

# **ADDENDUM 1 — Process for Updating the Comprehensive Plan and Adopting a Rate of Growth Ordinance**

## **ADDENDUM 1—PROCESS FOR AMENDING THE COMPREHENSIVE PLAN AND ADOPTING A RATE OF GROWTH ORDINANCE**

### **Durham's Rate of Growth Ordinance**

In 2002, the Town of Durham approved at Town Meeting and submitted a comprehensive plan update recommending that the Southwest Bend Growth District be designated as a growth area. The primary motivation for submitting the draft plan with a designated growth area was to support adoption of a rate of growth ordinance that limits issuance of building permits for new housing units to 45 in any calendar year. This decision to adopt a cap on housing starts was precipitated by a building boom in southern Maine and similar ordinances being adopted in neighboring communities. As indicated in Table 1, since adoption of the building permit cap in 2004, the cap has never been exceeded, and the low rate of housing starts since the Great Recession has led to its being completely ignored.

In addition to a current and foreseeable lack of need for a cap on issuance of building permits for new housing starts, the Durham *Growth Management and Establishment of Districts Ordinance* (a rate of growth ordinance) adopted in 2004 is potentially invalid for two reasons. First, Title 30-A, Chapter 187, §4314 M.R.S.A. requires that any rate of growth ordinance enacted in Maine be consistent with a comprehensive plan adopted in accord-

**Table 1—New Housing Starts 2000-2017**

2000—47 Housing Starts	2009—13 Housing Starts
2001—52 Housing Starts	2010—(Not Reported)
2002—73 Housing Starts	2011—(Not Reported)
2003—45 Housing Starts	2012—(Not Reported)
2004—42 Housing Starts	2013—6 Housing Starts
2005—33 Housing Starts	2014—7 Housing Starts
2006—29 Housing Starts	2015—5 Housing Starts
2007—27 Housing Starts	2016—18 Housing Starts
2008—18 Housing Starts	2017—14 Housing Starts
	2018—16 Housing Starts

ance with the State requirements for comprehensive plans.

The 2002 Durham Comprehensive Plan update was determined by the State Planning Office (SPO) to be inconsistent with legal requirements for comprehensive plans (Letter from Frank Hamble SPO, 12/20/2002).

The second reason to conclude that the Durham *Growth Management Ordinance* is in all probability invalid is that it does not meet statutory requirements for enactment of rate of growth ordinances. Title 30-A M.R.S.A., Chapter 187, §4360 sets out a specific formula for setting the rate of growth that is based on issuing 105

percent or more of the average number of permits issued for the prior 10 years.

The Rate of Growth Ordinance statute further requires that at least 10 percent of the building permits issued for new housing be dedicated to affordable housing units.

Finally, the Rate of Growth Ordinance statute requires that the number of building and development permits for new residential dwellings be recalculated every 3 years.

It is unclear whether the original enactment of the Durham *Growth Management Ordinance* that caps new housing starts at 45 per year was based on a calculation of the number of housing unit permits issued over the prior 10 years. It is clear, however, that the *Growth Management Ordinance* makes no provision for affordable housing units as required by Maine law. It is also clear that the Town did not recalculate the rate every 3 years since its adoption in 2004.

## Purpose of a Designated Growth Area

The purpose of designating one or more growth areas in a community is to direct the majority of future growth to those areas and thereby avoid sprawling development throughout the community, particularly in rural areas.

The tools needed to successfully direct future development to growth areas include providing the infrastructure (roads, utilities, etc.) necessary to support denser development and changes to zoning to allow more compact neighborhoods. Durham has no public utilities, and it lacks the fiscal capacity to develop them. In recent years, the number of housing starts has dropped to an average of about 15 per year, and demographic projections indicate that the rate will drop to half that amount over the next 20 years. At this pace, the private sector will also lack the investment capital needed to support public utilities or a growth area in Durham.

Based on the lack of need for a cap on housing starts and the lack of financial capacity to support a growth area, the Town is seeking exemption from the requirement to designate growth areas. One of the requirements for a community to qualify for the Growth Area Exemption is a prohibition on growth caps or rate-of-growth ordinances (Chapter 208, Section 4.B).

Therefore, the Durham *Growth Management and Establishments of Districts Ordinance* (a rate of growth ordinance) adopted in 2004 must be repealed in order to qualify for the exemption. This addendum to the draft comprehensive plan update includes a framework for instituting one or more designated growth areas and a corresponding rate of growth ordinance should development conditions indicate a need in the future.

## Factors and Indicators of Potential Need for Rate of Growth Limitation

Regional economic trends over the past decade have led to a significant decline in the rate of new housing construction in rural communities in Southern Maine like Durham. Demographic projections indicate that over the next two decades, the trend for reduced housing starts in Durham will continue and produce even less demand for housing.

This trend, however, could reverse if one or more of the surrounding employment centers sees major expansion that draws more workers looking for affordable housing. The closure of the Brunswick Naval Air Station is an example of a regional change that significantly affects the housing market. Brunswick has actively marketed the former naval air base as a redevelopment site known as Brunswick Landing: Maine's Center for Innovation. To date, the center has generated almost 2000 jobs. If a major industrial or technology business were to land there, the regional housing demand could quickly jump, placing new pressure on Durham for development permits.

