attempts to implement that concept through 3 basic methods:

1. The bill repeals all asserted grants of power to municipalities that do not contain a limitation on that power, except where the grant may serve as an example of how a municipality may choose to use its home rule power;

2. Provisions which do not limit home rule power, but may serve as a useful guide to municipalities are retained, but with an express recognition of municipal home rule authority to act otherwise; and

3. Finally, express limitations on home rule authority are retained wherever they represent a legitimate state interest. Former limitations which do not further legitimate state interests are repealed to allow municipalities freedom to act under their home rule authority.

It is not the intent of this bill to deny municipalities any power which they currently have under their home rule authority. This bill retains many statutory provisions as examples to provide guidance to a municipality in exercising its home rule authority. This bill also retains many provisions where a municipality's home rule authority is recognized as the source of power to perform a certain action. These changes are not intended to deny a municipality's home rule authority to enact ordinances in any area in which they presently may act. They are intended to clarify a municipality's present

home rule authority, not to reduce it. It is the intent of the Legislature that the standard of review established under section 13 of this bill shall be followed in determining when an implied denial of power to municipalities exists. Consistent with this intent, express acknowledgement of a municipality's home rule powers in one area is not to be interpreted as an implied denial of power to act in any other area; nor is the appearance of a model which municipalities may follow under their home rule authority to be interpreted as a denial of power to act otherwise.

One additional method of clarifying home rule power applied in this bill was to redraft the original grant of home rule power in an attempt to clarify its plenary grant of authority. This includes the addition of a standard of review by which the concept of home rule will be interpreted by the judiciary. That standard first provides a presumption that any action taken by a municipality is a valid exercise of its home rule authority. The court starts from the base that the municipality does have the power to enact any given ordinance. Second, the court will move from this base and invalidate a municipal ordinance only where the municipal ordinance will frustrate the purpose of any state law, or where the Legislature expressly denies a municipality the power to act in some area. This standard reaffirms the fundamental principle of home rule, that municipalities have been given a plenary grant of power, while recognizing that this authority is subject to the State's ability to limit that power in the furtherance of legitimate state interests. Only where the municipal ordinance prevents the efficient accomplishment of a defined state purpose should a municipality's home rule power be restricted, otherwise they are free to act to promote the well-being of their citizens.

Section 1 of the bill reenacts a provision of the Maine Revised Statutes, former Title 30, section 2151, which is repealed under section 12 of this bill. That provision provides that things which exist in accordance with municipal ordinances, such as street signs and utility poles, are not defects in a public way. This section reallocates that provision to the laws dealing with highway defects so it will be more readily found.

Sections 2 and 3 reenact the provisions contained in Title 30, chapter 215, subchapter IV which are repealed by section 31 of this bill. In order to better reflect the application of municipal home rule, these provisions were moved to Title 26 where employment agencies are regulated. The provisions provide an express legislative recognition that the Title 26 statutes do not preempt municipal home rule authority to enact additional regulations of employment agencies which do not frustrate the state policies expressed in Title 26.

Section 4 provides a general definition of "home rule authority" as that term is used in Title 30, Part 2. It recognizes the basic home rule grants found in the Constitution of Maine, and Title 30, chapter 201-A and Title 30, section 2151-A of this bill. Section 2151-A is enacted by section 13 of this bill and replaces the provisions of Title 30, section 1917 which is repealed by section 9 of this bill.

Sections 5 and 6 rewrite language which assertedly grants a municipality the power to receive gifts in trust or conditional gifts, with certain restrictions on their use. Since a municipality already has these powers under its home rule authority, it is not necessary to "give" a municipality these powers again. These sections rewrite the language as a limitation on a municipality's general home rule authority.

Section 7 replaces language in the provisions governing the submission of a municipal charter commission's final report. The present language requires that the report be accompanied by an attorney's opinion that the proposed charter "is not in conflict with" the general laws or the Constitution of Maine. The actual standard set out in the Constitution of Maine, Article VIII, Part Second is that a charter may not "contain any provision prohibited by" the Constitution of Maine or the general laws. This section replaces the present language with language tracking the constitutional provisions.

Section 8 similarly replaces the present "in conflict with" language with language tracking the Con-

stitution of Maine for legal opinions accompanying a proposed amendment to a municipal charter.

Section 9 repeals the present grant of home rule ordinance authority to municipalities contained in Title 30, section 1917. It is redrafted and reenacted by section 13 of this bill.

Section 10 recognizes that a municipality already has the power to appropriate funds to a council of governments under its home rule authority. The grant language in the present provision is amended by adding an explicit reference to the true source of the authority, municipal home rule.

Section 11 amends the present statutory provision governing the qualifications and method of election of town officials. It provides an express legislative recognition that a municipality has the power to alter these statutory requirements through municipal charter provisions adopted under its home rule authority.

Section 12 repeals Title 30, section 2151. This section of the statutes is perhaps the worst offender in terms of failing to recognize the adoption of home rule for municipalities. It contains most of the former legislative grants of ordinance power which were necessary before home rule. The adoption of home rule has rendered major portions of it totally obsolete. Those provisions which represent limitations on municipal home rule authority were retained; most are reenacted by sections 14 and 16 of this bill. Provisions which are not reenacted, but are repealed in their entirety since they are already included in the grant of home rule authority, include the following provisions of Title 30, section 2151:

1. Subsection 1, which contains the general police power grant of authority;

2. Subsection 2, paragraph A, which grants power to regulate public ways and other public property;

3. Subsection 2, paragraph B, which grants power to regulate things placed on public ways and

other public property, except that subparagraph (1) was moved to another section of the statutes under section 1 of this bill;

4. Subsection 2, paragraph C, which grants power to regulate pedestrian traffic and sidewalks, except that subparagraphs (1) and (2) are retained under sections 14 and 16 , respectively, of this bill;

5. Subsection 2, paragraph E, which grants power to control Dutch Elm disease;

6. Subsection 2, paragraph G, which grants power to protect and preserve historical buildings and places;

7. Subsection 5, paragraph A, which grants power to regulate pawnbrokers and secondhand dealers;

8. Subsection 5, paragraph B, which grants power to regulate junkyards and the sale of junk;

9. Subsection 5, paragraph D, which grants power to regulate dance halls;

10. Subsection 5, paragraph E, which grants power to require a license and fee for certain commercial operations; and

11. Subsection 5, paragraph F, which grants power to regulate itinerant vendors.

Section 13 enacts the new version of former Title 30, section 1917, which is repealed under section 9 of the bill. The new provisions contain the same original grant of home rule authority that currently appears in section 1917, but are moved to place them under chapter 209. This was done to reemphasize that the grant of ordinance home rule power is a separate and distinct aspect of a municipality's total home rule power in Maine. The Constitution of Maine, Article VIII, Part Second, contains the general charter home rule grant of authority. Title 30, chapter 201-A contains the implementing laws for the charter home rule grant. Despite its current placement in the midst of chapter 201-A, the ordinance home rule

grant is not part of the charter home rule implementing legislation. It stands on its own as a separate legislative grant of home rule authority to enact ordinances for any purpose not denied by the Legislature. Its placement in Title 30, chapter 209, which contains the provisions related to municipal ordinance authority, is designed to reflect the two-fold composition of municipal home rule in Maine, charter home rule and ordinance home rule.

In addition to simply moving the grant of ordinance home rule authority, section 13 of this bill also retains the original requirement that its provisions be construed liberally. By moving this provision into a new chapter, it is isolated from the provision requiring liberal construction found in Title 30, section 1920. That requirement is written into the new section 2151-A. A presumption that any municipal ordinance is a valid exercise of a municipality's home rule authority was also added in this section, and a standard of preemption was added which requires that a court must find that a municipal ordinance frustrates the purpose of a state law before it may invalidate the ordinance as being implicitly denied by the Legislature. These provisions establish a standard of review to be applied by the courts in resolving home rule questions. Finally, the provision that all penalties established by ordinance will accrue to the municipality was moved here from the present Title 30, section 2151. The requirement that a municipality must impose fines for the violation of any ordinance authorized by that section of the laws was deleted since there is no legitimate state interest to be served by such a provision.

Section 14 reenacts those provisions of present Title 30, section 2151 which serve as limitations on municipal home rule authority. The limitation on changes relating to certain municipal officers contained in present Title 30, section 1917 was moved to this new section in order to isolate the grant of home rule authority in the section enacted under section 13 of this bill, and to collect those provisions which limit that authority in the new statutory section enacted by this section of the bill. Provisions which are reenacted in this section as limitations on a municipality's home rule authority include the following provisions of Title 30, section 2151:

1. Subsection 2, paragraph D, which limits a municipality's home rule authority regarding parking meters;

2. Subsection 2, paragraph H, which limits a municipality's home rule authority regarding public pedestal telephones;

3. Subsection 2, paragraph K, which limits a municipality's home rule authority regarding handicapped parking ordinances;

4. Subsection 4, paragraph D, which limits a municipality's home rule authority regarding ordinances to protect persons and property from damage due to falling ice and snow;

5. Subsection 5, paragraph C which limits a municipality's home rule authority regarding the regulation of hawking and peddling of certain merchandise at retail; and

6. Those provisions of subsection 2, paragraph C, subparagraph (2) and subsection 4, paragraph E, subparagraph (1), which provide that violations of certain ordinances are declared to be public nuisances.

Section 14 also provides that the provisions relating to municipal pension systems presently found in Title 30, section 2152, subsection 1, are collected with other limitations on municipal ordinance home rule authority under the new Title 30, section 2151-B.

Section 15 repeals the present Title 30, section 2152 which contains the provisions concerning ordinances regulating municipal pension systems and administrative regulation of police and fire departments. Since there are no limitations on the power to enact ordinances establishing regulations on police and fire departments, those provisions are simply repealed since they are included within the home rule authority of municipalities. The provisions dealing with pension systems do limit home rule authority, and are reenacted under section 14 of this bill which places them in the new Title 30, section 2151-B, which collects limitations on a municipality's ordinance home rule authority.

Section 16 enacts a new Title 30, section 2152-C which collects those ordinance powers which are given by statute to the municipal officers of a municipality. These provisions may use grant language without violating the principle of home rule since they actually do grant power because they give it to the municipal officers rather than the municipality. Provisions which are moved under this section since they are grants of ordinance power to the municipal officers, include the following provisions of Title 30, section 2151:

1. Subsection 2, paragraph C, subparagraph (1), which allows them to establish certain procedural provisions regarding the enforcement of pedestrian traffic ordinances;

2. Subsection 3, which allows them to regulate the operation of vehicles on the public way and the operation of vehicles for hire; and

3. Subsection 7, which allows them to regulate the operation of motor vehicles on icebound inland lakes.

Section 17 eliminates language purportedly granting municipalities the power to adopt ordinances which incorporate certain codes by reference. Since a municipality has the home rule authority to do this already, the section actually acts as a limitation on home rule authority by defining which types of codes may be incorporated by reference. For that reason it is retained, but language is added to explicitly recognize that the ordinances are enacted under a municipality's home rule authority.

Section 18 enacts a new subsection to the statutory section governing the existence and filling of vacancies in municipal offices. The new provisions recognize a municipality's home rule authority to provide additional or different regulations in this area, subject to certain limitations. Any change in the statutory provisions governing vacancies in the office of municipal officer must be done by charter, but a change in the statutory provisions can be done by charter or ordinance in the case of any other municipal official. This distinction was made to en-

sure that any change regarding the terms and office of the chief municipal officials, the municipal officers, will not be made lightly, but are subject to the more stringent charter adoption or amendment process.

Section 19 replaces language purporting to grant a municipality the ordinance power to provide for "all necessary municipal functions" which are not provided for under law. Because the provision may serve to advise municipalities of this power, it is retained in the laws; however, since a municipality already has this power under its home rule authority, the new language explicitly recognizes that home rule is the source of this power, and also allows a municipality to provide for municipal functions by charter as well as ordinance. The latter change is probably required by the provisions of the Constitution of Maine, Article VIII, Part Second, in any event. Finally, the word "necessary" is deleted. There is no substantial state interest served by limiting a municipality's ability to deal with its problems to situations where it is "necessary." The municipality itself is best suited for determining the desirability of undertaking municipal functions; the State need not impose any higher standard.

Section 20 repeals a section of the statutes that purports to grant towns the ordinance power to provide for any municipal functions necessary to conduct the town's business after adoption of the town manager plan provided in Title 30, chapter 213, subchapter II-A. This section is superfluous in light of a municipality's home rule authority, as described in Title 30, section 2256, as amended by section 19 of this bill.

Section 21 replaces language purporting to grant a municipality the power to pay a clerk a salary. That authorization is no longer needed since the adoption of home rule, so the law is rewritten to avoid the grant language.

Section 22 replaces a reference to a statutory section repealed by section 15 of this bill. The statute purports to grant municipalities the power to enact ordinances establishing regulations for police

and fire departments. That power is included within the broad home rule authority or municipalities to enact ordinances, so the statutory cross reference is replaced with a simple reference to any "municipal ordinance," which may be enacted under its home rule authority.

Section 23 recognizes a municipality's home rule authority to limit the powers of a police officer by charter, as well as by ordinance, as presently allowed.

Section 24 adds a provision acknowledging municipal home rule authority to determine the powers of special police officers by charter, as well as by ordinance, as presently allowed.

Section 25 adds language expressly acknowledging municipal home rule as the source of a municipality's power to establish a board of appeals. This section also amends present law which allows the method of appointment and compensation of the board members to be established by charter by allowing these changes to be accomplished by ordinance as well. There does not appear to be any compelling reason to limit the method of altering these provisions to charter provisions, and to so limit that ability denies the power to towns that do not have a charter, but do have general home rule ordinance powers.

Section 26 replaces grant language concerning the appointment of associate members of a board of appeals with an explicit reference to a municipality's general home rule authority. This change makes this provision consistent with other municipal powers regarding boards of appeal by allowing the provisions to be enacted in a municipality's charter, as well as by ordinance, as presently allowed, correcting the inconsistency which presently exists.

Section 27 also maintains consistency regarding a municipality's ability to enact provisions applicable to a board of appeals by allowing a municipality to define the appellate jurisdiction of the board by charter, as well as by ordinance, as presently allowed. Language referring to Title 30, section 2411 as the source of a municipality's power to adopt a

board of appeals is deleted since the source of that power is actually the municipality's home rule authority.

Section 28 adds language which expressly references as municipality's home rule authority in a provision of the automobile graveyard and junkyard law that permits municipalities to regulate those junkyards by ordinances.

Section 29 reenacts a provision of the present Title 30, section 2151 which is repealed by section 12 of this bill. It is moved to the municipal licensing chapter of Title 30 because it deals with the municipal licensing authority, not a municipality's ordinance power.

Section 30 reenacts the provisions of Title 30, section 2151, subsection 4, paragraphs A through C and moves them to the municipal licensing chapter of Title 30 because they deal with the permit procedure for building regulations. The language is redrafted to clarify that these provisions do not regulate the adoption of home rule ordinances that regulate buildings, rather they actually regulate certain aspects of the permit procedure to be employed in this area.

Section 31 adds language to clarify that a municipality's source of power to require electrical inspections is its home rule authority.

Section 32 repeals the provisions relating to municipal licensing of employment agencies. Those provisions are redrafted and moved to Title 26 under sections 2 and 3 of this bill.

Sections 33 and 34 add language explicitly recognizing that the source of power enabling municipalities to enact waste water disposal ordinances is their home rule authority and replace language which asserted that those ordinances were enacted under the authority of that specific statutory section.

Section 35 repeals the statutory provision purporting to give municipalities the power to acquire property for recreational purposes and to conduct recreational programs, independently or jointly.

This power is inherent in a municipality's general home rule authority; no further grant is needed. Since no limitation on that authority appears in the law, and it is not useful as a model for municipalities, it is repealed entirely.

Section 36 repeals a law purportedly authorizing municipalities to hire a historian. This power is inherent in a municipality's home rule authority. Since no limitation appears and the law is not useful as a model for municipalities, it is repealed entirely.

Sections 37, and 39 through 41 repeal statutory provisions dealing with the establishment and operation of municipal forests. A municipality already has this power under its home rule authority and the limitations contained in the provisions, such as requiring a 2/3 vote to establish the forest, providing that a municipal forester need not be a resident of the town and requiring general fiscal restrictions to apply, do not serve any overriding state interests. For these reasons, the provisions were repealed, but a new statutory section is enacted by section 38 of this bill to serve as a model for municipalities in this area. That section provides that a municipality may acquire lands for a municipal forest under its home rule authority, but does not limit a municipality's home rule authority to define how to acquire and maintain those lands. The new provisions provide an example of how municipalities may choose to exercise their home rule authority, but leave the municipalities free to work out the details for themselves on a local basis to meet local needs.

Sections 42, 43 and 44 parallel the changes made regarding police officers in sections 22, 23 and 24 of this bill, establishing consistency among the provisions. Section 42 adds an explicit recognition that municipalities may set a term of office for fire chiefs by charter provision, as well as by ordinance, as presently allowed. Section 43 similarly recognizes a municipality's ability to define the duties of a fire chief by charter, as well as by ordinance. Section 44 does the same regarding limitations on providing assistance in extinguishing fires in other municipalities.

Section 45 repeals a statutory provision which purports to authorize municipalities to accept and hold land for open areas and public parks and playgrounds in the municipality. This authority is already included within a municipality's home rule authority. The section imposes no limitations on the municipality's acceptance and use of these lands and is not useful as a model for municipalities so it is repealed entirely.

Sections 46 and 47 amend the statutory sections regarding conservation and energy commissions by adding an explicit acknowledgement that home rule is the source of a municipality's authority to create such commissions. Although the statutory sections are not intended to preempt or limit a municipality's home rule authority to act otherwise in this area, they do serve as a useful model of how a municipality may choose to exercise its home rule powers and are retained for that reason.

Section 48 repeals a statutory section that purports to grant municipalities the power to appropriate money to compensate tree wardens and to acquire and care for shade trees. This power is inherent in a municipality's home rule authority. The section does not contain any limitation on that authority nor serve as a useful model for municipal action, so it is repealed entirely.

Section 49 adds language which replaces a purported grant of power to enact ordinances which require landowners to connect with municipal sewer lines. The new language recognizes municipal home rule as the source of the power to enact such an ordinance.

Section 50 updates a provision of the Revenue Producing Municipal Facilities Act which declared that its provisions were additional and supplemental to all other municipal powers. This section adds language replacing grant language and providing that the Revenue Producing Municipal Facilities Act will not be construed to preempt municipal home rule authority.

Section 51 simply replaces existing language which recognizes municipal home rule as the source of authority in regard to zoning ordinances with the term "home rule authority," a definition of which is provided in section 4 of this bill.

Section 52 adds language which recognizes home rule as the source of a municipality's power to enact a zoning ordinance with limitations on the granting of a variance additional to those imposed by the State.

Section 53 is intended to clarify that the adoption of home rule authority gives municipalities the power to appropriate money for any valid public purpose. This section does not add an explicit reference to a municipality's home rule authority because a municipality's ability to raise money has been largely preempted by the State, removing its home rule authority to act in that area; however, no such preemption has occurred with respect to a municipality's ability to appropriate money. The various purposes listed in Title 30, sections 5101 to 5108, with only a few exceptions which actually do establish limitations on a municipality's spending authority, are merely examples of proper municipal public purposes for which municipal funds may be expended. There was no legislative intent behind the enactment of these sections to limit a municipality's ability to expend funds under its home rule authority to only those purposes actually enumerated in Title 30, sections 5101 to 5108. This section amends section 5101 to explicitly recognize a municipality's power under its home rule authority to appropriate and expend funds for any valid public purpose. It also clarifies that the purposes listed in the statutes are merely examples, except where specific limitations on the expenditure of municipal funds are explicitly stated.

Sections 54 to 56 repeal specific limitations on municipal spending powers that no longer serve any useful state interest. They repeal the provisions that limit the amount of money a municipality can spend on advertising the resources of the State and the municipality, propagating and protecting fish and assisting conventions in the municipality. These

limitations are repealed since the State has no compelling reason to limit these expenditures by any municipality that chooses to make them. How a municipality decides to spend its tax income is best left up to the persons who contributed those taxes, and that is done best on a local level.

Section 57 replaces language which purports to grant municipalities the power to accept grants with neutral language that avoids any suggestion that a grant of power is intended. A municipality already has this power under its home rule authority.

Section 58 replaces language which grants plantations the same powers that "are granted to municipalities" under Title 30, chapter 239, subchapters V and VI, regarding planning and zoning. Those statutory provisions do not actually grant municipalities any power; the power to enact those ordinances is inherent in a municipality's home rule authority. All that those statutory provisions do is limit a municipality's home rule authority to enact planning and zoning ordinances. In order to carry out the original intent of this section, the language is replaced to simply grant plantations similar powers to enact planning and zoning ordinances, subject to the same statutory restrictions that apply to cities and towns. The grant of power is necessary in this instance since plantations, unlike cities and towns, do not have general home rule powers.

Sections 59 enacts new sections which reenact provisions repealed or rewritten elsewhere in this bill to avoid home rule complications for cities and towns; however, because plantations do not have home rule authority, whenever a home rule problem was resolved, it often reduced a plantations's powers in those sections of Title 30 which apply to plantations, as well as to towns and cities. This section is intended to restore those powers to plantations.

Section 60 reenacts the provisions of Title 30, section 2151, subsection 6, dealing with municipal ground water ordinances, which were repealed under section 12 of this bill. These provisions were moved to the ground water law in Title 38 and rewritten to explicitly recognize municipal home rule as the source of the power.

Section 61 provides a general savings clause to ensure a smooth transition upon enactment of this bill. The purpose of the savings clause is to ensure that:

1. The passage of this bill will have no legal effect, procedural or substantive, upon any event that occurred before the bill's effective date;

2. No official action taken by any municipality before the effective date of this bill, including the selection of municipal officials and employees, will be affected in any way by the passage of this bill, except as provided below; and

3. The provisions of this bill, including the new standard of review created for municipal ordinances enacted under the municipality's home rule authority, will apply to any case which arises out of operative events which occur after the effective date of this bill, regardless of when the ordinance in question was enacted.

This section will ensure that ordinances and regulations adopted by municipalities before the effective date of this bill will not be voided by the passage of this bill, and that municipal officials and employees will not be inadvertently displaced by the passage of this bill. It also ensures that the new substantive home rule provisions will apply to all actions which arise out of events occurring after the bill's effective date.

