DURHAM PLANNING BOARD
WORKSHOP MEETING AGENDA
Durham Town Offices, 6:30 p.m.
July 10, 2023

NOTE: No public comment will be taken on individual applications at the meeting unless the Board schedules a formal public hearing with required notice posted. Comments on applications can be submitted in writing to the Town Planner and will be forwarded to the Planning Board and the applicants.

1. Roll Call & Determination of a Quorum
2. Amendments to the Agenda
3. Continuing Business
   a) Board Discussion of Draft Land Use Ordinance Amendments (Public comment will not be taken)
      - Part 1 – Policy for Increased Housing Density
      - Part 2 – Policy for Zoning Boundary Determinations and Non-conforming Building Expansions
      - Part 3 – Policy for Solar Energy Systems and Cell Towers
      - Part 4 – Policy for Historic Preservation
      - Part 5 – Clarification of Fee Schedule Enactment

6. Other Business:

a. Board Discussion of Draft Land Use Ordinance Amendments

- On June 14, the leaders of the Planning Board, Conservation Commission, Board of Appeals, and Historic District Commission met to discuss potential land use policy initiatives for the 2024 Town Meeting.
- The goal of the meeting was to coordinate efforts and collaborate on areas where group missions and land use policy overlap.
- The leaders came to consensus on the following items:
    - The Planning Board will focus on housing policies;
    - The Conservation Commission will work on standards for solar farms and cell towers;
    - The Board of Appeals will look at simplifying the process for expansions of existing homes and businesses in the Resource Protection District and the authority for making zoning boundary determinations; and,
    - The Historic District Commission will prepare draft amendments to clarify standards and streamline procedures for historic preservation.
- A complete summary of the joint land use policy workshop is included in the agenda packet.

Part 1 – Policy for Increased Housing

- On June 16, the Governor signed into law LD 1706 that clarifies some of the provisions of the new State requirements for affordable housing projects and increased housing density. The action of the Legislature also extended the compliance deadline for towns with town meetings until July 1, 2024.
- The Town Planner prepared graphics to illustrate and explain the requirements of the State's new housing law and a hybrid approach that will allow landowners to add multiple accessory apartments on standard lots per Durham's Comprehensive Plan but will require larger lots for multiple, full-sized housing units on the same lot as required and allowed by LD 2003 & LD 1706 (graphics in packet) along with draft Ordinance amendments to implement the draft policy direction (also in packet).
- The Town Planner sought and received confirmation from the Maine Department of Economic and Community Development and MMA legal staff that the hybrid approach is permissible under the new law (opinions in packet).
- If the Planning Board wants to proceed with preparation of the hybrid response for the 2024 Town Meeting, a public participation process should be planned

for early Fall, followed by preparation of an amendment package to be processed starting in January.

Part 2 – Policy for Zoning Boundary Determinations and Non-conforming Building Expansions

- The Town Planner has done GIS analysis and identified 35 properties with buildings that are entirely or partially non-conforming uses due to resource protection zoning restrictions.
- Most of these buildings are residential, close to roads, and lie along the edges of the Resource Protection District.
- During the public participation process leading up to this year's expansion of the Resource Protection (RP) District, the boards and commissions took public input indicating concerns about the limitations that would be placed on expansion of these buildings and the need to give more flexibility for modest expansions.
- Both the Conservation Commission and Board of Appeals have indicated openness to looking at granting relief to affected property owners.
- The expansion of the RP District, both in terms of the establishment of multiple criteria for inclusion and the addition of 120 properties, could precipitate the need for more zoning boundary interpretations, a responsibility currently delegated to the Board of Appeals.
- The Board of Appeals has reviewed two such applications in recent years and indicated discomfort with making such technical determinations.
- In most towns, the Planning Board has responsibility for making zoning boundary determinations, since the Planning Board develops the Zoning Map following comprehensive plan recommendations.
- The Planning Board also routinely reviews technical studies and this function could be coordinated with subdivision and site plan reviews, where such zoning boundary determinations are raised as issues.
- The Board of Appeals has indicated openness to a transfer of authority and responsibility for zoning boundary determinations.

Part 3 – Policy for Solar Energy Systems and Cell Towers

- The Conservation Commission has agreed to take the lead in the preparation and processing of amendments to address the potential proliferation of solar energy systems and cell towers in Durham.
- The Planning Board will ultimately conduct the regulatory reviews of these facilities.
- Maine Audubon and other regional and state agencies have developed guidelines to encourage expansion of solar energy in Maine while minimizing the impacts on Maine's natural and cultural resources. The packet contains

some materials developed to help communities develop effective policies.

- The packet also contains legal guidance provided by a law firm that specializes in environmental law.
- Reviews of solar energy systems typically involve both conditional use and site plan review processes and standards.
- Durham now has the dual framework for reviewing such projects but lacks the specific standards necessary to effectively regulate both solar energy systems and cell towers.
- The packet contains a memo prepared by the Town Planner for the Planning Board when it reviewed the last cell tower application that pointed to the need to develop specific standards.
- A legal article from Falmouth Town Attorney William Plouffe elaborates on the serious problems communities can experience with inadequate regulatory reviews under federal legal requirements.
- The packet also contains sample ordinance language for both solar energy systems and cell towers.
- A two-phase process is anticipated with the first phase developing and adopting standards for both solar energy systems and cell towers based on model ordinances that would apply in all areas of Durham.
- A second phase requiring in-depth research could develop criteria for differential treatment of solar energy systems and cell towers in different locations in Durham.

Part 4 – Policy for Historic Preservation

- The Comprehensive Plan calls for better coordination of the activities of the Code Officer, Historic District Commission, and Planning Board which all have jurisdiction over projects affecting Durham's historic properties.
- At the Historic District Commission's request, the Town Planner worked with that group for more than a year to develop a plan for overhauling the historic preservation regulations.
- The Town Planner presented a report to the Historic District Commission in late August of 2022 that included recommendations for simplifying and streamlining the standards and procedures for conducting historic preservation reviews.
- Since that time, the Historic District Commission has been working on an alternative proposal and expects to complete its work by early Fall.

Part 5 – Clarification of Fee Schedule Establishment

- In April of 2022, voters approved removal of all specific permit fees from the Land Use Ordinance, moving them to a fee schedule to be adopted annually by the Select Board.

- Most of the fees have been updated, but confusion arose over the Land Use Ordinance failure to mention that a permit fee must be paid for gaining some required Town approvals or permits. At the direction of the Town Manager, the Town Planner sought a legal opinion from the Town Attorney on the Select Board's authority to enact such fees.
- The attached legal opinion indicates that the Select Board was given broad authority to enact permit fees "for any fee that is referenced within the Land Use Ordinance."
- To ensure that the Select Board has full and clear authority to enact any and all necessary fees for land use activities, it is important to get consistency in the Land Use Ordinance.
- One way to accomplish this would be to add references to fees in every Article that fails to refer to a permit fee.
- The second option is to delete all specific references in the various articles and provide a clearer blanket permit fee statement in Article 18, which covers administration of the Land Use Ordinance and delegates setting the fee schedule to the Select Board.

Joint Workshop on Land Use Policy – Summary Outcomes

June 14, 2023

PARTICIPANTS: Planning Board, Board of Appeals, Conservation Commission, Historic District Commission

INTRODUCTION

The Planning Board has been directed by the Select Board to take the lead in developing draft amendments to the Town's Land Use Ordinance for consideration at the next Town Meeting. Over the past few years, experience has indicated the need to limit the scope of issues and warrant articles within the capacity of the community to process and decide in the Town Meeting format. Another limiting factor is the availability of staff support for research on the issues and development of the public participation process.

GOALS OF THE SESSION:

- Explore needed changes to the Land Use Ordinance;
- Identify options for responding to land use policy challenges;
- Establish priorities for which challenges to address at the 2024 Town Meeting;
- Assign responsibility for developing a policy direction for each challenge; and,
- Foster communication and cooperation between the Town's land use policy groups.

POLICY DIRECTION

(Based on Town Planner's Assessment, Planning Board Discussions, and Joint Workshop Input)

PLANNING BOARD

- The Planning Board will focus efforts on implementation of the new State requirements for increased housing density.
- The State has delayed the implementation deadline to July of 2024, giving time for Durham to enact regulations tailored to the Town's needs in April of 2024.

- The Planning Board will also review recommended changes to the Land Use Ordinance to finalize the transition to Select Board establishment of all permit fees.

CONSERVATION COMMISSION

- The Conservation Commission has an interest in taking the lead on developing standards for solar energy systems.
- The Commission sees a potential need to cap the size of facilities and to develop a map showing feasible and preferred locations in Durham.
- Community-based systems such as those serving individual subdivisions should be treated differently and more favorably than regional generators.
- Input from other Joint Workshop representatives indicated the need to address cell towers at the same time as solar energy systems.
- The impact of these facilities within 1500 feet of any of the 10 officially designated historic structures must be considered under the current Land Use Ordinance.
- Analyzing suitable/acceptable locations for either form of infrastructure will be controversial and beyond the Town's ability to prepare in time for the next Town Meeting.
- At the same time the current Land Use Ordinance lacks adequate technical standards and administrative procedures to ensure legally defensible decisions by the Planning Board, and there have been multiple inquiries regarding solar energy projects in Durham.
- Developing performance standards and review procedures for solar energy systems and cell towers could be done in 2 phases.
- The first phase would enact standards based on similar ordinances in other communities, and those standards would be applied on a town-wide basis.
- A second phase could explore whether to restrict installations for both types of infrastructure to certain parts of the community through overlay zones.
- The first phase could be completed in time for the April 2024 Town Meeting but not the second phase.

BOARD OF APPEALS

- The Board of Appeals recognizes the impacts on property owners with existing residences of the expansion of the Resource Protection District.
- The Board would likely support streamlining and simplifying the process for obtaining permits for modest expansion of those residences.
- Allowances for expansion should be limited to the structures and not the uses unless a Board review is involved.

- The Town should also at least consider making allowance for modest expansions of existing non-conforming business structures, but those too should be limited to structures and not uses.
- The Board of Appeals also is likely to support transferring the responsibility for making zoning district boundary determinations and non-conforming structure expansions from the Board of Appeals to the Planning Board, as the Planning Board meets more regularly and has adequate technical support to deal with the issues.

HISTORIC DISTRICT COMMISSION

- The 2018 Comprehensive Plan calls for better coordination of the historic preservation programs in the Land Use Ordinance.
- Authority and responsibility for enforcing historic preservation requirements are currently split between the Code Officer, Historic District Commission, and Planning Board.
- There has been confusion over the roles of the three agencies and conflicts between them because of vague language in the Land Use Ordinance.
- The Historic District Commission wants to take the lead in preparing any changes to the Land Use Ordinance dealing with historic preservation to address these issues.
- The Commission supports clarifying the standards and simplifying the review process.
- The Commission opposes elimination of the Southwest Bend Historic District and the Commission's regulatory authority within that district.
- The Commission favors expansion of its regulatory authority to apply to all officially designated historic structures in Durham (i.e., the 10 listed or eligible for listing properties identified by the Maine Historic Preservation Commission).
- The Commission recognizes the need for more technical expertise to deal with historic preservation issues.

DRAFT POLICY DIRECTION FOR 2024

DURHAM LAND USE ORDINANCE

PART 1 – INCREASED HOUSING DENSITY

LD 2003 Implementation

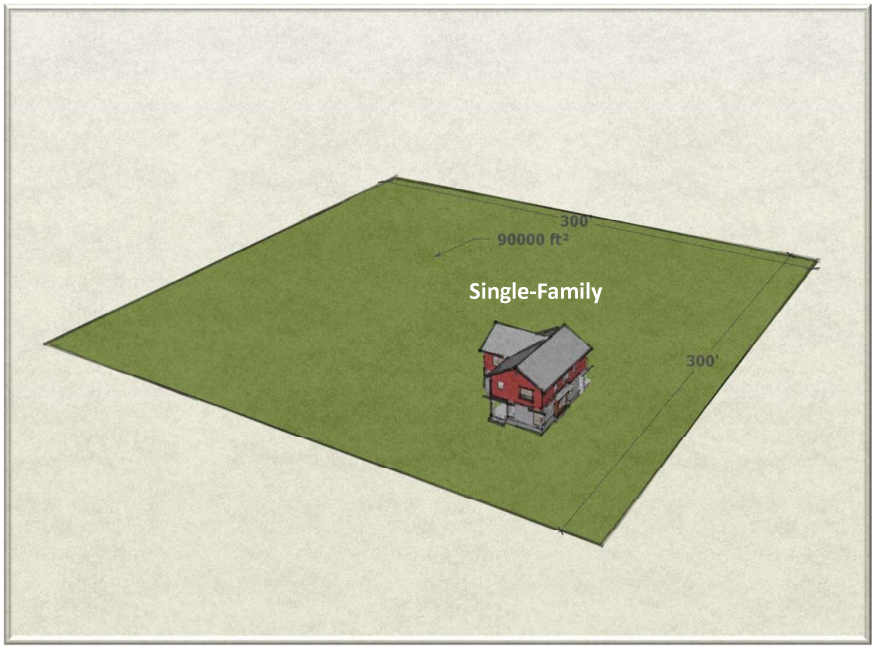
BASELINE IMPACTS OF THE LEGISLATION ON DURHAM

WHAT WILL CHANGE?

WHAT ARE THE OPTIONS FOR RESPONDING TO THE STATE MANDATE?

Current Durham Requirements

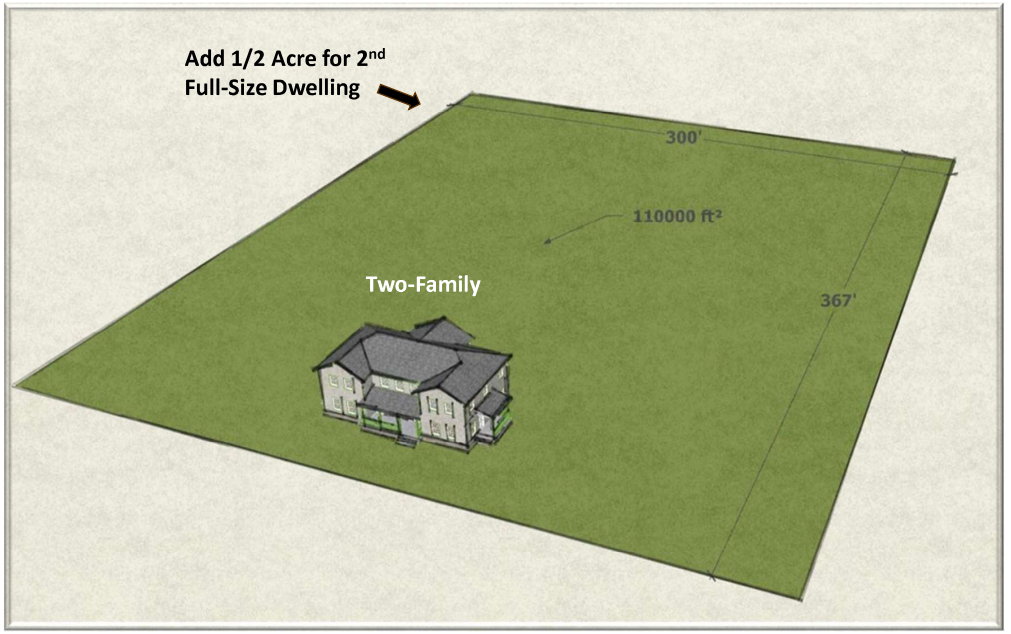
SINGLE-FAMILY



- **2 Acre Lot**
- **300 Ft Road Frontage**

- **1 Accessory Apartment**
- **50% Floor Area of House**
- **Maximum of 2 Units**

TWO-FAMILY (DUPLEX)

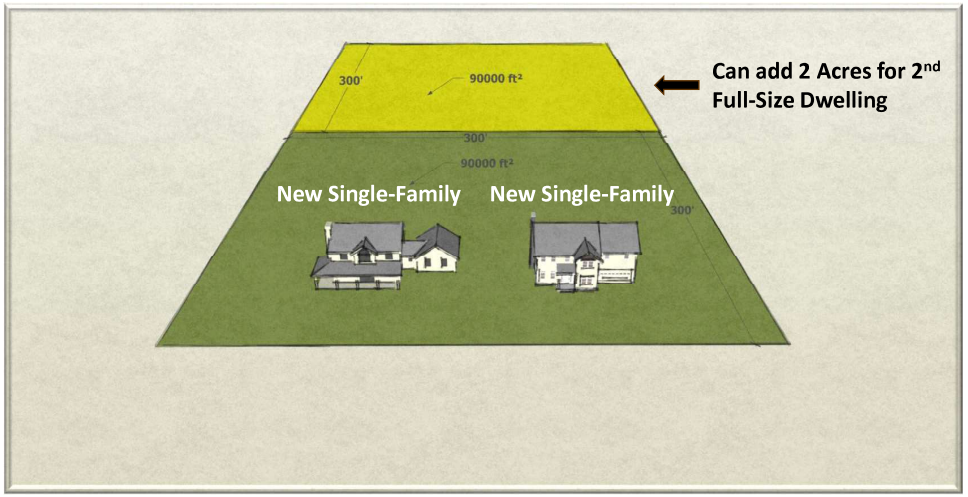


- **$2^{1/2}$ Acre Lot**
- **300 Ft Road Frontage**

- **No Accessory Apartment**
- **Maximum of 2 Units**

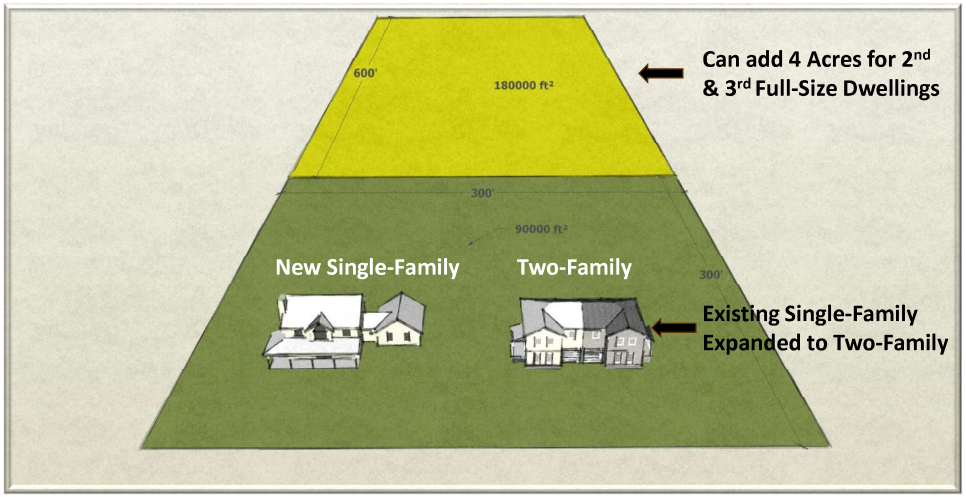
LD 2003 Requirements (Effective July 1, 2024)