Rather than waiting until a major regional development creates a dramatic spike in housing starts and then reacting in panic, the Town should anticipate the possibility of such a change and chart out a process for responding in a measured, objective manner. There are two direct, measurable indicators of significant change in the regional housing market affecting Durham. The first would be a spike in the number of building permits for new homes. Such an increase might be preceded or accompanied by a significant increase in subdivision applications being filed with the Planning Board.

The Town will continue to monitor the rate of new home building permits issued annually and the number of subdivision lots approved by the Planning Board. If at any point, the number of new home building permits exceeds the previous annual cap of 45 or the number of subdivision lots approved by the Planning Board exceeds 100, the Board of Selectmen should call for a special Town Meeting to consider enacting a temporary moratorium to provide opportunity to revisit the question of whether to establish one or more growth areas with higher density development and the infrastructure to support it.

Such a moratorium might contain, if legally permissible, an allowance for a limited number of building permits for new homes to be issued while the comprehensive plan is updated and ordinances are revised for the new growth management program, if one is adopted. If a moratorium can be enacted with an allowance for limited issuance of development permits, as opposed to a total moratorium, issuing 45 permits annually during the comprehensive plan review and ordinance revision process would return the Town to the same status it was prior to repeal of the 2004 *Growth Management and Establishment of Districts Ordinance* (a rate of growth ordinance).

## Suggested Approach to Establishing Required Growth Area(s)

The starting place for consideration of one or more designated growth areas could be the previously approved Southwest Bend District. The 2002 Comprehensive Plan designated that area as a growth district but failed to call for or allow development densities necessary to make it effective in absorbing the majority of new housing built in Durham. In their letters of inconsistency of

the comprehensive plan, State planners observed that keeping the same 2 acre minimum lot size as the rest of the community would do little if anything to encourage growth there or limit development effects in other parts of Durham.

One of the scenarios explored in the 2018 Comprehensive Plan update called for establishing a minimum lot size of 20,000 square feet with a road frontage of 100 feet in the Southwest Bend District. Such development could be served by individual septic systems on suitable soils, and a public water system tapping into the identified aquifers would address needed separations between septic systems and wells while providing a source of water for fire protection. The 6-month to 1-year moratorium, if enacted at special Town Meeting, would provide time to do a feasibility study to determine design and financing options for such a public water system to serve the growth area, as well as other needed ordinance amendments to make the growth area succeed.

The 2004 *Growth Management and Establishment of Districts Ordinance* included a differential growth rate cap for new housing within the Southwest Bend Growth District and revised the Town's road acceptance policy to favor that District. The State recognized and affirmed these growth management mechanisms in its letters of inconsistency. In order to legally support a permanent rate of growth ordinance (with required periodic updates), Durham will need to develop a growth management program that meets comprehensive planning requirements. Given the planning groundwork done to date, putting a revised plan together in the face of a regional building boom should be manageable. If the Town can legally allow an allocation of 45 new home building permits to be issued as it is updating the Comprehensive Plan and putting ordinance amend-

ments and infrastructure plans in place, local homebuilders could continue to meet current and continuing housing needs with little, if any interruption.

## Moratorium Requirements

The requirements for enacting a development moratorium are contained in Title 30-A, MRSA §4356:

*Any moratorium adopted by a municipality on the processing or issuance of development permits or licenses must meet the following requirements.*

*1. Necessity. The moratorium must be needed:*

- A. To prevent a shortage or an overburden of public facilities that would otherwise occur during the effective period of the moratorium or that is reasonably foreseeable as a result of any proposed or anticipated development; or,*
- B. Because the application of existing comprehensive plans, land use ordinances or regulations or other applicable laws, if any, is inadequate to prevent serious public harm from residential, commercial or industrial development in the affected geographic area.*

*2. Definite term. The moratorium must be of a definite term of not more than 180 days. The moratorium may be extended for additional 180-day periods if the municipality adopting the moratorium finds that:*

- A. The problem giving rise to the need for the moratorium still exists; and,*

*B. Reasonable progress is being made to alleviate the problem giving rise to the need for the moratorium.*

*3. Extension by selectmen. In municipalities where the municipal legislative body is the town meeting, the selectmen may extend the moratorium in compliance with subsection 2 after notice and hearing.*

A moratorium is defined in State law (Title 30-A, MRSA §4301.11) as “*...a land use ordinance or other regulation approved by a municipal legislative body that, if necessary, may be adopted on an emergency basis and given immediate effect and that temporarily defers all development, or a type of development, by withholding any permit, authorization or approval necessary for the specified type or types of development.*”

Whether this language is broad enough to allow a limited number of building permits for new homes as a “type of development,” should be reviewed with legal counsel. If State law is not flexible enough to allow a partial moratorium with allowance for 45 housing starts, the Town can consider whether to enact a total moratorium for the 6-month to 1-year process of updating the Comprehensive Plan if either of the review triggers are activated (more than 45 new building permits or 100 subdivision lots approved).