Attachment 7

HOME RULE AND THE PRE-EMPTION DOCTRINE: THE RELATIONSHIP BETWEEN STATE AND LOCAL GOVERNMENT IN MAINE

I. INTRODUCTION

The legal relationship between a state government and a municipal government determines the powers and responsibilities of these two political entities.[1] In Maine this relationship is complex and uncertain due to ambiguities in the constitutional and statutory scheme governing it[2] and due to the Maine Supreme Judicial Court's narrow and inconsistent interpretation of that scheme.[3] This Comment discusses the various methods for delegating power to municipalities,[4] including the traditional method which was used in Maine prior to 1970.[5] In addition, this Comment examines the "home rule" scheme enacted in 1970[6] and its subsequent judicial interpretation and application.[7]

Any statutory or common law framework for distributing the state's police power between state and local government should at-

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1. D. MARTIN, RUNNING CITY HALL 11 (1982). "Municipality" is derived from the Latin word *municipia*. Roman colonies received special privileges in order to secure and hold territory subdued by Roman arms. Although these inhabitants were Roman citizens, they were granted the privilege to be governed by their own laws. These privileged colonies were *municipia*. J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 3 (5th ed. 1911).

Traditionally, state governments in the United States did not provide for local or municipal governmental autonomy. *See infra* notes 53-62 and accompanying text. Legislative or constitutional adjustments in the traditional relationship allowed some local autonomy, hence the term home rule. *See infra* notes 63-115 and accompanying text. As one commentator noted: "As a political symbol 'home rule' is generally understood to be synonomous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of state government." Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964). The same term, however, is also used as a shorthand for any constitutional, legislative, or common law doctrine or scheme which governs the relationship between state and local governments. As Professor Sandalow put it, "as a legal doctrine, by contrast, home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments . . . ." *Id.* at 645. This Comment will use the term home rule to describe any constitutional or legislative schemes that replaced traditional common law relationships between state and local governments.

2. *See infra* notes 143-91 and accompanying text.
3. *See infra* notes 192-324 and accompanying text.
4. *See infra* notes 63-115 and accompanying text.
5. *See infra* notes 116-42 and accompanying text.
6. *See infra* notes 143-91 and accompanying text.
7. *See infra* notes 192-324 and accompanying text.

tempt to accommodate three policy considerations. First, in what could be referred to as the "certainty" principle, the relationship should be clearly defined to allow the machinery of both state and local government to operate smoothly, efficiently, and with minimum uncertainty as to each other's responsibilities.[8] Second, a state legislature must be able to retain ultimate control over municipal government to avoid the disruptive effects of municipalities operating with impunity within the state sovereign's borders: the "supremacy" principle.[9] Finally, local government must be free to address local problems left unresolved by the state legislature: the "governmental role" principle.[10]

Maine's home rule scheme, adopted in 1970, adequately accommodates each of these three policy considerations. However, the Maine Law Court's interpretation of the scheme emphasizes the supremacy principle at the expense of the other two. This emphasis results in the invalidation of much municipal legislation, thus creating doubt as to the scope of municipal government's authority and decreasing its ability to effectively legislate in the local population's public interest. This Comment suggests that the Legislature should take action to temper the court's emphasis on the supremacy principle and thus help restore certainty and assure the effectiveness of local government.[11]

II. The Nature of Municipal Power

Local political institutions embody essential values in our society. Freedom of association and the right of local democratic control are indispensible components of the sovereignty of the people.[12] As

8. As Justice Wathen of the Maine Supreme Judicial Court explained: "A large part of the difficulty and complexity [in municipal law] is caused by the fact that a municipality in Maine does not have a clearly defined area in which it is free to exercise its authority." Address by Justice Daniel E. Wathen to the Maine Municipal Association (Oct. 19, 1983).

9. The Maine Law Court has stated: "A city may not legislate without limit; it is subordinate to the state. 'As well might we speak of two centers in a circle as two sovereign powers in a state.'" Burkett v. Youngs, 135 Me. 459, 465, 199 A. 619, 622 (1938) (quoting State *ex. rel.* Mueller v. Thompson, 149 Wis. 488, 501, 137 N.W. 20, 26 (1912)).

10. "A municipality may enact police power ordinances for the following purposes: . . . Promoting the general welfare; preventing disease and promoting health; providing for the public safety." Me. Rev. Stat. Ann. tit. 30, § 2151(1)(A) (1978).

11. *See infra* notes 324-27 and accompanying text.

12. J. Rousseau, The Social-Contract 59-62, 95 (M. Cranston trans. 1968). *See also* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1031 n.18 (1985) (Powell, J., dissenting) ("The Framers recognized that the most effective democracy occurs at local levels of government, where people with first hand knowledge of local problems have more ready access to public officials responsible for dealing with them."); Frug, *The City As A Legal Concept*, 93 Harv. L. Rev. 1059, 1105-107 (1980).

Alexis de Tocqueville recognized over one hundred thirty years ago:

> The township is the only association so well rooted in nature that wherever men assemble it forms itself.
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> . . . .
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> . . . [T]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science: they put it within people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.[13]

Municipal government must serve two masters. Despite the appeal of de Tocqueville's instinctive notion that an autonomous local government protects the essence of individual liberty in the United States, the supremacy principle requires that local government also remain a subordinate functionary of state government.[14] Maine's Constitution, for instance, mandates that municipal corporations are subject to the general laws of the state.[15] Moreover, state legislation often requires that local governments act as administrative agents of the state government.[16] This administrative role must co-exist with

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13. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55-56 (G. Lawrence trans., J. Mayer & M. Lerner ed. 1966).

14. Frug, *supra* note 12, at 1105-117.

15. ME. CONST. art. IV, pt. 3, § 14 provides:

> **§ 14. Corporations, formed under general laws**
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> Section 14. Corporations shall be formed under general laws, and shall not be created by special Acts of the Legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained; and, however formed, they shall forever be subject to the general laws of the State.

16. *See, e.g.*, ME. REV. STAT. ANN., tit. 30, § 2752 (1978) (requiring municipalities to accept and review applications of those seeking to be licensed as innkeepers, victualers, or tavernkeepers, and to issue licenses to suitable individuals).

Municipal governments also have a substantial relationship with the federal government based essentially on the pre-emption doctrine. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973). An analysis of this relationship is beyond the scope of this Comment. It is worth noting, however, that although municipalities are not specifically mentioned in the United States Constitution, United States Supreme Court decisions reflect the view that under the Constitution municipalities are more analogous to private individuals rather than to sovereign governments. *See, e.g.*, Community Communications Co. v. City of Boulder, 455 U.S. 40, 70-71 (1982) (Rehnquist, J., dissenting). Cities do not enjoy the so-called "state action exemption" from federal antitrust laws either by virtue of their status as political subdivisions of the state or as autonomous governments under home rule powers. *Id.* at 53-57. *See also* Sullivan, *Antitrust Laws and the Evolution of the State Action Doctrine*, in NATIONAL LEAGUE OF CITIES, ANTITRUST AND LOCAL GOVERNMENT 9-18 (1982). To extend this immunity, state legislatures must develop a policy to regulate industry, clearly articulate it, and affirmatively express that the policy applies to municipal action. Community Communications Co. v. City of Boulder, 455 U.S. 40, 52 (1982). Furthermore, municipalities are "persons" within the meaning of the Civil Rights Act, and are liable for damages under 42 U.S.C. § 1983 (1982) for the unlawful

local government's governmental role which requires that municipal government be responsive to the local community. Intergovernmental relations between state and local units usually share at least one common attribute: a conflict over the degree to which a municipal government's acts are subordinate to those of the state government.[17]

Municipal government's multifaceted nature, which creates uncertainty as to its proper role in society,[18] reflects intergovernmental pressures extant since the late feudal period in England.[19] After the Norman Conquest medieval towns existed as autonomous communal associations, not legally created entities.[20] They developed in conjunction with a merchant class which grew in numbers despite the prevailing Christian antagonism toward capitalist enterprise.[21] The rise of urban centers and the merchant class which populated them related directly to the success of the agrarian economy.[22] A surplus of people and rural products resulted in significant commercial activity.[23] Entrepreneurs, freed from heretofore omnipresent agricultural and feudal responsibilities, naturally gravitated to urban trad-

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deprivation of civil rights. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). *See also* Stewart, *The Supreme Court Rewrites a Law: Municipal Liability Under Section 1983*, 15 URB. LAW 503 (1983).

17. O. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 38, at 104 (1982).

18. J. DILLON, *supra* note 1, at 30-31. F. GOODNOW, MUNICIPAL HOME RULE 18-20 (1897).

19. Frug, *supra* note 12, at 1083-90.

20. *Id.* at 1083.

> The medieval town was not an artificial entity separate from its inhabitants; it was a group of people seeking protection against outsiders for the interests of the group as a whole. The town was an economic association of merchants who created the town as a means of seeking relief from the multiplicity of jurisdictional claims to which they, and their land, were subject. These merchants gained their autonomy by using their growing economic power to make political settlements with others in the society, specifically the King and the nobility. They achieved a freedom from outside control that was made possible by, and that allowed to be enforced, a strong sense of community within the town.

Id. Another writer describes the medieval town as follows:

> [M]uch of medieval life was supportive because it was lived collectively in infinite numbers of groups, orders, associations, brotherhoods.
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> As nobles had their orders of chivalry, the common man had the *confrerie* or brotherhood of his trade or village, which surrounded him at every crux of life.
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> . . . .
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> . . . The *confreries* provided a context of life that was intensely sociable, with the solace and sometimes the abrasions that sociability implies.

B. TUCHMAN, A DISTANT MIRROR 39-40 (1978).

21. B. TUCHMAN, *supra* note 20, at 38-39.

22. L. MUMFORD, THE CITY IN HISTORY 253 (1961); C. PLATT, THE ENGLISH MEDIEVAL TOWN 21 (1976).

23. L. MUMFORD, *supra* note 22, at 253.

ing centers.[24]

Autonomous and elite groups of burghers carried out the internal functions of medieval municipal governments.[25] Towns imposed rigid regulations upon all who entered the town, whether they were noblemen, freemen, or peasants.[26] Although local government was usually oligarchic rather than democratic, the traditional feudal hierarchy did not operate within these growing urban centers.[27] The feudal hierarchy became displaced through the effective use of the burghers' growing bargaining position. These urban centers gave rise to economic growth and prosperity; feudal lords as well as the King quickly recognized towns as potentially significant revenue sources.[28] Urban burghers negotiated special privileges from the local feudal lords in the nature of free markets, exemption from tolls, and the power to dispense justice in their own courts pursuant to their own ordinances.[29]

The burghers used their economic power to obtain rights of freedom of association and mobility[30] from their lords in exchange for the relatively massive increase in tax revenues produced by the towns' efficient market economy.[31] The uniform regulations imposed by the burghers "contributed to make uniform the status of all the inhabitants located within the city walls and to create the middle class."[32] Peasants became citizens. Initially, then, the success of urban centers vastly improved the social condition of the average citi-

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24. *Id.* at 256.
25. Frug, *supra* note 12, at 1085.
26. *Id.* at 1086.
27. *Id.*
28. As power ceased to be represented in [the feudal landlords'] mind in purely military terms, he was tempted to part with a modicum of control over his individual tenants and dependents, in order to have their responsible collective contribution in the form of cash payments and urban rents: demands that the land-bound serf could not meet out of his poverty.

L. MUMFORD, *supra* note 22, at 256.

Professor Dillon suggested that as English towns and cities grew in wealth and population, they became less inclined to submit to arbitrary taxation. Edward I apparently was a shrewd negotiator: "This wise and politic prince was greatly distressed for money, and instead of attempting to raise it by the levy of arbitrary taxes, which were submitted to with murmurs and yielded sparingly, preferred to obtain it by the prior voluntary consent of the cities, towns, and buroughs." J. DILLON, *supra* note 1, at 17. According to Dillon, the local levy of taxes quickly gave rise to the beginnings of popular representation. Towns and cities were given the authority to send representatives to the King to give their consent to the King's decrees. *Id.* at 17-18.

29. C. PLATT, *supra* note 22, at 129-35.
30. "[T]he medieval city became a selective environment, gathering to itself the more skilled, the more adventurous, the more upstanding — probably therefore the more intelligent — part of the rural population. Citizenship itself, free association, replaced the ancient ties of blood and soil, of family and feudal allegiance." L. MUMFORD, *supra* note 22, at 262.
31. *Id.* at 264.
32. Frug, *supra* note 12, at 1086.

zen who participated in their development.[33]

The towns' special privileges did not develop from grants of power from a benevolent but omnipotent central government to the local government; rather, these privileges became the burgers' quid pro quo for the vast economic benefit they conferred upon the lords.[34] These special privileges became embodied in charter-like instruments setting out, in general terms, a covenant between parties bargained for in an arm's length transaction.[35] The towns' economic power secured their autonomy, and the character of medieval local government stressed the towns' governmental role. The local governments were in no sense subordinate administrative agencies of the central government.[36]

Later, as the King's power grew in relation to the various feudal lords, the towns became allied with him in common resistance to the landed nobility.[37] The King built walls for the towns and generally expanded the privileges of urban government to gain the burghers' support in the struggle to solidify his power base.[38] The alliance be-

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33. Certainly class antagonism between the town oligarchy, the guild members, and the rural population developed concurrently with the rise of urban centers. L. MUMFORD, *supra* note 22, at 256-57; B. TUCHMAN, *supra* note 20, at 38-39. Professor Frug, however, stresses the benefits which the sense of community conferred upon urban dwellers. He suggests that medieval political thought did not conceive of individual rights and interests as separate from those of the town, nor of those of the town as separate from the rest of society. Frug, *supra* note 12, at 1086-87. Drawing on the work of Otto Gierke, Frug suggests that the concept of the town's autonomy and of its citizens' autonomy merged, and that there were no "distinctions that we recognize as fundamental: between personal property rights and town sovereignty rights, between the town as a collection of individuals and the town as a whole." *Id.* at 1087. Under this view, the town became a cohesive association whose members advantaged themselves of its protections and benefits since it freed them in many respects from the tyranny of the feudal lord. *Id.* at 1083. *See generally* O. GIERKE, THE DEVELOPMENT OF POLITICAL THEORY (B. Freyd trans. 1966).

34. *See supra* notes 28-29 and accompanying text.

35. L. MUMFORD, *supra* note 22, at 261-62.

The charters negotiated between the Norman Conquest in 1066 and the early fifteenth century recognized the urban centers as communities and generally outlined the elements of the intergovernmental relationship. C. PLATT, *supra* note 22, at 129. However, these charters did not impose a formal corporate personality on municipalities. *Id.* This development would not occur until later in the fifteenth century. *See infra* notes 40-52 and accompanying text.

36. F. MAITLAND, TOWNSHIP AND BOROUGH 13 (1964). Municipalities "resisted royal interference as an inroad on the basic rights of Englishmen since the liberty of towns . . . had been established by the Magna Carta." Frug, *supra* note 12, at 1091. In 1215, the Magna Carta secured a promise that "the City of London shall have all her ancient liberties and free customs, both by land and water. Moreover, we will and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs." *Magna Carta*, ch. 13, *quoted in* J. BEBOUT, AN ANCIENT PARTNERSHIP 9 (1966).

37. L. MUMFORD, *supra* note 22, at 253; C. PLATT, *supra* note 22, at 128, 135.

38. L. MUMFORD, *supra* note 22, at 250-51. The King could collect taxes, *see supra* note 28, and oversee enforcement of criminal and civil law only through representa-

tween the King and local authorities was uneasy because the existence of plenary local authority potentially could be as destabilizing to the King's authority as was that of the feudal lords.[39]

As society became increasingly complex conflicts developed between the burghers and other members of society, including the sovereign.[40] As a result, the need arose for a legal relationship between the King and the local governments.[41] Thus, for the first time, the charters granted in this period[42] conferred the status of legal corporate personality upon municipalities.[43] At this point the common law began to develop the fiction that the corporate charter granted rights to municipalities, thus making them an arm or agent of the central government.[44] This fiction arose despite the fact that municipalities had long before bargained for those rights and that corporate status was simply a legal concept impressed upon an already existing relationship.[45]

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tives of the towns. The King's justices would visit each county, and typically each town came before them represented by its "reeve and four best men." F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 47 (1968) (Latin translation omitted). The town's opinion was routinely accepted as to the guilt or innocence of accused persons. However, if a town neglected to perform these functions, it would be subject to a fine. *Id.*

39. J. DILLON, *supra* note 1, at 18-19; Frug, *supra* note 12, at 1090-92.

40. Professor Frug suggests that an increasing recognition of the concept of individual rights as distinct from those of the local community itself accelerated these conflicts. Frug, *supra* note 12, at 1087-90. *See also* F. MAITLAND, *supra* note 36, at 85. Densely populated towns began to lose their homogeneous character and rifts developed among the once unified urban populations and their leaders. Frug, *supra* note 12, at 1089. Maitland also suggests that the town as an entity began to lose its holistic sense of association and community indistinguishable from its inhabitants, and increasingly took on a corporate character with rights and duties distinct from those of its inhabitants. F. MAITLAND, *supra* note 38, at 54; F. MAITLAND, *supra* note 36, at 18-19.

41. C. PLATT, *supra* note 22, at 129.

42. This second wave of charters imposed the formal corporate personality on municipal governments, *see infra* note 43, which distinguished these charters from those issued after the Norman Conquest, *see supra* note 35.

43. The first definite instance of formal municipal incorporation conferring a legal personality is generally thought to have occurred in 1439 when King Henry VI granted a charter to the City of Hull. F. MAITLAND, *supra* note 36, at 18. This charter established the text from which all subsequent charters of the "classic" age of incorporation would be based. C. PLATT, *supra* note 22, at 142. A chartered municipality in this period, as a fictitious corporate person, characteristically possessed the right of perpetual succession, the power to sue and be sued as a whole and by the corporate name, the power to hold lands, the right to use a common seal and the power of making by-laws. F. MAITLAND, *supra* note 38, at 56.

44. L. MUMFORD, *supra* note 22, at 263.

45. As for the charter itself, it led to the legal fiction, still piously preserved, that the town itself is a creature of the state and exists by sufferance. In plain fact the historic cities of Europe today are all older than the state that legally claims these rights, and had an independent existence before their right to exist was recognized!

When the King revoked London's charter in 1682, the fiction became law.[46] The court in *King v. The Mayor and Commonalty of the City of London*[47] held that the chartered city was identical to every other corporation, and thus, that the King could revoke municipal charters in a quo warranto proceeding.[48] The city charter became a revokable franchise rather than a vested right[49] and the charter came to represent a grant of legal powers to municipal governments. The King, and later Parliament, could strictly limit municipal functions to those expressly granted in the charter.[50] This new legal relationship necessarily focused on the municipalities' role as subordinate agents of the state.[51] The chartered municipalities' function as local governing bodies ran counter to their newly imposed corporate limitations. As a result, legislative activity by local government in areas of local public interest would be ultra vires, and thus beyond the scope of a municipality's authority, unless authorized by its charter.[52]

A. The Grant Approach to Delegating Power

Thus, by 1700 the relationship between Parliament and local government in England centered on the granting of chartered powers to municipalities. In colonial North America, the British utilized this system, and as a result, the grant approach was adhered to nearly exclusively in the United States.[53] Professor John F. Dillon, an influ-

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Id.

46. Frug, *supra* note 12, at 1094.

47. 89 Eng. Rep. 930 (K.B. 1683).

48. *Id.* at 938-39.

49. Frug, *supra* note 12, at 1092.

50. J. DILLON, *supra* note 1, at 19-22, 70-71; S. KYD, TREATISE ON THE LAW OF CORPORATIONS 1-9 (London 1793); H. STREET, A TREATISE ON THE DOCTRINE OF ULTRA VIRES 12-14 (1930).

51. F. GOODNOW, *supra* note 18, at 19.

52. One commentator has defined the doctrine of ultra vires as follows:

> [Since] corporations exist for the attainment of certain objects only, and that, if their powers are not expressly they are impliedly restricted to such only as are necessary for the due attainment of those objects, and that, consequently, they can perform no acts, enter into no transactions, and incur no liability but such as spring out of or are otherwise incidental to the purposes for which they have been created.

H. STREET, *supra* note 50, at 1.

53. 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §§ 1.10, .14, .36 (3d ed. 1971).

Colonial towns did not have the same formal corporate structure that chartered English cities possessed. Colonial towns' power could be perceived as based on freedom of association rather than on corporate rights. Frug, *supra* note 12, at 1097. The application of borrowed English municipal law to ostensibly non-corporate American local governments initially led to some confusion. One early Massachusetts case demonstrates the initial uncertainty in state and local relations. In Inhabitants of the Fourth School Dist. in Rumford v. Wood, 13 Mass. 193 (1816), the Massachusetts

ential scholar of municipal government in the late 1800's and early 1900's, endorsed a narrowly drawn, charter-based conceptualization of municipal power.[54] His concept of municipal power, known as Dillon's Rule, became the standard restatement of the traditional relationship between state and local government in the absence of legislation or state constitutional authority to the contrary.[55] Dillon's

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Supreme Judicial Court struggled to define the nature of local public entities. The court held that school districts were legal entities capable of suit despite other non-corporate characteristics.

> That they are not bodies politick and corporate, with the general powers of corporations, must be admitted . . . . The same may be said of towns and other municipal societies, which . . . are yet deficient in many of the powers incident to the general character of corporations.
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> . . . It is not necessary that our municipal corporations should act under seal, in order to bind themselves, or obligate others to them. A vote of the body is sufficient for this purpose . . . .

Id. at 199. Despite the court's skepticism regarding the extent of a municipality's corporate character, it affirmed the school district's power to sue. This early uncertainty was short lived, since most courts eventually embraced the corporate model of municipal government. *See infra* note 55 and accompanying text.

54. J. DILLON, *supra* note 1, at 448-49. Professor Dillon began teaching at the Columbia Law School in 1879 after twenty-one years of continuous judicial service. His work, *Treatise on the Law of Municipal Corporations*, was first conceived in 1866 while Dillon served as Chief Justice of the Iowa Supreme Court. C. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 112 (1973).