VACANT LOT



- Must allow 2 Dwelling Units
- Can be Duplex or 2 Single-Family
- Maximum of 2 Units
- Can Require 2 Acres per Dwelling Unit
- (Without Town Action by July 1 2024, Must Allow on 2 Acres)

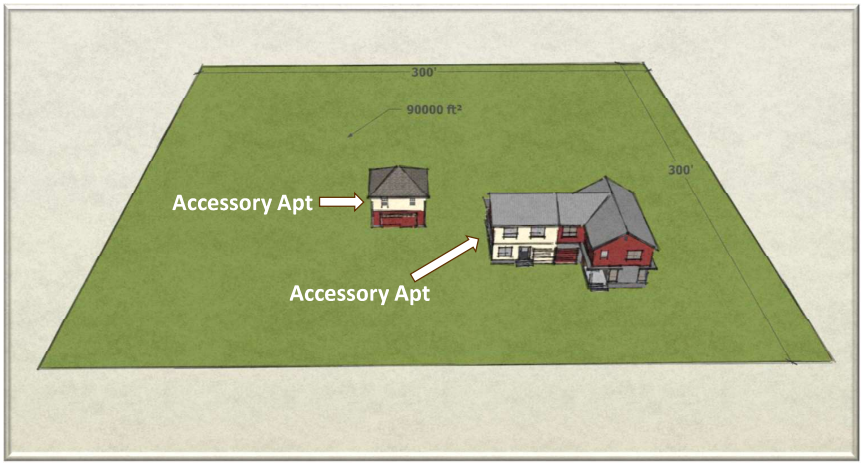
DEVELOPED LOT



- Must allow 3 Dwelling Units
- Can be One Attached, One Detached, or One of Each
- Maximum of 3 Units
- Can Require 2 Acres per Dwelling Unit
- (Without Town Action by July 1 2024, Must Allow on 2.5 Acres)

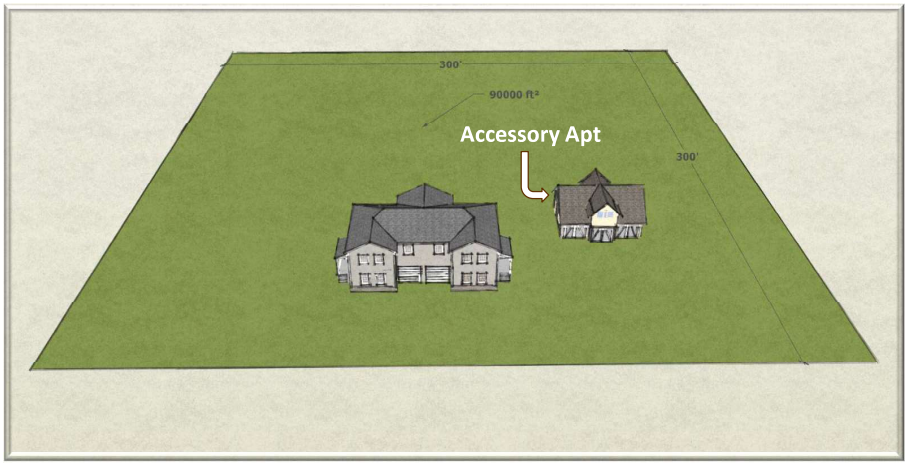
DURHAM COMPREHENSIVE PLAN RECOMMENDATIONS

SINGLE-FAMILY



- **Allow 2 Accessory Apartments**
- **Limit Size to 50% of Main Dwelling Unit**
- **Maximum of 3 Units**

TWO-FAMILY

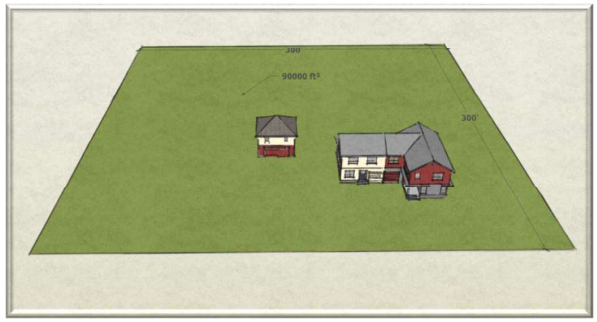


- **Reduce Lot Size from $2^{1/2}$ Acres to 2 Acres**
- **Allow 1 Accessory Apartment**
- **Limit Size to 50% of Either Dwelling Unit**
- **Maximum of 3 Units**

PLANNING BOARD HYBRID PROPOSAL

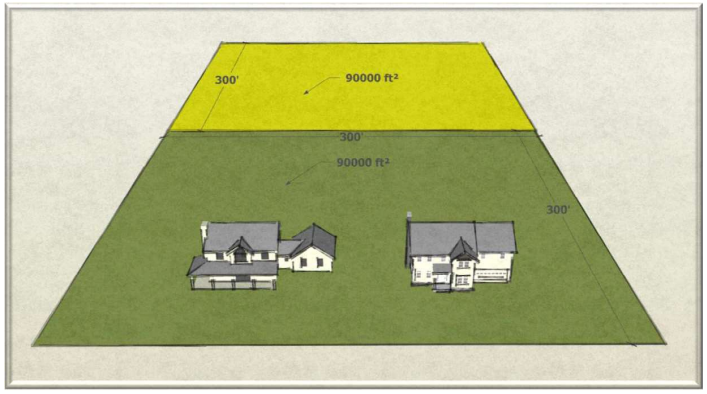
COMPREHENSIVE PLAN FOR SMALLER ACCESSORY APARTMENTS

LD 2003 FOR FULL SIZED HOUSING UNITS



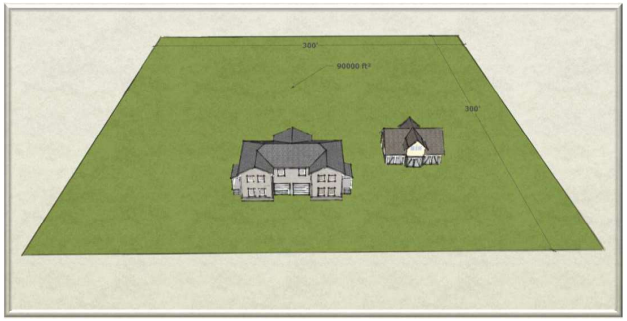
- Single-Family with 2 Accessory Apartments
- 2-Acre Lot
- Maximum of 3 Units

- OR -



- 2 Single-Family Homes
- 4-Acre Lot
- Maximum of 2 Units

- OR -



- Two-Family with 1 Accessory Apartment
- 2-Acre Lot
- Maximum of 3 Units

- OR -

- 1 Single-Family and 1 Two-Family
- 6-Acre Lot
- Maximum of 3 Units

ARTICLE 4: SPATIAL STANDARDS IN ZONING DISTRICTS
Section 4.1 DISTRICT REQUIREMENTS

A. Rural Residential & Agricultural District

1. Minimum Lot Size Single-Family or Two-Family – 90,000 sq. ft.
    a. Minimum Buildable Area – Each lot must contain a contiguous 40,000 sq. ft. building envelope which does not contain areas in Resource Protection District, wetlands, or slopes greater than twenty (20%) percent.
2. Minimum Access to Lots – ~~Only one single family detached dwelling or two-family dwelling shall be permitted on a lot.~~ No dwelling shall be erected except on a lot that fronts on a street as defined, and the minimum street frontage, measured along the lot line at the street, shall be at least equal to the minimum lot width.
3. Minimum Road Frontage – 300 ft.
4. Minimum Setbacks
    a. Front Lot Line Residential – 50 ft.
    b. Front Lot Line Non-residential – 100 ft.
    c. Side Lot Line Residential – 20 ft.
    d. Side Lot Line Non-residential – 100 ft.
    e. Rear Lot Line Residential – 20 ft.
    f. Rear Lot Line Non-residential – 100 ft.
5. Maximum Structure Height[1] – 35 ft.
    a. For Schools and Municipal Structures – 50 ft.
6. Maximum Coverage for impervious surfaces (including structures) – 25%
7. Minimum Lot Area ~~Size Two-Family~~ Multiple Dwellings – ~~110,000~~ 90,000 sq. ft. per dwelling if the lot contains more than a single-family detached dwelling or a two-family dwelling (accessory apartments are exempt from lot area requirements).
8. Maximum Number of Housing Units per Lot- Three (3)

NOTE: To address future housing needs in Durham, the 2018 Comprehensive Plan recommends using the same lot size for a duplex (two-family) as a single-family home and allowing additional smaller accessory apartments on those lots to better fit neighborhoods and the Town's rural character. The State has mandated that additional housing units be added without size restrictions but allows lot sizes to be increased for those full-sized units. This "hybrid" proposal allows the smaller accessory apartments on standard lots to favor that outcome while requiring 2 acres per full-sized housing unit to discourage increased housing that detracts from neighborhood and rural character. Thus, building a single-

[1] Features of structures such as chimneys, towers, spires and structures for electric power transmission and distribution lines may exceed the maximum structure height requirement.

family home and a duplex on the same lot will require 6 acres of land. In both cases, the maximum number of housing units allowed on any lot with be three. Landowners will be able to pursue either option, multiple smaller housing units on a standard lot or multiple larger housing units on a larger lot. If the proposed Ordinance changes are not adopted, landowners will be legally entitled to build a single-family home and a duplex on 2.5 acres as of July 1, 2024.

ARTICLE 5: PERFORMANCE STANDARDS

Section 5.1 ACCESSORY APARTMENTS

The purpose of the provisions concerning accessory apartments is to provide a diversity of housing for town residents while protecting the single-family rural character of residential neighborhoods the community. Accessory apartments may be utilized for rental purposes as well as in-law accommodations subject to the following requirements. If the accessory apartment does not meet all of said requirements, then a conditional use permit shall be required:

A. The dwelling shall have only one main entrance and all other entrances shall appear subordinate to the main entrance. An entrance leading to a foyer with entrances leading from the foyer to the two dwelling units is permitted. No open or enclosed outside stairways shall be permitted above the first story.

B. The main dwelling unit shall have at least fifteen hundred (1500 sq. ft.) square feet of floor area and the accessory apartment shall not exceed fifty (50%) percent of the floor area of the main dwelling unit. Floor area measurements shall not include unfinished attic, basement or cellar spaces, nor public hallways or other common areas.

C. ~~Only one accessory apartment shall be permitted per lot. It~~ An accessory apartment shall be made part of the main residence or located in a separate building whose primary function is not as a dwelling unit, such as a garage or barn.

D. Accessory apartments shall not be permitted for any nonconforming structure or use, where the nonconformity is due to the use of the premises, as opposed to nonconforming dimensional requirements.

NOTE: To address future housing needs in Durham, the 2018 Comprehensive Plan recommends using the same lot size for a duplex (two-family) as a single-family home and allowing additional smaller accessory apartments on those lots that better fit neighborhoods and the Town's rural character. When combined with changes to Articles 4 (District Standards) and 9 (Definitions), the draft amendments will allow two smaller accessory apartments with a single-family home and one accessory apartment with a duplex for a maximum of three housing units on a 2-acre lot. A duplex and single-family home on the same lot will require 6 acres. While either option of smaller units or full-sized units will be allowed as required by State law, the changes will favor smaller units. If the proposed Ordinance changes are not adopted, landowners will be legally entitled to build a single-family home and a duplex on 2.5 acres as of July 1, 2024.

Re: Durham Concept for Compliance with LD 2003

George Thebarge <townplanner@durhammaine.gov>
Mon 6/26/2023 8:35 AM

To:Legal Services Dept <legal@memun.org>

Cc:Jerry Douglass <townmanager@durhammaine.gov>;Alan Plummer <ceo@durhammaine.gov>;Anne Torregrossa <atorregrossa@durhammaine.gov>;Juliet Caplinger <jcaplinger@durhammaine.gov>;Allan Purinton <apurinton@durhammaine.gov>;John Talbot <jtalbot@durhammaine.gov>;Tyler Hutchison <thutchison@durhammaine.gov>;Ron Williams <rwilliams@durhammaine.gov>

Garrett,

Thank you for responding to our inquiry on the legal viability of a hybrid approach to responding to LD 2003's requirements for increased density. We understand the limitations of your analysis. At this point, we are looking for initial confirmation that allowing multiple accessory apartments on standard lots and requiring larger lots for multiple, full-sized dwelling units (i.e., single-family homes) is permissible under the new statutory framework. It was through a similar exploration that Durham learned that limiting the increased housing unit density to accessory apartments is not permissible.

This level of legal analysis will support moving forward with a public participation process to see if there is public support for this hybrid approach to meeting Durham's housing needs and complying with State law. The alternative is to follow the requirements of LD 2003 without tailoring the Land Use Ordinance to follow the Comprehensive Plan recommendations for protecting neighborhood integrity and Durham's rural character (to the extent allowed under LD 2003).

George

George Thebarge
Durham Town Planner
630 Hallowell Rd
Durham, ME 04222
townplanner@durhammaine.gov
207-353-2561

From: Legal Services Dept <legal@memun.org>
Sent: Friday, June 23, 2023 2:28 PM
To: George Thebarge <townplanner@durhammaine.gov>
Cc: Jerry Douglass <townmanager@durhammaine.gov>; Alan Plummer <ceo@durhammaine.gov>; Anne Torregrossa <atorregrossa@durhammaine.gov>; Juliet Caplinger <jcaplinger@durhammaine.gov>; Allan Purinton <apurinton@durhammaine.gov>; John Talbot <jtalbot@durhammaine.gov>; Tyler Hutchison <thutchison@durhammaine.gov>; Ron Williams <rwilliams@durhammaine.gov>
Subject: FW: Durham Concept for Compliance with LD 2003

Good afternoon George,

I want to start by being mindful of Maine’s Freedom of Access Act and noting that this email is intended to be received in a one-way manner; I strongly encourage those who are copied to save any further discussion for a public meeting rather than a “reply all” email conversation.

With that disclaimer out of the way, it seems based on the proposal you attached and your description that the "hybrid" approach you are considering would regulate additional ("full size") and accessory dwelling units differently in terms of lot size and density. If I am understanding this correctly, then I agree that approach should be permissible. This is based on my understanding that it is consistent with the "LD 2003" law, now Public Law 2021, Chapter 672, to regulate additional and accessory dwelling units differently.

Specifically, Title 30-A, section 4364-B in subsection 4(A) requires municipalities to exempt accessory dwelling units from density requirements and lot area requirements (but not necessarily setback or other dimensional requirements). Title 30-A, section 4364-A does not contain this exemption for additional dwelling units and explicitly authorizes in subsection 3 the establishment of lot area requirements for additional dwelling units.

Beyond this, I am inclined to defer to the DECD's answer to the question as it was posed to them. If you sense I may be missing the mark or have any clarifying questions, you are welcome to circle back. Either way, I very much advise consulting the town's legal counsel on the wording of any amendments prior to recommending them to the town's legislative body for adoption.

Finally, I also want to note the very recent enactment of a law which is now in effect that modifies some of the provisions enacted by LD 2003. The new law is known as LD 1706, now codified as Public Law 2023, Ch. 192, available online here. It seems you are aware that LD 1706 has extended the effective date of LD 2003, giving Durham until July 1 of 2024 to comply. So far as I can tell based upon an initial review of the new law, it does not appear its terms would alter my analysis above under the existing law.

I hope this is helpful. Again, you are welcome to let me know if you have any follow up questions.

Best,
Garrett

Garrett Corbin, Staff Attorney
Legal Services Department
Maine Municipal Association
60 Community Drive, Augusta, ME 04330
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FAX: 207-624-0187
legal@memun.org

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From: George Thebarge <townplanner@durhammaine.gov>
Sent: Wednesday, June 21, 2023 3:01 PM
To: Legal Services Dept <legal@memun.org>
Cc: Jerry Douglass <townmanager@durhammaine.gov>; Alan Plummer <ceo@durhammaine.gov>; Anne Torregrossa <anne_torregrossa@yahoo.com>; Anne Torregrossa <atorregrossa@durhammaine.gov>; Juliet Caplinger <jcaplinger@durhammaine.gov>; Allan Purinton <apurinton@durhammaine.gov>; John Talbot <jtalbot@durhammaine.gov>; Tyler Hutchison <thutchison@durhammaine.gov>; Jerry Douglass <townmanager@durhammaine.gov>; Ron Williams <rwilliams@durhammaine.gov>
Subject: Durham Concept for Compliance with LD 2003

CAUTION: This email originated from outside your organization. Exercise caution when opening attachments or clicking links, especially from unknown senders.
The Durham Planning Board will be doing research over the summer and preparing a public participation process for developing draft Land Use Ordinance amendments for consideration at the

April 2024 Town Meeting. Durham's 2018 Comprehensive Plan made recommendations for expanding housing diversity that are very much in line with LD 2003. The Town's housing recommendations, however, call for controlling the design of added housing units to protect neighborhood integrity and Durham's rural character.

LD 2003 and DECD's administrative rules placed restrictions on Durham's ability to follow its comprehensive plan in terms of limiting the size of the added housing units to fit town and neighborhood character. We believe that the dual tracks of Sections 3 and 4 of the Legislation provide opportunity to pursue a hybrid solution that will comply with the State mandate for full-sized housing units while favoring development of smaller accessory apartments.

Staff at Maine DECD have indicated that they consider that this hybrid concept would be viable under the State's new housing requirements. Could MMA legal staff also provide feedback on whether this concept would pass muster? The attached graphics provide explanation and illustration of our analysis.

George Thebarge
Durham Town Planner
630 Hallowell Rd
Durham, ME 04222
townplanner@durhammaine.gov
207-353-2561

RE: Dual Approaches to Accommodating Increased Density?

Averill, Benjamin <Benjamin.Averill@maine.gov>
Tue 5/2/2023 3:12 PM
To: George Thebarge <townplanner@durhammaine.gov>

Hi George,

Taking a look at the proposed language, yes this should meet the requirements of statute as long as your district requirements allow for the same lot area requirements for each additional principle dwelling unit (and exempt accessory apartments from any density requirements). Quickly looking at your comp plan I assume both the exemption for a designated growth area was approved by DACF as well as the rate of growth ordinance was repealed? If there is not an exemption for the DGA then you would need to allow up to 4 units on a lot in the zoning district designated as the growth area (which I'm sure you have figured out by now) but otherwise you should be all set as proposed.

Also thank you for letting us know about the errors in the final rules for Chapter 5. We became aware of the last week and reached out to the Secretary of State's office to correct the errors. We will update the website with a revised version of the rules that fixes those grammatical errors when possible.

Please let me know if you have any additional questions. I hope all is well!

