

2023 Legal Year in Review *for* ME & NH Planners

2023 Northern New England Planning Conference

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MAINE



CASE LAW UPDATE - MAINE

Case Law Update - Maine

- *Raposa v. Town of York*
- *Tomasino v. Town of Casco*
- *Hill v. Town of Wells*
- *LaMarre v. Town of China*
- *29 McKown, LLC v. Town of Boothbay Harbor*
- *City of Lewiston v. Verrinder*
- *15 Langsford Owner, LLC v. Town of Kennebunkport*
- *Morgan v. Townsend*

LEGISLATIVE UPDATES - MAINE

MAINE'S NEW HOUSING LAW

An Overview of Maine's New Housing Law (LD 2003)

Maine LD 2003:

“An Act To Implement to Recommendations of the Commission to Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restriction”

LD 2003 addresses four main areas:




1. The Additional Dwelling Units Allowance
2. The Accessory Dwelling Units Allowance
3. The Affordable Housing Density Bonus
4. Municipal Role in Fair Housing and Housing Production Goals

The Additional Dwelling Units Allowance

Statutory Reference:

[30-A M.R.S. § 4364-A](#)

For any area where housing is allowed, a municipality must allow a certain density of dwelling units on a given lot.









	Lots in the Designated Growth Area	Lots outside of the Designated Growth Area
<u>Residentially Vacant Lots:</u> Does the lot <u>not</u> contain an existing dwelling unit?		
<u>Single-Family Dwelling Lots:</u> Is the lot developed with <u>one</u> existing dwelling unit?	 (Up to 2 extra dwelling units—1 within or attached to existing structure, 1 detached dwelling unit, or one of each)	

The Accessory Dwelling Units (“ADU”) Allowance

Statutory Reference:

30-A M.R.S. § 4364-B

In any area where housing is allowed, a municipality must allow an accessory dwelling unit (“ADU”) to be located on the same lot as a single-family dwelling unit.

	Lots in any land use district where housing is allowed
Is the lot developed with <u>one</u> single-family dwelling unit (which is the principal structure)?	 +  (at least 1 ADU must be allowed)
Is the lot developed with <u>two</u> single-family dwelling units?	  +  (at least 1 ADU must be allowed)
Is the lot developed with <u>one</u> single-family dwelling unit <u>and</u> an accessory dwelling unit that predates LD 2003?	  +  ? (unclear)
Is the lot vacant or developed with only non-residential structures?	No allowance.

The Affordable Housing Density (“AHD”) Bonus

Statutory Reference:

[30-A M.R.S. § 4364](#)

In any area where multi-family dwellings are allowed, a municipality must allow an “affordable housing development” (“AHD”) to have a dwelling unit density of at least 2.5 times the “base density” that is otherwise allowed in that location.

	Lots in the Designated Growth Area	Lots outside if the DGA that are served by public water and sewer	Lots outside of the DGA that are <u>not</u> served by public water and sewer
Is the AHD Bonus allowed?	Yes	Yes	No

Municipal Role in Fair Housing and Production Goals

Statutory Reference:

[30-A M.R.S. § 4364-C](#)

Maine municipalities are required to “ensure that ordinances and regulations are designed to affirmatively further the federal Fair Housing Act, 42 United States Code, Chapter 45, as amended, and the Maine Human Rights Act to achieve the statewide or regional housing production goal,” and in furthering those goals may regulate short-term rentals.

Municipal Tools to Address LD 2003

Challenges and Opportunities

- Definitions
- Nonconformities
- Labeling
- AHD Bonus Calculation
- Enforcing Affordability Covenants
- Deadlines
- Comprehensive Plan
- Definitions
- Schedule of Land Uses
- Dimensional and Setback Standards
- Performance Standards
- Review Procedures
- Rate of Growth Ordinance
- Private Restrictions
- Short-Term Rentals

MAINE'S (OLD AND NEW) FOOD SOVEREIGNTY LAWS

Maine's Food Sovereignty Laws

The Maine Agriculture Protection Act

7 M.R.S. §§ 151, *et seq.*

A municipality must provide the DACF commissioner with a copy of any proposed ordinance that affects farm operations or agricultural composting operations at least 90 days prior to the meeting of the legislative body or public hearing at which adoption of the ordinance will be considered. The commissioner shall review the proposed ordinance and advise the municipality as to whether the proposed ordinance restricts or prohibits the use of best management practices. This section does not affect municipal authority to enact ordinances.