Dillon was a major influence in the development of the "public purpose" doctrine as a limitation on government's taxing power. *Id.* at 164. During the latter half of the nineteenth century, municipal governments frequently attempted to provide some services which previously had been regarded as objects of private initiative. Some services, such as public utilities, became accepted without much protest, while others such as the establishment and operation of manufacturing enterprises, *see, e.g.*, Opinion of the Justices, 58 Me. 590 (1871), were objected to on the ground that they did not serve a public purpose. C. JACOBS, *supra*, at 145. "[I]n the heyday of laissez-faire, 1870-1910, the efforts of municipalities to provide directly for the needs of their inhabitants were not infrequently frustrated." *Id.*

The Justices of the Maine Supreme Judicial Court fully accepted a strict "public purpose" limitation on taxation in Opinion of the Justices, 58 Me. 590 (1871). One year later, in a decision citing Chief Justice Dillon's opinion in Hanson v. Vernon, 27 Iowa 28 (1869), the Law Court struck down legislation enabling the Town of Jay to lend its credit to induce construction of a sawmill within the town. Allen v. Inhabitants of Jay, 60 Me. 124, 128 (1872). This growing tendency of local government to address problems through private investment alarmed the laissez-faire capitalists, and may have been a major impetus for Dillon's Rule and its quick acceptance in Maine. The rationale of *Allen*, however, has been thoroughly discredited. *See* Common Cause v. State, 455 A.2d 1, 22-25 (Me. 1983) (upholding a grant by the City of Portland to a private company for the construction of a dry-dock). *Cf.* Stewart v. Supervisors of Polk County, 30 Iowa 9 (1870) (distinguishing and limiting Hanson v. Vernon, 27 Iowa 28 (1869)). *Stewart* was decided after Dillon left the Iowa bench to become a federal judge. C. JACOBS, *supra* at 191 n.45.

55. D. MARTIN, *supra* note 1, at 11-12. Although Dillon's Rule was an articulation of the then prevailing status of municipal governments, it effectively became a rule of

Rule states:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted *in express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable.[56]

The essence of Dillon's Rule is the presumption that a municipality is a corporation and as such, is powerless except for those powers expressly or impliedly granted to it.[57]

Dillon emphasized the benefits which the corporate character of municipalities conferred upon society. First, local governments were insulated from a state legislature's demands that they assume regional responsibilities since they possessed only limited chartered powers.[58] This insulation was fragile, however, because a state legislature usually possessed the authority to alter, amend or revoke a municipality's charter.[59] Second, corrupt local governments could be restrained from causing extensive harm to the public good.[60] Narrowly circumscribed powers would restrain corrupt municipal bosses from getting out of hand.

Dillon's corporate charter view of the relationship between state and local public bodies did not provide for municipal autonomy or embody a governmental role for municipalities. Instead, he saw the municipality's corporate charter as a very narrowly drawn "constitution," preventing municipal legislation on matters not enumerated within the charter. Although the grant approach minimized municipal authority by presuming municipal powerlessness absent an express grant of authority, at least it made clear state and local spheres of responsibility. Dillon's grant approach, therefore, effectuates the "certainty principle." Dillon's Rule also emphasized the

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law indistinguishable from the traditional or grant approach to municipal power. *See* Note, *The Indiana Home Rule Act: A Second Chance for Local Self-Government*, 16 IND. L. REV. 677, 679 (1983).

56. J. DILLON, *supra* note 1, at 448-49 (emphasis in original).

57. *See supra* note 43 and accompanying text.

58. J. DILLON, *supra* note 1, at 31. Professor Dillon found "evil effects of municipal rule" arising from legislation conferring powers beyond the local administrative function. A most conspicuous example is conferring power on a municipality to aid in construction of regional railways, and to incur unlimited debt in that regard. *Id.*

59. 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 8.08 (3d ed. 1971).

60. *See* J. DILLON, *supra* note 1, at 31. Tremendous corruption in local government in the late nineteenth century may have influenced Dillon's conception of municipal corporations. He believed limited local powers would prevent such scandals as those perpetrated by New York's "Tweed Ring." J. DILLON, *supra* note 1, at 31 n.3. For a detailed discussion of the prosecutions in that scandal see H. CLINTON, CELEBRATED TRIALS 361-515 (1897).

municipality's role as an agent of the state,[61] favoring the supremacy principle at the expense of a governmental role for municipalities.[62]

B. *Early Municipal Autonomy — Imperium in Imperio*

In the late nineteenth century, increased urbanization led municipalities to seek some autonomy from state government in order to address concerns that were not dealt with by the state legislatures.[63]

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61. *See* Woodcock v. City of Calais, 66 Me. 234, 235 (1877). The Maine Law Court in *Woodcock* stated: "[M]unicipal corporations, so far as their public character is concerned, being agencies of the government, are not liable to a private action for the unauthorized or wrongful acts of their officers, even while acting in the line of their official duties, unless made so by statute . . . ." *Id.*

Professor Frank J. Goodnow, among others, worried that this emphasis disregarded the role of municipal organizations as efficient local governments which should have power to pinpoint and solve local problems. "The state legislature, which has the power to determine what shall be the functions of municipal corporations, has, to a large extent, lost sight of their original purpose, and has come to regard them as organs of the central government, for the purposes of the general state administration . . . ." F. GOODNOW, MUNICIPAL HOME RULE 17 (1897).

62. *See supra* notes 8-10 and accompanying text.

63. *See* Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385, 386. Municipal autonomy was justified by the assumption that "the communities themselves . . . are generally in a better position than any higher echelon of government to understand and to deal sympathetically with [local problems]." *Id.* at 385-86. Additionally, a traditional romantic preference for "strong and self-reliant local government" supported the movement for local autonomy. *Id.* at 386. Commentary and some case law suggested that municipal government possessed inherent power to govern. *See, e.g.*, McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916); Wilber, *The Inherent Right to Local Self-Government*, 2 DET. C.L. REV. 31 (1931). The classic judicial statement stating this proposition is People v. Hurlbut, 24 Mich. 44, 108 (1871) (Cooley, J., concurring). *Hurlbut* held that local officials had to be elected by the people of the locality or appointed by individuals elected by the locality. *Id.* at 67. The ruling was based upon Michigan's Constitution, which provided: "Judicial offices of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." MICH. CONST. of 1850, art. XV, § 7. Justice Cooley, in the course of his separate opinion, stated:

> The state may mould local institutions according to its view of policy or expediency; but local government is a matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

People v. Hurlbut, 24 Mich. 44, 108 (Cooley, J., concurring).

See also State *ex. rel.* Geake v. Fox, 158 Ind. 126, 130-37, 63 N.E. 19, 20-23 (1902); State *ex rel.* Jameson v. Denny, 118 Ind. 382, 396-400, 21 N.E. 252, 257-58 (1888); Iowa v. Barker, 116 Iowa 96, 104-106, 89 N.W. 204, 206-207 (1902); J. DILLON, *supra* note 1, at 26 n.1, 163 n.1 and cases cited therein; Note, *supra* note 55, at 678.

The advocates of inherent municipal power argued that plenary and aboriginal rights and powers existed in municipal governments. Under this theory, the state legislature derived its power from that which was surrendered by the towns. People v.

The movement toward greater municipal autonomy was first successful in 1875, when Missouri enacted a new constitution which gave the City of St. Louis the right to charter its own government.[64] The Missouri experience with home rule created a new method for distributing a state's police power between state and local government.[65] This method became known as *imperium in imperio*,[66] and its influence continues to affect the relationship between state and local governments in many states, including Maine.[67] The principal

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Hurlbut, 24 Mich. at 98-99 (Cooley, J., concurring).

This argument stressed that since organized local government pre-dated centralized government, the right to local self-government did not spring from the central government, but was inherent in municipalities. J. DILLON, *supra* note 1, at 162. The resurgence of a notion of inherent municipal power emphasized the governmental role principle. *See supra* note 10 and accompanying text. This theory envisaged plenary municipal power within a local sphere of influence, but disregarded the supremacy principle, that is, local government's role as a complementary administrative unit within the sovereign state. *Id.*

The United States Supreme Court ended all speculation regarding the inherent power of municipal government in City of Worcester v. Worcester Consol. St. Ry. Co., 196 U.S. 539 (1905). In *Worcester*, a municipal ordinance required street railway companies to keep the portions of streets occupied by their tracks in good repair. A state statute had recently abrogated such responsibilities statewide. The Court declared the municipal ordinance ultra vires, stating that "[a] municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself . . . . The city is the creature of the State." *Id.* at 548-49 (citation omitted). *See also* J. DILLON, *supra* note 1, at 154 n.1 and cases cited therein. The concept of inherent municipal power was laid to rest by the Supreme Court, but a parallel development in Missouri remained unaffected and took root. *See infra* notes 64-67 and accompanying text.

64. MO. CONST. of 1875, art. IX, §§ 20-25. In 1920, Missouri amended its Constitution to provide that "[a]ny city having a population of more than one hundred thousand inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the State." MO. CONST. of 1875, art. IX, § 16 (1920).

65. The Missouri constitutional home rule grant is contained in MO. CONST. art. VI, § 19 (1945, amended 1971) which, before amendment in 1971, read in pertinent part: "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the constitution and laws of the state . . . ." The 1971 amendment allowed cities with more than 5,000 inhabitants to adopt a charter. MO. CONST. art. VI, § 19.

66. *Imperium in imperio* literally translates as a state within a state. In the United States, the phrase was first used in City of St. Louis v. Western Union Tel. Co., 149 U.S. 465 (1893). In *Western Union*, a telegraph company was granted the right to erect poles on city property in St. Louis, Missouri. The company contested a rental charge for such use. St. Louis was unique at that time in that the Missouri Constitution provided for its charter through a free election of drafters and local ratification by referendum. *Id.* at 467. *See* MO. CONST. of 1875, art. IX, § 20. In holding that the charge was within the city's authority the Court said: "The city is in a very just sense an '*imperium in imperio*.' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter." *Id.* at 468.

67. Maine's constitutional home rule provision follows closely the scheme first

characteristics of this model include a constitutionally mandated division of responsibility between state and local government based on a distinction between statewide and local matters[68] and a constitutionally protected sphere of local affairs beyond state legislative control.[69]

Until 1963, the National Municipal League (NML), which periodically publishes a *Model State Constitution*, used an *imperium in imperio* scheme as its model.[70] Section 801 of that model provided the relevant language: "*Home Rule for Local Units.* Any county or city may adopt or amend a charter for its own government, subject to such regulations as are provided in this constitution and may be provided by general law."[71] Section 804 attempts constitutionally to secure for each city "full power and authority to pass laws and ordinances relating to its local affairs . . . but this grant of authority shall not be deemed to limit or restrict the power of the legislature to enact laws of statewide concern uniformly applicable to every city."[72] The drafters of Maine's home rule constitutional amend-

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adopted in Missouri. *See infra* text accompanying note 167. Other states' home rule schemes are similar to Missouri's original grant in that they maintain a degree of autonomy for municipalities in local matters. *See, e.g.*, COLO. CONST. art. XX, § 6.

68. *See* City of St. Louis v. Meyer, 185 Mo. 583, 597-98, 84 S.W. 914, 918 (1904). The court stated: " 'matters of purely municipal and local concern the Constitution intended to commit to local self-government.' " *Id.* (quoting City of St. Louis v. Dorr, 145 Mo. 466, 479, 46 S.W. 976, 979 (1898)).

69. For a recent example of the *imperium in imperio* model at work, *see* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 269, 407 N.E.2d 1369, 1376 (1980) (state statute *does not* prevail to override a local zoning law because localities are granted the authority to adopt zoning regulations by the Ohio constitutional home rule provision). *See also* Bromage, *Home Rule—NML Model*, 44 NAT'L MUN. REV. 132, 135 (1955). Professor Bromage points out that it is frequently up to the courts to decide what is a local affair as opposed to a state-wide issue. *Id.*

70. COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (5th ed. 1948) [hereinafter cited as NML MODEL]. In the sixth edition, the Committee abandoned the *imperium in imperio* scheme. Instead it adopted the limitation approach. *See* COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1963). *See also infra* text accompanying notes 99-108.

71. NML MODEL, *supra* note 70, § 801.

72. *Id.* § 804. Section 804 of the NML MODEL enumerates certain specific matters included in the definition of "local affairs" in the constitutional grant of powers to municipalities:

> The following shall be deemed to be a part of the powers conferred upon cities by this section when not inconsistent with general law:
>
> (a) To adopt and enforce within their limits local police, sanitary and other similar regulations.
>
> (b) To levy, assess and collect taxes, and to borrow money and issue bonds, and to levy and collect special assessments for benefits conferred.
>
> (c) To furnish all local public services; and to acquire and maintain, either within or without its corporate limits, cemeteries, hospitals, infirmaries, parks and boulevards, water supplies, and all works which involve the public health and safety.

ment followed the policy embodied by this *imperium in imperio* NML Model.[73]

Theoretically, this NML Model offers long-term stability in state and local relationships since it minimizes intergovernmental conflict by permitting state and local spheres of jurisdiction gradually to solidify through application of the doctrine of *stare decisis*.[74] Cities in those states where rural interests dominate the state legislatures may prefer this model, since they would have a measure of protection against the impact of rural lawmakers who may oppose state legislation serving basically urban needs.[75] This model also prevents the legislature from whittling away the powers conveyed to the municipal corporation and preserves the municipality's governmental role.[76]

The *imperium in imperio* model does, however, contain two serious flaws. First, since drafters of the model were fearful of the impact on the sovereignty of the state caused by completely insulated

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(d) To maintain art institutes, museums, theatres, operas, or orchestras, and to make any other provision for the cultural needs of the residents.

(e) To establish and alter the location of streets, to make local public improvements, and to acquire, by condemnation or otherwise, property within its corporate limits necessary for such improvements, and also to acquire additional property in order to preserve and protect such improvements, and to lease and sell such additional property, with restrictions to preserve and protect the improvements.

(f) To acquire, construct, hire, maintain and operate or lease local public utilities; to acquire, by condemnation or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and to grant local public utility franchises and regulate the exercise thereof.

(g) To issue and sell bonds, outside of any general debt limit imposed by law, on the security in whole or in part of any public utility or property owned by the city, or of the revenues thereof, or of both, including in the case of a public utility, if deemed desirable by the city, a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate such utility.

(h) To organize and administer public schools and libraries.

(i) To provide for slum clearance, the rehabilitation of blighted areas, and safe and sanitary housing for families of low income, and for recreational and other facilities incidental or appurtenant thereto; and gifts of money or property, or loans of money or credit for such purposes, shall be deemed to be for a city purpose.

Id.

73. The NML MODEL divides the relative responsibilities of state and local government into local and statewide subject matter areas. *See supra* text accompanying note 72. Similarly, Maine's home rule amendment provides for broad municipal power in matters "local and municipal in character." *See infra* notes 150-76 and accompanying text.

74. *See* MAINE INTERGOVERNMENTAL RELATIONS COMMISSION, REPORT ON HOME RULE 2-3 (1968) [hereinafter cited as M.I.R.C. REPORT].

75. Bromage, *supra* note 69, at 135.

76. M.I.R.C. REPORT, *supra* note 74, at 3.

and autonomous local governments, they sought a compromise.[77] In Missouri, the compromise was a provision directing that municipalities "shall always be in harmony with and subject to the Constitution and laws of Missouri."[78] Similarly, the NML Model subjected municipalities, notwithstanding the broad authority to act in local affairs, to "general laws."[79] As one commentator notes, "[t]aken at face value, this language would appear to indicate that what the state gave with one hand it took away with the other."[80] The language of the constitutional grant of power appeared to give the legislature the power to interfere with municipal affairs so long as such interference was accomplished by general law.[81] Commentators,

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77. *See* Schmandt, *supra* note 63, at 387. Professor Schmandt noted:

> Home rule in Missouri was unfortunately born with serious congenital defects. When the constitution makers of 1875 were prevailed upon to accept the plan for local autonomy proposed by the St. Louis delegation, their uncertainty as to the significance of the new device and their fear that the sovereignty of the state might in somewise be impaired caused them to surround the enabling grant with such restrictive phraseology that they left the matter of home rule in a state of ambiguity.

Id.

78. *See* MO. CONST. of 1875, art. IX, § 23. *See also* Schmandt, *supra* note 63, at 387.

79. *See supra* text accompanying note 71. General law refers to statutes that operate uniformly throughout the state on all persons and localities under like circumstances. 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.50 (3d ed. 1971). A special law, on the other hand, "affect[s] less than all the cities of one of the classes of cities." F. GOODNOW, *supra* note 18, at 63.

80. Schmandt, *supra* note 63, at 387. Professor Schmandt inquired: "For if the charter must conform to statutory law as well as to the organic document, how could a *constitutionally* guaranteed sphere of local autonomy exist?" *Id.*

81. *See supra* text accompanying note 72. In the local government context, the general law requirement serves as a municipal equal protection clause. Moreover, it strengthens the position of municipalities over the legislature, for the prohibition on special laws may prevent a legislature from interfering with purely local matters. F. GOODNOW, *supra* note 18, at 62-63. Prior to such prohibitions, legislative mischief was done, inter alia, by granting franchises in specific towns, appointing local officers, etc. *See id.* at 60-61 (listing various state constitutional prohibitions on state legislatures).

Goodnow advocated neither a "special law" prohibition on the state legislature nor the *imperium in imperio* home rule model. He rejected limitations on state government because he believed that in the balance between effective local government requiring a degree of autonomy from state interference and the state's interest in sovereign control of all activity within its borders, the state's interest is superior despite the negative impact on municipal government. *Id.* at 94-98. In the case of special legislation, Goodnow advocated a system which would give notice of special legislation to affected municipalities. If the localities failed to approve the special legislation, it could not become law until repassed by the legislature. The notice provisions remedied the problem of rushing potentially discriminatory legislation through unnoticed. *Id.* at 97-98.

In 1875, Maine adopted a general law restriction on the Legislature through a constitutional amendment. Resolve of Feb. 24, 1875, ch. 90, 1875 Me. Acts 30. ME. CONST. art. IV, pt. 3, § 13 provides: "The Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or pri-

however, disagree about the validity of this construction.[82]

The second and most significant flaw in the *imperium in imperio* model is its reliance on the ambiguous meaning of local affairs.[83] Commentators have described the term "local affairs" as a "thorny question"[84] and as the "crux" of this home rule model.[85] Courts have struggled with what exactly is a local affair since they first examined the state and local relationship.[86] An early Massachusetts case,[87] de-

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vate legislation." This clause is construed to be mandatory, so that "special legislation is unconstitutional if a general law has been enacted or could have been made applicable." Brann v. State, 424 A.2d 699, 704 (Me. 1981) (citation omitted). The clause is construed by the Law Court in light of its "concern about the use of special legislation, with its potential for 'privilege, favoritism, and monopoly.' " *Id.* (citation omitted).

In Maine, special laws are still relatively routine despite the conditional prohibition. *See*, e.g., An Act to Authorize the Town of West Bath to Regulate Ice Racing on New Meadows Lake, ch. 30, 1981 Me. Laws 1254. The act provides: "Nothwithstanding any provisions of the Revised Statutes, the Town of West Bath is authorized to enact a municipal ordinance regulating automobile ice racing on that portion of New Meadows Lake which is within the territorial limits of the town of West Bath." *Id.*

82. The author of the NML MODEL, Professor Arthur Bromage, recognized that the legislature can attempt to interfere with local affairs through general law. But when a statute purports to restrict the power of municipalities in this area, Bromage believed a court should uphold the legislature's action only if it concerns a statewide interest. Bromage, *supra* note 69, at 135.

The language of the NML MODEL, *see supra* note 70, however, suggests another interpretation. Professor Terrence Sandalow, for example, found that this model permits legislative interference by the passage of general laws without regard for whether their subject matter is of statewide interest. Sandalow, *supra* note 1, at 651 n.30 (1964). *But see* Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 298 n.148 (1968) (concurring with Professor Bromage's interpretation of the NML MODEL).

83. Vanlandingham, *supra* note 82, at 298.

84. COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 97 (6th ed. 1963).

85. Vanlandingham, *supra* note 82, at 291.

86. By 1936, the Wisconsin Supreme Court could find no precise definition in "any court of this country." Van Gilder v. City of Madison, 222 Wisc. 58, 67, 267 N.W. 25, 28 (1936). Commentators also have struggled to define the term: H. ALDERFER, AMERICAN LOCAL GOVERNMENT AND ADMINISTRATION 138-40 (1956); 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 3.40 (1984); F. GOODNOW, *supra* note 18, at 77-81. 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 4.85-.100 (3d ed. 1979); Sandalow, *supra* note 1, at 687; Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 684-85 (1973); Vanlandingham, *supra* note 82, at 272, 291-93.

87. Stetson v. Kempton, 13 Mass. 272 (1816). In *Stetson*, a town attempted to raise money through a property tax to provide additional wages for the militia. The Massachusetts Supreme Judicial Court determined that the town lacked the power to do so. The court noted:

> The right of towns to grant or raise money, so as to bind the property of the inhabitants, or subject their persons to arrest for nonpayment, is certainly derived from statute. Their corporate powers depend upon legislative charter or grant; or upon prescription, where they may have exercised the powers anciently without any particular act of incorporation. But in all cases the powers of towns are defined by the statute of 1785, c. 75.

cided prior to the separation of Maine from Massachusetts,[88] contained a partial list of local affairs: payment of municipal officers; support of schools and of the poor; and construction of town assembly halls and marketplaces,[89] but not theaters, circuses or "any other place of mere amusement."[90] In *Burkett v. Youngs*[91] the Maine Supreme Judicial Court also attempted to delineate between municipal and state affairs:

> What are municipal affairs?
>
> There are no well laid rules or principles by which to ascertain the answer to that question.
>
> Municipal affairs, it has been said, comprise the internal business of a municipality.
>
> . . . .
>
> . . . [M]atters which relate, in general, to the inhabitants of the given community and the people of the entire State, are of the prerogatives of State government. . . . In fact, there are comparatively few governmental doings that are completely municipal.[92]

The *imperium in imperio* model's reliance on the local affairs distinction decreases its ability to serve the goal of defining with certainty the relationship between state and local government.[93] The distinction is difficult to draw since both state and local govern-

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> . . . .
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> With respect to the defence of any town against the incursions of an enemy in time of war, it is difficult to see any principle, upon which that can become a necessary town charge. It is not a corporate duty to defend the town against an enemy. This is properly the business of the state or government, and is the most essential consideration for the obligation of the citizen to contribute to the general treasury.

Id. at 278-79.

88. Maine became a separate state in 1820. *See* Act of Mar. 3, 1820, ch. 19, 3 Stat. 544; 1819 Mass. Acts. ch. CLXI. The common law of Massachusetts became the common law of Maine by operation of the Act of Separation and ME. CONST. art. X, § 3 which provides: "All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation." *See* Hilton v. State, 348 A.2d 242 (Me. 1975).