Best,

Ben

Ben Averill
Housing Opportunity Program Coordinator
Dept. of Economic & Community Development
111 Sewall Street, 3rd Floor
59 State House Station
Augusta, ME 04330
Tel: 207-441-9831
www.maine.gov/decd

From: George Thebarge <townplanner@durhammaine.gov>
Sent: Monday, May 1, 2023 1:31 PM
To: Averill, Benjamin <Benjamin.Averill@maine.gov>
Cc: Gove, Hilary <Hilary.Gove@maine.gov>
Subject: Dual Approaches to Accommodating Increased Density?

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Ben,

One more question in advance of tomorrow's Durham Planning Board meeting.

As mentioned in previous communications, Durham had set out to comply with the new law by allowing multiple accessory apartments/dwelling units on 2 acre lots. We learned that the goal to limit the size

of the added units to follow Comprehensive Plan recommendations (fit in to rural & neighborhood character) was impermissible under the law and administrative rule.

During our year-long public participation process, we presented two options to the community. The first was to allow the accessory units as mentioned without increasing lot sizes. The second option was to allow the added units, but to increase the lot size when units are added, with 2 acres for each unit. The community was evenly split on the two options, and the Planning Board recommended putting the comprehensive plan recommendations (no increase in lot size) on the April 1 Town Meeting warrant. When we discovered the prohibition on limiting expansions to accessory apartments, the Planning Board pulled the proposal for this year.

I am advising the Planning Board to continue its deliberations and to revisit the two options previously considered and to look at a combination of the two for all lots in Durham:

- Allow a single-famly home to have 2 accessory apartments and a duplex to have 1 accessory apartment; and,
- Require 2 acres of lot area for each full-sized dwelling unit.

The following language that was added to the rule seems to support this approach:

SECTION 4. ACCESSORY DWELLING UNITS

A. GENERAL

1. A municipality must allow, effective July 1, 2023, one accessory dwelling unit to be located on the same lot as a single-family dwelling unit in any area in which housing is allowed, subject to the requirements outlined below. The requirements listed in Section 4 apply to municipalities with and without zoning. Private, state or local standards such as homeowners' association regulation, deed restrictions, set back, density, septic requirements, shoreland zoning and subdivision law may also apply to lots.
2. A municipal ordinance that allows more than one accessory dwelling unit or that allows accessory dwelling units to be established in relation to duplex, triplex and other multi-unit buildings shall be considered consistent with the goals of P.L. 2021 Ch. 672.

Are you able to indicate whether this language does, in fact, support the conceptual, 2-pronged approach to bringing Durham into compliance with Chapter 672?

Thanks,

George

George Thebarge
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DRAFT POLICY DIRECTION FOR 2024

DURHAM LAND USE ORDINANCE

PART 2 – POLICY FOR ZONING BOUNDARY DETERMINATIONS AND NONCONFORMING BUILDING EXPANSIONS

ARTICLE 2: ESTABLISHMENT OF DISTRICTS

Section 2.3. DISTRICT BOUNDARIES

A. **Uncertainty of Boundaries** - Where uncertainty exists with respect to the boundaries of the various districts as shown on the Official Zoning Map, the following rules shall apply:

1. Boundaries indicated as approximately following the center lines of streets, highways, or right-of-way shall be construed to follow such center lines;
2. Boundaries indicated as approximately following well-established lot lines shall be construed as following such lot lines;
3. Boundaries indicated as approximately following municipal limits shall be construed as following municipal limits;
4. Boundaries indicated as following shorelines shall be construed to follow the normal high water line, and in the event of natural change in the shoreline shall be construed as moving with the actual shoreline;
5. Boundaries indicated as being parallel to or extensions of features indicated in Paragraphs (1) through (4) above shall be so construed. Distances not specifically indicated on the Official Zoning Map shall be determined by the scale of the map. Any conflict between the Official Zoning Map and a description by metes and bounds in a deed shall be resolved in favor of the description by metes and bounds.
6. Where physical or cultural features existing on the ground are at variance with those shown on the Official Zoning Map, or in circumstances where the items covered by Paragraphs (1) through (5) above are not clear, **the <u>Planning</u> Board ~~of Appeals~~** shall interpret the district boundaries.

ARTICLE 17: BOARD OF APPEALS

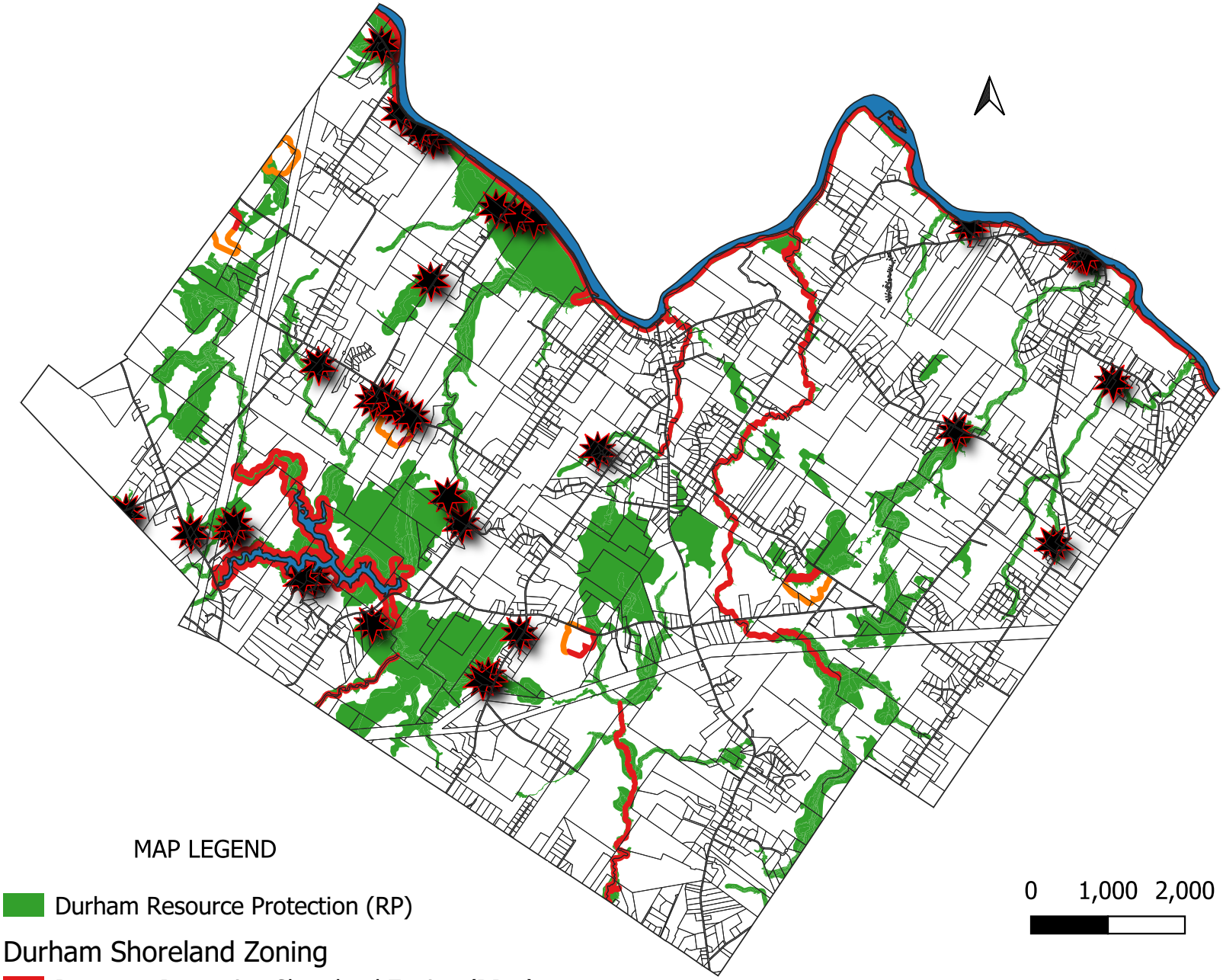
Section 17.3. POWERS AND DUTIES

~~D. **District Boundary Lines Interpretation:** An interpretation of Zone boundaries may be made as part of an appeal hearing or made at the request of the Board of Selectmen, Planning Board, or Code Enforcement Officer.~~

NOTE: The Planning Board prepares amendments to the Zoning Map for consideration at Town Meeting, and most communities assign authority and responsibility for map amendments with the Planning Board. The Planning Board has more experience reviewing technical studies, and interpretation of zoning boundary lines can be coordinated with Planning Board project reviews.

DURHAM MAINE ZONING MAP
Adopted April 1, 2023

id	MAP	LOT
1	11	37001
2	8	62
3	5	23
4	4	142
5	4	141
6	4	140
7	4	139
8	4	70
9	3	52001
10	3	22001
11	7	32006
12	8	51001
13	8	51002
14	8	56
15	10	4
16	10	5001
17	11	32
18	11	33
19	11	42001
20	12	1
21	12	2
22	12	3
23	12	6002
24	12	36001
25	10	26002
26	10	21001
27	10	21
28	10	20
29	10	19
30	9	9001
31	9	12002
32	9	17005
33	9	17004
34	9	37006
35	9	37015



ARTICLE 16: NONCONFORMING USES

Section 16.1. NONCONFORMING USES

~~B. **Residential Expansions:** A residential non-conforming use may be expanded by up to thirty (30%) percent of the area which it occupied at the time it became nonconforming, upon issuance of a Conditional Use Permit. The Board of Appeals may approve an expansion of a non -conforming use of more than thirty (30%) percent of the area which it occupied at the time it became nonconforming, if:~~

~~1. The use will conform to all other requirements of this Ordinance;~~

~~2. The expansion will not have an adverse impact on the groundwater. The Board shall consider any of the following as evidence that this condition is met:~~

~~a. Written evidence that the sewage disposal system for the property complies with the current requirement of the Maine State Plumbing Code and is sized to accommodate the proposed expansion: or,~~

~~b. Written evidence from a licensed soils evaluator that a subsurface sewage disposal system meeting the requirements the Maine State Plumbing Code and sized to meet the expanded use can be installed on the parcel; and,~~

~~c. Written documentation from a groundwater hydrologist demonstrating that the proposed sewage disposal and water supply system will not affect the quality of quantity of groundwater supplies of abutting property owners.~~

Section 16.2. NONCONFORMING STRUCTURES

A. **Expansions**: A non-conforming building may be added to or expanded after obtaining a permit from the same permitting authority as that for a new structure, if such addition or expansion does not create an increase the linear nonconformity of a structure and is in accordance with subparagraphs 1. ~~and 2~~ through 3. below.

1. A non-conforming building shall not be added to or enlarged unless such addition or enlargement does not increase the linear extent of the nonconformance of the building or a variance is obtained from the Board of Appeals.

2. A nonconforming building may be expanded by up to thirty (30%) percent of the area which it occupied at the time it became nonconforming. The Planning Board may approve as a conditional use the expansion of a non-conforming building by more than thirty (30%) percent of the area which it occupied at the time it became nonconforming.

NOTE: The proposed changes provide a simpler process for modest expansions of nonconforming structures while clarifying that nonconforming uses cannot be expanded. Code Officer approval of small projects with larger changes going to the Planning Board for conditional use approval is consistent with the treatment of accessory apartments and home-based businesses.

DRAFT POLICY DIRECTION FOR 2024

DURHAM LAND USE ORDINANCE

PART 3 – POLICY FOR SOLAR ENERGY SYSTEMS AND CELL TOWERS

BEST PRACTICES

for Low Impact Solar Siting, Design, and Maintenance

Avoiding and Minimizing Impacts to Natural and Agricultural Resources

Increasing renewable energy production in Maine is critical to mitigating the impacts of climate change on Maine's natural resources and agricultural and natural resource based economies. Solar projects that follow these low-impact best practices will help Maine people, businesses, and communities realize solar's climate and economic benefits, while avoiding or significantly reducing undue impacts to wildlife, farming, and critical natural resources such as clean water.

The purpose of this document, authored by Maine-based environmental and agricultural nonprofit organizations, is to advise solar developers, municipalities, and the public about ways to avoid or minimize development conflicts. It is not meant to supercede required federal, state and municipal permitting; likewise, we recommend using these best practices regardless of permit requirements. It is also important to note that solar development is subject to other considerations, including interconnection, project economics, and other siting constraints.

photo: Carl Lender/FLCKR

photo: Michelle Callahan/FLCKR

Natural Resource Siting Best Practices

(1) Preferentially use disturbed, developed, or degraded lands. This includes landfills, brownfields[1], roadway medians and edges, parking lots, rooftops, idle or underutilized industrial or commercial sites, and sand and gravel pits. Utilizing disturbed lands avoids new forest clearing, minimizes soil disturbance, and takes advantage of unutilized or underutilized space.

(2) Avoid where practical, and minimize as much as possible, impacts to sensitive wildlife habitats and high-value natural resources. This includes all habitats identified as "Significant Wildlife Habitats" under Maine's Natural Resources Protection Act, as well as additional areas and natural communities deemed to be rare or particularly sensitive to encroachment.[2] Other sensitive habitats include threatened and endangered species habitat, rare plant populations, cold-water fish habitat, wetlands, eelgrass beds, rare natural communities, Focus Areas of Statewide Ecological Significance, forested areas that have not previously been cleared for agriculture, and resilient and connected landscapes.[3]

There is no comprehensive statewide inventory that includes all Rare, Threatened, and Endangered species occurrences and habitats, Significant Wildlife Habitats, and important natural resources. Though many resources are included on data layers and resource maps, the completeness of such varies by habitat type, location, and previous survey efforts. Thus, such tools should be considered preliminary until otherwise noted by the appropriate resource agency.

A desktop evaluation of these resources should not take the place of detailed, site-specific investigations of any proposed site to identify any unmapped habitats, species, or resources present at the site. Likewise, it should be recognized that GIS mapping may not be accurate and site specific investigations may supercede GIS mapping.

In all circumstances, preference should be given to avoidance, with minimization and compensation utilized only where avoidance is not possible.

(3) Avoid where practical, and minimize as much as possible, impacts to intact forest landscapes. Intact forest landscapes are areas with no significant human development or long-term habitat fragmentation and that provide relatively undisturbed habitat conditions. They are critical for increasing carbon storage, harboring biodiversity, regulating hydrological regimes, and providing other essential ecosystem functions.

(4) Allow for habitat connectivity by avoiding or minimizing impacts to wildlife corridors; locating projects near existing transmission and distribution infrastructure, highways and population centers; co-locating new transmission infrastructure; and using wildlife-friendly fencing. Wildlife corridors include migration corridors for terrestrial wildlife, aquatic corridors, and climate corridors utilized by wildlife as habitats and home ranges shift in the face of climate change. Likely upland and wetland habitat connectors are depicted on Beginning with Habitat maps, but terrestrial migration corridors aren't as thoroughly mapped. Site-specific information, as well as conversations with natural resource agencies and local nonprofit organizations, may be needed to properly avoid impacts.

Co-locate new transmission lines with existing man-made linear features, wherever possible. If co-location is not possible, utilize routes that have the least overlap with high value natural resources and habitats. Minimize use of fencing and where fencing is required, use designs that allow for wildlife passage.

(5) Protect water quality and avoid erosion. Utilize Stream Smart road/stream crossings, proper erosion control techniques, and minimize the number of stream and wetland crossings to the greatest degree possible. Provide adequate buffers around wetlands, vernal pools, and other aquatic systems to allow for the natural functioning of such systems, including retaining shade for streams and providing travel corridors for multiple fish and wildlife species. Adopt stream protection standards for buffers and cutting developed by the Maine Department of Inland Fisheries and Wildlife.

(6) If development is proposed in a greenfield site[4] or away from existing infrastructure, evaluate potential cumulative impacts, including existing development and potential future development for a site. This includes the amount of impervious surface and amount of vegetation clearing in the area.

(7) Restore or maintain native vegetation in the project area, including "pollinator friendly" species, and avoid where practical, and minimize as much as possible, the use of pesticides and/or herbicides.

1. Brownfields are properties, that, if redeveloped or reused, may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.
2. Maps for these areas can be found through the statewide Beginning with Habitat program.
3. The location of these habitats can be obtained through the Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources, Maine Natural Areas Program, federal agencies, and local non-profit organizations.
4. A greenfield site is a site that has not been previously developed or otherwise degraded.

Agricultural Siting Best Practices

If it is determined that agricultural land is a responsible site for solar power, the following should be considered to mitigate impacts to the future productivity of the land:

(1) **Where possible, avoid land identified by the Natural Resources Conservation Service as "Prime Farmland" or "Farmland of Statewide Importance," or otherwise cause productive farmland to be taken out of production, including land leased for agricultural uses.**

(2) **Preferentially use previously-developed, disturbed, degraded, or marginally productive portions of the farm property.** This includes rooftops, land within and around farmstead areas, sand and gravel pits, and other areas with low utility for agricultural production.

(3) **Encourage dual-use projects, where agricultural production and electricity production from solar installations occur together on the same piece of land.**

(4) **Build, operate, and decommission projects in ways that preserve the ability for the land to be farmed in the future and that do not inhibit access to or the productivity of farmland surrounding the solar installation.**

(5) **Minimize the impacts of grid connection on the agricultural resources of the property.**

(6) **Where applicable, projects should benefit the farm business directly by providing electricity to meet the energy needs (in whole or in part) of the farm.**

Best Practices for All Solar Development

(1) **Use a proactive approach to community engagement.** In general, Maine people overwhelmingly support solar power. As specific solar projects are proposed in greater number, at larger scale, and in and around communities, it is important to educate and listen to community members about individual projects as early in the development process as feasible. Informal presentations or open houses are often more effective for genuine engagement than the processes required for local permitting.

(2) **Provide municipalities and community members with information about the performance and beneficial outcomes of projects.** Project owners are encouraged to provide information about project performance or outcomes before, during, and after construction. Information can include: energy generation, financial savings, employment/spending, property tax payments, emission reductions or similar metrics. This information can be shared through signage at the project, newspaper articles, or updates to local government officials.

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Municipal Regulation of Solar Power in Maine

As my colleague wrote in a recent blog article called Maine Landowner's Guide to Solar Leases, recent legislative developments incentivize solar power in Maine. This led to a "land rush" of out-of-state solar developers seeking to obtain interests in land from Maine landowners for potential solar development. With any rush for development, comes concerns from neighbors, landowners, and municipal officials making sure those land uses stay under adequate local control.

At the same time, many municipalities and citizens want to make sure their ordinances encourage renewable energy systems. Whenever a municipality wishes to regulate an industry already regulated at the state and local level, the municipal ordinance or licensing scheme must be crafted carefully. To not be in conflict with or preempted by existing state or national law, it must regulate the same activities and provide both applicants and the municipal officials' clear standards.

Some things citizens & officials seeking to craft ordinances regarding solar power in Maine should carefully consider:

Maine State Law Limits on Municipal Authority to Regulate Solar Energy Systems on Residential Property

A municipal ordinance, bylaw, or regulation adopted after September 30, 2009, that directly regulates the installation or use of solar energy devices on residential property must not run afoul of certain limits. It may not interfere with the right of a resident to install or use a solar energy device on a residential property owned by a person.