Maine's Food Sovereignty Laws

The Maine Food Sovereignty Act

7 M.R.S. §§ 281, *et seq.*

Pursuant to the home rule authority granted to municipalities . . . and notwithstanding any provision of law regulating food in this Title [7] or Title 22 to the contrary, except as contained in section 285, a municipality . . . may adopt ordinances regarding direct producer-to-consumer transactions and the State shall recognize such ordinances by not enforcing those laws or implementing rules with respect to those direct producer-to-consumer transactions that are governed by the ordinance.

Maine's Food Sovereignty Laws

Constitutional Right to Food

Me. Const. Art. I, Sec. 25

All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.

NEW HAMPSHIRE



2023 Session Legislative Changes

SB 222

- Amends the definition of “broadband” in RSA 38:38, I(c) by including a specific standard as an alternative to the standard set by the FCC
 - Rates of transmission greater than or equal to 100 MB/s download & 20 MB/s upload
- As a result...expands the definition of what areas of the State are considered “unserved by broadband”--RSA 33:3 & :3-g
- ***Potentially opening up ability to bond for expansion of broadband in “unserved” areas of State***

2023 Session Legislative Changes

SB 78

- Fairly drastic changes to PB/subdivision authority to require & specifics of performance bonds. Review against local security requirements! RSA 674:36, III-VI.
 - Cannot limit security to only LOC, passbook, or cash; must allow at least 2 from that list
 - Cost escalation factors increased from 10% to 15%, but no increase for non-construction
 - Specific parameters for notice of, timing of inspections, and release of security thereafter
 - Must allow road/utility work to begin without a bond in place; can require before sale of lot or application for building permit
 - Can now require bond for landscaping and final pavement
- Eliminates specific language in RSA 674:36, IV (now VI) allowing applicant to propose fire suppression system in SF/duplex residences and allowing PB to enforce if offered...arguably doing away with this as possible option for applicant/PB
 - Interplay with HB 247, driveway characteristics, and possible conflict between PB approval and violation of Fire Code...???

2023 Session Legislative Changes

HB 247

- Clarifies the authority of local land use boards, likely PB, to regulate driveway access for residential properties (detached SF & duplex). RSA 153:5, VI.
- Minimum driveway width of 12' for driveways of over 150 feet
- “Due consideration” must be given to input from Fire Chief regarding driveway characteristics (access, width, grade, clearance, road surface, etc.)
- Intended to prevent residential structure from being approved by PB but then violation of Fire Code that prevents construction of driveway as already approved

2023 Session Legislative Changes

HB 564

- Ratifies amendments to the “State Building Code” reviewed and recommended by the NH State Building Code Review Board as of Nov. 4, 2022. RSA 155-A:1, IV.
- Ratifies amendments to the “State Fire Code” adopted by the State Fire Marshal and the NH Board of Fire Control through January 18, 2023. RSA 153:5.
- Make sure local building inspectors are using current versions of state building and fire codes!

HB 42

- HOA approved by PB cannot be dissolved without first having joint hearing before PB per RSA 676:2. RSA 292:8-m.

2023 Session Legislative Changes

HB 252

- Exempts certain agricultural operations from municipal noise ordinances, amending RSA 31:39, I(n)
- Farms, agriculture, or farming under RSA 21:34-a exempt from local noise regulation and “quiet hours”
- No longer required to seek waiver from noise regulations under RSA 674:32-c, II
- Does NOT include “agrotourism” as defined by RSA 21:34-a, III(b)(5); those may still be regulated under local noise regulation
- PB may still exercise noise restrictions as part of site plan regulations. RSA 674:44, II(n)