89. Stetson v. Kempton, 13 Mass. 272, 278-79 (1816). *See also* J. LORD, THE MAINE TOWNSMAN, OR LAWS FOR THE REGULATION OF TOWNS 13-16 (Portland 1845).

90. Stetson v. Kempton, 13 Mass. 272, 279 (1816).

91. 135 Me. 459, 199 A. 619 (1938). In *Burkett*, a Bangor taxpayer sought to have the 1938 general appropriation resolve passed by the city council referred to the local electorate for acceptance or rejection. The plaintiff relied on a provision of the Constitution of Maine which provided in part: "The city council of any city may establish the initiative and referendum for the electors of such city in regard to its municipal affairs . . . ." *Id.* at 463-64, 199 A. at 621. *See* ME. CONST. art. IV, pt. 3, § 21 (1909, amended 1980). The court rejected the plaintiff's argument holding that a local government's budget and related assessments were not municipal affairs and thus not subject to the local electorate's approval or disapproval. Burkett v. Youngs, 135 Me. at 466-67, 199 A. at 622-23.

92. Burkett v. Youngs, 135 Me. at 464-67, 199 A. at 621-22 (citations omitted).

93. *See supra* note 8 and accompanying text.

ments are interested in the great majority of subject matter areas.[94] The hazy line between state and local concerns confounds the previously clearly defined[95] relationship between state and local government under the grant approach. As a result the certainty principle is sacrificed.[96] To the extent municipal government is insulated from state legislative interference, the supremacy principle is also disregarded.[97] Furthermore, the courts are frequently called upon to draw the line between state and local power, and in so doing interfere with what is basically a political distribution of the state legislature's power.[98]

C. *The Limitation Approach*

In 1953, Dean Fordham drafted an alternative constitutional provision to the *imperium in imperio* model for the American Municipal Association. It reads in part:

> A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute.[99]

This limitation approach to municipal power constitutionally secures the authority for municipal legislation until a state statute limits the power of a municipality to act in the particular subject matter area.[100]

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94. Vanlandingham, *supra* note 82, at 293. "[T]he problem of classifying these functions appears to have no satisfactory solution, since in a complex society state and local governments frequently have a concurrent interest in them, and they cannot be assigned to exclusive spheres save on the basis of arbitrary reasoning." *Id.*

95. *See supra* text accompanying note 61.

96. *See supra* note 8 and accompanying text.

97. *See supra* note 9 and accompanying text.

98. *See, e.g.*, Burkett v. Youngs, 135 Me. 459, 199 A. 619 (1938). *See supra* notes 91-92 and accompanying text. As Bromage explains: "When all is said and done, it must be recognized that the ultimate success of the home rule section of the [NML MODEL] rests upon a wiser and broader sweep of judicial interpretation." NML MODEL, *supra* note 70, at 47. A less complimentary explanation of this model emphasizes that the *imperium in imperio* approach "strongly tends to dump political questions into the laps of the courts." Fordham, *Home Rule — AMA Model*, 44 NAT'L MUN. REV. 137, 139 (1955).

99. AMERICAN MUNICIPAL ASSOCIATION, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (1953). Dr. Jefferson B. Fordham is a former dean and professor emeritus at the University of Pennsylvania Law School.

100. An example of this model at work is City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 164 P.2d 598 (1945):

> Where a home rule city has power by its charter it may act in conformity with such power not only in matters of local concern, but also in matters of state-wide concern, within its territorial limits, unless the Legislature has

The constitutional presumption that a municipality may fully exercise the state's police power is a reversal of the grant approach presumption that municipal government is impotent until a state statute, or charter provision, is found that grants to a municipality the power to act in the particular subject matter area.[101] The reversal of the Dillon Rule presumption is the distinctive contribution of the limitation approach to home rule.[102] As one commentator explained: "In lawyer's language, [the limitation approach] 'inverts the presumption' or 'shifts the burden' on the authority issue; in common language, [the limitation approach] converts city authority from a question of 'why' into a question of 'why not?' "[103]

Fordham's model is unique because it rejects the state and local subject matter distinction, and removes the limitations on the state legislature to act in local affairs imposed under the *imperium in imperio* model.[104] Fordham identified several advantages of the limitation approach. First and foremost, he noted that the model obviates "the need to appeal to the legislature for enabling legislation. . . . [T]his approach 'emphatically reverses the old strict-constructionist [grant approach] presumption against the existence of municipal power . . . .' "[105] Second, he maintained that the elimination of the state and local distinction removed the political questions generated by that inquiry from the court's domain and left them for the legislature.[106] Fordham considered the legislature, rather than the courts, better suited to determine how governmental responsibilities should be allocated between state and local actors, because the legislature is able to adjust the allocation in light of changing conditions more easily than the judiciary can through the relatively slow judicial process.[107] Fordham pointed out that a final advantage of the limitation

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> appropriated the field, and directly or by necessary implication established a rule, beyond which the city may not go.

Id. at 6, 164 P.2d at 601. *See also* COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1963) [hereinafter cited as NEW NML MODEL]. In 1963, the National Municipal League abandoned the *imperium in imperio* model and adopted the limitation approach with the sixth edition of its Model State Constitution. The NEW NML MODEL provides in part: "A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law." *Id.* The NML's primary justification for adopting the limitation approach was the benefit of doing away with the "thorny question" under the *imperium in imperio* model of what is "local law" and thus avoiding "hazardous" judicial application. *Id.* at 97.

101. *See supra* notes 53-62 and accompanying text.
102. Sandalow, *supra* note 1, at 650; Vanlandingham, *supra* note 82, at 307-308.
103. Schwartz, *supra* note 86, at 678.
104. Fordham, *supra* note 98, at 140.
105. *Id.* (quoting NEW NML MODEL, *supra* note 100, commentary at 20).
106. *Id.* at 138-39.
107. *Id.* at 140. " '[T]here should be a policy-making power in a state, short of the

approach is that it eliminates an element of uncertainty in the relationship between state and local government. Certainty is achieved by eliminating the ambiguous state and local subject matter distinction of the *imperium in imperio* approach.[108]

In sum, municipalities may be delegated power by one of three possible methods, or variations thereon: the grant approach,[109] the *imperium in imperio* approach,[110] and the limitation approach.[111] The limitation approach best reconciles the three conflicting goals of a state and local government relationship.[112] On the one hand, the limitation approach creates an open-ended mandate to municipalities to actively legislate in the public interest of the community, and thus encourages the municipality's governmental role.[113] On the other hand, it establishes a legal relationship between state and local government that leaves no doubt that municipalities are subservient administrative units of the state.[114] The state legislature may adjust this relationship at will by passing or repealing statutes which deny power to or pre-empt municipalities in particular areas.[115]

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general electorate, competent to make the decisions as to adaptation and devolution of governmental powers and functions to serve the changing needs of society.'" *Id.* Other commentators, however, view the judicial process as a benefit. *See, e.g.*, Bromage, *supra* note 69, at 135 (advantage of judicial defense against legislative intrusion into municipal affairs); M.I.R.C. REPORT, *supra* note 74, at 3 (advantage of stability to state-local relations by virtue of judicial doctrine of *stare decisis*).

108. *See* Fordham, *supra* note 98, at 140.

109. *See supra* notes 53-62 and accompanying text.

110. *See supra* notes 63-98 and accompanying text.

111. *See supra* notes 99-108 and accompanying text.

112. *See supra* notes 8-10 and accompanying text.

113. The only restraint on municipalities under this model is the state legislature, thus eliminating the slippery definition of local matters. This avoids the possibility of regulatory gaps where the legislature has not acted in response to a recognized problem in the municipality and the subject matter is defined as non-local and therefore beyond the municipal government's authority. *See* Sandalow, *supra* note 1, at 653-54. *See also infra* notes 129, 307.

114. The certainty principle and supremacy principle, *see supra* notes 9-10 and accompanying text, are thus accommodated. The vague definition of local matters under the *imperium in imperio* model also obscures the boundaries of municipal power and leads to

> what one commentator has termed "municipal pussyfooting." Officials not only hesitate to embark on new programs, but at times employ the confusion created by joint legislative-municipal responsibility as a pretext for failing to take action. . . . A broad grant of municipal initiative, by contrast, serves to promote the visibility of governmental decision making by pinpointing responsibility.

Sandalow, *supra* note 1, at 656 (quoting LEPAWSKY, HOME RULE FOR METROPOLITAN CHICAGO XV (1935)).

115. A form of this approach characterizes the state and local relationship in Maine. *See infra* notes 216-324 and accompanying text.

III. Judicial Application of the Grant Approach in Maine

Prior to 1820, Massachusetts communities (including those in the District of Maine) adopted both the town meeting and municipal forms of local government.[116] In 1821, one year after separation from Massachusetts,[117] Maine codified the existing relationship between municipalities and the state government.[118] The statute set forth town meeting and election procedures, enumerated other specific municipal powers including the power to tax citizens for "other necessary charges," and provided for a general police force to enforce those provisions.[119]

The Maine statute copied virtually verbatim language from the Massachusetts statute of 1785.[120] The Massachusetts statute, a fore-

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116. J. Reid, Maine, Charles II and Massachusetts-Governmental Relationships In Early Northern New England 17 (1977). Before unification with Massachusetts, Sir Ferdinando Gorges held a patent from the King for " 'the planting, ruling, ordering and governing' of all of America between the latitudes of forty and forty-eight degrees [including all of what is now Maine]. . . . Rights were included to regulate completely all forms of activity within the grant." *Id.* at 6.

Gorges made land grants from his patent, and these patentees then became the local administrators making grants on their own. *Id.* at 8-10. These proprietary practices were at the heart of the system. *Id.* at 10. When Massachusetts annexed Maine in 1651, the Massachusetts General Court began granting town charters. A collision between the patent system and the town government system eventually resulted in the general adoption of the town government system. *Id.* at 11-110.

117. See *supra* note 88.

118. Act of Mar. 19, 1821, ch. 114, § 6, 1821 Me. Laws 459, 463. Section 6 of the statute reads:

> Sec. 6. *Be it further enacted*, That the citizens of any town, qualified as aforesaid, at the annual meeting for the choice of town officers, or at any other town meeting, regularly warned, may grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges, arising within the same town, to be assessed upon the polls and property within the same, as by law provided; and they are also hereby empowered to make and agree upon such necessary rules, orders and bye-laws, for the directing, managing and ordering the prudential affairs of such town, as they shall judge most conducive to the peace, welfare and good order thereof; and to annex penalties for the observance of the same not exceeding five dollars for one offence, to ensure to such uses as they shall therein direct: *Provided*, They be not repugnant to the general laws of this State: *And provided also*, Such orders and bye-laws shall have the approbation of the Court of Sessions of the same county.

Id.

Before separation the Massachusetts General Court granted charters and recognized the existence of towns established in the District of Maine. The General Court granted municipalities the "privileges and immunities" of other Massachusetts towns. These later to be Maine towns conformed with those in Massachusetts in terms of structure, powers and duties. O. Hormell, Maine Towns 8 (1932). Massachusetts law including its common law, in force on the date of separation, provided the precedents for Maine law. Me. Const., art. X, § 3.

119. Act of Mar. 19, 1821, ch. 114, § 6, 1821 Me. Laws 159, 463.

120. *Compare* Act of Mar. 19, 1821, ch. 114, § 6, 1821 Me. Laws 459, 463 *with* Act

runner to Dillon's Rule, granted specific powers to municipalities. Chapter 75 stated in part that "the freeholders, and other inhabitants of each respective town . . . may grant and vote such sum or sums of money, as they shall judge necessary for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges arising with the same town . . . ."[121] The Massachusetts Supreme Judicial Court interpreted the statute in *Stetson v. Kempton*.[122] In *Stetson*, the inhabitants of Fairhaven approved a tax at a town meeting to pay additional wages "allowed the drafted and enlisted militia of said town, and other expenditures of defense."[123] The plaintiff, a resident of the town, sued to prevent the seizure of his chaise and harness for nonpayment of the assessment.[124] The statutory language "and other necessary charges" seemed to allow flexibility to municipal governments in raising necessary sums of money. Relying on this apparent flexibility, and realizing that raising money to pay additional compensation to militiamen was not expressly authorized by any statute or by Fairhaven's charter, Fairhaven argued that the power to do so was covered by the power to raise money for "other necessary charges."[125]

In rejecting Fairhaven's argument and in holding the tax ultra vires, the Massachusetts court drained much of the meaning from the statute's discretionary language. The court found that a municipality derived its power to grant or raise money from general state statutes or through charter by special acts of the legislature.[126] Since the court did not find any explicit grant authorizing this particular municipal action, the statute of 1785, chapter 75, determined the validity of the town's act.[127] The court defined a "necessary charge" as one to effect "a legal discharge of [a town's] corporate duty," or as one that is "essential to the comfort and convenience of the citizens."[128] Despite the court's ruling that Fairhaven's tax did not constitute a necessary charge, however, its definition left some room for the limited exercise of municipal government. Thus, *Stetson* left some hope that municipal government could exercise the governmental role.[129]

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of Mar. 23, 1786, ch. 75, 1784-1785 Mass. Acts 605.

121. Act of Mar. 23, 1786, ch. 75, 1784-1785 Mass. Acts 605, 610.

122. 13 Mass. 272 (1816). *See also* Inhabitants of the Fourth School Dist. in Rumford v. Wood, 13 Mass. 193 (1816).

123. Stetson v. Kempton, 13 Mass. at 273.

124. *Id.* at 272.

125. *Id.* at 278-79.

126. *Id.* at 278.

127. *Id.*

128. *Id.* at 279.

129. But that hope was slim, for the facts of *Stetson* presented a compelling argument for the town which was rejected by the court. The United States was embroiled

In Maine, the Supreme Judicial Court thoroughly considered the scope of municipal powers under Maine's statutory scheme for the first time[130] in *Bussey v. Gilmore*.[131] In *Bussey*, the plaintiff challenged a tax authorized by the town of Bangor to pay for a bridge.[132] The court found that towns had no authority to provide for the erection of bridges over tidal or navigable rivers.[133] As in *Stetson*, the court found that the power to tax must emanate from the "other necessary charges" language of chapter 114 of the Statutes of 1821.[134] The court held that municipalities are limited to power "clearly incident to the execution of the power granted."[135]

Although the court in *Bussey* cited and drew from the principles of *Stetson*,[136] it narrowed *Stetson's* definition of "other necessary charges." The *Stetson* court found municipal powers to include those exercised to effect legal discharge of the town's corporate duty (specifically listed by statute or charter), or those essential to the comfort and convenience of the citizens.[137] This formulation allowed for some discretion in municipalities to legislate in the local public interest outside its administrative corporate role. The *Bussey* court's holding that municipalities may only exercise powers "clearly incident to" a granted power impliedly rejected the latter portion of the *Stetson* test in favor of a strict grant approach to municipal power.[138]

Subsequent Maine court decisions cemented the municipality's role as corporate agent of the state, while diminishing its ability to

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in the War of 1812 and Great Britain was destroying property along the coast. Stetson v. Kempton, 13 Mass. at 273. Since the federal government and the Commonwealth of Massachusetts could not adequately protect the coast, coastal towns sought to protect themselves. The court found that "although it may be impracticable, in so extensive a territory, to furnish competent security to every section or point, . . . it does not follow that corporations of limited powers, like towns, can take upon themselves the duty, and exact the money of their citizens for the execution of it." *Id.* at 279-80.

Problems which are left unaddressed by state government but which are also beyond the scope of local government's authority to correct result in regulatory "gaps." The existence of a gap presents a compelling reason to review the state and local governmental relationship. *See supra* note 113 and accompanying text.

130. A few earlier cases touched on the nature and scope of municipal power, *see, e.g.*, Inhabitants of Alna v. Plummer, 3 Me. 88 (1824); Todd v. Inhabitants of Rome, 2 Me. 55 (1822); Morrell v. Sylvester, 1 Me. 248 (1821) (citing Stetson v. Kempton, 13 Mass. 272 (1816)).

131. 3 Me. 191 (1824).

132. *Id.* at 192-93.

133. *Id.* at 196.

134. *Id. See* Stetson v. Kempton, 13 Mass. 272, 279 (1816).

135. Bussey v. Gilmore, 3 Me. at 196.

136. *Id.* at 195-96.

137. Stetson v. Kempton, 13 Mass. 272, 278-79 (1816). See also *supra* notes 122-29 and accompanying text.

138. *See supra* text accompanying note 135.

act as "government."[139] The court in one case found that towns "derive none of their powers from, nor are duties imposed upon them by, the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments."[140] The net result of the decisions regarding municipal corporations was that by the twentieth century, the grant approach, as articulated by Professor Dillon,[141] became firmly entrenched in Maine.[142]

IV. Maine's Home Rule Scheme

A. *Problems Under Dillon's Rule — Goals of Home Rule*

Several problems became evident in Maine, as they had elsewhere, as a result of Dillon's Rule and its grant approach to delegating power to municipalities. The first and most important problem concerned the need for municipalities to seek specific authorization from the Legislature in order to cope with increasingly complex problems in society.[143] In doing so, municipalities swamped the leg-

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139. *See, e.g.*, Chase v. Inhabitants of Litchfield, 134 Me. 122, 182 A. 921 (1936). *See also* Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58 (1842) (municipalities exist at the pleasure of the state); Phillips Village Corp. v. Phillips Water Co., 104 Me. 103, 71 A. 474 (1908) (municipalities unable to contract for purchase of water company absent explicit legislative authorization).

140. Hooper v. Emery, 14 Me. 375, 377 (1837) (citing Stetson v. Kempton, 13 Mass. 272 (1816) and Bussey v. Gilmore, 3 Me. 191 (1824) as controlling).

141. *See supra* notes 53-62 and accompanying text.

142. Chase v. Inhabitants of Litchfield, 134 Me. 122, 182 A. 921 (1936), contains an excellent survey of Maine authority discussing the extent of municipal power under Dillon's Rule. Other Maine cases provide a variety of descriptions of municipal corporations. *See* Inhabitants of Frankfort v. Waldo Lumber Co., 128 Me. 1, 4, 145 A. 241, 243 (1929) (hand of the state); Inhabitants of Bayville Corp. v. Inhabitants of Boothbay Harbor, 110 Me. 46, 51, 85 A. 300, 302 (1912) (instruments of government created for political purposes); Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 369, 40 A. 141, 142 (1898) (territorial divisions into which the territory of the state is divided by the Legislature for political purposes); Carlton v. Newman, 77 Me. 408, 415, 1 A. 194, 198 (1885) (political subdivisions); Woodcock v. City of Calais, 66 Me. 234, 235 (1877) (agencies of the government); Inhabitants of Westbrook v. Inhabitants of Deering, 63 Me. 231, 236 (1874) (institutions of the state established for certain public purposes); Opinion of the Justices, 58 Me. 590, 597 (1871) (public corporations for public purposes); Mitchell v. City of Rockland, 52 Me. 118, 123 (1860) (quasi-corporations).

143. *See, e.g.*, Squires v. Inhabitants of Augusta, 155 Me. 151, 153 A.2d 80 (1959). In *Squires*, a city ordinance permitting the busing of public and private school children to and from school was struck down as beyond the scope of authority delegated to the towns by the Legislature. *Id.* at 167-68, 153 A.2d at 88. The court was unmoved by the public safety interest embodied in the ordinance which "respond[ed] to a purely modern exigency, traffic disasters in alarming arithmetic progression." *Id.* at 210, 153 A.2d at 111 (Sullivan and Dubord, JJ., dissenting). The majority insisted that "only a properly worded enabling act, authorizing municipalities to expend funds for the transportation of children . . . would meet constitutional requirements." *Id.* at 164, 153 A.2d at 87. *See generally* M.I.R.C. Report, *supra* note 74, at 1-2; Frug, *supra*

islature with local matters at the expense of statewide concerns.[144] Second, these increasingly complex problems required increasingly varied and flexible responses.[145] State legislative action often was inefficient and ineffective.[146] Third, the Maine Legislature with absolute control over municipal government, promulgated legislation which regulated the most local of municipal affairs.[147]

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note 12, at 1062-73; Sharp, *Home Rule in Alaska: A Clash Between the Constitution and the Court*, 3 U.C.L.A.—ALASKA L. REV. 1, 2-3 (1973); Vanlandingham, *supra* note 82, at 269-72; Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571, 571-79 (1955).

144. M.I.R.C. REPORT, *supra* note 74 at 1. The Maine Legislature's major concern during debate on the home rule amendment in 1969 was the time and money expended in approving every municipal charter revision. "It makes no sense to me that the Legislature should determine what charter changes should be made by the cities and towns of our state. . . . I believe we have at least 70 or 77 charter changes in this Legislature [thus far] which takes a lot of time, a lot of energy, and a lot of cost." 2 ME. LEGIS. REC. 3257 (1969) (statement of Rep. Sahagian). Another representative emphasized that:

> [T]here are many many issues of statewide importance . . . which we fail to deal with as effectively as we would like to because we do not have the time to do so.
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> . . . .
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> . . . [H]ome rule is one logical and effective way of cutting down on the number of local issues that divert a good deal of the attention and time of the Legislature . . . .

Id. at 3257-58 (statement of Rep. Lund).

The home rule scheme adopted in Maine initially accomplished this goal. In the first year following adoption of home rule there was a significant drop in the Legislature's special act workload. Also, municipalities increased their charter drafting and revision activity. J. Haag, Address at the Maine Municipal Association Home Rule Seminar (Apr. 17, 1971), reprinted in MAINE MUNICIPAL ASSOCIATION, INFORMATION BULLETIN No. 30-71, at 3 (no date) (copy on file at Maine Law Review office).

A second but no less important concern was that home rule would encourage the resolution of local problems at the local level.

> It happens all to often that people who have a disagreement with a charter provision or with a city government or some officials within the city government, will not resolve their problem at the local level through local action and through action at the ballot box, but will seek to go over the heads of the community representatives, elected officials, and will try to solve the problems here at the state level instead.

2 ME. LEGIS. REC. 3258 (1969) (statement of Rep. Lund).

145. Squires v. Inhabitants of Augusta, 155 Me. 151, 210-11, 153 A.2d 80, 111 (1959) (Sullivan and Dubord, JJ., dissenting) (police power must be adaptable to changing circumstances); Boston and Maine R.R. Co. v. County Comm'r, 79 Me. 386, 393, 10 A. 113, 114 (1887) (the exercise of police power "must become wider, more varied, and frequent, with the progress of society"). *See also* M.I.R.C. REPORT, *supra* note 74, at 1.