Also, it protects the right of a person to install or use a solar clothes-drying device on residential property they rent. Any restrictions on the installation and use of a solar energy system on residential property must be "reasonable."

This means it is necessary to protect:

- Public health and safety, including but not limited to ensuring safe access to and rapid evacuation of buildings
- Buildings from damage
- Historic or aesthetic values, when an alternative of reasonably comparable cost and convenience is available
- Shorelands under shoreland zoning provisions

What Regulatory Vehicle to Employ?

While many municipalities may default to a stand-alone ordinance, there are a number of regulatory approaches available to accommodate this land use. This includes creating a specific overlay zone that allows certain solar energy systems.

Classifying certain systems as allowed by conditional use permits enables a municipality to allow the use only under certain conditions. Licensing schemes or site plan regulations may be found in a stand-alone ordinance or as part of the zoning or land use ordinance.

Understand the Different Types of Solar Power Systems

Ordinances should mandate levels of review and performance standards based on the scale and type of solar energy system. Generally, this includes small-, medium-, and large-scale solar energy systems, each of which may be ground-mounted or roof-mounted.

An ordinance should provide a greater level of review depending on the size of the operation. It is typical for a small-scale solar power system that provides energy to the site user to require only a permit from the Code Enforcement Officer. A larger-scale solar energy system that provides energy to the grid requires review by planning staff and the planning board.

Furthermore, roof-mounted and small-scale ground-mounted solar energy systems may not require any permits. It is common to allow such uses "as of right." As long as certain standards applicable to any principal or accessory structures are met.

Solar systems occupying 20+ acres or impacting certain natural resources require a Site Location of Development permit from the Maine Department of Environmental Protection. Known as a Site Location, it typically coincides with a related Natural Resources Protection Act permit. These permits prohibit significant negative impacts to sensitive wildlife habitat, wetlands, water quality, groundwater, soil erosion, stormwater, noise, and scenic character.

Site Plan Review & Performance Standards

Probably the most significant area of concern for municipalities is the siting of the energy facility. These can be addressed through enacting specific performance standards applicable to energy facilities over a certain size. Standards might require the applicant to prove a proposed project will not have an adverse impact on significant wildlife areas or prevent the utilization of prime agricultural soils.

Maine Audubon and the NRCM created a best practices guide, **Model Solar Ordinance** that details particular voluntary siting practices. These could be crafted into mandatory performance standards through a solar ordinance or amendment to an existing site plan review regulations.

Careful attention is required to make sure the added language pertaining to solar power systems is consistent with the existing land use ordinance. Standards should be specific and clear to avoid challenges that the standard is so vague it constitutes an unconstitutional delegation of authority to the Planning Board.

Innovative Developments

Some municipalities go beyond merely incentivizing solar power. For instance, Santa Monica recently enacted legislation that requires a new building to have a minimum of 1.5 watts of solar energy capacity as part of the construction process. While this may appear radical and add some cost to construction, it is not without precedent to require certain building practices to benefit the eventual homeowner. For example, many building codes and ordinances require a minimum level of insulation and a maximum water flow for plumbing fixtures.

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CONTACT US

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FEBRUARY 2020

Model Site Plan Regulations and Conditional Use Permits to Support Solar Energy Systems in Maine Municipalities

This document describes and models two land-use tools Maine municipalities may use to permit small-, medium-, and large-scale solar energy systems, including both ground-mounted and roof-mounted solar installations. The purpose of this document is to assist Maine municipalities in supporting development of solar energy systems in ways that address the needs of their community. Communities will need to carefully consider how model language may be modified to suit local conditions and where it should be inserted into an existing zoning ordinance, if applicable. Further, it is highly recommended that any language adapted from these models be reviewed by municipal counsel prior to adoption.

Selecting a Land-Use Tool

Several land-use tools are available to accommodate solar energy systems, including overlay zones, floating zones, conditional-use permits, and site plan regulations. The two land-use tools addressed here, site plan regulations and conditional-use permits, were selected to respond to the variations in planning resources across Maine municipalities. Site-plan regulation may be more appropriate for municipalities that do not have a zoning ordinance in place; a combination of Site Plan Review and conditional-use permits may be appropriate for municipalities that have an existing zoning ordinance. That said, municipalities with an existing zoning ordinance that wish to allow solar may not need to amend their ordinance in advance of development; the model site-plan regulation standards may be sufficient to meet a community's needs in the short-term as they consider amending their ordinance for development over the long-term.

Furthermore, roof-mounted and small-scale ground-mounted solar energy systems may not require any regulatory or permitting changes, or additional oversight by a municipal planning authority, at all. Many communities allow these land uses as-of-right, for example, if they meet standards such as accessory structure requirements in the case of small ground-mounted systems. This means that development may proceed without the need for a conditional use permit, variance, amendment, waiver, or other discretionary approval. These projects cannot be prohibited, and can be built once a building permit has been issued by the inspector of buildings, building commissioner, or local inspector. See page 7 for model definitions (including square footage) for small-, medium-, and large-scale solar energy systems, as well as definitions for roof- and ground-mounted solar energy systems.

Navigating This Document

The document contains model site plan regulations and conditional use permit language. Model site plan regulation language begins on page 3 and model conditional use language begins on page 7. Content in the yellow boxes includes additional context and information for readers to consider as they contemplate how the model language may suit their municipality. Content in brackets should be modified to fit a municipality's particular resources and nomenclature. This content, a long with the model language, may also provide municipalities the information they need to create different land use tools to guide solar development in their community.

Readers may also want to consider a Maine-based Frequently Asked Questions document that addresses solar power development from a community and municipal perspective and recommended Best Practices for Low Impact Siting, Design, and Maintenance from some of Maine's leading natural resource and agricultural organizations. These documents can be found at maineaudubon.org/solar.

For More Information

Please contact Eliza Donoghue, Director of Advocacy and Staff Attorney for Maine Audubon, at edonoghue@maineaudubon.org.

I. MODEL SITE PLAN REGULATION LANGUAGE

Site Plan Review and Performance Standards

Site Plan Review may be appropriate when medium-scale ground-mounted systems are sited within natural resource protection districts. Site Plan Review may be appropriate for large-scale ground-mounted systems when they are sited anywhere within the community.

Site Plan Review procedures and requirements may stand alone or as a separate section of a municipality's zoning ordinance. There are also instances when communities that have a zoning ordinance have separate Site Plan Review provisions and procedures pertaining to a particular use or development type.

As discussed previously (see 'Selecting a Land-Use Tool', above), performance standards are generally sufficient for roof-mounted and small-scale ground-mounted solar energy systems.

Standards for Roof-Mounted and Small-Scale Ground-Mounted Solar Energy Systems

(a) Roof-mounted and building-mounted solar energy systems and equipment are permitted by right, unless they are determined by the [Code Enforcement Officer, with input from the Town Engineer and the Fire Chief] to present one or more unreasonable safety risks, including, but not limited to, the following:

  (i) Weight load;

  (ii) Wind resistance;

  (iii) Ingress or egress in the event of fire or other emergency; or

  (iv) Proximity of a ground-mounted system relative to buildings.

(b) All solar energy system installations shall be installed in compliance with the photovoltaic systems standards of the latest edition of the National Fire Protection Association (NFPA1) adopted by [Town].

(c) All wiring shall be installed in compliance with the photovoltaic systems standards of the latest edition of the National Electrical Code (NFPA 70) adopted by [Town].

(d) Prior to operation, electrical connections must be inspected and approved by the Electrical Inspector.

Additional Standards for Medium- and Large-Scale Ground-Mounted Solar Energy Systems

In addition to the standards in [Sec. __], medium- and large-scale ground-mounted solar energy systems shall comply with the following:

(a) Utility Connections: Overhead or pole-mounted electrical wires shall be avoided to the extent possible within the facility.

(b) Safety: The solar system owner or project proponent shall provide a copy of the Site Plan Review application to the [Fire Chief] for review and comment. The [Fire Chief] shall base any recommendation for approval or denial of the application upon review of the fire safety of the proposed system.

(c) Visual Impact: Reasonable efforts, as determined by the [Planning Board], shall be made to minimize undue visual impacts by preserving native vegetation, screening abutting properties, or other appropriate measures, including adherence to height standards and setback requirements.

(d) Land Clearing, Soil Erosion, and Habitat Impacts: Clearing of natural vegetation shall be limited to what is necessary for the construction, operation and maintenance of ground-mounted solar energy systems or as otherwise prescribed by applicable laws, regulations, and bylaws/ordinances. Ground-mounted facilities shall minimize mowing to the extent practicable. Removal of mature trees shall be avoided to the extent possible. Native, pollinator-friendly seed mixtures shall be used to the extent possible. Herbicide and pesticide use shall be minimized. No prime agricultural soil or significant volume of topsoil shall be removed from the site for installation of the system.

Solar Energy System Fencing

The National Electric Code requires fencing for certain sized, ground-mounted solar energy systems. To allow for wildlife passage, fences should be elevated by a minimum of 5 inches. To maximize wildlife's ability to permeate fencing, municipalities may consider requiring the use of 'Solid Lock Game Fences'. Such fencing would start with 8 by 12-inch openings at the bottom (ground) with progressively smaller openings at the top of the fence. This type of fencing meets the National Electric Code for human safety. Additionally, municipalities may consider requiring the placement of five-inch or larger diameter wooden escape poles in two or more corners of the perimeter fence as an alternative means for wildlife to escape the enclosed area.

(e) Fencing: Where fencing is used, fences should be elevated by a minimum of 5 inches to allow for passage of small terrestrial animals.

(f) Removal: Solar energy systems that have reached the end of their useful life or that has been abandoned consistent with this ordinance shall be removed. The owner or operator shall physically remove the installation no more than 365 days after the date of discontinued operations. The owner or operator shall notify the [Code Enforcement Officer] by certified mail of the proposed date of discontinued operations and plans for removal. Decommissioning shall consist of:

(i) Physical removal of all solar energy systems, structures, equipment, security barriers, and transmission lines from the site.

(ii) Disposal of all solid and hazardous waste in accordance with local, state, and federal waste disposal regulations.

(iii) Stabilization or re-vegetation of the site as necessary to minimize erosion. Native, pollinator-friendly seed mixtures shall be used to the maximum extent possible.

(g) Abandonment:

(i) Absent notice of a proposed date of decommissioning or written notice of extenuating circumstances, a large-scale ground-mounted solar energy system shall be considered abandoned when it fails to operate for more than one year.

(ii) If the owner or operator of the solar energy system fails to remove the installation within 365 days of abandonment or the proposed date of decommissioning, the [Town] retains the right to use all available means to cause an abandoned, hazardous, or decommissioned large-scale ground-mounted solar energy system to be removed.

Additional Standards for Large-Scale Solar Energy Systems

(a) Large-scale ground-mounted solar energy systems shall not be considered accessory uses.

(b) Operations and Maintenance Plan: The project proponent shall submit a plan for the operation and maintenance of the large-scale ground-mounted solar energy system, which shall include measures for maintaining safe access to the installation as well as other general procedures for operational maintenance of the installation.

(c) Signage: A sign shall be placed on the large-scale solar energy system to identify the owner and provide a 24-hour emergency contact phone number.

(d) Emergency Services: The large-scale ground-mounted solar energy system owner or operator shall provide a copy of the project summary, electrical schematic, and site plan to the [Fire Chief]. Upon request, the owner or operator shall cooperate with the [Fire Department] in developing an emergency response plan. All means of shutting down the system shall be clearly marked. The owner or operator shall provide to the [Code Enforcement Officer] the name and contact information of a responsible person for public inquiries throughout the life of the installation.

Site Plan Application and Review

(a) Applicability:

(i) Roof-mounted systems and small-scale ground- mounted systems are not subject to Site Plan Review.

(ii) Medium-scale ground-mounted solar energy systems are not subject to Site Plan Review, except in natural resource protection districts and as may be required if conditional use permits are needed.

(iii) Large-scale ground-mounted solar energy systems are subject to Site Plan Review.

(b) In addition to the [Town's] site plan application requirements, the Applicant shall submit the following supplemental information as part of a site plan application:

(i) A site plan showing:

(1) Property lines and physical features, including roads, for the project site;

(2) Proposed changes to the landscape of the site, grading, vegetation clearing and planting, exterior lighting, screening vegetation or structures;

(3) Blueprints or drawings of the solar energy system showing the proposed layout of the system, any potential shading from nearby structures, the distance between the proposed solar collector and all property lines and existing on-site buildings and structures, and the tallest finished height of the solar collector;

(4) Documentation of the major system components to be used, including the panels, mounting system, and inverter(s);

(5) Name, address, and contact information of the proposed system installer, the project proponent, project proponent agent, and all co-proponents or property owners, if any; and

(6) A one- or three-line electrical diagram detailing the solar photovoltaic installation, associated components, and electrical interconnection methods.

If the following are not addressed in existing Site Plan Review regulations, then the community may wish to include them:

(7) Locations of important plant and animal habitats identified by the Maine Department of Inland Fisheries and Wildlife or [Town of], or rare and irreplaceable natural areas, such as rare and exemplary natural communities and rare plant habitat as identified by the Maine Natural Areas Program.

(8) Locations of wetlands and waterbodies.

(9) Locations of "Prime Farmland" and "Farmland of Statewide Importance".

(10) Locations of floodplains.

(11) Locations of local or National Historic Districts.

(12) A public outreach plan, including how the project proponent will inform abutters and the community.

Review Processes

(a) For projects that are subject to permitted uses, [Town staff] will review the application and make final determination within 5 days of receipt.

(b) For all projects that require Site Plan Review, the following administrative procedures shall take effect:

(i) Prior to submitting an application and the start of the review process, a pre-application conference is recommended. The conference is initiated by the Applicant and is scheduled with the Applicant and a member of the planning staff to discuss pertinent requirements.

(ii) The Applicant shall submit the required number of copies of their application at least seven days in advance of the meeting when the project is scheduled for a [Planning Board] agenda.

(iii) Applications are processed in the order in which they are received.

(iv) Within 10 days of receipt of the application in the [Department of Planning and Development], the Applicant will be notified if their application is complete or incomplete. If it is incomplete, a list of outstanding items will be included in the notification letter. Each time revisions are submitted on an incomplete application, the [Town] has another 10 days to review the revised materials to make a determination of completeness.

(v) Once an application is deemed to be complete, the project will be reviewed by [Town staff] for compliance with the ordinance standards. The Applicant will be notified of staff comments regarding the project and the Applicant may make revisions to address these comments.

(vi) When the project is scheduled for a [Planning Board] agenda, the planning staff will prepare a written report that discusses the project and makes a recommendation to the [Planning Board] as to a decision. The report is available to the Applicant on the [___ day] preceding the [Planning Board] meeting. The [Board] will hold the public hearing on the application within 30 days of receipt of a complete application and make a decision within 10 days of that hearing. A decision may be postponed, with agreement of the applicant, to allow time for revisions to a plan.

(vii) The applicant or a duly authorized representative should attend the [Planning Board] meeting to discuss the application.

II. MODEL CONDITIONAL-USE PERMIT LANGUAGE

Purpose

(a) Solar energy is a local, renewable and non-polluting energy resource that can reduce fossil fuel dependence and emissions. Energy generated from solar energy systems can be used to offset energy demand on the grid, with benefits for system owners and other electricity consumers.

(b) The use of solar energy equipment for the purpose of providing electricity and energy for heating and/or cooling is an important component of the [Town's] sustainability goals.

(c) The standards that follow enable the accommodation of solar energy systems and equipment in a safe manner while still allowing the quiet enjoyment of property.

(d) This ordinance is intended to balance the need for reasonable standards and expedited and streamlined development review procedures.

Within a Zoning Ordinance the definition section usually stands alone, but may be included in a subsection within other sections of the Zoning Ordinance.

Definitions

Electrical Equipment: Any device associated with a solar energy system, such as an outdoor electrical unit/control box, that transfers the energy from the solar energy system to the intended location.

Electricity Generation (production, output):
The amount of electric energy produced by transforming other forms of energy, commonly expressed in kilowatt-hours (kWh) or megawatt-hours (MWh).

Height of building: The vertical measurement from grade to the highest point of the building, except that utility structures such as chimneys, TV antennae, HVAC systems, and roof-mounted solar energy systems shall not be included in this measurement, nor shall any construction whose sole function is to house or conceal such structures.

Mounting: The manner in which a solar PV system is affixed to the roof or ground (i.e., roof mount, or ground mount.

Power: The rate at which work is performed (the rate of producing, transferring, or using energy). Power is measured in Watts (W), kilowatts (kW), Megawatts (MW), etc. in Alternative Current (AC).

Solar Array: Multiple solar panels combined together to create one system.

Solar Collector: A solar PV cell, panel, or array, or solar thermal collector device, that relies upon solar radiation as an energy source for the generation of electricity or transfer of stored heat.

Solar Energy System: A solar energy system whose primary purpose is to harvest energy by transforming solar energy into another form of energy or transferring heat from a collector to another medium using mechanical, electrical, or chemical means. It may be roof-mounted or ground-mounted, and may be of any size as follows:

1. Small-scale Solar Energy System is one whose physical size based on total airspace projected over a roof or the ground is less than 15,000 square feet (approximately one-third of an acre);
2. Medium-scale Solar Energy System is one whose physical size based on total airspace projected over a roof or the ground is equal to or greater than 15,000 square feet but less than 87,120 square feet (two acres); and
3. Large-scale Solar Energy System is one whose physical size based on total airspace projected over a roof or the ground is equal to or greater than 87,120 square feet (two acres).

Solar Energy System, Ground-Mounted: A Solar Energy System that is structurally mounted to the ground and is not roof-mounted; may be of any size (small-, medium- or large-scale).

Solar Energy System, Roof-Mounted: A Solar Energy System that is mounted on the roof of a building or structure; may be of any size (small-, medium- or large-scale).

Tilt. The angle of the solar panels and/or solar collector relative to horizontal. Tilt is often between 5 and 40 degrees. Solar energy systems can be manually or automatically adjusted throughout the year. Alternatively, fixed-tilt systems remain at a static tilt year-round.

Use Regulations

Within a Zoning Ordinance, the Use Regulations describe which land uses are allowed within different zoning districts of the community, as well as which permits are required. The Use Regulations typically include a Use Table and/or narrative description of the principal and accessory uses that are allowed, prohibited, and/or allowed only through a conditional use permit or are subject to Site Plan Review within each zoning district.

The example provided in this section demonstrates how roof-mounted, small-scale ground-mounted, medium-scale ground-mounted, and large-scale ground-mounted solar energy systems can be incorporated into a municipality's Use Regulations as a Use Table. A town may elect instead to list uses.

In this model, roof-mounted solar energy systems, regardless of size, are allowed as-of-right throughout the community. This means that development may proceed without the need for a conditional-use permit, variance, amendment, waiver, or other discretionary approval. These projects cannot be prohibited, and can be built once a building permit has been issued by the inspector of buildings, building commissioner, or local inspector.