2023 Caselaw

***Town of Conway v. Scott Kudrick*, (No. 2022-0098) (Decided May 2, 2023)**

- Another **STR** Case!! Issue on Appeal: Does the town's ZO permit non-owner occupied STR in residential districts??
- YES(!!)...Because under the town's ZO, such a use was properly classified as "residential/dwelling unit"
 - "a single unit providing complete and independent living facilities for one or more persons living as a household, including provisions for living, sleeping, eating, cooking, and sanitation"
- Focus of appeal was on how to interpret "living as a household"; Not defined; dictionary definitions supported each party; Ct interpreted consistent with the ZO as a whole
- Note the lack of any exclusion in definition for "transient" occupancy...
- TAKEAWAY: if you want to regulate STR's differently than typical residential use, specifically address in ZO
- **BONUS**: does an owner-occupied requirement, i.e. no renting, violate *Britton v. Chester* if it arguably restricts affordable housing...???

2023 Caselaw

TransFormations, Inc. v. Town of Amherst, (No. 2021-0214) (Decided Nov. 30, 2022)

- Petitioner submitted a CUP application for a planned residential development for 64 units, with 75% of the site preserved as open space
- PB denied under ZO because of failure to show that proposed use will not have a significant adverse impact; specific mention of traffic
- At least one PB member invited a reapplication with “more information”
- Petitioner refiled a second CUP application, this time for 43 units, and with a traffic study. PB again rejects under *Fisher v. Dover* because “no material change of circumstances affecting merits”.
- Ct reverses. When a Board denies and invites reapplication with further information, like a traffic study, a subsequent application with that information is viewed as a “materially different” application

2023 Caselaw

Richard Anthony v. Town of Plaistow, (No. 2021-0410) (Decided May 16, 2023)

- Challenge to site plan approval for construction equipment rental/maintenance facility
- Several arguments addressed by Ct., but for today, focus on required timing of when to appeal a PB decision to the ZBA if alleging a violation of zoning
- If PB interprets ZO when issuing site plan or subdivision decision, a challenge to that zoning interpretation must go to the ZBA *when that zoning related decision is initially made. RSA 676:5, III*
 - Here, PB conditionally approved site plan in June 2019
 - Appealed directly to superior court, RSA 677:15, but dismissed bc not final approval & no jurisdiction to consider zoning arguments because not appealed to ZBA
 - Final approval issued in June 2020; appeal followed to both ZBA and superior court
 - ZBA: appeal untimely bc not appealed to ZBA in June 2019 when zoning decision was initially made
 - No jurisdiction to consider zoning related arguments

2023 Caselaw

Jeffrey Raymond, Trustee v. Town of Plaistow, (No. 2022-0236) (Decided July 28, 2023)

- Plaintiff proposed an office/warehouse use for property; sought zoning determination that it was proposed use; CEO disagreed, ruling it was a contractor's yard, which is a prohibited use
- Appeal to ZBA. ZBA dismissed plaintiff's appeal, in part because of plaintiff's history of violating ZO on *other* properties; ZBA believed that plaintiff would not follow the ZO on this property
- Ct reversed ZBA, ruling that it was legal error for ZBA to consider zoning violations on other properties.
 - When ruling on admin appeal, ZBA is to consider whether use as presented is compliant with the ZO and shall not anticipate or speculate as to future violations.
 - Future violations are addressed via enforcement, and not as factor considered by ZBA

2023 Caselaw

Juliana Lonegran v. Town of Sanbornton, (No. 2022-0142) (Decided May 31, 2023)

- Appeal of Special Exception/Excavation Permit to operate excavation
- ZBA designated by ordinance as “regulator” for purposes of RSA 155-E, and further that ZBA would conduct single hearing process for both SE and excavation permit
- Special Exception issued; motion for rehearing filed within 30 days
- CT: Nope...too late. Issuance of SE also deemed to be issuance of excavation permit and RSA 155-E:9 requires motion for rehearing within 10 days, not 30
- Tough Outcome...
 - Application to ZBA did not mention excavation permit, only SE
 - Notice of ZBA hearing did not specifically mention issuance of excavation permit by the “regulator” but nonetheless held to comply with RSA 676:7 because that statute does not require specifying the precise approval being sought

THANK YOU



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