146. *See, e.g.*, Squires v. Inhabitants of Augusta, 155 Me. 151, 153 A.2d 80 (1959) (city without authority to provide for conveyance of children to school despite state compulsory education law). *See supra* note 143. *See also* Sandalow, *supra* note 1, at 655.

147. Maine's Governor Curtis articulated this concern in proposing revisions to the state and local government relationship: "The day when the local representative

By the 1960's, Maine municipal officials and overworked legislators agreed that legislative procedures following Dillon's grant approach no longer furnished efficient municipal government.[148] Advocates of more powerful municipal government formulated a plan to create a new method for delegating power to local political units which would achieve the following goals: 1) allow local government to be responsive to the needs of the local community; 2) eliminate the need for state approval of all changes in local charters of legislation; 3) maintain continuity and certainty in the state and local relationship; and 4) eliminate interference by the legislature in local matters.[149] The first step in achieving these goals was to adopt a constitutional amendment which incorporated a redefinition of the state-local relationship.

B. The Constitutional Amendment

In 1968, after a year-long study, the Maine Intergovernmental Relations Commission reported to Governor Curtis and members of the 104th Legislature a proposed change in the relationship between state and local government in Maine.[150] The Commission recommended that the relationship between state and local government be changed by constitutional amendment[151] from a grant approach to one providing for some local autonomy. The drafters sought to prevent the state Legislature from interfering with municipal autonomy in local matters.[152] In this respect, their reasoning was similar to the reasoning of proponents of the *imperium in imperio* model of home rule.[153] They chose to recommend action by constitutional amend-

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went to the legislature to effect all local changes, whether trivial or important, should be ended." Address by Governor Curtis, Maine Municipal Association Convention (Oct. 26, 1967), *reprinted in* THE MAINE TOWNSMAN, Nov. 1967, at 4, 5. *See also* Sandalow, *supra* note 1, at 647.

148. 2 ME. LEGIS. REC. 3256 (1969) (statement of Rep. Rideout); Editorial, THE MAINE TOWNSMAN, Jan. 1969, at 1. (policy objective of the Maine Municipal Association is implementation of municipal home rule).

149. M.I.R.C. REPORT, *supra* note 74, at 1-3.

150. M.I.R.C. REPORT, *supra* note 74.

151. *Id.* at 2.

152. *Id.* at 2-3. It is unclear if this purpose for providing constitutional home rule remained viable after enactment. The draft amendment proposed in the M.I.R.C. REPORT varies significantly from the final version. *See infra* notes 166-76 and accompanying text. *See also* the enabling legislation *infra* notes 177-91 and accompanying text, and the judicial construction of the home rule scheme *infra* notes 192-324 and accompanying text. It cannot now be seriously suggested that the home rule scheme insulates *anything* from legislative enactment. *See* 2 ME. LEGIS. REC. 3260 (1969) (statement of Rep. Martin).

153. *See supra* notes 63-98 and accompanying text. When the drafters of Maine's proposed home rule constitutional provision defined home rule as "the autonomy of operation of a municipal unit within its own framework," perhaps they had Schwartz' definition of *imperium in imperio* in mind. M.I.R.C. REPORT, *supra* note 74, at 1. According to Schwartz, the *imperium in imperio* model operates as a doctrine of "au-

ment due to fear that an open-ended legislative delegation of power to municipalities would be unconstitutional.[154] The Maine Constitution provides that corporations "shall forever be subject to the general laws of the State;"[155] a statute purporting to insulate municipal corporations from any general law regulating local affairs would certainly be suspect.

The draft proposal read: "Municipal corporations shall have the exclusive power to alter and amend their charters on all matters which are local and municipal in character."[156] This draft, representing the *imperium in imperio* home rule model in its purest form,[157] would have totally foreclosed the Legislature from interfering with municipal government in local matters by virtue of the words "exclusive power."[158] The draft did not even contain the caveat of the National Municipal League's *imperium in imperio* model that "this grant of power shall not be deemed to limit or restrict the power of the Legislature to enact laws of statewide concern uniformly applicable to every city."[159] Under Maine's original draft amendment, the Legislature would have had no control over a local matter even if it purported to uniformly regulate that subject matter by enactment of a general law.[160]

Under the original draft proposal, the courts would be called upon to define the boundaries of "matters which are local and municipal in character." Thus, the judiciary would play a dominant role in shaping the relationship between state and local government. Through case by case adjudication, the substantive content of local subject matter would emerge. The drafters anticipated that the doctrine of *stare decisis* would solidify those boundaries and create stability and certainty in the relationship between state and local governments.[161]

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tonomy" which "supplies the city with some limited degree of immunity from state legislation that professes to displace or override city decisions which themselves fall within the scope of home rule authority." Schwartz, *supra* note 86, at 676.

154. M.I.R.C. REPORT, *supra* note 74, at 2.

155. ME. CONST., art. IV, pt. 3, § 14. *See supra* note 15.

156. M.I.R.C. REPORT, *supra* note 74, at 2.

157. *See supra* notes 63-98 and accompanying text.

158. M.I.R.C. REPORT, *supra* note 74, at 2.

159. NML MODEL, *supra* note 70, at 16. This caveat was included in home rule amendments since Missouri first adopted the *imperium in imperio* model in 1875. *See supra* notes 64-69 and accompanying text.

160. The Legislature avoided this risk, by adding the general law limitation to the amendment's final version. It is interesting, although academic, to ask whether Maine's constitutional provision subjecting all corporations to state general law, ME. CONST., art. IV, pt. 3, § 14, would have imposed a general law limitation by inference, or if that provision would simply invalidate the home rule amendment. *See supra* note 15.

161. M.I.R.C. REPORT, *supra* note 74, at 3. The drafters were perhaps overly optimistic since the *imperium in imperio* model's local and statewide distinction had al-

The drafter's pure *imperium in imperio* approach to home rule was significantly altered by the Legislature.[162] First, the Legislature omitted the word "exclusive" from the amendment.[163] Second, after the phrase "power to alter and amend their charters on all matters," the Legislature inserted the caveat: "not prohibited by constitution or general law."[164] Finally, the Legislature's version provided that "[t]he legislature shall prescribe the procedure by which the municipality may so act."[165] All three changes suggest the Legislature's desire to decrease the degree of municipal autonomy conferred by the amendment, and to maintain its ability to control the distribution of governmental power between state and local government.

As finally passed in a statewide referendum on November 4, 1969,[166] the constitutional amendment establishing "home rule,"

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ready failed to accommodate the certainty principle in other jurisdictions. *See supra* notes 63-98 and accompanying text.

162. *See* 2 ME. LEGIS. REC. 3259 (1969) (statement of Rep. Martin).

163. House Amend. A to L.D. 451, No. H-416 (104th Legis. 1969).

164. *Id. See infra* text accompanying note 167.

165. House Amend. A to L.D. 451, No. H-416 (104th Legis. 1969). This final version appears identical in effect to the *imperium in imperio* model adopted by the National Municipal League until 1963 with one exception: the NML MODEL provided an enumerated non-exclusive list of local powers. *See* NML MODEL, *supra* note 70, §§ 801, 804. The "local and municipal in character" language is the break point between state and local governments' authority in both the NML MODEL and Maine's home rule constitutional amendment.

The definition of general law then becomes critical for municipalities. In this context, general law can be defined basically in two ways. It may act as a prohibition on special legislation, so that local matters could be dealt with on the state level so long as *all* similarly situated municipalities are similarly affected. Or, it may cover only legislation regulating matters of *statewide interest* applicable to every municipality. The latter interpretation is the only one that affords municipalities some insulation from state legislative interference. *See supra* notes 81-82. It is strange that the Legislature adopted the *imperium in imperio* model six years after the National Municipal League abandoned it. *See supra* note 70.

Professor James T. Haag viewed the amendment as a combination of the *imperium in imperio* and the limitation approach models:

> The scope of powers granted are couched in terminology reminiscent of the [limitation] approach, "on all matters, not prohibited by Constitution or general law"; however, the qualifying phrase "which are local and municipal in character" introduces ambiguity to what, otherwise, would be a broad grant of power under the [limitation] approach.

Haag, *Perspectives on Home Rule in Maine*, THE MAINE TOWNSMAN, July 1970, at 12. This assessment is technically inaccurate since Bromage's *imperium in imperio* model also contained the language "subject to such regulations as are provided in this constitution and may be provided by general law." NML MODEL, *supra* note 70, § 801. The essence of the NML MODEL and Maine's constitutional amendment remains the distinction between local and statewide subject matter.

166. The Legislature presented the amendment to Governor Curtis by legislative resolve on June 11, 1969. Inter-Departmental Memorandum from Charles R. Larouche, Assistant Attorney General, Attorney General's Office to Samuel H. Slosberg, Director, Legislative Research Dept. (Oct. 16, 1970) (copy on file at Maine Law Review office). The ballot for this referendum was two feet long and contained thir-

stated:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.[167]

The amendment's final form immediately created an ambiguous relationship between state and local government in Maine. After passage, the Attorney General issued an opinion concluding that, despite the omission of the word "exclusive" from the amendment as finally enacted, the Legislature could not amend municipal charters on "local" matters.[168] He based his opinion on two factors. First, a

> grant of power to inhabitants of municipalities to amend and alter their own charters . . . could have been accomplished by a mere Act of the Legislature. The only apparent purpose for the use of a Constitutional Amendment to confer this power was to provide a limitation on the power of the Legislature.[169]

Second, the Legislature had rejected a proposed provision of the enabling legislation implementing home rule which would have provided that the "Legislature shall have the right to grant, amend or revise the charter of any municipality."[170] Based on these two factors, the Attorney General suggested that the deletion of the word "exclusive" from the constitutional amendment before enactment was not to restore the Legislature's power of alteration, but rather to remove "redundant" language.[171] The legislative history of the amendment indicates that the Attorney General's conclusion is arguably valid.[172]

The Legislature's addition of the phrase "not prohibited by Constitution or general law" also contributed to the ambiguity in the

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teen bond issues totalling a record $117.4 million. Based on media reports, the importance of these bond issues clearly overshadowed the importance of the home rule amendment. Additionally, only 144,000 citizens actually voted, approving home rule by just over 10,000 votes. Portland Press Herald, Nov. 5, 1969, at 1.

167. ME. CONST., art. VIII, pt. 2, § 1.

168. Inter-Departmental Memorandum from Charles R. Larouche, Assistant Attorney General, Attorney General's Office to Samuel H. Slosberg, Director, Legislative Research Dept., at 2-3 (Oct. 16, 1976).

169. *Id.* at 3.

170. *Id.* at 1-2.

171. *Id.* at 3.

172. Statements by two legislators are revealing: "May I also add that this bill does not prevent individuals from coming to the Legislature at any time they want to amend their charters . . . . They can come to the Legislature at any time to amend their charters, as they always have in the past." 1 ME. LEGIS. REC. 407 (1970) (statement of Sen. Tanous). *But see* "The Legislature therefore has no further authority in the act of altering and amending the charters of municipalities." 1 ME. LEGIS. REC. 600 (1970) (statement of Rep. Martin).

home rule amendment. That phrase is subject to the various interpretations formulated since Missouri first adopted the *imperium in imperio* model.[173] The definitions of "prohibited" and "general law" are particularly unclear. Furthermore, the amendment's last sentence directs the Legislature to pass procedural enabling legislation. Such legislation, passed the following year,[174] purports to define the substantive relationship between state and local legislative powers.[175] In short, the home rule constitutional amendment conferred a degree of autonomy upon municipalities in "local" affairs, but various additions and caveats in both its language and the language of the enabling legislation planted the seeds which would grow into an inconsistent and narrow judicial view of home rule.[176]

C. *The Enabling Legislation*

An important component of Maine's new home rule scheme was the procedural enabling legislation passed pursuant to the constitutional amendment's last sentence.[177] The legislation implemented home rule by providing detailed procedures for when and how a municipal charter may be revised.[178] Also, this enabling legislation provided for liberal construction of the home rule scheme in favor of the municipalities.[179] Among the numerous provisions of the now codified enabling legislation, section 1917 is perhaps the most interesting and substantive provision. It provides:

> Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has the power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law or charter. No change in the composition, mode of election or terms of office of the legislative body, the mayor or the manager of any municipality may be accomplished by bylaw or ordinance.[180]

This section's sweeping language contains two operative phrases. The first phrase, "[a]ny municipality may . . . exercise any power or function which the Legislature has the power to confer upon it," is

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173. *See supra* note 81.

174. Act of Jan. 30, 1970, ch. 563, 1971 Maine Laws 59 (codified as amended at ME. REV. STAT. ANN. tit. 30, §§ 1911-1920 (1978 & Supp. 1984-1985)).

175. *See infra* notes 180-88 and accompanying text.

176. *See infra* notes 275-324 and accompanying text.

177. ME. CONST., art. VIII, pt. 2, § 1.

178. Act of Jan. 30, 1970, ch. 563, 1971 Maine Laws 59 (codified as amended at ME. REV. STAT. ANN. tit. 30, §§ 1911-1920 (1978 & Supp. 1984-1985)).

179. *Id.* at 67 (codified as amended at ME. REV. STAT. ANN. tit. 30, § 1920 (1978)) ("This Chapter, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect the purposes thereto.").

180. Act of Jan. 30, 1970, ch. 563, 1971 Maine Laws 59, 66 (codified at ME. REV. STAT. ANN. tit. 30, § 1917 (1978)).

identical to the American Municipal Association's limitation approach model.[181] The second phrase empowers municipalities to "exercise any power or function granted to the municipality by the Constitution, general law or charter." In essence this language tracks that of the constitutional amendment.[182] Since the two "grant" phrases are joined by "and," they supplement each other; neither narrows the scope of the other.

Section 1917's apparent procedural status belies its substantive impact. The constitutional amendment was designed to create some degree of autonomy for municipalities through the *imperium in imperio* home rule model.[183] Although section 1917 supposedly was intended to dovetail with and supplement the amendment, it utilized the limitation approach to home rule.[184] By combining elements of the *imperium in imperio* and limitation models, two separate and incompatible models for municipal autonomy, the Legislature created an ambiguous relationship between state and local government. For example, the constitutional amendment's language limiting municipal charter amendments to local matters is missing from section 1917.[185] Instead of limiting municipal power to local matters, section 1917 purports to convey to municipalities authority to exercise the state's plenary police power limited only by statutes which deny that power "either expressly or by clear implication."[186]

As a result, section 1917 broadens the scope of autonomy secured for municipalities by the constitutional amendment. It does so by permitting municipal legislation in areas other than those "local and municipal in character."[187] At the same time, section 1917 narrows

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181. *Compare id. with* AMERICAN MUNICIPAL ASSOCIATION, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (1953). *See supra* notes 99-115 and accompanying text.

182. *See* ME. CONST., art. VIII, pt. 2, § 1. *See also supra* text accompanying note 167.

183. *See supra* text accompanying note 176.

184. Interestingly, the NML had *replaced* the *imperium in imperio* model with the limitation approach to home rule; it did not attempt to combine the two schemes. *See supra* notes 70, 100.

185. *Compare* ME. CONST., art. VIII, pt. 2, § 1 *with* ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *See supra* text accompanying note 180.

186. ME. REV. STAT. ANN. tit. 30, § 1917 (1978) ("any power or function which the Legislature has the power to confer upon it"). *See supra* text accompanying note 180.

Professor James Haag adopted the interpretation that § 1917 and its limitation language was enacted by the Legislature to clarify the meaning of the constitutional phrase "local and municipal affairs." Haag's interpretation simplifies the scheme by providing for a legislative definition of the ambiguous phrase "local and municipal affairs." J. Haag, Address at the Maine Municipal Association Home Rule Seminar (Apr. 17, 1971), *reprinted in* MAINE MUNICIPAL ASSOCIATION, INFORMATION BULLETIN No. 30-71, at 1 (no date) (copy on file at Maine Law Review office).

187. Section 1917 also provides for ordinance power in all matters not denied to municipalities by the Legislature. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). The grant in ME. CONST., art. VIII, pt. 2, § 1 provides only for charter amendments in

the scope of municipal autonomy as articulated in the amendment. The statute permits the Legislature to deny power to municipalities either "expressly or by clear implication." This ability to foreclose municipal action is not limited to non-local subject matter areas. To the extent that the amendment confers a degree of insulation from legislative interference in local matters, section 1917 purports to remove the Legislature's disability.[188] Thus, while the scheme's purpose to increase municipal autonomy in the disposition of local affairs remains clear, its conflicting language leaves unclear the means by which that purpose will be effectuated.

Taken together, the constitutional amendment and section 1917 radically altered the longstanding relationship between municipalities and the state[189] by replacing the grant approach to municipal power. The constitutional amendment which grants municipal governments the power to legislate in local matters,[190] and section 1917 which creates the assumption that plenary municipal power is restrained only by limiting state legislation,[191] operate on inconsistent presumptions as to both the potential scope of municipal power and how state and local functions are to be delineated. As one might expect, the courts have been called upon to interpret the issues and ambiguities arising from the internally inconsistent scheme.

V. Judicial Interpretation of Home Rule in Maine

The Maine Legislature's failure to define adequately the relationship between state and local government presented the Maine Supreme Judicial Court with the task of defining home rule. The home rule scheme adopted in Maine created a range of possible judicial interpretations of the concept. An examination of the cases decided subsequent to the scheme's enactment reflects the court's narrow

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local matters. *See supra* text accompanying note 167.

188. May the Legislature constitutionally enact statutes that either narrow or broaden the amendment? Two factors suggest yes. First, ME. CONST., art. IV, pt. 3, § 14 provides that municipal corporations shall always be subject to the general laws of the state. *See supra* note 15. Second, while the drafters of the constitutional amendment proposed a pure *imperium in imperio* model, the subsequent alterations strongly suggest that the Legislature intended to maintain control over the machinery governing the relationship between state and local government. *See supra* notes 162-65 and accompanying text.

Although the constitutionality of § 1917 has never been tested, the Law Court has never invalidated a municipal ordinance strictly on the ground that it purported to regulate other than "local matters;" nor has it upheld an ordinance in the face of a state statute denying power to municipalities to legislate on a "local matter." This Comment will assume the state constitutionality of § 1917 and attempt to reconcile the various aspects of Maine's home rule scheme.

189. This alteration effectively reverses the presumption of municipal powerlessness. *See supra* notes 101-103 and accompanying text.

190. *See supra* notes 150-76 and accompanying text.

191. *See supra* notes 177-88 and accompanying text.

conception of the scope of a municipal government's authority.

A. *Early Cases*

The early decisions construing the scope of municipal power under Maine's home rule scheme indicate a reluctance to recognize the new home rule scheme at all.[192] In *Town of Windham v. LaPointe*[193] and *Town of Waterboro v. Lessard*[194] the Maine Supreme Judicial Court expressly applied the grant approach to examine municipal ordinances despite the then three-year-old home rule scheme.[195] This tendency to require specific enabling statutes for the exercise of specific municipal powers while ignoring the basic home rule scheme continued beyond the early 1970's.[196] As late as 1977,

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192. *See, e.g.*, Town of Windham v. LaPointe, 308 A.2d 286 (Me. 1973); Town of Waterboro v. Lessard, 287 A.2d 126 (Me. 1972).

193. 308 A.2d 286 (Me. 1973).

194. 287 A.2d 126 (Me. 1972).

195. In *Town of Windham v. LaPointe*, the Law Court held unconstitutional an ordinance which delegated power to approve the locations for house trailer parks to the town's Selection and Planning Board because the ordinance provided no standards to guide the discretion of the enforcement authority. 308 A.2d at 293. However, the court found, utilizing a typical grant approach to municipal power, that the ordinance was within the scope of ME. REV. STAT. ANN. tit. 30, § 2151(4)(A) (1964) (current version at ME. REV. STAT. ANN. tit. 30, § 2151(4)(A) (1978 & Supp. 1984-1985)) (granting general police power to municipalities), stating that a municipality "may exercise only such powers as are expressly conferred upon it by the Legislature or as are necessarily implied from those expressly so conferred." 308 A.2d at 290.

In *Town of Waterboro v. Lessard*, the Law Court also ignored the new home rule scheme when it found a municipal ordinance, which prohibited construction within twenty feet of a boundary line, ultra vires since it did not fall within the express grants of police or zoning power, ME. REV. STAT. ANN. tit. 30, §§ 2151, 4954 (1964) (current version at ME. REV. STAT. ANN. tit. 30, §§ 2151, 4954 (1978 & Supp. 1984-1985)). 287 A.2d at 130. The court premised its holding on " 'an accepted rule that when a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified.' " 287 A.2d at 129 (quoting State v. Brown, 135 Me. 36, 38-39, 188 A. 713, 714-15 (1936)). The court's lack of reliance upon the newly enacted home rule scheme may reflect the degree to which the grant approach to municipal power has dominated legal thinking in the area. Commentators have expressed surprise at the vagueness of the constitutional amendments, and/or statutes which ended the firmly entrenched grant approach reign in many jurisdictions. *See* Sandalow, *supra* note 71, at 658; Schmandt, *supra* note 63, at 387; Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1, 13-16 (1948).