Ground-Mounted Systems

For ground-mounted systems, there is a distinction between how small-scale, medium-scale and large-scale systems are treated and where each are allowed as-of-right, via Site Plan Review, or by conditional use permit. The model zoning allows small-scale ground-mounted systems as-of-right throughout the community except for in natural resource protection zones, in which a conditional use permit is required. These are of a size that would service a house, small businesses, or small municipal building. The model zoning allows medium-scale ground-mounted systems in all districts except as a principal use in natural resource protection zoning districts; in these or similar districts, medium-scale ground-mounted systems are only allowed as an accessory use through Site Plan Review.

As drafted, the model zoning requires Site Plan Review for all large-scale ground-mounted systems and prohibits such systems in natural resource protection districts. Alternatively, a municipality may choose to prohibit large-scale ground-mounted systems in residential districts, due to housing or other growth or land use needs. Site Plan Review is discussed in more detail earlier in this document (see page 3), but in general it establishes criteria for the layout, scale, appearance, safety, and environmental impacts of certain types and/or scales of development. Typically, site plan approval must be obtained before the building permit is issued.

Siting Best Practices

"Low Impact Solar Siting, Design, and Maintenance", a resource created by Maine-based environmental and agricultural NGOs, describes how Maine communities can realize solar energy systems' climate and economic benefits while avoiding or significantly reducing undue impacts to wildlife, farming, and critical natural resources. This resource can be found at maineaudubon.org/solar. The practices described in the resource, coupled with the standards outlined in the model site plan regulation language, can ensure that solar energy systems are thoughtfully sited within a community.

Applicability

(a) Notwithstanding the provisions of 1 M.R.S.A section 302 or any other law to the contrary, the requirements of this [Chapter] shall apply to all roof-mounted and ground-mounted solar energy systems modified or installed after the date of its enactment.

(b) All solar energy systems shall be designed, erected, and installed in accordance with all applicable codes, regulations and standards.

(c) Any upgrade, modification or structural change that materially alters the size, placement or output of an existing solar energy system shall comply with the provisions of this [Chapter].

(d) For the purpose of this [Chapter], the [Town's] zoning districts are mapped and categorized as follows:
[see Use Table on next page].

Permitting

(a) A solar energy system or device shall be installed or operated in the [Town] provided it is in compliance with this ordinance.

(b) Permitting shall be determined by the locational zone within the [Town], type of solar system, and proposed size. The [Town] has designated the proper permitting process for each solar system in the attached matrix entitled "Permitting Required for Solar Energy Systems."

(c) Permitted Use: Roof-mounted solar energy systems are permitted in all zoning districts, subject to the dimensional standards of [Sec. 5] and the additional standards outlined in [Sec. 5] and [Sec. 6].

Permitting Required for Solar Energy Systems

	Commercial	Industrial	Residential	Rural Residential	Rural Farm and Forest	Natural Resource Protection
Principal Use						
Medium-scale Ground-mounted SES	**Y**	**Y**	**CU**	**CU**	**CU**	**N**
Large-scale Ground-mounted SES	**SPR**	**SPR**	**SPR or N**	**SPR**	**SPR**	**N**
Accessory Use						
Rooftop SES	**Y**	**Y**	**Y**	**Y**	**Y**	**Y**
Small-scale Ground-mounted Solar	**Y**	**Y**	**Y**	**Y**	**Y**	**CU**
Medium-scale Ground-mounted Solar	**Y**	**Y**	**Y**	**CU**	**CU**	**SPR**

Y = Allowed; N = Prohibited; CU = Conditional Use; SPR = Site Plan Review

Dimensional Regulations

In most cases, the existing dimensional standards in a Zoning Ordinance will allow for the development of small-, medium-, and large-scale solar energy systems. However, if a municipality finds alternate dimensional standards are necessary to allow solar energy energy systems while protecting public health, safety, and welfare, it may impose them.

Height

It is recommended that for purposes of height, roof-mounted solar energy systems should be considered similar to chimneys, television antennae, roof-top mechanical equipment and other appurtenances that are usually either allowed a much higher maximum height (e.g., 100 feet instead of 35 feet) or are exempted altogether from building height requirements. Such an exemption can be stated in the definition of "Building Height" or through language similar to that provided in the following example.

Dimensional Standards

(a) Height: In mixed-use and non-residential commercial/industrial zones, solar energy systems shall be considered to be mechanical devices and, for purposes of height measurement, are restricted only to the extent consistent with other building-mounted mechanical devices.

(b) Height standards for ground-mounted solar energy systems are dependent on location and zoning district:

(i) In residential and mixed-use zoning districts, such systems shall not exceed twelve (12) feet in height when oriented at maximum tilt, except that the maximum height is twenty-two (22) feet for systems set back at least thirty (30) feet from any property line.

(ii) In all other zoning districts, such systems shall conform to the building height requirements of the zoning districts in which they are located.

Setbacks

It is recommended that small- and medium-scale ground-mounted solar energy systems that are accessory to a primary building or structure on a lot be provided with more flexible setback requirements than those that would typically apply to a primary structure. Many communities already provide some flexibility for "accessory structures" like sheds, allowing these to be closer to the lot line than the primary structure. For example, where a front/side/rear yard setback for the primary structure may be 50 feet, setbacks of 20 feet may be allowed for accessory structures. When ground-mounted solar energy systems are developed as accessory structures to a home, business or other building or structure, they should be afforded at least the same flexibility.

If a community does not have this type of reduced setback already built into the Zoning Ordinance, a provision could be added that effectively reduces the setback distance just for this use.

(c) Setbacks for Ground-Mounted Solar Energy Systems

(i) Notwithstanding any other provision of this ordinance to the contrary, the setbacks for ground-mounted solar energy systems shall be as follows:

(1) Minimum front yard: In residential zoning districts, fifty (50) feet. In mixed use and non-res idential zoning districts, whatever the front yard setback is for that zoning district, but in no event less than ten (10) feet.

(2) Minimum rear yard: Whatever the rear yard setback is for accessory buildings in that zoning district.

(3) Minimum side yard: Whatever the rear yard setback is for accessory buildings in that zoning district.

(ii) Additional setbacks may be required to mitigate visual and functional impacts.

Lot Coverage

A number of communities use "maximum lot coverage" or "maximum impervious surface" as one of their dimensional standards. While it is clear that such features as driveways or buildings would be included in any calculation of lot coverage, many other features may be more ambiguous depending on how clearly the definition in the Zoning Ordinance is written. Regardless of the definition, it is recommended that solar energy systems with grass or another pervious surface under them be exempted from lot coverage or impervious surface calculations. However, if the area is to be paved or otherwise rendered impervious then this land area should in fact count toward any coverage or impervious surface limit. For the purposes of municipal stormwater regulations, panels could have the effect of altering the volume, velocity, and discharge pattern of stormwater runoff, however, vegetated cover beneath arrays should not be considered fully impervious.

Example:

Solar energy systems shall not be included in calculations for lot coverage or impervious cover as defined in [Sec. __].

Created by

Maine Audubon, with significant review, feedback, and support from Maine-based solar developers, municipal planners, agricultural organizations, and solar advocates.

Please contact Eliza Donoghue at edonoghue@maineaudubon.org with questions.

TOWN OF DURHAM
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MEMO TO: Durham Planning Board

FROM: George Thebarge AICP, Town Planner

DATE: January 16, 2020

RE: Standards for Review of Cell Towers

The Chairman has requested that I provide guidance to the Planning Board for the processing of a cell tower application under the new Land Use Ordinance adopted in December of 2019. The overhaul of the Ordinance conducted last year divided the review of all non-residential projects into two separate articles.

A. CONDITIONAL USE REVIEW

The first article regulating non-residential uses and projects is Article 7, Conditional Use. This article and review process is intended to be an initial screening of proposals to verify that the project will not have undue adverse impacts on neighbors and the community at large. The eight criteria listed in the Ordinance in Section 7.4 are as follows:

1. **Public Health Impacts:** The proposed use will not create unsanitary or unhealthful conditions by reason of sewage disposal, emissions to the air or water, or other aspects of its design or operation;
2. **Traffic Safety Impacts:** The proposed use will not create unsafe vehicular or pedestrian traffic conditions when added to existing and foreseeable traffic in its vicinity;
3. **Public Safety Impacts:** The proposed use will not create public safety problems which would be substantially different from those created by existing uses in the neighborhood or require a substantially greater degree of municipal services than existing uses in the neighborhood;
4. **Environmental Impacts:** The proposed use will not result in sedimentation or erosion, or have an adverse effect on water supplies;

5. **Scale & Intensity of Use:** The proposed use will be compatible with existing uses in the neighborhood, with respect to physical size, visual impact, intensity of use, and proximity to other structures;
6. **Noise & Hours of Operation:** The proposed use will be compatible with existing uses in the neighborhood, with respect to the generation of noise and hours of operation;
7. **Right, Title, or Interest:** The applicant has sufficient right, title or interest in the site of the proposed use to be able to carry out the proposed use; and,
8. **Financial & Technical Ability:** The applicant has the financial and technical ability to meet the standards of this Section and to comply with any conditions imposed by the Planning Board pursuant to subsection 7.5.

In addition to these review criteria, the new Land Use Ordinance provides the Planning Board with the authority to impose conditions of approval on uses and projects requiring conditional use approval. Those conditions may include, "but are not limited to" the following requirements:

1. Increased property line setbacks;
2. Fences and planting screens to create effective buffers between uses;
3. Limits on hours of operation; and,
4. Location of parking and signs.

B. SITE PLAN REVIEW

The second set of regulations that would apply to the review of a cell tower are found in Article 8, Site Plan Review. The intent of the ordinance is that site plan review is for more detailed design review of projects than the initial screening that takes place under conditional use reviews. Only larger projects involving construction of buildings and parking lots are required to go through site plan review. The extensive submission and design standards deal with all aspects of developing a commercial site including: site utilization, vehicular access, internal vehicular circulation and parking, utilities, lighting, signage, fire protection, and buffering.

It is important to note, that the model site plan review ordinance used in developing Article 8 and the language the Town adopted was not intended for and is not particularly well suited for review of cell towers. For that reason and because of Federal regulations that limit the authority of local municipalities to regulate "wireless telecommunications facilities," most Maine communities have adopted separate regulations that specifically apply to such cell towers. I am attaching a copy of the model ordinance developed by the State Planning Office (now provided by DACF).

C. MODEL WIRELESSTELECOMMUNICATIONS FACILITIES ORDINANCE

The "Wireless Telecommunications Facilities Ordinance" prepared by SPO was intended to help Maine communities effectively respond to the spread of cell towers in a way that complies with Federal regulations under the Telecommunications Act of 1996 and various amendments to it. Under Federal law, there are specific time limits imposed for the local review process. As I understand it, those time limits or "clocks" start upon receipt of the application by a staff member in the office. Upon receipt of the application, the Town has 30 days to determine whether the application is complete. If the Town fails to inform the applicant of deficiencies in the application within that time frame, it is deemed complete and no additional information can be required. Upon a determination of completeness, the reviewing authority then has 60 days to render its decision. These time limits can be extended with mutual agreement of the applicant. But without that consent, the application is deemed granted if the Town fails to make a decision within the Federally proscribed time limits.

D. FEDERAL LIMITATIONS ON LOCAL TOWER REVIEW AUTHORITY

I provide this assessment of the need to comply with requirements of the Federal Telecommunications Act in your review of any cell phone tower based in part on a presentation at the Northern New England Chapter of the American Planning Association in November of 2019 by Katherine Miller, Esq., a New Hampshire attorney who specializes in cell tower regulations. In addition to warnings about the Federal "clocks," Ms. Miller also provided the following summary of the limitations placed on municipal review of cell towers:

- No discrimination among providers of functionally equivalent services;
- "Reasonable" time frames for municipal board decision;
- Denials must be in writing and based on substantial evidence in a written record;
- Cannot prohibit or have the effect of prohibiting applicant from providing services;
- Cannot deny application based on radio frequency emissions if they meet FCC standards; and,
- State and Municipal Laws or Regulations may not prohibit any entity from providing telecommunications services unless they are: 1) competitively neutral, and 2) necessary, including for public health and safety.

Federal law does allow local governments to regulate the location, height, and other characteristics of cell towers, as long as those regulations and decisions don't violate the service provision guidelines adopted by the FCC. Requirements used by other communities reflected in the model wireless ordinance include requirements to demonstrate that there is a "gap" in cell phone coverage that can't be addressed by placing equipment on an existing tower through a process called "co-location." Towns can also require that any tower installed provide for future co-location by other service providers.

In the model ordinance you will also find guidance for adopting height limits on towers, which also must not have the effect of limiting service and must be applied consistently and rationally. View impacts can also be regulated, but mostly apply to designated public "viewsheds" as opposed to individual homes. Many communities require photo simulations of such public views, with and without the proposed wireless tower to judge those view impacts. Both the "Radio Frequency" (RF) studies demonstrating gaps in cell phone coverage and the visual impact studies can be peer reviewed at the cost of the applicant.

E. REGULATIONS ENFORCEABLE BY DURHAM

To my knowledge, Durham has not adopted a wireless communications ordinance or regulations that specifically apply to such projects. Therefore, the articles for conditional use review and site plan review are the only regulations that can be applied by the Planning Board. The conditional use criteria, particularly the ones related to Public Health (with recognition that RF emissions regulation is prohibited), Public Safety, and Scale and Intensity of Use provide some basis for conducting the required review of any cell tower application. Increased setbacks for the tower (e.g., height of tower from property lines), buffering of the equipment building(s), and limits on ground level lighting could be imposed as approval conditions under the provisions of Section 7.5.

In imposing any such conditions, the Board could consider the standards contained in the model Wireless Telecommunications Ordinance as being typical design solutions applied by other communities consist with Federal law, but you should exercise caution in applying any such standard as a reason for denying an application, as you don't have an adopted ordinance with enforceable standards.

Since most tower installation companies and cell service providers are used to installing facilities under regulations that meet the requirements of the model ordinance and Federal regulations, they are likely to agree with reasonable approval conditions that follow those widely applied guidelines and do not limit the ability of service providers to meet the communications needs of their customers.

F. SEEK QUALIFIED TECHNICAL & LEGAL ADVICE

Although I have considerable experience in drafting cell tower regulations and processing applications under those regulations, I am by no means an expert on wireless communications technology or regulation to address RF studies or the structural engineering issues related to towers, and I am also not qualified to provide specific legal guidance to the Planning Board, which should come from an attorney with specialized experience in this complicated area of land use regulation. I hope that this generalized information will assist the Planning Board in seeking additional guidance as you deem it necessary.

Local Regulation of Tower Siting

(from ***Maine Townsman***, July 2000)

by William Plouffe, Esq., Attorney, Drummond Woodsum & MacMahon

The Federal Telecommunications Act of 1996 ("TCA") was intended by Congress to facilitate the development of wireless telecommunications facilities, including towers erected to support transmitting and receiving antennas. It is in the national interest for this technology to flourish. However, Congress was also aware that the siting of these towers is often a matter which generates local concern and controversy. Those who must live near these towers may oppose the proposed locations because of visual impacts, structural safety issues, health concerns and other reasons. Typically, these concerns are raised and pursued in the local land use permitting process.

Congress was aware of this tension between national interests and local control over land use and incorporated within the TCA language providing a balance of these interests. As the United States Court of Appeals for the First Circuit recently observed, the TCA includes "a deliberate compromise between two competing aims – to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over the siting of towers." *Town of Amherst v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 13 (1st Cir. 1999).

The TCA's compromise language was recently tested in proceedings before the Town of Falmouth's Board of Zoning Appeals in a matter involving two applications to construct telecommunications towers. The Board ultimately denied both applications and the tower developers appealed to the United States District Court. In what appears to be the first case in Maine brought under the TCA, the Court upheld the authority of Falmouth to deny the tower applications. *Industrial Communications & Electronics, Inc. v. Town of Falmouth, et al.*, F.Supp.2d ____ (D. Me. 2000).

This article discusses the TCA's effort to balance the interests of the tower industry with the interests of local land use authorities and reviews how the TCA was applied in the Falmouth case. It then discusses some lessons from the Falmouth case.

TCA's Preservation of Local Zoning Authority

A critical section of the TCA is captioned "preservation of local zoning authority" and states:

> (A) Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modifications of personal wireless service facilities. *47 U.S.C.A. § 332(c)(7).* ***["Personal wireless services" include such services as cell phones, mobile radio services and pagers. They do not include television, satellite television or AM/FM radio broadcasting services.]***

The same section, i.e., "this paragraph," of the TCA also contains "limitations" on local control and it is these "limitations" that are used by the tower industry to challenge the decisions of local zoning authorities. However, when examined carefully, the TCA simply provides the industry specific procedural and substantive protections. It has not preempted local zoning authority. As long as local authorities do not violate those specific protections, they remain free to apply their land use ordinances, even if it results in denial of an application to build a new tower.

Procedural Protections

The TCA affords certain procedural protections to applicants seeking to construct telecommunications facilities, including towers. These are:

1. Permit applications must be acted on "within a reasonable period of time" after the permit request is filed, "taking into account the nature and scope" of the request;

2. The decision on the permit request must be in writing; and

3. The decision must be supported by "substantial evidence in a written record."

Substantive Protections

The TCA also affords certain substantive protections to applicants. It provides that local zoning authorities may not:

1. Unreasonably discriminate among providers of functionally equivalent services;

2. Prohibit or have the effect of prohibiting the provision of personal wireless services; and

3. Regulate on the basis of the environmental effects of radio frequency emissions to the extent that the personal wireless facilities comply with the Federal Communications Commission's regulations concerning emissions.

Town of Falmouth Case

Industrial Communications & Electronics (IC&E), a Massachusetts company with operations in New England, Florida and Colorado, purchased a parcel of land in Falmouth with four existing telecommunications towers. This land is in a part of Falmouth that has a number of towers and that is zoned to permit towers as conditional uses. However, the zoning regulations, which were adopted in 1990, require that towers not exceed 200 feet in height and that they be set back from all sidelines a distance which at least equals the height of the tower, i.e., the so-called "fall zone." None of IC&E's towers exceeded 200 feet, the highest being 170 feet, but three of the four towers failed to meet the required setback. These three towers were "grand-fathered" with respect to setbacks because they pre-existed enactment of the regulations.

IC&E, which holds a license from the Federal Communications Commission to provide Specialized Mobile Radio Service ("SMRS") in Maine, filed a conditional use application with the town to build a new 200-foot tower on their land which did not meet the setback requirements. They proposed to remove the four existing towers, one of which (the 170-foot tower) had been damaged in the January 1998 ice storm. IC&E took the position that it was, in effect, repairing this ice storm damaged tower; that this fit within the "structural alteration" provision of the ordinance; and that this distinguished their application from an application to build a new tower on land which had no grandfathered towers on it. In the event that the Board of Appeals disagreed with this interpretation, IC&E also applied for a variance from the setback requirements of the ordinance.

The Board found that what IC&E proposed was the tearing down of an existing tower and the building of a new tower in a different location on the lot. This, the Board reasoned, was the same as a proposal to build a new tower. Consequently, the new tower had to meet the "fall zone" setback, which it did not. The Board also denied the requested variance, finding that IC&E failed to meet the "undue hardship" test because, among other things, IC&E knew that the property size would not accommodate a 200-foot tower due to setback requirements and because IC&E was able to use the existing towers for broadcast purposes. In fact, IC&E had tenants on the existing towers (this is called "co-location") from whom IC&E received rent. IC&E appealed this decision to the United States District Court. ***[The TCA permits appeals to be brought in "any court of competent jurisdiction." IC&E could have asserted its TCA claims in state court. In fact, with respect to the substantial evidence claim brought by IC&E, the Court observed: "This seems to be a purely state law issue that belongs in state courts. Nevertheless, Congress has directed that federal courts become involved." IC&E also filed a so-called Rule 80-B appeal in the Maine Superior Court. That appeal was stayed by agreement of the parties.]***

After being denied permits for the 200-foot tower, IC&E filed applications for a 170 foot tower in a slightly different location on the lot. It did not meet the required setbacks. In addition to the arguments which IC&E had made in support of its 200-foot tower request, IC&E argued that it was entitled to a permit on the basis of being an allowable expansion of a non-conforming use. Although the tower was no higher than the damaged 170-foot tower that would be removed, the proposed tower had a larger base. (The extra strength of the proposed tower was needed to accommodate the weight of co-located antennas in addition to IC&E's own SMRS antennas.) The Board of Appeals rejected this proposal on essentially the same grounds as those given for rejecting the earlier proposal. The Board also found that it was not an allowable expansion of a non-conforming use. IC&E appealed this decision to the United States District Court. (The appeals were considered simultaneously by the Court.)

In their appeals, IC&E alleged that Falmouth violated the TCA by making decisions not based upon substantial evidence; by effectively prohibiting personal wireless services; and by unreasonably discriminating against IC&E. IC&E also claimed damages and attorneys' fees pursuant to the federal civil rights act, alleging that the town's violation of the TCA deprived them of rights secured by federal law. *42 U.S.C.A. § § 1983, 1988.* The Court analyzed each of the TCA claims separately.

The Court began by reviewing the meaning of the term "substantial evidence," as established in prior court opinions, and defined it as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Further, the Court found that the substantial evidence test gives the agency the benefit of the doubt since it does not require the degree of evidence that satisfies the court but only the degree of evidence that satisfies a reasonable factfinder.

After reviewing the extensive findings of fact and conclusions of law written by the Board in both cases, the Court found that there was substantial evidence to support the Board's conclusion that the tower proposals did not fall within the zoning ordinance's provision allowing "structural alterations" of existing towers (with conditional use approval) but, rather, constituted proposals to replace an existing tower with a new tower. The Court also found substantial evidence to support the Board's conclusion that the IC&E proposal to tear down the existing 170-foot tower meant that it would lose its grandfathered status and that, therefore, it could not be considered as a permissible expansion of a nonconforming use.

The Court then turned to the variance denial. It focused on the reasonable return and self-created hardship prongs of the four-part undue hardship test under State law. With respect to the reasonable return test, the Court, guided by Maine law, affirmed the Board's findings that the property could be used profitably by IC&E in its current condition. In fact, it was being used for the antennas of other telecommunications carriers who paid rent to IC&E.

With respect to the self-created hardship prong of the test, the Court noted that IC&E had bought the land with the four towers knowing that they could not meet IC&E's new wireless services needs and that IC&E had bought the land with presumptive knowledge of the ordinance's limitations on future development. The Court concluded that substantial evidence supported the Board's decision.

The next TCA based claim by IC&E was that Falmouth had violated one of the substantive protections afforded wireless carriers under the TCA by effectively prohibiting the provision of personal wireless services within the town. Specifically, IC&E maintained that the Ordinance did not allow modernization of existing facilities. It also pointed out that 14 of the 15 existing towers in Falmouth do not meet the fall zone requirements and cannot be replaced under the Board's interpretation of the ordinance. The Court began its analysis by commenting that a plaintiff under the TCA need not show a general ban on towers in order to succeed in a claim brought under this provision of the TCA. However, the plaintiff must meet a "heavy" burden and show "from language or circumstance not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Here, IC&E did not offer evidence to show that the other towers in Falmouth could not be upgraded without violating the fall zone. More importantly, the town showed that there is a substantial amount of acreage in the town which is zoned for towers as conditional uses. IC&E's response that most of this acreage is near residential areas and that the Board would never allow new towers near residential areas was unavailing since the record showed that the town had, in the past, permitted towers near residences. The Court also noted that IC&E had not been convincing in its assertions that it had sought out other tower sites but had been unable to purchase them.

The final TCA based claim was that Falmouth had discriminated against IC&E. The Court rejected this claim:

> The "discrimination" prong prohibits a municipality from purposefully denying a PWS [personal wireless services] provider similar access to that which other functionally equivalent providers have. The Act does not mandate that a provider may construct a tower that does not satisfy the municipality's zoning requirements merely because other providers have found a way to provide service to a given area.

There was no suggestion that IC&E could not get the same access to other towers through co-location that its competitors had. There also was no suggestion that Falmouth was intentionally favoring other providers over IC&E.

IC&E's claim for damages and attorney's fees was rejected because it failed to show that Falmouth had violated the TCA. ***[The question of whether a municipality which has violated the TCA is liable for damages and attorneys fees under 42 U.S.C. § 1983 has been decided by several courts with different results. The only Court of Appeals decision on the issue has found that damages and fees are available to the plaintiff].***

Lessons from Falmouth Case

There is no federal land use or zoning law associated with the TCA. Municipalities are allowed to apply their ordinances to tower applications just as those ordinances would be applied to other applications provided that the municipality adheres to the procedural and substantive limitations discussed above. The procedural limitations are, in general, no more onerous than what is required under Maine law.

The TCA requires a written decision on every application. This is no more than is required under State law. However, the Falmouth case demonstrates that local land use boards in TCA cases should take the time to issue detailed written decisions that fully explain the board's reasoning. The Falmouth Board issued extensive findings of fact and conclusions in each of the two cases. These served the Board well when this matter went before the Court.

Local boards should compare the evidence presented to each of the review criteria which they are applying in reviewing a tower proposal. For example, if the proposal requires a variance, go through each of the four prongs of the hardship test to determine whether the applicant has met its burden of providing proof on each criterion and then determine whether that proof is persuasive when compared to all the evidence before the Board. The Board's decision will be upheld if its is supported by "substantial evidence". This, again, is the same approach which should be used in all variance applications. However, it takes on even greater importance in TCA cases because of the extra scrutiny which a federal court may give the decision and because of the possibility of the town's being held liable for damages under the federal civil rights statute.

Municipalities should have areas where towers are allowed as permitted or conditional uses. Those areas should be viable for tower use, i.e., the land areas should be large enough to accommodate towers and the topography should be suitable for towers. The availability of these areas should be made part of the record in tower permit proceedings.

Municipalities should not take the position that "we" already have enough of a certain type of wireless service and, so, no more towers for that type of service will be allowed. This invites a discrimination claim under the TCA.

Land use agencies and boards should ask enough questions to get an understanding of what is proposed and the technology behind it. Tower developers have often done propagation studies which show what area their signal will cover when broadcast from an antenna at a certain height; a structural study to show the "loading" on the tower with certain types of antennas and cables; and a market survey to show which areas have population centers that can serve as a customer base. Further, there are differences between digital and analog systems that require different tower features. In some cases, it may be worthwhile for the local agency to hire expert engineering assistance to help it understand the proposal.

Conclusion

Three years ago, there were only a handful of court cases interpreting the TCA. Most of all of these were at the United States District Court level. Many were favorable to the tower industry. Over the past two years, there have been dozens of cases, some of them reaching the Court of Appeals level. The more recent trend seems to be more favorable to municipalities. This maybe the result of the municipalities learning more about the TCA and taking more care in complying with it.

What the Falmouth case shows is that Maine towns, even after enactment of the TCA, can still control the location of towers and generally require them to met the same standards as other types of development. This is what Congress intended.

WIRELESS TELECOMMUNICATIONS FACILITIES ORDINANCE

CONTENTS

Section 1. Title

This Ordinance shall be known and cited as the "Wireless Telecommunications Facilities Siting Ordinance" of [municipality], Maine, (hereinafter referred to as the "ordinance").

*The **Title** section can be eliminated if this ordinance is incorporated into an existing Site Plan or other Land Use Ordinance. Brackets indicate where the municipality should insert its name.*

Section 2. Authority

This ordinance is adopted pursuant to the enabling provisions of Article VIII, Part 2, Section 1 of the Maine Constitution; the provisions of Title 30-A M.R.S.A. Section 3001 (Home Rule), and the provisions of the Planning and Land Use Regulation Act, Title 30-A M.R.S.A. Section 4312 *et seq*.

*The **Authority** section is needed to describe how the municipality derives its power from the State to adopt ordinances. It can be deleted if this ordinance is made part of an existing ordinance that already has this provision.*

Section 3. Purpose

The purpose of this ordinance is to provide a process and a set of standards for the construction of wireless telecommunications facilities in order to:

Implement a municipal policy concerning the provision of wireless telecommunications services, and the siting of their facilities;

Establish clear guidelines, standards and time frames for the exercise of municipal authority to regulate wireless telecommunications facilities;

Allow competition in telecommunications service;

*The **Purpose** section gives the reasons for the ordinance. Municipalities are not required to have this section, but it helps municipal officials and courts interpret the ordinance. This section establishes the community benefits for regulating these facilities. Users should be careful to tailor this section to their needs, **and the community needs should be based on documented facts, such as a scenic inventory**. See the **Definitions** section for the term "wireless telecommunications facilities."*

As discussed more fully in the literature accompanying this model ordinance, the Wireless Telecommunications Act of 1996 opened the industry up to wide competition. With respect to local land use control, the Act provides as follows:

- *The Act prohibits municipalities from banning these facilities within the municipality;*

Encourage the provision of advanced telecommunications services to the largest number of businesses, institutions and residents of [municipality];

Permit and manage reasonable access to the public rights of way of [municipality] for telecommunications purposes on a competitively neutral basis;

Ensure that all telecommunications carriers providing facilities or services within [municipality] comply with the ordinances of [municipality];

Ensure that [municipality] can continue to fairly and responsibly protect the public health, safety and welfare;

Encourage the colocation of wireless telecommunications facilities , thus helping to minimize adverse visual impacts on the community;

Enable [municipality] to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition and technological development;

Further the goals and policies of the comprehensive plan, while promoting orderly development of the town with minimal impacts on existing uses; and

Protect the scenic and visual character of the community.

- *The Act prohibits municipalities from <u>effectively</u> prohibiting them, (much like Maine state law concerning mobile home parks);*

- *The Act permits municipalities to limit the location and number of facilities, provided all functionally equivalent carriers are treated equally;*

- *The Act requires municipalities to make their decisions in writing and based on substantial evidence the Act requires that municipal decisions must be made within a reasonable period of time.*

The Applicability section describes the activities that are regulated under this ordinance. This model applies to all wireless telecommunication facilities, but a municipality can limit the application to address fewer facilities.

Section 4. Applicability

This local land use ordinance applies to all construction and expansion of wireless telecommunications facilities, except as provided in section 4.1.

4.1. Exemptions

The following are exempt from the provisions of this ordinance:

A.) Emergency Wireless Telecommunications Facility. Temporary wireless communication facilities for emergency communications by public officials.

B.) Amateur (ham) radio stations. Amateur (ham) radio stations licensed by the Federal Communications Commission (FCC).

C.) Parabolic antenna. Parabolic Antennas less than seven (7) feet in diameter, that are an accessory use of the property.

D.) Maintenance or repair. Maintenance, repair or reconstruction of a wireless telecommunications facility and related equipment, provided that there is no change in the height or any other dimension of the facility.

The Exemptions section describes the activities that will not be reviewed under this ordinance. Municipalities should determine whether other ordinances apply to these facilities, and decide whether similar exemptions should be given to these facilities in those ordinances.

This model ordinance exempts emergency communications facilities used by public officials only. Municipalities should consider exempting similar facilities used by private interests.

*The Federal Telecommunications Act exempts amateur "ham" radio stations. This model exempts other facilities for ease of administration. See **Definitions** section for "FCC".*

Parabolic antennas (i.e.. satellite dishes) are exempt because they are commonly accessory residential uses, so the numerous reviews might be burdensome on both the property owner and the municipality.

*Maintenance and repair are exempt if they don't alter the size of the facility, because these activities usually don't change the impact of the facility on the community. This model also exempts reconstruction of facilities, but municipalities should consider whether certain reconstruction projects should be reviewed in order to bring nonconforming uses into compliance and to promote colocation existing facilities. See **Definitions** section for "height."*

The exemption for temporary facilities allows "COWs" (cellular on wheels) to be erected for initial market coverage while the permanent facility is established. This exemption also allows short term facilities for media or events. The municipality should determine a maximum time period based on the needs of the service providers in the community. This model ordinance exempts accessory antennas for residences only. Municipalities should consider whether to grant a similar exemption for public service or other purposes as well.

E.) Temporary wireless telecommunications facility. Temporary wireless telecommunications facility, in operation for a maximum period of one hundred eighty (180) days.

F.) Antennas as Accessory Uses. An antenna that is an accessory use to a residential dwelling unit.

*The **Review and Approval Authority** section sets out the approval requirement for facilities. It also gives the CEO and Planning Board the authority to review applications and make findings.*

*This model gives preference to colocation by providing a streamlined CEO permitting process and fewer standards. Municipalities may not want to have the CEO make this decision. An alternative approach is to require all projects to be reviewed by the Planning Board, but still using the streamlined process and criteria for certain projects like colocation. See **Definitions** section for "colocation" and "expansion."*

Section 5. Review and Approval Authority

5.1. Approval Required

No person shall construct or expand a wireless telecommunication facility without approval of the Code Enforcement Officer (CEO) or the Planning Board as follows:

A.) Expansion of an Existing Facility and Colocation. Approval by the CEO is required for any expansion of an existing wireless telecommunications facility that increases the height of the facility by no more than 20 feet; accessory use of an existing wireless telecommunications facility; or colocation on an existing wireless telecommunications facility.

B.) New Construction. Approval of the Planning Board is required for construction of a new wireless telecommunications facility; and any expansion of an existing wireless telecommunications facility that increases the height of the facility by more than 20 feet.

*The **Pre-Application Conference** allows the municipality to explain the process and standards to the applicant, and allows coordination of local, State, and federal reviews. The conference can be used to identify alternative sites to the applicant which it might not have considered, especially as far*

5.2 Approval Authority

In accordance with Section 5.1 above, the CEO or Planning Board shall review applications for wireless telecommunications facilities, and make written findings on whether the proposed facility complies with this Ordinance.

Section 6. Approval Process

6.1. Pre-Application Conference

All persons seeking approval of the CEO or the Planning Board under this ordinance shall meet with the CEO no less than thirty (30) days before filing an application. At this meeting, the CEO shall explain to the applicant the ordinance provisions, as well as application forms and submissions that will be required under this ordinance.

6.2. Application

All persons seeking approval of the CEO or the Planning Board under this ordinance shall submit an application as provided below. The CEO shall be responsible for ensuring that notice of the application has been published in a newspaper of general circulation in the community.

A.) Application for CEO Approval. Applications for permit approval by the CEO must include the following materials and information:

1.) Documentation of the applicant's right, title, or interest in the property where the facility is to be

as the possible visual impacts are concerned. Applicants and CEOs are cautioned that this pre-application conference is to determine what the submission materials will be, not to discuss the merits of those materials as they may satisfy local concerns regarding the visual impacts of the proposed development.

Municipalities with planners on staff may want to require applicants to meet with the Planner first, instead of the CEO or Planning Board. Likewise, the applicant may want to have a pre-application meeting with the Planning Board in a workshop forum before investing a great deal of time and money in system buildout to identify significant issues.

*The **Application** needs to require enough information for the CEO or the Planning Board to determine whether the proposed facility meets the standards described in the next section. This model ordinance allows the CEO to establish the form of the application. Municipalities may want to adopt a form specifically for the CEO application. The CEO Application is shorter than the Planning Board Application because the former is not required to review a project with the same level of scrutiny as the Planning Board.*

This information helps ensure that the applicant meets the standard for having a legal interest in the property. For a nonowner of the site, the legal interest may include a lease, easement or option to purchase the property.

The FCC regulates wireless telecommunications facilities, and requires license holders to complete a review of the facility under the National Environmental Protection Act (NEPA) and the National Historic Preservation Act (NHPA). These reviews assure that, in addition to review of impacts upon historic sites and structures, all Radio Frequency (RF) Emissions issues have been addressed at the federal level, an issue which the federal Telecommunications Act specifically exempts from municipal review.

sited, including name and address of the property owner and the applicant.

2.) A copy of the FCC license for the facility or a signed statement from the owner or operator of the facility attesting that the facility complies with current FCC regulations.

3.) Identification of districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed, or eligible for listing, in the National Register of Historic Places (see 16 U.S.C. 470w(5); 36 CFR 60 and 800).

4.) Location map and elevation drawings of the proposed facility and any other proposed structures, showing color, and identifying structural materials.

5.) For proposed expansion of a facility, a signed statement that commits the owner of the facility, and his or her successors in interest, to:

a.) respond in a timely, comprehensive manner to a request for information from a potential colocation applicant, in exchange for a reasonable fee not in excess of the actual cost of preparing a response;

b.) negotiate in good faith for shared use by third parties;

*The NEPA review includes analysis of impacts on the natural environment and historic places. This application requirement seeks to ensure that the NEPA review is performed prior to, or at the same time, as the submission of the application. Impacts on historic districts or structures are assessed by either the local Historical Society or the Maine Historic Preservation Commission. See the Appendix for more information on this review. See **Definitions** section for "Historic." If this review is already required under the provisions of another ordinance, this requirement could be deleted.*

This information helps the reviewing authority determine whether the application meets the standards for Height, Color, Materials, and Visual Impacts.

This requirement corresponds to the standard conditions of approval. The commitment helps the municipality encourage colocation of facilities in the future.

The municipality must decide whether applications are to be submitted to the CEO or the municipal planner.

c.) allow shared use if an applicant agrees in writing to pay reasonable charges for colocation;

d.) require no more than a reasonable charge for shared use, based on community rates and generally accepted accounting principles. This charge may include but is not limited to a pro rata share of the cost of site selection, planning project administration, land costs, site design, construction and maintenance, financing, return on equity, depreciation, and all of the costs of adopting the tower or equipment to accommodate a shared user without causing electromagnetic interference.

This information helps the Planning Board determine whether the application meets the standard for having adequate right, title or interest in the property. For a nonowner of the site, the legal interest may include a lease, easement or purchase option.