196. Many Law Court decisions to this day premise the exercise of municipal power on specific enabling statutes especially when the validity of such exercise is not at issue. *See, e.g.*, Crosby v. Inhabitants of Ogunquit, 468 A.2d 996, 999 (Me. 1983); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1067 (Me. 1978). Such stipulations may be expedient when the main issue is the federal constitutionality of the ordinance, but they allow the home rule scheme to fall into disuse. As far as the Law Court's interpretation of home rule is concerned, out of sight *is* out of mind. This tendency to ignore the home rule scheme is likely to build on itself since both the Justices and the attorneys arguing before them are " 'steeped in the traditions of Dillon's Rule.' " Starn, *Municipal Home Rule*, MAINE TOWNSMAN, Jan. 1983, at 11.

the court invalidated a municipal subdivision ordinance passed pursuant to a specific enabling statute because the ordinance covered campsites and therefore exceeded the regulatory scope contemplated by that specific enabling statute.[197] The court never explained why municipal authority could not be based on the more broadly drawn home rule scheme. In fact, it did not even mention home rule. Instead the court simply reiterated the principle that "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition."[198]

Roy v. Inhabitants of Augusta[199] is another clear example of the Law Court's disinclination to recognize the existence of the municipal home rule scheme.[200] Pursuant to statute,[201] municipalities are charged with licensing suitable persons to keep billiard rooms in "any place where it will not disturb the peace and quiet of a family."[202] The Augusta City Council enacted an ordinance providing that "[n]o person shall operate a bowling alley, shooting gallery, pool or billiard room without obtaining a license from the municipal officers."[203] Furthermore, "[s]uch license shall be granted only if the *location* is in such a place that it will not disturb the peace and quiet of a family . . . ."[204] The court found that the ordinance's language "delineates a criterion of regulation broader than is authorized by the statute. . . . [T]he excess of the Ordinance which must be held a nullity lies in the extent to which the Ordinance allows the *location* of the billiard room, . . . rather than the nature of the activity of playing billiards itself to be deemed capable of constituting a disturbance."[205] The court did not inquire whether the state statute

197. Town of Arundel v. Swain, 374 A.2d 317, 318, 320 (Me. 1977). The court phrased the issue as "whether the proposed campground is a 'subdivision' within the meaning of 30 M.R.S.A. § 4956." *Id.* at 319. The statute provided in pertinent part: "All requests for subdivision approval shall be reviewed by the municipal planning board . . . ." ME. REV. STAT. ANN. tit. 30, § 4956(2)(A) (1964) (current version at ME. REV. STAT. ANN. tit. 30, § 4956(2)(A) (1978 & Supp. 1984-1985)). The local ordinance in question, construed by the local planning board to encompass the campground in question, required local approval of subdivision developments. Town of Arundel v. Swain, 374 A.2d at 318. The court agreed with the plaintiffs who sought to build commercial campsites and held that the local ordinance was ultra vires to the extent it regulated "campsites" as opposed to "subdivisions." *Id.* at 321.

198. Town of Arundel v. Swain, 374 A.2d at 319 n.3 (citing Stoker v. Town of Irvington, 71 N.J. Super. 370, 378, 177 A.2d 61, 66 (1961)).

199. 387 A.2d 237 (Me. 1978).

200. The United States District Court for the District of Maine also failed to acknowledge the new home rule scheme as the basis for municipal power in Dupler v. City of Portland, 421 F. Supp. 1314, 1320 n.8 (D. Me. 1976).

201. ME. REV. STAT. ANN. tit. 8, § 2 (1964) (current version at ME. REV. STAT. ANN. tit. 8, § 2 (1980)).

202. *Id.*

203. Roy v. Inhabitants of Augusta, 387 A.2d at 238.

204. *Id.* (emphasis added).

205. *Id.* at 240 (emphasis in original).

denied further regulation of billiard rooms to municipalities either expressly or by clear implication;[206] nor did it determine whether regulation of billiard rooms is local and municipal in character.[207] Rather, the court invalidated the ordinance because there was no specific grant of authority in the state statutes which could support the town's regulation.[208]

In 1979, the Law Court faced another home rule issue in *Clardy v. Town of Livermore*.[209] The municipal ordinance in question set minimum lot frontage as a condition to building upon a lot.[210] Homeowners contended that the ordinance violated the grant approach doctrine as set out in *Town of Waterboro v. Lessard*.[211] The town argued that the advent of home rule in Maine rendered the homeowners' adherence to the grant approach inapplicable to the case at bar.[212] Although the court did not reach the question of whether the ordinance was a valid exercise of municipal power,[213] its dicta is instructive:

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206. *See* ME. REV. STAT. ANN. tit. 30, § 1917 (1978).

207. *See* ME. CONST., art. VIII, pt. 2, § 1.

208. In *Roy*, the Law Court strained to avoid a federal constitutional issue and, to reach the same result, erred on the home rule question by failing to address the municipality's scope of authority under the home rule scheme. Certainly the tenet of statutory construction is well established that if "one among alternative constructions would involve serious constitutional difficulties [it] is reason to reject that interpretation in favor of another." 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1973); *see also* State v. Davenport, 326 A.2d 1 (Me. 1974). However, this tenet presumes the validity of the two interpretations.

209. 403 A.2d 779 (Me. 1979).

210. *Id.* at 779-80.

211. *Id.* at 780. In *Lessard*, the Law Court held invalid an ordinance prohibiting the construction of a building within 20 feet of a boundary line. The court found that the ordinance went beyond the authority granted by ME. REV. STAT. ANN. tit. 30, § 2151 (1964). The court, in deciding the case, ignored the home rule scheme. Instead it applied the

> "well established rule" that when a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified. . . . And it is held that if a by-law or ordinance as drawn is outside the scope of the grant and exceeds the powers to legislate conferred upon the municipality, it is invalid.

Town of Waterboro v. Lessard, 287 A.2d 126, 129 (Me. 1972) (quoting State v. Brown, 135 Me. 36, 38-39, 188 A. 713, 714-15 (1936)).

212. Clardy v. Livermore, 403 A.2d at 781. "Municipal home-rule," the town argued, "reverses this prior foundational doctrine; under home-rule, without need for additional legislative enabling action, every municipality is taken to possess, inherently, all powers the Legislature could validly confer, except such as the Legislature has otherwise denied either expressly or by clear implication." *Id.*

213. The Law Court held that since the ordinance in question became effective after the plaintiffs had purchased their land and had only prospective applicability, it could not be applied to force the removal of the building then situated on the plaintiffs' land. The validity of the ordinance was not addressed. Clardy v. Town of Livermore, 403 A.2d at 782.

> We agree with defendant Town that the issues it raises in this case are important as portents of many, and major, transformations that have been wrought by the advent of municipal home-rule in the legal framework which has governed, for so long, the interrelations of State and municipal authority.[214]

Thus, the *Clardy* court acknowledged the existence of home rule in Maine, but it left the issue of its meaning and effect for future consideration.[215]

B. The Court's "Pre-emption" Analysis

1. Theoretical Basis

The legislative history and the language of the home rule constitutional amendment reflect two legislative purposes for the amendment. First, the alterations of the drafters' original proposal prior to passage demonstrate the Legislature's intent to maintain control over the method of distributing power between state and local government.[216] A comparison of the grant approach with the constitutional amendment which replaced it reflects a second legislative purpose. The grant approach presumed municipal impotence unless specific enabling statutes authorized specific municipal action.[217] The constitutional amendment passed in 1969 contained ambiguous language which left unclear the details of the relationship between state and local government.[218] However, the amendment made one thing clear; it replaced the grant approach presumption with a presumption that municipal governments are empowered to act in some areas *notwithstanding the absence of legislative grants of authority*. So, municipalities in Maine should be presumed authorized to act in a given subject matter area unless the Legislature decides to dictate otherwise. The Legislature articulated this conclusion by

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214. *Id.* at 781. While the court agreed that the issues raised by the town were important, it failed to articulate the role that the "local and municipal" language of the amendment plays in the new home rule scheme, perhaps retaining the undefined language as a residual source of authority to maintain control over municipal legislation in future cases.

Similarly, in Bird v. Town of Old Orchard Beach, 426 A.2d 370 (Me. 1981), the court blended the constitutional amendment and the home rule statute, but retained the option to define "local and municipal in character" independently of legislative intendment:

> Thus, reading the constitutional and statutory provisions together, we can say that municipalities *in local and municipal affairs* may exercise any power or function granted them by the State Constitution, the general law or the municipal charter, not otherwise prohibited or denied expressly or by clear implication by the constitution, the general law, or the charter itself.

Id. at 372 (emphasis added).

215. Clardy v. Town of Livermore, 403 A.2d at 781.

216. *See supra* notes 163-65 and accompanying text.

217. *See supra* notes 53-62 and accompanying text.

218. *See supra* notes 150-76 and accompanying text.

stating, in section 1917, that a municipality may "exercise any power or function which the Legislature has the power to confer upon it which is not denied" to it by the Legislature.[219] Therefore, Maine's home rule scheme appears intended by the Legislature to embody the limitation approach to municipal power.

The Supreme Judicial Court, in tacit recognition of this conclusion, has recently applied a limitation approach, or "pre-emption" analysis to municipal home rule issues.[220] The court properly de-emphasized the "local and municipal in character" limitation in the constitutional amendment, and as a result, that language rarely furnishes the controlling rule of law.[221] Instead, the court has determined a municipality's ability to legislate in a particular subject matter area by examining relevant state legislation.[222] If the court determines that the Legislature intended to pre-empt or "occupy" an area of regulation, then the court will invalidate any municipal ordinance which sets different standards of conduct in the same regulatory field.[223] This analysis is based on the limiting language in the home rule statute which provides for plenary municipal power "unless denied expressly or by clear implication."[224]

Conforming a pre-emption analysis to the limitation approach engenders simplicity and accommodates the certainty principle.[225] Judges, lawyers, and municipal officials may presume a given ordinance valid and then seek state statutes which deny that power to municipalities. Most importantly, reading the home rule scheme as an example of the limitation approach reflects the court's recogni-

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219. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *See supra* text accompanying note 180.

220. *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983).

221. The court has not based its holding in any case after 1970 strictly on a judicial determination that a particular subject matter is statewide rather than local in character. *See, e.g.*, Schwanda v. Bonney, 418 A.2d 163 (Me. 1980). However, the court's decision in School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979) comes very close to such a determination. *See infra* notes 295-307 and accompanying text.

222. *See, e.g.*, Schwanda v. Bonney, 418 A.2d 163 (Me. 1980). For a discussion of *Schwanda* see *infra* notes 287-94 and accompanying text.

223. When the municipal ordinance is more restrictive than the enabling statute "occupying" the area of regulation, it is invalid. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 160 (Me. 1983). There are no cases where the ordinance is less restrictive than the statute "occupying the field," but under current pre-emption analysis, it is unlikely such an ordinance would be upheld. *Cf.* Bookland of Maine, Inc. v. City of Lewiston, No. CV-83-307, slip op. at 7 (Me. Super. Ct., And. Cty., Oct. 25, 1983). For a discussion of *Bookland* see *infra* notes 282-85 and accompanying text.

224. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983). For a discussion of *Ullis* see *infra* notes 228-37 and accompanying text, and *infra* notes 278-80.

225. *See supra* text accompanying note 8.

tion of the legislative purpose to change the manner by which municipalities receive their power. No longer must a specific statute authorize a municipal act; the Legislature intended that the municipalities possess plenary legislative power until such power is *denied* to them by the Legislature. So long as the limitation approach[226] to municipal authority is maintained, a town may presume it has the power to act unless it is pre-empted by the Legislature.

Nevertheless, although the court purports to rely on the limitation approach to examine municipal legislation, its analysis continues, on occasion, to reflect a grant approach to municipal power.[227] The area of liquor control provides the best illustration of the court's continuing struggle between the grant and limitation approaches to the state-local relationship.

In *Ullis v. Inhabitants of Boothbay Harbor*[228] the defendant municipality passed a "victualer's ordinance" which imposed licensing requirements on restaurants that served liquor.[229] The ordinance prohibited the granting of a liquor license if a restaurant was situated within 1200 feet of a preexisting licensee.[230] The town believed that the close proximity of two or more taverns caused "unnecessary noise and public disturbances," as well as parking problems.[231] The court held the ordinance invalid because "[b]y enacting the comprehensive, statewide liquor licensing scheme . . . the legislature by clear implication has denied to municipalities the right to legislate in the area of liquor sales."[232] The court found that while no statute specified the standards to be used by municipalities in granting or denying license applications,[233] nor expressly denied to municipalities the power to legislate in the liquor control area, liquor control nonetheless was pre-empted by the state. The court stated:

> A broader reading of the entire statutory scheme regulating liquor licenses in the state of Maine, however, yields the conclusion that, except in certain situations addressed by specific statutory provisions, the legislature did not intend municipal officials to impose additional local requirements on top of the statewide requirements set by the legislature and the State Liquor Commission for all license applicants.[234]

According to the court, the state's "pre-emption" of liquor regula-

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226. *See supra* notes 99-115 and accompanying text.

227. *See* Crosby v. Inhabitants of Ogunquit, 468 A.2d 996 (Me. 1983). *See infra* notes 238-74 and accompanying text.

228. 459 A.2d 153 (Me. 1983).

229. *Id.* at 155.

230. *Id.*

231. *Id.* at 155 n.1.

232. *Id.* at 159.

233. *See* ME. REV. STAT. ANN. tit. 28, § 252 (1974) (current version at ME. REV. STAT. ANN. tit. 28, § 252-A (Supp. 1984-1985)).

234. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d at 158.

tion denies "by clear implication"[235] the power of municipalities to legislate. Thus, although the court found the exercise of municipal power to be invalid and unenforcible, the court's analysis reinforced the home rule scheme's most basic functional component: "A municipality in Maine may exercise 'any power or function which the legislature has the power to confer upon it, which is not denied either expressly or by clear implication.' "[236] Accordingly, the home rule scheme is distinct from the grant approach since home rule requires that a denial of authority exist in order to invalidate a municipal ordinance rather than requiring that a grant of authority exist in order to validate a municipal ordinance.[237]

The court, however, in its most recent decision in the liquor regulation area, ignored the home rule scheme by returning to a grant approach analysis. In *Crosby v. Inhabitants of Ogunquit*,[238] the municipality passed a "Special Amusement Ordinance" setting standards for the issuance of amusement permits to liquor licensees.[239] State law required liquor-licensed establishments offering entertainment to possess such a special amusement permit.[240] Further, the statute delegated the authority for issuing such permits to the municipality in which the applicant is located.[241] Ogunquit's ordinance limited the type of entertainment permitted in a liquor establishment to "music . . . transmitted without the aid of amplification or electronic devices or instruments,"[242] and required licensees to post a $10,000 bond naming the town as beneficiary.[243] The ostensible

235. *Id.* at 159. The court based its holding of denial by clear implication on a finding that the ordinance "works at cross purposes to the state's liquor licensing statutes, therefore impermissibly conflicts with them." *Id.*

236. *Id.* at 159. Although the *Ullis* decision properly follows the limitation approach analysis, it finds an implied denial of power to municipalities in a statute which merely sets minimum standards of conduct. ME. REV. STAT. ANN. tit. 28, § 201 (1974) (current version at ME. REV. STAT. ANN. tit. 28, § 201 (Supp. 1984-1985)) provides eligibility criteria for liquor license applicants. It forbids the issuance of licenses in certain circumstances but does not mandate the issuance of licenses in any circumstance. The court's analysis reflects a determination that when certain persons or things are specified in a statute, an intention to exclude all others from its operation may be inferred. But as one court stated: "The ancient maxim *expressio unius est exclusio alterius* is a dangerous road map with which to explore legislative intent." Wachovia Bank and Trust Co., N.A. v. National Student Marketing Corp., 650 F.2d 342, 354-55 (D.C. Cir. 1980), *cert. denied* 425 U.S. 954 (1981). Thus, although adherence to the limitation approach may preserve local autonomy in theory, expansive interpretation of state statutes may extinguish it in reality. *See infra* notes 275-322 and accompanying text.

237. *See supra* notes 216-19 and accompanying text.

238. 468 A.2d 996 (Me. 1983).

239. *Id.* at 997-98.

240. ME. REV. STAT. ANN. tit. 28, § 702(1) (Supp. 1984-1985).

241. *Id.*

242. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 998.

243. *Id.* at 1001.

goal of the ordinance was noise control, presumably a valid object of police power regulation.[244]

The court held that the entertainment limitation was unconstitutional as violative of the due process clause of the United States Constitution,[245] and that the bond requirement was invalid as exceeding the municipality's power.[246] The court's analysis of municipal power in *Crosby* was twofold. The court first examined the ordinance's limitation on entertainment and sought to define "the extent to which municipalities may exercise the general police power of the State."[247] The court then focused specifically on whether municipalities have the "authority to require a bond as a prerequisite to the issuance of an amusement permit."[248] However, in doing so, the court failed to apply the pre-emption analysis it had so recently reaffirmed in *Ullis*.[249]

The *Crosby* court's analysis differed from the functional pre-emption test articulated in *Ullis* in two ways. First, the court in *Crosby* did not begin its analysis on the conditional assumption that "any municipality may . . . exercise any power . . . which the legislature has the power to confer upon it . . . ."[250] Certainly this includes the state's general police power.[251] Instead, with respect to the entertainment limitation, the *Crosby* court, citing *Ullis*, stated: "In interpreting the liquor licensing laws, we recently held that the State had delegated only certain enumerated licensing powers to the municipalities, retaining all residuary powers."[252] While not a completely erroneous statement of the holding in *Ullis*, the language which speaks of a "delegation" of power suggests a grant approach analysis. The *Ullis* court had not held that the state's liquor regulat-

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244. *Id.* at 1000.

245. The court's due process analysis followed that in State v. Rush, 324 A.2d 748 (Me. 1974). An exercise of police power does not violate due process if 1) the object of the exercise provides for the public welfare; 2) the legislative means employed are appropriate to the achievement of the ends sought; 3) the manner of exercising the power is not arbitrary or capricious. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 (citing State v. Rush, 324 A.2d at 753). The court ruled that Ogunquit's ordinance was unconstitutional because the means, the prohibition of electronically generated music, were inappropriate to the end of noise control. The court also declared the ordinance was arbitrary in its application. *Id.* at 1000.

246. *Id.* at 1001-1002.

247. *Id.* at 998-99.

248. *Id.* at 1001.

249. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153 (Me. 1983). *See supra* notes 228-37.

250. ME. REV. STAT. ANN. tit. 30, § 1917 (1978). *Compare* Crosby v. Inhabitants of Ogunquit, 468 A.2d at 1001 n.6 *with* Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983).

251. *See* ME. REV. STAT. ANN. tit. 30, § 2151 (1978) (granting municipalities authority to exercise police power to promote general welfare).

252. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 (citing Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 158-60 (Me. 1983)).

ing scheme delegated anything to local government; rather, it found that "the legislature by clear implication has *denied* to municipalities the right to legislate in the area of liquor sales."[253]

Second, the *Crosby* court did not address the question whether power to enact the ordinance was denied by clear implication because it "works at cross purposes to the state's liquor licensing statutes, and therefore impermissibly conflicts with them."[254] Thus, the court strayed further from the limitation approach enunicated in *Ullis*. The *Crosby* court, continuing with its grant approach, looked to other possible sources of municipal power rather than to limitations on presumed authority.[255]

> In the present context we need not determine whether the State has retained all residuary powers and has delegated only limited powers to the municipalities with respect to regulating entertainment in establishments selling liquor. We assume for purposes of this appeal that the municipality exercised general police powers, rather than limited statutory powers, in enacting . . . the ordinance.[256]

The *Crosby* court should have determined whether Ogunquit's power to legislate in this regard had been *denied* by the legislature.

In the second part of its opinion, dealing with the ordinance's bond requirement, the *Crosby* court continued its grant approach analysis.[257] In a footnote the court stated:

> In Part II of this opinion we assumed, without deciding, that Ogunquit exercised the general police power in enacting [the ordinance] to limit the permitted forms of entertainment. The overlap between 30 M.R.S.A. § 2151 (1978) (a general grant of authority to enact ordinances to promote the general welfare and provide for the public safety) and 28 M.R.S.A. § 702 (a specific grant of authority to license entertainment and to impose such other limitations as may be required to protect the public health, safety and welfare) *leaves in doubt the question whether a specific statutory power or the general police power is the source of municipal authority in this regard.* The bond requirement imposed by [the ordinance], however, does not evolve from the general police power and is not a limitation on entertainment. If the authority exists it must be derived from 28 M.R.S.A. § 702 or the "home rule" grant contained in 30 M.R.S.A. § 1917 (1978) ("municipality may . . . exercise any power . . . which the Legislature has power to confer upon it, which is not denied . . . by clear implication . . . .)".[258]

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253. Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983) (emphasis added).

254. *See id.*

255. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 n.3.

256. *Id.* at 999 (footnotes omitted).

257. *Id.* at 1001-1002.

258. *Id.* at 1001 n.6.

Certainly, before the enactment of the home rule scheme, many possible sources of municipal power existed, and the overlap and confusion discussed above by the court was a distinct possibility.[259] The home rule scheme, however, provided a basis for plenary municipal police power, and thus the proper question for the *Crosby* court was whether this plenary power was limited in any way. Instead, the court considered three possible sources of authority for a bonding requirement:[260] (1) the general grant of police power to municipalities;[261] (2) the special amusement statute;[262] and (3) the home rule grant.[263] The court eliminated the general police power grant and the home rule grant from consideration without providing any rationale for doing so,[264] and settled on the special amusement statute as the source of authority. Finding no authorization for a bonding requirement within that statute, the court held that the bonding requirement was ultra vires.[265] The court chose to forego the simplicity and certainty of the limitation approach when it reduced the home rule scheme to simply one among many grants of specific authority rather than a broad presumption of plenary authority.[266] The practical effect of the *Crosby* court's analysis is the reintroduction of the grant approach.[267]

The court's reasoning in *Crosby* reflects the tradition of the grant approach in municipal law.[268] In other cases, such as *Roy v. Inhabi-*

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259. The most obvious problem with searching for "grants" of municipal authority is that there are so many statutes on the books purporting to grant municipalities power in certain circumstances that confusion is bound to occur. *See* Crosby v. Inhabitants of Ogunquit, 468 A.2d at 999 & n.2, 1001 & n.6. For example, if a town wished to enact a particular ordinance, the court could at least look to the general police power grant in ME. REV. STAT. ANN. tit. 30, § 2152 (1978 & Supp. 1984-1985) and any specific enabling statute which covered the subject matter of the proposed ordinance. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 2315 (1974) (municipalities granted power to establish and abolish municipal offices "as it may deem necessary for the proper and efficient conduct of the affairs of the municipality"); ME. REV. STAT. ANN. tit. 30, § 4352 (1974) (municipalities granted power to construct public sewers at the expense of the town "when they deem it necessary for public convenience and health").

260. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 1001 n.6.

261. ME. REV. STAT. ANN. tit. 30, § 2151 (1978 & Supp. 1984-1985).

262. ME. REV. STAT. ANN. tit. 28, § 702 (1974 & Supp. 1984-1985).

263. ME. REV. STAT. ANN. tit. 30, § 1917 (1978).

264. The general police power grant and the home rule scheme overlap to a large extent. "The home rule power is at least as broad as the police power under 30 M.R.S.A. § 2151 (1978), which for many years has authorized municipalities to impose by ordinance fines recoverable for their own benefit." Inhabitants of Boothbay Harbor v. Russell, 410 A.2d 554, 559 (Me. 1980).

265. Crosby v. Inhabitants of Ogunquit, 468 A.2d at 1001-1002.

266. *See supra* notes 99-115 and accompanying text.