This information helps the Planning Board determine that the applicant meets FCC standards for radio frequency emissions, financial capability, and the right to develop their "build-out" capability.

This information helps the Planning Board decide whether the application meets this standard for location. By identifying all structures and facilities above 150 feet, new opportunities for colocation may be discovered. Exempting rooftop antennas from mapping eliminates undue hardship on the applicant. Municipalities may also want to adjust the height requirement to suit local conditions. These issues can be discussed during the pre-application conference.

B.) Application for Planning Board Approval. An application for approval by the Planning Board must be submitted to the Code Enforcement Officer The application must include the following information:

1.) Documentation of the applicant's right, title, or interest in the property on which the facility is to be sited, including name and address of the property owner and the applicant.

2.) A copy of the FCC license for the facility, or a signed statement from the owner or operator of the facility attesting that the facility complies with current FCC regulations.

3.) A USGS 7.5 minute topographic map showing the location of all structures and wireless telecommunications facilities above 150 feet in

The site plan helps the Planning Board understand the impacts of the facility on abutting properties. It also helps the Planning Board decide whether the application meets the standards for setbacks and structural integrity.

height above ground level, except antennas located on roof tops, within a five (5) mile radius of the proposed facility, unless this information has been previously made available to the municipality. This requirement may be met by submitting current information (within thirty days of the date the application is filed) from the FCC Tower Registration Database.

One of the major concerns with these facilities is their aesthetic impact on the community. This information helps the Planning Board decide whether the application meets the standards for color, materials, landscaping, and lighting to address this concern. "Stealth" or camouflaging techniques can be used to make antennas less obtrusive, though they have not yet been used in Maine.

4.) A site plan:

a.) prepared and certified by a professional engineer registered in Maine indicating the location, type, and height of the proposed facility, antenna capacity, on-site and abutting off-site land uses, means of access, setbacks from property lines, and all applicable American National Standards Institute (ANSI) technical and structural codes;

b.) certification by the applicant that the proposed facility complies with all FCC standards for radio emissions is required; and

c.) a boundary survey for the project performed by a land surveyor licensed by the State of Maine.

Photo simulations provide the Planning Board with information to decide whether the application meets the standard for color, materials, and visual impact. This information can also be used for determining compliance with a visual impact standard, if adopted by a municipality (See Appendix).

Photo simulations, as part of the application, should be relied upon by the Planning Board based on their:

- *Representativeness, in that the simulation represents important and typical views of the project;*
- *Accuracy, in that the similarity between the simulation and the reality will be easily recognizable to the average citizen;*

5.) A scenic assessment, consisting of the following:

a.) Elevation drawings of the proposed facility, and any other proposed structures, showing height above ground level;

b.) A landscaping plan indicating the proposed placement of the facility on the site; location of existing structures, trees, and other significant site features; the type and location of plants proposed to screen the facility; the method of fencing, the color of the structure, and the proposed lighting method.

c.) Photo simulations of the proposed facility taken from perspectives determined by the Planning Board, or their designee, during the pre-application conference. Each photo must be labeled with the line of sight, elevation, and with the date taken imprinted on the photograph. The photos must show the color of the facility and method of screening.

- *Visual clarity, in that the details, parts, and overall contents shall be clearly recognizable;*

- *Legitimacy, in that the simulation is defensible as to the veracity of its attempts to reproduce reality.*

The narrative provides the municipality with important information about the overall coverage requirements necessary to meet the applicant's "build-out" over the long term. Specifically, it helps the Planning Board decide whether the standard for location has been met, and the reasons why colocation is not feasible. See additional information included in the appendix, specifically the FCC Fact Sheets.

For Maine communities, the first step is to assess whether there are visual impacts as a result of the proposed facility. The ***Visual Impact Standards*** *(below) set out the parameters by which the Planning Board will review the project's potential visual impacts. The first review criteria has to do with whether a scenic resource (as identified in the adopted comprehensive plan) would be affected. If the resource has not been identified in the plan, then the town's ability to regulate based on impacts to this resource may be severely limited. The* ***Appendix*** *contains more detailed information regarding this issue.*

This evidence of existing facility review is used by the Planning Board to determine whether the facility meets the priority location standard. This requirement seeks to compel the applicant to look for a location that meets the municipal preferences.

This structural strength evidence will help provide documentation of the Board's decision. See ***Definitions*** *section for "****targeted market coverage area****."*

d.) A narrative discussing:

i.) the extent to which the proposed facility would be visible from or within a designated scenic resource,

ii.) the tree line elevation of vegetation within 100 feet of the facility, and

iii.) the distance to the proposed facility from the designated scenic resource's noted viewpoints.

6.) A written description of how the proposed facility fits into the applicant's telecommunications network. This submission requirement does not require disclosure of confidential business information.

7.) Evidence demonstrating that no existing building, site, or structure can accommodate the applicant's proposed facility, the evidence for which may consist of any one or more of the following:

a.) Evidence that no existing facilities are located within the targeted market coverage area as required to meet the applicant's engineering requirements,

b.) Evidence that existing facilities do not have sufficient height or cannot be increased in height

at a reasonable cost to meet the applicant's engineering requirements,

c.) Evidence that existing facilities do not have sufficient structural strength to support applicant's proposed antenna and related equipment. Specifically:

i.) Planned, necessary equipment would exceed the structural capacity of the existing facility, considering the existing and planned use of those facilities, and these existing facilities cannot be reinforced to accommodate the new equipment.

ii.) The applicant's proposed antenna or equipment would cause electromagnetic interference with the antenna on the existing towers or structures, or the antenna or equipment on the existing facility would cause interference with the applicant's proposed antenna.

iii.) Existing or approved facilities do not have space on which planned equipment can be placed so it can function effectively.

d.) For facilities existing prior to the effective date of this ordinance, the fees, costs, or contractual provisions required by the owner in order to share or adapt an existing facility are unreasonable. Costs exceeding the pro rata share of a new facility development are

This requirement corresponds to the Standard Condition of Approval. The signed statement from the owner helps the municipality encourage colocation of facilities in the future. Using this requirement in conjunction with the design standards, the municipality can ensure that colocation remains a viable option.

presumed to be unreasonable. This evidence shall also be satisfactory for a tower built after the passage of this ordinance;

e.) Evidence that the applicant has made diligent good faith efforts to negotiate colocation on an existing facility, building, or structure, and has been denied access;

8.) Identification of districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed, or eligible for listing, in the National Register of Historic Places (see 16 U.S.C. 470w(5); 36 CFR 60 and 800).

9.) A signed statement stating that the owner of the wireless telecommunications facility and his or her successors and assigns agree to:

The surety establishes the financial capability of the applicant to remove an abandoned facility (see Abandonment section below).

a.) respond in a timely, comprehensive manner to a request for information from a potential colocation applicant, in exchange for a reasonable fee not in excess of the actual cost of preparing a response;

b.) negotiate in good faith for shared use of the wireless telecommunications facility by third parties;

c.) allow shared use of the wireless telecommunications facility if an applicant agrees

in writing to pay reasonable charges for colocation;

d.) require no more than a reasonable charge for shared use, based on community rates and generally accepted accounting principles. This charge may include but is not limited to a pro rata share of the cost of site selection, planning project administration, land costs, site design, construction, financing, return on equity, depreciation, and all of the costs of adapting the tower or equipment to accommodate a shared user without causing electromagnetic interference. The amortization of the above costs by the facility owner shall be accomplished at a reasonable rate, over the useful life span of the facility.

*The **Application Fee** should not be included with the **Review Fee**. The application fee covers administrative costs which may be different for CEO review and Planning Board review.*

12.) A form of surety approved by the Planning Board to pay for the costs of removing the facility if it is abandoned.

13.) Evidence that a notice of the application has been published in a local newspaper of general circulation in the community.

*The **Review Fee** covers the costs of consultants to help the municipality to review the application. The need for an outside consultant is the Planning Board's choice, based on some established practice. The consultation fees must be "reasonable and customary" for the community, and the municipality is urged to check the consultant's references. Municipalities can create an escrow account for this purpose, and any balance must be returned to the applicant.*
The "Model Subdivision Regulations" Article 13 Performance Guarantees may serve as a good model for various fee structures.

6.3. Submission Waiver

The CEO or Planning Board, as appropriate, may waive any of the submission requirements based upon a written request of the applicant submitted at the time of application. A waiver of any submission requirement may be granted only if the CEO or Planning Board finds in

writing that due to special circumstances of the application, the information is not required to determine compliance with the standards of this Ordinance.

*The **Notice of Complete Application** starts the clock for the review process.*

6.4. Fees

A.) CEO Application Fee

An application for CEO approval shall include payment of an application fee of $_____. The application shall not be considered complete until this fee is paid. The applicant is entitled to a refund of the application fee if the application is withdrawn within fifteen (15) days of date of filing, less all expenses incurred by the [municipality] to review the application.

Where there are Planning Departments, or where the Municipal Engineer has responsibility for review of these types of applications, copies of the application should be forwarded to them.

B.) Planning Board Application Fee

An application for Planning Board approval shall include payment of an application fee of $_____. The application shall not be considered complete until this fee is paid. An applicant is entitled to a refund of the application portion of fee if the application is withdrawn within fifteen (15) days of date of filing, less all expenses incurred by the [municipality] to review the application.

*The municipality might wish to develop a **standard form** just for these uses to be used for abutter notification.*

C. Planning Board Review Fee

An applicant for approval by the Planning Board shall pay all reasonable and customary fees incurred by the municipality that are necessary to review the application. The review fee shall be paid in full prior to the start of construction.

That portion of the review fee not used shall be returned to the applicant within fourteen (14) days of the Planning Board's decision.

*This model ordinance provides for a mandatory **public hearing**, but this is not required under State law. A municipality may give the Planning Board discretion to decide whether to hold a hearing.*

6.5. Notice of Complete Application

Upon receipt of an application, the CEO shall provide the applicant with a dated receipt. Within five (5) working days of receipt of an application the CEO shall review the application and determine if the application meets the submission requirements. The CEO or Planing Board, as appropriate, shall review any requests for a waiver from the submission requirements and shall act on these requests prior to determining the completeness of the application.

*This **CEO Approval** is for use in municipalities which allow their Code Officers to make findings and approve applications. Where this is not the case, this section should be struck. Remember, however, that the point of having the CEO review and approve applications is to further the goal of encouraging colocation.*

If the application is complete, the CEO shall notify the applicant in writing of this determination and require the applicant to provide a sufficient number of copies of the application to the [Planning Board, Planning Office, Code Enforcement Office, Engineering Department, Police Department, and Fire Department].

This requirement protects both parties' interests in that it begins the time period for appeal of the municipal decision.

If the application is incomplete, the CEO shall notify the applicant in writing, specifying the additional materials or information required to complete the application.

If the application is deemed to be complete, and requires Planning Board review, the CEO shall notify all abutters to the site as shown on the Assessor's records, by first-class mail, that an application has been accepted. This notice shall contain a brief description of the proposed activity and the name of the applicant, give the location of a copy of the application available

for inspection, and provide the date, time, and place of the Planning Board meeting at which the application will be considered. Failure on the part of any abutter to receive such notice shall not be grounds for delay of any consideration of the application nor denial of the project.

6.6. Public Hearing

For applications for Planning Board approval under Section 5.1(B), a public hearing shall be held within 30 days of the notice of the complete application.

6.7. Approval

A.) CEO Approval. Within thirty (30) days of receiving a complete application for approval under section 5.1(A), the CEO shall approve, approve with conditions, or deny the application in writing, together with the findings on which that decision is based. The CEO shall approve the application if the CEO finds that the application complies with the provisions in Section 7.1 of this ordinance.

The CEO shall notify all abutters of the decision to issue a permit under this section. The time period may be extended upon agreement between the applicant and the CEO.

*Note the definition of **unreasonable adverse impact** below, in the **Definitions** section.*

B.) Planning Board Approval. Within ninety (90) days of receiving a complete application for approval under section 5.1(B), the Planning Board shall approve, approve with conditions, or deny the application in writing, together with the findings on which that

decision is based. However, if the Planning Board has a waiting list of applications that would prevent the Planning Board from making a decision within the required ninety (90) day time period, then a decision on the application shall be issued within sixty (60) days of the public hearing, if necessary, or within 60 days of the completed Planning Board review. This time period may be extended upon agreement between the applicant and the Planning Board.

Section 7. Standards of Review

To obtain approval from the CEO or the Planning Board, an application must comply with the standards in this section.

7.1. CEO Approval Standards

An application for approval by the CEO under Section 5.1(A) must meet the following standards.

A.) The proposed facility is an expansion, accessory use, or colocation to a structure existing at the time the application is submitted.

B.) The applicant has sufficient right, title, or interest to locate the proposed facility on the existing structure.

C.) The proposed facility increases the height of the exiting structure by no more than twenty (20) feet.

D.) The proposed facility will be constructed with materials and colors that match or blend with the

*The **Priority of Locations** standard sets out a preference for colocation over new facilities. The applicant is required to show that colocation is not feasible before the Planning Board will approve new construction. An alternative approach is to designate areas where these facilities are permitted.*

It is important to review the discussion below on "Visual Impacts" to help understand the value that this prioritization provides to the overall review and approval process.

The municipality may wish to contract the services of a qualified consultant to review all sites that would serve within the carrier's "target coverage area." However, this review must be careful not to produce the effect of "effectively prohibiting the provision of service," as counter to the federal act.

The municipality must establish standards for use on public property.

If colocation is in any district is a higher priority for the community, then a facility's location in a Residential district would raise that district's priority. Likewise, the municipality may change the order of priorities, but must remain careful not to effectively exclude all carriers from all locations.

***In addition, location** and **height** (see Section 7.2(D) below) must be considered together so that the Planning Board doesn't discriminate against an equivalent provider. Beyond that, there are a myriad of choices a municipality may use to meet its own particular goals, be they for more numerous, shorter facilities, or taller and fewer ones.*

surrounding natural or built environment, to the maximum extent practicable.

E.) The proposed facility, to the greatest degree practicable, shall have no unreasonable adverse impact upon districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed, or eligible for listing, in the National Register of Historic Places (see 16 U.S.C. 470w(5); 36 CFR 60 and 800).

7.2. Planning Board Approval Standards

An application for approval by the Planning Board under Section 5.1(B) must meet the following standards.

A.) Priority of Locations. New wireless telecommunications facilities must be located according to the priorities below. The applicant shall demonstrate that a facility of a higher priority cannot reasonably accommodate the applicant's proposed facility.

1.) Colocation on an existing wireless telecommunications facility or other existing structure in the following districts, as identified in the [name of municipality] Zoning Ordinance:

2.) A new facility on public or private property in an Industrial District, or permitted as an Industrial Use.

If a community wants to limit the height of facilities, being careful not to effectively prohibit them, then the "carrot" must be the ease of colocation. Like a large umbrella, the higher the tower, the larger the sphere of coverage, and the fewer number of towers required for the first two phases of build-out - coverage and intermediate (see the Appendix).

Another critical element for determining the number of facilities is population density. The industry is market driven, and that market is primarily driven by population densities. The greater the densities, ultimately the greater the number of antennas. If there are not suitable colocation opportunities, then there will be more facilities (a.k.a., tower).

If a community wants to require colocation, then leeway must be left for either building a larger tower first, or being able to expand on that tower as a colocator. Communities which are flexible but clear have been the winners - towers located where they are least obtrusive, or located where the public eye must find them among the din of everyday life - telephone poles and lines, industrial fixtures, etc. In order for colocation to work, it must be the easiest path, with the least resistance for the carrier. If the town wants only the minimum intrusion, then one tall, well placed tower with plenty of colocation options may be the best route.

*An alternative **Location** standard designates areas where facilities may be constructed. This is useful if the community wants to create "tower farms" in appropriate locations. This approach must be carefully considered so that it does not exclude or discriminate against service providers, in violation of the federal Telecommunications Act. Towers are often permitted in Business, Commercial, and Industrial Districts, and municipalities with significant residential districts should consider some accommodations to wireless facilities to allow for*

3.) A new facility on public or private property in a Commercial District, or permitted as a Commercial Use.

4.) A new facility on public or private property in a Rural District, or permitted as a Rural Use.

5.) A new facility on public or private property in a Residential District, or permitted as an Residential Use.

[OR]

A.) Location

New wireless telecommunications facilities may be permitted only in the following districts as designated in the [municipal] zoning ordinance:

[list districts here]

coverage of the residential area, taking local topography into account.

*The **Siting on Municipal Property** standard is intended to protect the public interest in public property. The use of public property must be carefully considered because the mandatory use of public property can violate federal antitrust laws. If a municipality wants to simply encourage siting on public property, options include free siting of municipal police antennas, sources of income for schools, and marketing options for teacher and municipal employees.*

The municipality should establish standards for siting these facilities on public property. One example are the standards used by the National Park Service, which requires that the siting will meet the policies of the department or agency. In this situation, that may mean placement of a facility in a public park is less appropriate than placement in a municipal industrial park.

The municipality may change the order of location priorities to suit its own needs, but it must understand the risks, as well as the opportunities, to locating these facilities exclusively on public property without due process, which could run counter to federal antitrust laws.

If these standards are going to be incorporated into an existing zoning ordinance, the description of districts should correlate to the districts listed in the existing ordinance.

*The **Height** standard should be considered carefully because height restrictions can effectively exclude facilities, and thus the provision of service, especially if there are restrictions on the location of facilities as well. In planning the acceptable locations of facilities, the town needs to consider the interplay between height and coverage. Again, the taller the facility, the wider range of coverage. The stronger the facility, the more colocation opportunities develop. The shorter the towers, the greater number may be necessary for market coverage. The Appendix provides more information on these planning considerations. The average freestanding monopole is 180-195 feet tall.*

*An **alternative** height standard sets different height limits in different districts, which can help direct or concentrate larger facilities to certain areas.*

Limiting height to 195 feet eliminates the need in most cases for lighting and marking, as required by the FCC. The difference in height between the two could mean an additional opportunity for colocation. However, for scenic issues, towns could allow taller towers in more desirable places, thus maximizing colocation possibilities.

B.) Siting on Municipal Property. If an applicant proposes to locate a new wireless telecommunications facility, or expand an existing facility on municipal property, the applicant must show the following:

1.) The proposed location complies with applicable municipal policies and ordinances.

2.) The proposed facility will not interfere with the intended purpose of the property.

3.) The applicant has adequate liability insurance and a lease agreement with the municipality that includes reasonable compensation for the use of the

***Setbacks** protect abutting property owners from the unlikely event that the use will physically impact the property; and from indirect impacts, such as obstruction of air or light. The intent is to protect abutting properties from the unlikely structural failure of the facility through wind loading, resulting in the structure toppling over. Coupling setbacks with design and engineering*

property and other provisions to safeguard the public rights and interests in the property.