267. Recall that the limitation approach to home rule becomes meaningless if it does not reverse the grant approach presumption of municipal impotence. *See supra* notes 99-115 and accompanying text.

268. *See supra* notes 195-96.

tants of Augusta,[269] the court began its analysis by searching for grants of municipal authority sufficient to enable the municipal act.[270] The huge volume of enabling statutes passed before and after home rule's inception provides multiple sources of municipal authority.[271] Confusion results when the court asks whether a municipal ordinance fits within a specific enabling statute rather than whether the ordinance is *denied* by a specific pre-emptive statute. By returning to the grant approach to the state-local relationship, the court extinguishes not only the meaning but the very essence of Maine's home rule scheme.[272] However, when the court adheres to the limitation approach as articulated in section 1917,[273] Maine's home rule scheme retains its functional component. Adherence to this structure promotes the advantages of the limitation approach.[274]

2. Factors Indicating "Pre-emption"

Assuming that cases such as *Crosby* and *Roy* are anomalous, and that section 1917's limitation approach expresses the intended relationship between state and local government in Maine, the court's focus should be on whether a state statute denies to municipalities the power to act either expressly or by clear implication. The dispositive question is whether the effectuation of legislative purpose requires a denial of municipal power in a given subject matter area.[275]

Legislative intent to pre-empt municipal power is most obvious when the Legislature enacts a statute expressly directing municipalities to act in a certain manner.[276] It is less clear, however, how to identify a legislative intent to deny municipalities authority by clear implication. The court has cited the existence of a comprehensive state regulatory scheme, the need for uniform state regulation in a particular subject matter area, legislative history, and historical considerations as factors indicating an intention to deny municipal

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269. 387 A.2d 237 (Me. 1978). *See also* Lynch v. Town of Kittery, 473 A.2d 1277 (Me. 1984).

270. Roy v. Inhabitants of Augusta, 387 A.2d at 238.

271. *See* ME. REV. STAT. ANN. tit. 30, §§ 1901-5401 (1978 & Supp. 1984-1985).

272. *See supra* note 153.

273. ME. REV. STAT. ANN. tit. 30, § 1917 (1978).

274. These advantages include certainty in the legal relationship, maintenance of legislative supremacy over local government and flexibility to allow local government to perform its governmental role. *See supra* notes 99-115 and accompanying text.

275. *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983). Effectuation of legislative purpose requires pre-emption where a local ordinance "works at cross purposes to the state's . . . statutes, and therefore impermissibly conflicts with them." *Id.*

276. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, § 2001-A (Supp. 1984-1985) (providing specific requirements for perambulating boundary lines between municipalities). An ordinance most clearly conflicts with a statute when it expressly permits what the statute expressly prohibits or vice versa. Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 744 (1959).

power by clear implication.[277]

Frequently, the court finds a pre-emption of municipal authority when an extensive state legislative scheme regulates conduct in a particular subject matter area. For example, in *Ullis v. Inhabitants of Boothbay Harbor*[278] the court examined a municipal ordinance that was more restrictive than the state's licensing requirements. While no statute expressly denied the municipality authority to impose extra licensing requirements, the court ruled that a "broader reading of the entire statutory scheme"[279] demonstrated that the Legislature intended that municipalities merely apply unaltered the state's licensing criteria.[280] In addition, a comprehensive statutory

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277. These factors reflect considerations similar to those relied on in the federal pre-emption context. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190 (1983). Congressional intent to supersede state law may be found from a " 'scheme of federal regulation . . . so pervasive as to make reasonable inference that Congress left no room for the States to supplement it.' " *Id.* at 204 (quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). However, " 'historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* at 206 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). *See infra* note 325.

278. 459 A.2d 153 (Me. 1983).

279. *Id.* at 158.

280. *Id.* The court's conclusion follows from its test which required than an ordinance "conflict" or work "at cross purposes" to the state statute. *Id.* at 159. This test was elaborated on by both the Maine Municipal Association and the Attorney General of Maine in amicus curiae briefs filed in Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1978). They both argued that state legislation in a particular subject area does not automatically prohibit further and more comprehensive action by the municipality. Brief of an Amicus Curiae, The Maine Municipal Association, at 9, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975); Brief of the Attorney General, Amicus Curiae, at 8, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975). In *Maineland*, the Attorney General argued further that there must be some finding of frustration of state purpose of "actual conflict between the ordinance and the statute which renders it impossible for a person falling within their respective purviews to comply with both." Brief of Attorney General, Amicus Curiae, at 8, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975).

The Maine Municipal Association argued that a local ordinance is valid under the home rule scheme " '[i]n the absence of any express legislative intent to forbid local activities consistent with the purpose of the State's . . . legislation, and in the absence of any circumstances from which it appears any legislative purpose will be frustrated.' " Brief of an Amicus Curiae, The Maine Municipal Association, at 11, Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d 1350 (Me. 1975) (quoting Bloom v. City of Worcester, 363 Mass. 136, 160, 293 N.E.2d 268, 283 (1973)). The *Maineland* court did not reach the issue addressed in these briefs of whether the municipal ordinance in question was invalid and unenforceable. Instead, the court reversed a summary judgment by the superior court on the ground that outstanding issues of material fact remained unresolved. Inhabitants of North Berwick v. Maineland, Inc., 393 A.2d at 1351. Despite the *Maineland* court's lack of guidance, it seems reasonable that to the extent that the ordinance effectuates the policies embodied in the statute, it should not be pre-empted. *See* Note, *supra* note 276, at 748-49. If a statute is

scheme need not contain multiple provisions in order to reflect legislative intent to pre-empt the subject matter area. A single, but sufficiently specific and detailed statute may be enough to indicate a pre-emptive, comprehensive regulatory scheme.[281]

This test also works in reverse: where there is no comprehensive regulatory scheme, courts generally find no pre-emption unless the statute expressly denies power to local government. In *Bookland of Maine, Inc. v. City of Lewiston*,[282] for example, the defendant municipality passed an ordinance regulating the display and dissemination of "obscene" materials to minors.[283] The same subject matter was addressed by the Legislature in title 17, sections 2911-2912 of

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prohibitive in nature, a stricter municipal ordinance should not be beyond the municipal government's scope of authority. *Id.* at 749.

Ohio has adopted a head-on clash theory to determine when a municipal ordinance impermissibly conflicts with a state statute. Village of Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923). There can be no conflict by inconsistency alone. A conflict exists only when one authority permits an act forbidden by the other. *Id.* at 268, 140 N.E. at 521. *See also* Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 26 (1948).

One example in Maine of a municipal ordinance more restrictive than a corresponding prohibitive statute is addressed in State v. Lewis, 406 A.2d 886 (Me. 1979). In *Lewis*, the defendant was convicted of maintaining an automobile graveyard in violation of the City of Eastport's ordinance regulating such establishments. *Id.* at 887. State statutes established a comprehensive regulatory scheme that defined "automobile graveyard" and set forth unlawful locations for such graveyards. ME. REV. STAT. ANN. tit. 30, § 2451-B (1978). Eastport's ordinance defined "automobile graveyard" more expansively than did the state statute. State v. Lewis, 406 A.2d at 888 n.5. The statute defined an automobile graveyard in part as "a place of storage . . . for 3 or more unserviceable, discarded, worn-out or junked motor vehicles," ME. REV. STAT. ANN. tit. 30, § 2451-B(1) (1978), while Eastport included in its definition any place where *two* or more *unregistered* vehicles are kept. State v. Lewis, 406 A.2d at 888 n.5 (emphasis added). Despite the state's comprehensive legislative scheme, the court held that the ordinance was valid and enforceable since the more stringent local requirements "incorporate[d] the concept of 'discarded or junked vehicles.' " *Id.*

Lewis demonstrates that the court may not find that enacted legislation pre-empts municipal ordinances which further the policies of the state legislation, such as that in *Lewis* prohibiting a nuisance. ME. REV. STAT. ANN. tit. 30, § 2451 (1978).

The rationale in *Lewis* appears anomalous however. For example, in *Ullis v. Inhabitants of Boothbay Harbor*, a municipal ordinance regulating liquor more restrictively than state law was at "cross purposes," despite the liquor statutes' presumably "prohibitive" character. 459 A.2d 153, 159 (Me. 1983). Similarly, in *Schwanda v. Bonney*, a more restrictive concealed weapons ordinance was invalid and unenforceable despite restrictive policies embodied in the state statute. 418 A.2d 163, 167 (Me. 1980). The result in *Ullis* is perhaps better explained by the existence of a comprehensive regulatory scheme, and historical state control of liquor regulation. The court's rationale in *Schwanda* included the need for statewide uniformity in the area of concealed weapons licensing. *See infra* notes 287-94 and accompanying text.

281. In James v. Inhabitants of West Bath, 437 A.2d 863 (Me. 1981) and Schwanda v. Bonney, 418 A.2d 163 (Me. 1980), one statute was sufficient to occupy the field and pre-empt the municipal ordinance.

282. No. CV-83-307 (Me. Super. Ct., And. Cty., Oct. 25, 1983).

283. *Id.* at 1, 12-13.

the Maine Revised Statutes.[284] Nonetheless, the court found no pre-emption:

> While regulatory in nature, this legislation does not appear to be exclusive. It lacks the ordinary characteristics of a comprehensive statutory scheme. It is brief and general in its tone. It deals with a subject that is of deep, but varying, local concern. Urban areas, with an infusion of commercial interests and a highly mobile, unrestricted youth population, may wish to afford special protection to minor children by providing a shield, of purely local design, against obscene influences. It does not appear that the State intended to preclude such local action.[285]

A second factor cited by courts finding pre-emption by clear implication is the perceived need for uniform regulation in a particular subject matter area.[286] Two recent Maine decisions clearly reflect the importance of this consideration. In *Schwanda v. Bonney*[287] the court asked whether the Legislature "pre-empt[ed] the field respecting regulatory requirements in the issuance of concealed weapons licenses to the exclusion of the municipalities that perform the actual task of their issuance . . . ."[288] State law required a license for persons to carry concealed weapons, and it delegated the licensing authority to the municipalities.[289] The statute's operative language

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284. ME. REV. STAT. ANN. tit. 17, § 2911(2) (1983 & Supp. 1984-1985) provides in part that: "[A] person is guilty of disseminating obscene matter to a minor if he knowingly distributes, or exhibits or offers to distribute or exhibit to a minor, any obscene matter declared obscene, in an action to which he was a party, pursuant to subsection 3." ME. REV. STAT. ANN. tit. 17, § 2912 (1983) provides in part: "No book, magazine or newspaper containing obscene material on its cover and offered for sale shall be displayed in a location accessible to minors unless the cover of that book, magazine or newspaper is covered with an opaque material sufficient to prevent the obscene material from being visible." Lewiston's ordinance read in part: "It shall be unlawful for any person knowingly to exhibit . . . at any place . . . where juveniles are invited as part of the general public: (1) Any book, pamphlet, magazine . . . which depicts sexually explicit [material] which is harmful to juveniles." LEWISTON, ME., REV. CODE § 19-102(e) (1983). Certain publications, not obscene under state law, could be considered "harmful to juveniles" under the ordinance. "The measures required to comply with the ordinance, short of total elimination from inventory, would necessarily involve segregation or isolation of non-obscene, but 'harmful to juveniles' materials and tend to call attention to a potential buyer." Bookland of Maine, Inc. v. City of Lewiston, No. CV-83-307, at 2 (Me. Super. Ct., And. Cty., Oct. 25, 1983). While the ordinance was held not pre-empted by state law, it was held unconstitutional. *Id.* at 17, 19.

285. Bookland of Maine, Inc. v. City of Lewiston, No. CV-83-307 (Me. Super. Ct., And. Cty., Oct. 25, 1983).

286. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 241-44 (1959); Schwanda v. Bonney, 418 A.2d 163, 166 (Me. 1980); School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979).

287. 418 A.2d 163 (Me. 1980).

288. *Id.* at 165.

289. ME. REV. STAT. ANN. tit. 25, § 2031 (1974), *repealed and replaced by* ME. REV.

permitted a municipality to issue a concealed weapon permit to "any legal resident of such city or town of good moral character."[290] The town of Freeport passed an ordinance which imposed criteria in addition to the statute's "good moral character" requirement.[291] Specifically, the ordinance required the applicant to certify in writing that a concealed weapon was "required for the personal safety and protection of the licensee or required in connection with the employment of the licensee."[292] The court's interpretation of the statute depended on the legislative purpose behind the enactment.[293] The court reasoned that the Legislature could not have intended the anomalous result which would follow if the town of Freeport could impose its own requirements in addition to the "good moral character" requirement of the statute.

> It is undisputed that a license granted by the municipality of residence entitles the licensee to carry a concealed weapon anywhere in the State. Thus, an individual obtaining a license from another town in the State could carry a concealed weapon anywhere in Maine, including Freeport, even though he could not qualify under Freeport's ordinance requirements. A resident of Freeport, on the other hand, who did meet the statutory condition but lacked the additional eligibility standard of the ordinance could not carry a concealed weapon anywhere in the State. Obviously, the need for uniform application of the concealed weapons law precludes local regulation resulting in such inconsistencies.[294]

The third factor considered by the Law Court in pre-emption analysis is the historical context of the ordinance or statute. The traditional relationship between the respective responsibilities of state and local government may offer guideposts for the construction of legislative purpose. For example, in *School Committee of Wins-*

STAT. ANN. tit. 25, §§ 2031-2032 (Supp. 1984-1985).

290. *Id.* This section was completely rewritten in 1981 as §§ 2031 and 2032, *see* Act of Sept. 18, 1981, ch. 119, 1981 Me. Laws 148 (codified at ME. REV. STAT. ANN. tit. 25, §§ 2031-2032 (Supp. 1984-1985)), which now provides much more specific criteria for licensing, but still does not require the additional showing which Freeport's ordinance specified.

291. Schwanda v. Bonney, 418 A.2d at 164.

292. *Id.* (quoting Freeport's Concealed Weapons Ordinance).

293. *Id.* at 165-66 ("Legislative intendment always controls; this is a fundamental precept of statutory construction.").

294. *Id.* at 166.

In 1979, there were five concealed weapon licensees in the City of Portland; by Feb. 1, 1984, that number had increased to 155. Although the ostensible reason for these weapons is hunting and trapping, the tremendous growth in licensing appears to be a peculiarly urban phenomenon. Portland Evening Express, Apr. 9, 1984, at 1. This fact may decrease the vitality of the uniformity rationale, since one of the earliest reasons for providing a degree of autonomy for municipalities was the existence of unique conditions in urban society. *See supra* notes 22-36 and accompanying text.

low v. Inhabitants of Winslow,[295] the court reviewed a municipal charter amendment that changed the term of office for school committee members from three to two years.[296] The Legislature had granted Winslow a charter in 1969, thus creating a "municipality" and terminating its "town meeting" form of government.[297] The charter provided for members of the municipal school committee to serve three-year terms.[298] In 1977, the Town Council proposed, and the voters approved by referendum, amendments to the town charter which included reducing school committee members' terms of office from three to two years.[299] The plaintiff school committee members argued that the amendments were beyond the scope of municipal power since educational matters were reserved to the state and were not "local and municipal in character."[300] The defendant municipality argued principally that the state law requiring three-year terms for "town" school committee members[301] did not apply to chartered "municipalities."[302]

The court found that a consistent line of authority developed over the last century in Maine clearly reflected the "preeminence of the State in educational matters, vis-a-vis local government."[303] Furthermore, the court found that "[a] 'definite pattern' emerges from an investigation of our Legislature's action . . . . [T]he clear thrust of every action by the Legislature in this regard suggests an intention to occupy the field . . . and to preempt inconsistent local regulation."[304] Therefore, even though Winslow was no longer a town but rather was a municipality, "this would not entitle it to pursue its own wishes with respect to what is clearly a state matter."[305] The

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295. 404 A.2d 988 (Me. 1979).

296. *Id.* at 993-94.

297. *Id.* at 989.

298. *Id.*

299. *Id.*

300. *Id.* at 991. *See also* Squires v. Inhabitants of Augusta, 155 Me. 151, 167, 153 A.2d 80, 89 (1959) ("The State has always maintained general control of education . . . .").

301. ME. REV. STAT. ANN. tit. 20, §§ 471-472 (1965), *repealed and replaced by* ME. REV. STAT. ANN. tit. 20-A, §§ 2302, 2304 (1983 & Supp. 1984-1985).

302. School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 991. ME. REV. STAT. ANN. tit. 20, §§ 471-472 (1965) envisioned election of school board members at town meetings. School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 933. Winslow abandoned town meetings in 1969 with the adoption of a municipal charter. *Id.* The town argued that the statute was therefore inapplicable to school boards serving chartered municipalities. *Id.* at 991. The court rejected this argument stating: "The issue here, however, is not the power to select by municipal election rather than town meeting, but the power to prescribe the term of office." *Id.* at 993.

303. *Id.*

304. *Id.* at 993 (citation and footnote omitted).

305. *Id.* The court's analysis leads to gaps in regulatory authority. "Winslow may fall within a statutory gap not contemplated by the Legislature." School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 993. A gap occurs when no state

court therefore declared the ordinance invalid and unenforceable.[306] Thus, *Winslow* demonstrates that historical distinctions between "state" and "local" responsibilities continue to influence the determination of legislative purpose in a given area.[307]

Similarly, in *James v. Inhabitants of West Bath*[308] the court focused on historical considerations in reviewing a municipal ordinance which required a local license in order to dig marine worms in the town's tidal flat.[309] A state statute also required persons to obtain a license to dig marine worms on the Maine coast.[310] The court

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legislation exists and municipal government's hands are tied since the matter is not local and municipal in character. *See supra* note 113. The United States Supreme Court found the existence of such a regulatory gap in federal legislation regulating the licensing of nuclear power generation. Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm., 461 U.S. 190, 207-208 (1983). While the Nuclear Regulatory Commission has authority over national security, public health and safety matters, it "was not given authority over the generation of power itself, or over the economic question of whether a particular plant should be built." *Id.* at 207. "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make these judgments." *Id.* at 207-208. Thus, the Supreme Court found the existence of gaps in legislative schemes sufficient to deny pre-emptive effect to such schemes. *But see* School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 993.

306. School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d at 993-94.

307. Maine court decisions have, up to now, rarely attempted to define a subject matter area as local and municipal in character when no state statute purported to govern the same area as the municipal ordinance in question. The court's reluctance to make an independent judgment as to the character of a subject matter area despite the apparent constitutional mandate to do so, *see* ME. CONST., art. VIII, pt. 2, § 1, is noteworthy. It reflects the court's desire to permit the Legislature to dictate the political relationship between municipalities and state government. *See, e.g.*, Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983); Bird v. Town of Old Orchard Beach, 426 A.2d 370, 372 (Me. 1981); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065, 1067-68 (Me. 1978). In these cases the court has limited pre-emption analysis to an examination of potentially conflicting state statutes and has not extended it to an independent examination by the court to determine whether an ordinance regulates subject matter local and municipal in character.

However, the court has found state pre-emption even in the absence of an articulated legislative intention when the local legislation in question purports to regulate in traditionally statewide areas. In effect, the Legislature may occupy a field of regulation without specific language to that effect in areas that the court independently considers non-local. *See, e.g.*, School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979). This kind of judicial activism clouds the relatively clear division of state and local responsibility engendered by the limitation approach. A deemphasis of historical considerations will permit the Legislature to decide through its enactments what areas are local or statewide in character, and provide a clearer picture of the relative responsibilities of state and local government. This would free municipal governments to legislate in the public interest without fear of having their enactments declared void and unenforceable by the court.

308. 436 A.2d 863 (Me. 1981).

309. *Id.* at 865.

310. ME. REV. STAT. ANN. tit. 12, § 6751 (1981 & Supp. 1984-1985) (section 6751 may or may not have been repealed on January 1, 1985 by its own terms, *see* L.D.

expressly declined to make an independent judgment whether marine worm digging was local and municipal in character.[311] Nevertheless, the court held that the Legislature had pre-empted the field even though no statute expressly denied the town the power to regulate marine worm digging.[312] The court based its holding of pre-emption upon both the state licensing statute and the public trust doctrine.[313] The court noted that "[a] consistent theme in the decisional law is the concept that Maine's tidal lands and resources . . . are held by the State in a public trust for the people of the State."[314] The Legislature's historical role as the guardian of the public trust creates in effect a presumption of pre-emption of public trust resources regulation.[315]

An examination of the Law Court's pre-emption analysis leads to a few tentative conclusions. First, despite the statutory requirement to liberally construe the home rule scheme in favor of the municipalities,[316] the court shows little inclination to allow municipalities to deviate from specific statutory grants of power. The court adds an extensive gloss to "denied . . . by clear implication" through its willingness to impute pre-emptive legislative purpose in circumstances where no such language appears in the statutes or legislative history. This results in a very broad construction of that phrase. Dozens of existing enabling statutes purport to "grant" municipalities authority in specific areas,[317] and each one potentially "pre-empts" variant municipal legislation. Little room is left for home rule in this situation.[318]

Second, the court is reluctant to invalidate municipal enactments on the basis that they are not local and municipal in character absent state legislation in that area. However, the presence of *any* state statute in a traditionally non-local area will usually be sufficient to invalidate a variant municipal ordinance.[319] This analysis

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972, Statement of Fact (112th Me. Legis. 1985)).

311. James v. Inhabitants of West Bath, 437 A.2d at 865 n.3.

312. *Id.* at 865.

313. *Id.*

314. *Id. See generally* M. Tannenbaum, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 MAINE L. REV. 105 (1985).

315. James v. Inhabitants of West Bath, 437 A.2d at 866.

316. ME. REV. STAT. ANN. tit. 30, § 1920 (1978).

317. *See generally* ME. REV. STAT. ANN. tit. 30, §§ 1901-5404 (1978 & Supp. 1984-1985).

318. *But see* Merrill v. Town of Hampden, 432 A.2d 394 (Me. 1981) (per curiam). The Law Court in *Merrill* held that a grant of power to municipalities allowing the appointment of tree wardens did not restrict the warden's function as to care and control of public shade trees. The court noted that the applicable statute, ME. REV. STAT. ANN. tit. 30, § 3901 (1978) "is permissive only, and by its terms it plainly does not limit the broad home rule powers of a municipality." 432 A.2d at 395.

319. *See, e.g.*, Crosby v. Inhabitants of Ogunquit, 468 A.2d 996 (Me. 1983). *See*

follows from a heavy reliance on the ancient maxim *expressio unis est exclusio alterius* to imply a legislative prohibition on all powers related to but omitted from specific grants of power to municipalities.[320]

Third, once the court deems a subject matter area pre-empted, apparently the grant approach operates within that area. As a result, for a municipality to exercise power within the occupied area, the court requires a specific delegation or grant of power from the Legislature to enable the municipality to legislate in that area.[321] A broadly interpreted pre-emption analysis which focuses on the existence of state statutes and requires express grants of power within the pre-empted area effectively neutralizes home rule in all but those few areas where *no* state statutes are present. Ironically, most of the specific enabling statutes contained in title 30 of the Maine Revised Statutes were hard-won grants of power to municipalities before the adoption of home rule. Nevertheless, these grants of power now haunt municipalities as evidence of possibly pre-empted areas.[322]

Finally, if the *Crosby v. Inhabitants of Ogunquit*[323] decision indicates a trend, the limitation approach to delegating state power to municipalities will be lost in favor of the grant approach.[324] The broadly construed "pre-emption" analysis in Maine eliminates most substantive gains municipalities may have expected through adoption of home rule. However, if the grant approach is re-established then the fundamental concept of home rule is lost.

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supra notes 238-67 and accompanying text.

320. *See supra* note 236.

321. *Id.*

322. The Supreme Judicial Court of Massachusetts recognized this irony as problematic. Its solution may be an appropriate guide for Maine's Law Court. In *Bloom v. City of Worcester* the court stated:

> Many pre-Home Rule Amendment general laws were necessary to grant powers to municipalities under the now discarded policy that a municipality "has only those powers which are expressly conferred by statute or necessarily implied from those expressly conferred or from undoubted municipal rights or privileges." Obviously, many pre-Home Rule Amendment statutes granting authority to municipalities were rendered unnecessary by the Home Rule Amendment. We are not inclined to attribute to permissive statutes of that type a limiting function upon the powers of municipalities . . . . *Were we to infer such a limiting function from the existence of such permissive statutes, the result would be that the legislative powers of municipalities would be restricted precisely to those which they had at the time of the adoption of the Home Rule Amendment. That was not the purpose of the voters in adopting the Home Rule Amendment, and no such purpose can be found in [legislation passed since its adoption].*

363 Mass. 136, 157, 293 N.E.2d 268, 281 (1973) (emphasis added).

323. 468 A.2d 996 (Me. 1983).

324. *See supra* notes 238-67 and accompanying text.

VI. Conclusion

The grant approach, dating back to this nation's earliest days, became the established method for delegating power to municipalities because it curbed the tendency for local corruption and tyranny, and was judicially administrable. The role of the courts was very limited in this area since boundaries of municipal power were clear-cut. Thus, the legislature, the courts, and municipal officials understood the state and local government relationship. However, the price for certainty in allocating power between the state and municipalities was high. The grant approach placed a tremendous burden on the state legislatures, which were forced into the unenviable task of writing great quantities of legislation granting municipalities specific powers. Furthermore, at least in Maine, the Legislature periodically had to revise charters for each chartered town.

Maine's home rule scheme, developed and implemented between 1968 and 1970, demonstrated the desire of the people of Maine to establish responsible and effective local government. Unfortunately, the Legislature used two non-complementary home rule models in developing Maine's home rule scheme. The resulting confusion created uncertainty as to the substance of this new relationship between state and local government.

Constitutional and statutory ambiguities created the need for judicial interpretation. The Maine Supreme Judicial Court has generally adopted a pre-emption approach to examine the validity of municipal legislation. Although the court purports to interpret the "denied . . . by clear implication" language of section 1917 in home rule cases, it frequently finds that the slightest entry by the Legislature into a subject matter area is enough to occupy the field and preclude municipal legislation.[325] Once the court recognizes the occupation, then the municipality is limited to those powers granted expressly by statute or necessary to carry out such grant.

The court frustrates the legislative purpose for home rule in Maine by its reluctance to part with traditional ideas. Adherence to this interpretation will result in the end of meaningful home rule in Maine. This result is assured, for as municipalities compare the language of the home rule scheme with the court decisions interpreting the scheme, their conclusion must be that the scope of municipal power is a great deal less than suggested by the words of the consti-

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325. The concept of occupying the field is suggested in many federal pre-emption cases. *See, e.g.*, Kelly v. Washington, 302 U.S. 1 (1937). Though the concept met with disfavor in that context, Hines v. Davidowitz, 312 U.S. 52 (1941) (expression "occupying the field" does not provide constitutional test; rather the Supreme Court's "primary function is to determine whether [the State law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67), it remains a part of the Maine court's pre-emption test. *See supra* note 280. *See, e.g.*, School Comm. of Winslow v. Inhabitants of Winslow, 404 A.2d 988 (Me. 1979).

tutional and legislative provisions. So convinced, municipal leaders again will approach the legislature, hat in hand, seeking specific grants of authority for local projects. In this way, the functional benefits of the home rule concept erode from disuse.

To re-establish the limitation approach, and thus re-establish certainty while providing a meaningful role for municipal government, the Legislature may need to clarify the purpose of the home rule scheme. Perhaps the great quantity of specific authorizing statutes[326] purporting to grant powers to the municipalities should be prefaced by a preamble. These statutes, contained for the most part in title 30 of the Maine Revised Statutes, are superfluous in light of the broad basis for municipal power contained in section 1917. This preamble to title 30 could state that no statute purporting to grant power to municipalities shall be read as pre-empting the municipalities from passing legislation within the same subject matter area, unless otherwise stated in the language of the specific statute. This preamble would clarify the status of these pre-home rule grants. Thus a grant, the purpose of which was to permit municipal activity under the grant approach, could not then acquire a new purpose to "occupy" a particular subject matter area under the limitation approach. The preamble would allow state and local government to coextensively legislate in the public interest unless an overriding state policy requires a single standard of conduct. In this way, municipalities would retain their govermental role. Ironically, the Legislature must refrain from acceding to municipal requests for specific authorizing statutes and instead refer local government to the general grant of power in section 1917. Municipalities too must refrain from seeking specific enabling legislation. For with each new statute, local government directly contributes to the demise of the home rule scheme.[327] The greater the number of potential sources of municipal power the greater the temptation by the court to avoid the limitation approach. The desirability of autonomous local government is not at issue; rather, the question is how to implement the purposes home rule scheme. Inefficiency and confusion will plague this vital governmental relationship until Maine adheres to its home rule scheme.

Robert W. Bower, Jr.

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326. ME. REV. STAT. ANN. tit. 30, §§ 1901-5404 (1978 & Supp. 1984-1985).
327. *See* Sandalow, *supra* note 1, at 653, 670.

Attachment 8

Linda Gifford
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12-12-01

Matt Lazar
State Planning Office
State House Station
Augusta, Maine 04330

HAND-DELIVERED

Re: Maine's Subdivision Law and LD 1278, P.L. 2001, ch. 359

Dear Matt,

I am submitting comments from the Maine Association of REALTORS to aid in your preparation of a report to the Committee on Natural Resources regarding the desire of municipalities to set individual subdivision definitions. I am also responding to the report prepared by Kirsten Hebert of the Maine Municipal Association dated September, 2001. The Maine Association of REALTORS is a professional trade association which has approximately 3000 members statewide, 2700 of which are real estate licensees working in primarily the residential, but also the commercial, markets. The other 300 members are people working in related professions, such as appraisal, lending, building inspections and closings.

If, during the Second Regular Session of the 120th Legislature, no changes are made to chapter 359 of P.L. 2001, then the section which prohibits municipalities from having individual subdivision definitions will sunset on October 1, 2002 (section 4). The Maine Association of REALTORS believes this is not the best thing for the state and its citizens and asks the State Planning Office to recommend to the Committee on Natural Resources that the sunset be repealed, and the state definition of subdivision be upheld and enforced. Allowing municipalities to adopt their own subdivision definitions is not desirable for reasons of affordability, sensible growth management and planning, predictability, consumer confidence, and legislative history and intent. I will address each of these areas and believe that for reasons of consistency, predictability and

affordability, the conclusion should be reached that land use policy in the area of subdivision is best left to the state.

LEGISLATIVE HISTORY AND INTENT

The state Subdivision law was originally passed in 1971. Basically, it sets forth a definition of a subdivision (creation of three lots in five years) as well as some transfers which are exempt (gifts to family members, sales to abutters, pursuant to court order, etc.) It is the first comprehensive state law which sets forth definitions at the state level which are to be implemented and enforced at the local level. It replaces almost 30 years of prior piecemeal, haphazard land use laws, which were incomplete in definition and implementation. Most notably, the 1971 subdivision law, which though amended numerous times since then, is still the basis of today's subdivision law, was passed just after the home rule authority was implemented in Maine (1969-1970). The law sets forth the method by which a subdivision may be approved including the scope and method of adopting "reasonable regulations", application process, notice to abutters, a full survey, and hearing by the Planning Board of the municipality in which the subdivision is located (sec. 4403). There is a requirement that eighteen review criteria be met by the person proposing to create the subdivision (sec. 4404). It is a technical, precise process, which is set out in the State law, but carried out and enforced at the local level. Discretion as to whether or not the criteria have been met is vested in the municipal reviewing authority. But nowhere is the discretion as to what constitutes a subdivision, or what the reviewable criteria or process should be, delegated to the towns, except in two very precise and distinct areas. The first is in section 4401, subsection 4 C (2), which allows towns to elected to count 40 acre lots for subdivision purposes. The second is in section 4401 subsection 4 (H) which allows towns, under home rule authority to expand the definition of subdivision to include the division of a structure for commercial or industrial use.

The state law is complete, precise, and fully sets forth the definitions, process, standards and determinations, which must be made by the municipality. The state legislature has clearly spoken fully in the area of subdivisions and has pre-empted home rule in this particular area. The state law clearly directs the municipalities to act in a precise and certain manner. Clearly, if that were not the case, the current law would not have been passed in 1971, immediately after home rule authority was given in 1969-1970. Also, when the home rule amendments were made in 1987, which clarified and acknowledged home rule authority, no amendments were made

to the subdivision statute (P.L. 1987, ch. 583). This appears to acknowledge that where there is an overwhelming and legitimate state interest in a particular area, such as comprehensive land use planning, home rule authority should be limited.

As further proof of the intent of the State to control land use planning through the subdivision law, one need only look at the myriad, and often confusing, amendments made to the subdivision law over the years since its inception. Even in its current form, it has its critics, and almost anyone involved in land use would make suggestions for improvements. But that discussion is not the one at hand, and should serve only as proof that the state continues to take control in the subdivision arena. While they could have given up long ago, and left the definitions and processes to the towns, the state legislature has continued to grapple with and attempt to improve the subdivision law, all the while retaining control of subdivision issues at the state level, and leaving only implementation and enforcement to the towns. Clearly legislative intent leaves no room for local subdivision definitions, which would thwart the land use planning design envisioned by the state subdivision law. Therefore, the language contained in section 4 of P.L. 2001, ch. 359 is a clear embodiment of legislative history and intent, and the sunset provision should be repealed.

SENSIBLE GROWTH MANAGEMENT

There is an overwhelming public purpose which can only be accomplished by continuing to support a statewide subdivision law, and denying the ability of towns to set their own subdivision definitions and standards. This purpose is one of managing growth in the State of Maine in a sensible manner which avoids sprawl and the negative impacts which occur when development is thwarted in growth areas and pushed into more rural areas which have not yet experienced growth pressures and therefore have not yet reacted by enacting ordinances which slow or shut down growth. An example would be in the suburbs of Portland, where the communities closest to Portland (and its jobs and amenities) decide through various mechanisms such as growth caps, building permit moratoriums and potentially onerous subdivision definitions and processes to slow or stop growth. This pushes growth out further and further from the service centers, which chews up open space, forest land, and agricultural land, and exacerbates the typical sprawl-related problems of needing new schools, and new roads and of slowing traffic on roads once built for higher speeds.

If we are truly to have a vision for Maine which includes growth, and jobs, and places for our children to have homes and find work, while protecting the environment which defines Maine and its people, then it is imperative that we have a statewide policy and framework which plans for land use and growth. This simply cannot be done on a town by town, piecemeal basis. That approach would only serve to carve up Maine into growth/no-growth zones based on artificial municipal boundaries, rather than what makes sense from a long-term land use planning point of view. Thirty years ago, the state saw that need for land use planning when the subdivision law was adopted as a state law rather than as an enabling statute which gave municipalities the right to define subdivisions by local ordinance. The need for the state's direction and strength in the planning arena is now more critical than ever, and municipalities should not be given the right to adopt local definitions of subdivisions which would disregard the need for both growth and protection of open space and the environment.

AFFORDABILITY

A major concern about the town's desire to adopt local subdivision definitions is that a town could set a standard which would say any lot sold to anyone or even gifted to a child is a subdivision and has to go through the subdivision process. The subdivision process is expensive and cumbersome. A full survey needs to be made of the property, costing thousands of dollars. Notice to the abutters and a public hearing has to occur, causing delays, which are costly. Information and proof that the eighteen criteria in the state law have been met has to be given to the reviewing municipal authorities, which is also expensive and time-consuming. The growth areas in Maine are where we have our biggest affordable housing problems (southern Maine and the coast). That is where we also have our largest growth pressures, which are likely to include towns where, if allowed, local subdivision ordinances would likely be enacted which would include review and subdivision approval for single lots, even those gifted by parent to child. This would exacerbate the affordable housing problem, since gifts of back land from parents to children on which to build a home accounts for a large number of affordable housing solutions, as well as the benefits of families staying together and taking care of each other. Municipalities complain that these types of lots constitute a large number of new housing starts in their towns each year and are a "loop-hole" in the subdivision review process. Perhaps a less expensive, less onerous, "permit-by-rule" type process for single lots or currently exempt lots could be enacted at the state level which would allow for review and comment by the local code enforcement officer,

while avoiding the cost of a survey and full public review. But, again, this should be a process set forth in the state subdivision statute, and not left to individual towns because it should comply with a state land use planning policy, and not occur in a piecemeal manner.

PREDICTABILITY

The state subdivision statute is confusing enough without adding the unpredictability of each individual municipality having their own definitions of subdivisions, and approval processes. Developers, builders, and consumers need to be able to predict with some degree of certainty what the outcome will be if a certain town, or site is chosen for a home. Town ordinances are not kept in the same manner as state laws. They change more sporadically, with less public debate and input, and are kept in a much more haphazard way, often with no copies of the latest ordinances available in a public place for scrutiny by the people who will be governed by them. Ask anyone who has applied for a permit in a small town. You can call three selectmen, and get three versions of what they think the applicable standards or ordinances are. The larger towns and cities of course have staffs and public offices with regular office hours and don't have these same problems. But as those towns adopt more stringent growth control measures, the growth pressures will move to the smaller towns, which won't be as easily able to cope, and sensible growth will suffer.

CONSUMER CONFIDENCE

My comments in this section come from my experience as a title and closing attorney and address both consumer confidence which is also covered in the preceding section on predictability as well as consumer protection. Whenever someone is buying land on which to build, or even a pre-existing home, they engage an attorney to conduct a title search. This always occurs when a loan is being secured to purchase the property, because the bank regulations require it, but even if cash is paid without a loan being taken out, there is almost always a title search. There are numerous things, which the title attorney is looking at and for before giving an opinion that the title to the land is marketable. These include things such as liens, mortgages, rights of way, boundary agreements, restrictions, easements, covenants, and other issues, which may affect the use and enjoyment of the property. All of these things are of public record, which means they must be properly recorded in the Registry of Deeds for the

county in which the property is located in order to affect the property. Since the subdivision law is a state law which is known to all under the revised statutes, and since it sets forth a basic definition of subdivision as being three lots in five years, it is very easy for a title attorney to track the number of conveyances recorded at the Registry of Deeds and report a potential subdivision problem which needs to be addressed with the town before closing. If however, the subdivision law depended on a local definition which might be one lot in any number of years, two lots in ten years, or any number of other permutations, issuing an opinion on whether or not the lot in question might pose a subdivision problem would require an independent search of the town records and ordinances, as well as the current search of the registry records. I think that would almost be impossible for a title attorney to do. Many town records are not in a public place and are not accessible during normal business hours. Some town records are not accurate or complete. Even if it were possible to conduct the search and render a meaningful opinion, the cost to the consumer would be prohibitive. I predict that most title attorneys would simply exclude from their opinions any certification as to subdivision issues. That would leave the consumer in the position of buying a piece of property, only to find out later that they can't get a building permit without going through an expensive and time-consuming subdivision process. Consumer confidence would suffer.

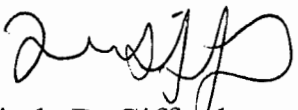
The bank's lending process would also be impacted, as they may not be willing to lend on property without a certification as to subdivision. And title insurance companies may not be willing to insure title without a predictable, certifiable subdivision opinion. If either of these were to occur, then the consumer would have no choice but to spend the extra money to have the double search done to look at both town and Registry records.

CONCLUSION

The State subdivision law has been in existence and working for almost thirty years. It may not be perfect, and may have some problems, which could be addressed in a meaningful way. But, growth management and land use planning need state guidance and policy. Municipal home rule authority should not be used in this instance to undermine the ability of the state to set the standard for subdivisions, which are integral parts of land use planning. In order for citizens to have land use outcomes which are predictable and affordable, there should be one definition, one standard, and one process for subdivisions which is used state-wide. I urge the repeal of the sunset provision set forth in chapter 359.

Thank you for the opportunity to comment on this compelling issue. I look forward to any questions or comments you may have.

Sincerely,



Linda B. Gifford, esq.
Maine Association of REALTORS

cc: Cindy Butts, EVP
Ed Suslovic, GAD

Attachment 9

PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLC

ATTORNEYS AT LAW

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December 12, 2001

Matt Nazar
State Planning Office
38 State House Station
Augusta, ME 04333

DEC 1 2001

Re: LD 1278, PL 2001, Chapter 359, Subdivisions

Dear Matt:

I am submitting these comments for MEREDA, the Maine Real Estate and Development Association. MEREDA is a trade association representing real estate developers and others involved in development, including bankers, lawyers and engineers.

As you know, MEREDA worked with you and your office to strengthen the subdivision law last session. MEREDA supports understandable, consistent regulation. To that end MEREDA supported the language in LD 1278 that made it clear that municipalities must utilize the state definition of subdivision. As a compromise with MMA, that language will be repealed in October 2002. MEREDA opposes the repeal of that language.

MEREDA supports the comments from the Maine Association of REALTORS and joins in those comments.

I have also reviewed the information submitted by MMA. It is important to recognize that, in addition to the survey, MMA has provided its interpretation of the law. MEREDA, however, concludes that the Legislature has not granted municipalities the authority to redefine subdivisions, rather, the Legislature has by clear implication established a comprehensive state regulatory scheme which preempts municipal authority. In the case cited by MMA, Town of Arundel v. Swain, 347 A.2d 317 (Me. 1977) the Maine Law Court said "[m]unicipalities taking advantage of the powers granted by the statute are bound by the legislative definition." Thus, contrary to MMA, MEREDA believes that the Legislature has already occupied the field regarding the definition of a subdivision. Removing the repealer language retains this original legislative intent.

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For all the reasons cited in the REALTORS' comments, MEREDA believes that a reversal of the State's role in the definition of a subdivision is unwise. Developers seek certainty and a timely, fair process. The proliferation of more stringent subdivision definitions and criteria are effective tools for both blocking development as well as contributing to rising costs. To obtain more certainty and a timely process, developers will skip over one municipality to another. Clearly, the actions of each municipality are impacting both the patterns of development in the region and neighboring towns. To avoid this result, the uniform statewide regulation must be adhered to.

Thank you for your consideration of our concerns. We look forward to working with you and other interested parties on this matter in the Legislature.

Sincerely,

Ginger

Virginia E. Davis
for MEREDA

VED\las

Attachment 10

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December 17, 2001

Matt Nazar
State Planning Office
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Augusta, Maine 04333

RE: Maine's Subdivision Law and LD 1278

Dear Matt:

This letter serves as comment from the Maine Bankers Association for your report to the Committee on Natural Resources regarding municipalities establishing their own local definitions of subdivisions. Enclosed also is a letter prepared by the Maine Bankers Association distributed to the Maine House last May, which summarized our concerns at that time. Our concerns about municipalities establishing local definitions of subdivisions remain the same**: if each municipality establishes their own subdivision definition, the cost of real estate closings and title searches will increase substantially, and in some cases loans may be denied because of the lack of an adequate title certification. Also, many loan closings would be significantly delayed – slowing an already strained system!**

Maine Bankers Association represents twenty-one Maine financial institutions with more than 7,500 employees in offices in all counties around the state. Our financial institutions regularly conduct mortgage banking business around the state and some members actively sell these mortgages to national secondary mortgage markets such as Fannie Mae and Freddie Mac. *The number of mortgages sold on the secondary market total 75% or more of all real estate mortgage loans in the state.* Every one of these residential mortgage loans sold on the secondary market requires a title search as a condition by the purchasers. Also, bank regulatory agencies generally require mortgage and any other loans secured by real estate to have title searches for bank safety and soundness reasons.

Maine Bankers Association joins other professionals in the real estate industry urging your office and the Natural Resources Committee and ultimately the full Legislature to repeal the October 2002 sunset provision that would allow municipalities to establish their own definitions of subdivisions. Unless this provision is repealed, when the title search and subsequent certification is required for a closing, the title attorney will have to search both the County Registry of Deeds and the local town records in order to verify clear title. This additional search process could add significant time, and considerable cost to the title search, a cost that is born entirely by the consumer! The additional cost could be substantial, in some cases more than the original title search in the County Registry thereby more than doubling the cost of the title search to the consumer (Searches now often cost between $250 and $400 or more, doubling could make these costs $500 - $800 or more.)

No doubt your office and the Legislature is aware that there have been many refinancings of real estate-secured loans in the past six months. If during this period of time there had been local definitions of subdivision, consumers would have suffered literally hundreds of thousands of added

costs and considerable delays to their closings. Our members believe this cost and delay causes far more harm to Maine residents than any benefit from the new local definitions of subdivisions, resulting in a poor public policy for this state!

Maine Bankers Association appreciates the opportunity to comment on this matter. We welcome questions and will be happy to discuss our concerns with your office and the Natural Resources Committee of the Legislature.

Sincerely,

Mark L. Walker

Mark L. Walker, Vice President & General Counsel
Maine Bankers Association

Cc: Sen. John Martin
Rep. Scott Cowger
Rep. Ted Kaufman
Rep. Charles La Verdierre