[IMPORTANT NOTE: The working group, made up of industry and municipal representatives, could not reach consensus on the following subsection. Municipalities are strongly recommended to work with applicants in determining effective and appropriate colocation design requirements during the pre-application, design, and Planning Board workshop phases.]

C.) Design for Colocation. A new wireless telecommunications facility and related equipment must be designed and constructed to accommodate expansion for future colocation of at least three additional wireless telecommunications facilities or providers. However, the Planning Board may waive or modify this standard where the district height limitation effectively prevents future colocation.

D.) Height. A new wireless telecommunications facility must be no more than __ feet in height.

[OR]

D.) Height. A new wireless telecommunications facilities must meet the following height standards, in the following districts:

1.) In any Manufacturing or Industrial District the maximum height for a wireless telecommunications facility shall be ___ feet.

standards will ensure the safest structure possible is constructed.

This ordinance allows the Planning Board to alter the setback, but establishes predictability that the setback will not be below a baseline threshold. Using an easement or other notice of waiver from the strict interpretation of the 105% setback helps both the municipality and applicant find sites that will have the least visual impact. It is crucial that the municipality remember that without first identifying those key visual vistas and features, regulating these facilities based on their visual impacts is problematic at best.

If adopted as a separate ordinance, care should be taken to properly refer to the districts as designated in the zoning ordinance.

*The **Landscaping** standard is intended to protect the interests of abutting land owners and the general public that will view the facility.*

*The **Fencing** standard is intended to protect the facility and the public from harm by trespassers.*

*The **Lighting** standard is intended to minimize the off-site impacts of facility lighting while protecting the public. Options include: limiting the height and location of the facility to avoid the requirement by the FAA that the facility be lighted, and the Planning Board may wish to provide options in the **Submissions** section as well. Remember, however, that the alternatives proposed may be preempted by the FAA.*

2.) In any Rural District the maximum height for a wireless telecommunications facility shall be ___ feet, or sufficiently above tree line to minimize interference.

3.) In any Commercial District the maximum height for a wireless telecommunications facility shall be ___ feet.

4.) In any Neighborhood Business/Commercial District the maximum height for a wireless telecommunications facility shall be ___ feet.

5.) Residential District. In any Residential District the maximum height for a wireless telecommunications facility shall be ___ feet.

E.) Setbacks. A new or expanded wireless telecommunications facility must comply with the set back requirements for the zoning district in which it is located, or be set back one hundred five percent (105%) of its height from all property lines, whichever is greater. The setback may be satisfied by including the areas outside the property boundaries if secured by an easement. The following exemptions apply:

1.) In _____ districts, the setback may be reduced by the Planning Board upon a showing by the applicant that the facility is designed to collapse in a manner that will not harm other property.

2.) An antenna is exempt from the setback requirement if it extends no more than five (5) feet

*The **Color and Materials** standard is intended to protect the interest of the pubic that will view the facility. Some communities have required unlit facilities to be painted neutral or "dull" colors (gray, e.g.) to minimize their physical presence.*

*The **Structural** standard is intended to minimize the possibility of collapse. In fact, when constructed to these standards, there is little likelihood that these structures will topple over like a tree. Typically, as seen in Quebec this winter, they topple down upon themselves. The goal of this standard is to minimize off-site impacts, while allowing reasonable use and repairs to occur, especially during emergencies. Rather than become structural engineers, the Planning Board may simply seek to have an engineer certify that the structure meets these standards.*

If a town wishes to address or regulate this use, or any other use with this kind of impact, then the municipal reviewers must have relevant submission requirements, and defensible review standards to define and assess that impact. The version presented here is one example; there are others.

Applicants, Planning Boards, and Planners must recognize that visual impacts are unavoidable, since these facilities (structures and antennas) are technologically required to be at a certain height and in certain locations to achieve minimal target area coverage. Further, the higher PCS frequencies, what are known as "line-of-sight" frequencies, do no bend around obstacles such as buildings, trees, etc., and therefore have much less flexible siting needs than traditional cellular and pager antennas, transmitters, etc.

horizontally from the edge of the structure to which it is attached, and it does not encroach upon an abutting property.

F.) Landscaping. A new wireless telecommunications facility and related equipment must be screened with plants from view by abutting properties, to the maximum extent practicable. Existing plants and natural land forms on the site shall also be preserved to the maximum extent practicable.

G.) Fencing. A new wireless telecommunications facility must be fenced to discourage trespass on the facility and to discourage climbing on any structure by trespassers.

H.) Lighting. A new wireless telecommunications facility must be illuminated only as necessary to comply with FAA or other applicable state and federal requirements. However, security lighting may be used as long as it is shielded to be down-directional to retain light within the boundaries of the site, to the maximum extent practicable.

I.) Color and Materials. A new wireless telecommunications facility must be constructed with materials and colors that match or blend with the surrounding natural or built environment, to the maximum extent practicable. Unless otherwise

*These **Noise** standards may be deleted, or if the municipality has an existing noise ordinance, this exemption should be included.*

required, muted colors, earth tones, and subdued hues shall be used.

J.) Structural Standards. **[Evidence that]** A new wireless telecommunications facility must comply with the current Electronic Industries Association/ Telecommunications Industries Association (EIA/TIA) 222 Revision Standard entitled "Structural Standards for Steel Antenna Towers and Antenna Supporting Structures."

K.) Visual Impact. The proposed wireless telecommunications facility will have no unreasonable adverse impact upon designated scenic resources within the Town, as identified either in the municipally adopted comprehensive plan, or by a State or federal agency.

1.) In determining the potential unreasonable adverse impact of the proposed facility upon the designated scenic resources, the Planning Board shall consider the following factors:

a.) The extent to which the proposed wireless telecommunications facility is visible above tree line, from the viewpoint(s) of the impacted designated scenic resource;

b.) the type, number, height, and proximity of existing structures and features, and background features within the same line of sight as the proposed facility;

c.) the extent to which the proposed wireless telecommunications facility would be visible from the viewpoint(s);

d.) the amount of vegetative screening;

e.) the distance of the proposed facility from the viewpoint and the facility's location within the designated scenic resource; and

f.) the presence of reasonable alternatives that allow the facility to function consistently with its purpose.

*The **Amendment** section provides for the same review for amendments as original applications. As an alternative, municipalities may want to provide for a different procedure.*

L.) Noise. During construction, repair, or replacement, operation of a back-up power generator at any time during a power failure, and testing of a back-up generator between 8 a.m. and 9 p.m. is exempt from existing municipal noise standards.

M.) Historic & Archaeological Properties. The proposed facility, to the greatest degree practicable, will have no unreasonable adverse impact upon a historic district, site or structure which is currently listed on or eligible for listing on the National Register of Historic Places.

*The **Abandonment** section authorizes the CEO to remove unused facilities at the owners expense. The town must decide how much of the facility must be removed, and the depth to which the original site must be restored. This requirement can be made part of the lease agreement, and the applicant must demonstrate that there is sufficient bonding for this to occur. **It is strongly advised that a public hearing be held prior to the revocation of the permit.***

7.3 Standard Conditions of Approval

The following standard conditions of approval shall be a part of any approval or conditional approval issued by the CEO or Planning Board. Where necessary to ensure that an approved

The reclamation should address the visual impacts as well. The Town should decide whether pre-construction shall consider the area below grade.

project meets the criteria of this ordinance, the Planning Board can impose additional conditions of approval. Reference to the conditions of approval shall be clearly noted on the final approved site plan, and shall include:

1.) The owner of the wireless telecommunications facility and his or her successors and assigns agree to:

a.) respond in a timely, comprehensive manner to a request for information from a potential colocation applicant, in exchange for a reasonable fee not in excess of the actual cost of preparing a response;

b.) negotiate in good faith for shared use of the wireless telecommunications facility by third parties;

c.) allow shared use of the wireless telecommunications facility if an applicant agrees in writing to pay reasonable charges for colocation.

d.) require no more than a reasonable charge for shared use of the wireless telecommunications facility, based on community rates and generally accepted accounting principles. This charge may include, but is not limited to, a pro rata share of the cost of site selection, planning project administration, land costs, site design, construction and maintenance, financing, return on equity, depreciation, and all

*The **Appeals** section makes the Board of Appeals the final decision maker. For municipalities without a Zoning Board of Appeals, the appeals by aggrieved parties must be made to the Superior Court. For municipalities incorporating these standards into an existing zoning ordinance, this section could be deleted if already present in the ordinance.*

*The **Administration and Enforcement** section gives the CEO broad authority to prosecute violations of the ordinance. Alternatively, municipalities may require prior approval of some other municipal official(s) before certain enforcement actions are taken. For municipalities incorporating these standards into an existing zoning ordinance, this section could be deleted if already present in the ordinance.*

These municipal officers may be the CEO or the Town or City Manager, depending upon the current administrative responsibilities.

of the costs of adapting the tower or equipment to accommodate a shared user without causing electromagnetic interference. The amortization of the above costs by the facility owner shall be accomplished at a reasonable rate, over the life span of the useful life of the wireless telecommunications facility.

2.) Upon request by the municipality, the applicant shall certify compliance with all applicable FCC radio frequency emissions regulations.

Section 8. Amendment to an Approved Application

Any changes to an approved application must be approved by the CEO or the Planning Board, in accordance with Section 5.

Section 9. Abandonment

A wireless telecommunications facility that is not operated for a continuous period of twelve (12) months shall be considered abandoned. The CEO shall notify the owner of an abandoned facility in writing and order the removal of the facility within ninety (90) days of receipt of the written notice. The owner of the facility shall have thirty (30) days from the receipt of the notice to demonstrate to the CEO that the facility has not been abandoned.

If the Owner fails to show that the facility is in active operation, the owner shall have sixty (60) days to remove the facility. If the facility is not removed within this time period, the

municipality may remove the facility at the owner's expense. The owner of the facility shall pay all site reclamation costs deemed necessary and reasonable to return the site to its pre-construction condition, including the removal of roads, and reestablishment of vegetation.

If a surety has been given to the municipality for removal of the facility, the owner of the facility may apply to the Planning Board for release of the surety when the facility and related equipment are removed to the satisfaction of the Planning Board.

Section 10. Appeals

Any person aggrieved by a decision of the CEO or the Planning Board under this ordinance may appeal the decision to the Board of Appeals, as provided by [section of Zoning or Land Use Ordinance]. Written notice of an appeal must be filed with the Board of Appeals within thirty (30) days of the decision. The notice of appeal shall clearly state the reasons for the appeal.

Section 11. Administration and Enforcement

The CEO, as appointed through either the Zoning Ordinance or by the Board of Selectmen or Town or City Council, shall enforce this ordinance. If the CEO finds that any provision of this ordinance has been violated, the CEO shall notify in writing the person responsible for such violation, indicating the nature of the violation, and ordering the action necessary to correct it. The CEO shall order correction of the violation and may take any other legal action to ensure compliance with this ordinance.

If these provisions are incorporated into an existing zoning ordinance, ***municipalities should make sure that the existing definition is amended to include towers****.*

The [Municipal Officers], or their authorized agent, are authorized to enter into administrative consent agreements for the purpose of eliminating violations of this ordinance and recovering fines without court action. Such agreements shall not allow a violation of this ordinance to continue unless: there is clear and convincing evidence that the violation occurred as a direct result of erroneous advice given by an authorized municipal official upon which the applicant reasonably relied to its detriment and there is no evidence that the owner acted in bad faith; the removal of the violation will result in a threat to public health and safety or substantial environmental damage.

Section 12. Penalties

Any person who owns or controls any building or property that violates this ordinance shall be fined in accordance with Title 30-A M.R.S.A. § 4452. Each day such violation continues after notification by the CEO shall constitute a separate offense.

Section 13. Conflict and Severability

13.1 Conflicts with other Ordinances

Whenever a provision of this ordinance conflicts with or is inconsistent with another provision of this ordinance or of any other ordinance, regulation, or statute, the more restrictive provision shall apply.

13.2 Severability

The invalidity of any part of this ordinance shall not invalidate any other part of this ordinance.

Section 14. Definitions

The terms used in this ordinance shall have the following meanings:

"Antenna" means any system of poles, panels, rods, reflecting discs or similar devices used for the transmission or reception of radio or electromagnetic frequency signals.

"Antenna Height" means the vertical distance measured from the base of the antenna support structure at grade to the highest point of the structure, even if said highest point is an antenna. Measurement of tower height shall include antenna, base pad, and other appurtenances and shall be measured from the finished grade of the facility site. If the support structure is on a sloped grade, then the average between the highest and lowest grades shall be used in calculating the antenna height.

"Colocation" means the use of a wireless telecommunications facility by more than one wireless telecommunications provider.
"Expansion" means the addition of antennas, towers, or other devices to an existing structure.

"FAA" means the Federal Aviation Administration, or its lawful successor.

"FCC" means the Federal Communications Commission , or its lawful successor.

"Height" means the vertical measurement from a point on the ground at the mean finish grade adjoining the foundation as calculated by averaging the highest and lowest finished grade around the building or structure, to the highest point of the building or structure. The highest point shall exclude farm building components, flagpoles, chimneys, ventilators, skylights, domes, water towers, bell towers, church spires, processing towers, tanks, bulkheads, or other building accessory features usually erected at a height greater than the main roofs of buildings.

"Historic or Archaeological Resources" means resources that are:

1. Listed individually in the National Register of Historic Places or eligible for listing on the National Register;

2. Certified or preliminarily determined by the Secretary of the Interior as contributing to the historical significance of a registered historic district or a district preliminarily determined by the Secretary of the Interior to qualify as a registered historic district;

3. Individually listed on a state inventory of historic places in states with historic preservation programs approved by the Secretary of the Interior;

4. Individually listed on a local inventory of historic places in communities with historic preservation programs that have been certified by Secretary of the Interior through the Maine Historic Preservation Commission; or

Municipalities may wish to substitute the "Labor Market Area" for this definition.

5. Areas identified by a governmental agency such as the Maine Historic Preservation Commission as having significant value as an historic or archaeological resource and any areas identified in the municipality's comprehensive plan, which have been listed or are eligible to be listed on the National Register of Historic Places.

"Historic District" means a geographically definable area possessing a significant concentration, linkage or continuity of sites, buildings, structures or objects united by past events or aesthetically by plan or physical development and identified in the municipality's comprehensive plan, which is listed or is eligible to be listed on the National Register of Historic Places. Such historic districts may also comprise individual elements separated geographically, but linked by association or history.

"Historic Landmark" means any improvement, building or structure of particular historic or architectural significance to the Town relating to its heritage, cultural, social, economic or political history, or which exemplifies historic personages or important events in local, state or national history identified in the municipality's comprehensive plan, which have been listed or are eligible to be listed on the National Register of Historic Places.

"Line of sight" means the direct view of the object from the designated scenic resource.

"Parabolic Antenna" (also known as a satellite dish antenna) means an antenna which is bowl-shaped, designed for the reception and or transmission of radio frequency communication signals in a specific directional pattern.

"Principal Use" means the use other than one which is wholly incidental or accessory to another use on the same premises.

“Public Recreational Facility” means a regionally or locally significant facility, as defined and identified either by State statute or in the municipality's adopted comprehensive plan, designed to serve the recreational needs of municipal property owners.

“Designated Scenic Resource” means that specific location, view, or corridor, as identified as a scenic resource in the municipally adopted comprehensive plan or by a State or federal agency, that consists of:

1.) a three dimensional area extending out from a particular viewpoint on a public way or within a public recreational area, focusing on a single object, such as a mountain, resulting in a narrow corridor, or a group of objects, such a downtown skyline or mountain range, resulting in a panoramic view corridor; or

2.) lateral terrain features such as valley sides or woodland as observed to either side of the observer, constraining the view into a narrow or particular field, as seen from a viewpoint on a public way or within a public recreational area.

“Targeted Market Coverage Area” means the area which is targeted to be served by this proposed telecommunications facility.

“Unreasonable Adverse Impact” means that the proposed project would produce an end result which is:

1.) excessively out-of-character with the designated scenic resources affected, including existing buildings structures and features within the designated scenic resource, and

2.) would significantly diminish the scenic value of the designated scenic resource.

“Viewpoint” means that location which is identified either in the municipally adopted comprehensive plan or by a federal or State agency, and which serves as the basis for the location and determination of a particular designated scenic resource.

"Wireless Telecommunications Facility" or “Facility” means any structure, antenna, tower, or other device which provides radio/television transmission, commercial mobile wireless services, unlicensed wireless services, cellular phone services, specialized mobile radio communications (SMR), common carrier wireless exchange phone services, specialized mobile radio communications (SMR), common carrier wireless exchange access services, and personal communications service (PCS) or pager services.

Section 15. Effective Date

This ordinance becomes effective on _____.

DRAFT POLICY DIRECTION FOR 2024

DURHAM LAND USE ORDINANCE

PART 4 – POLICY FOR HISTORIC PRESERVATION

DRAFT POLICY DIRECTION FOR 2024

DURHAM LAND USE ORDINANCE

PART 5 – CLARIFICATION OF FEE SCHEDULE ESTABLISHMENT

LINNELL, CHOATE & WEBBER, LLP
MEMORANDUM

TO: GEORGE THEBARGE, DURHAM TOWN PLANNER

FROM: JOHN W. CONWAY, ESQ.

SUBJECT: PERMIT APPLICATION FEES

DATE: APRIL 27, 2023

I have reviewed your email together with the questions presented. In addition, I have reviewed the revisions to the Land Use Ordinance which were acted on at the April 2, 2022, Town Meeting. Additionally, you had forwarded to me the minutes of the meeting of the Select Board establishing a fee schedule and the adopted fee scheduled dated June 14, 2022.

You have presented three separate questions which I will answer separately.

1. I agree with your assessment that the Select Board has the authority to increase or lower the fees which specific reference is made to in the Land Use Ordinance.

2. The language of Section 18.1, A, 2 indicates that, "All permit fees shall be established in a fee schedule adopted annually by the Select Board …". This is broad delegation for establishing the permit fees, and I believe that any fee that is referenced within the Land Use Ordinance is subject to being established by the Select Board in their fee schedule. I see no problem with placing these fees in the fee schedule.

3. Once again, I note that the delegated authority by the Town Meeting to the Select Board is very broad in regards to fees. As I understand the question in #3, you are concerned that there might be differential fees for various projects which require a general conditional use permit. The current Section 7.2 of the Land Use Ordinance indicates that all applications shall be accompanied by a fee "per the fee schedule adopted by Select Board." It is my opinion that the Select Board can establish differentiated fees for different classes of projects which require conditional use approval. As you have pointed out, your concern has to do with things like large industrial projects, solar farms or cell towers. These may very well require a higher level of review and therefore a larger fee.

As long as the fees which are established correspond to the actual review process that the Town needs to go through for those projects, then it is my opinion that the Select Board can establish those in its fee schedule. However, I do not believe that the law would allow for fees which are simply based on the value of a project or are arbitrary given the developer's

status. All fees should correspond to the actual costs of the Town of the review process for that particular project.

I trust this answers your questions. If you have further questions, please contact me.