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S.P. 101

In Senate, February 8, 2011

An Act To Prohibit Municipal Ordinances More Stringent than State Guidelines

Reference to the Committee on Environment and Natural Resources suggested and ordered printed.

Joseph G. Carleton Jr.

JOSEPH G. CARLETON, JR.
Secretary of the Senate

Presented by Senator COLLINS of York.

Cosponsored by Senator: SAVIELLO of Franklin, Representative: NASS of Acton.

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

2 **Sec. 1. 36 MRSA §1109, sub-§3**, as amended by PL 2007, c. 627, §29, is further
3 amended to read:

4 **3. Open space land qualification.** The owner or owners of land who believe that
5 land falls within the definition of open space land contained in section 1102, subsection 6
6 shall submit a signed schedule in duplicate on or before April 1st of the year in which that
7 land first becomes subject to taxation under this subchapter to the assessor on a form
8 prescribed by the State Tax Assessor that must contain a description of the land, a general
9 description of the use to which the land is being put and other information the assessor
10 may require to aid in determining whether the land qualifies for classification as open
11 space land and for which valuation categories set forth in section 1106-A the land is
12 eligible. The assessor shall determine whether the land falls within the definition of open
13 space land contained in section 1102, subsection 6 and, if so, that land must be classified
14 as open space land and subject to taxation under this subchapter. In making the
15 determination that the restriction or preservation of land for which classification is sought
16 provides a public benefit, as required in section 1102, subsection 6, the assessor shall
17 consider all facts and circumstances pertinent to the land and its vicinity. Factors
18 appropriate to one application may be irrelevant in determining the public benefit of
19 another application. A single factor, whether listed below or not, may be determinative of
20 public benefit. Among the factors to be considered are:

- 21 A. The importance of the land by virtue of its size or uniqueness in the vicinity or
22 proximity to extensive development or comprising an entire landscape feature;
- 23 B. The likelihood that development of the land would contribute to degradation of
24 the scenic, natural, historic or archeological character of the area;
- 25 C. The opportunity of the general public to appreciate significant scenic values of
26 the land;
- 27 D. The opportunity for regular and substantial use of the land by the general public
28 for recreational or educational use;
- 29 E. The importance of the land in preserving a local or regional landscape or
30 resource that attracts tourism or commerce to the area;
- 31 F. The likelihood that the preservation of the land as undeveloped open space will
32 provide economic benefit to the town by limiting municipal expenditures required to
33 service development;
- 34 G. Whether the land is included in an area designated as open space land or
35 resource protection land on a comprehensive plan or in a zoning ordinance or on a
36 zoning map as finally adopted;
- 37 H. The existence of a conservation easement, other legally enforceable restriction,
38 or ownership by a nonprofit entity committed to conservation of the property that will
39 permanently preserve the land in its natural, scenic or open character;

- 1 I. The proximity of other private or public conservation lands protected by
2 permanent easement or ownership by governmental or nonprofit entities committed
3 to conservation of the property;
- 4 J. The likelihood that protection of the land will contribute to the ecological
5 viability of a local, state or national park, nature preserve, wildlife refuge, wilderness
6 area or similar protected area;
- 7 K. The existence on the land of habitat for rare, endangered or threatened species of
8 animals, fish or plants, or of a high quality example of a terrestrial or aquatic
9 community;
- 10 L. The consistency of the proposed open space use with public programs for scenic
11 preservation, wildlife preservation, historic preservation, game management or
12 recreation in the region;
- 13 M. The identification of the land or of outstanding natural resources on the land by
14 a legislatively mandated program, on the state, local or federal level, as particular
15 areas, parcels, land types or natural resources for protection, including, but not
16 limited to, the register of critical areas under Title 12, section 544-B; the laws
17 governing wildlife sanctuaries and management areas under Title 12, section 10109,
18 subsection 1 and sections 12706 and 12708; the laws governing the State's rivers
19 under Title 12, chapter 200; the natural resource protection laws under Title 38,
20 chapter 3, subchapter 1, article 5-A; and the Maine Coastal Barrier Resources
21 Systems under Title 38, chapter 21;
- 22 N. Whether the land contains historic or archeological resources listed in the
23 National Register of Historic Places or is determined eligible for such a listing by the
24 Maine Historic Preservation Commission, either in its own right or as contributing to
25 the significance of an adjacent historic or archeological resource listed, or eligible to
26 be listed, in the National Register of Historic Places; or
- 27 O. Whether there is a written management agreement between the landowner and
28 the Department of Inland Fisheries and Wildlife or the Department of Conservation
29 as described in section 1102, subsection 10.

30 If a parcel of land for which the owner or owners are seeking classification as open space
31 contains any principal or accessory structures or any substantial improvements that are
32 inconsistent with the preservation of the land as open space, the owner or owners in their
33 schedule shall exclude from their application for classification as open space a parcel of
34 land containing those buildings or improvements at least equivalent in size to the state
35 minimum lot size as prescribed by Title 12, section 4807-A or by the zoning ordinances
36 or zoning map pertaining to the area in which the land is located, whichever is larger. For
37 the purposes of this section, if any of the buildings or improvements are located within
38 shoreland areas as defined in Title 38, chapter 3, subchapter ~~1~~ 1, article 2-B, the excluded
39 parcel must include the minimum shoreland frontage required by the applicable minimum
40 lot standards under the ~~minimum~~ guidelines established pursuant to Title 38, chapter 3,
41 subchapter ~~1~~ 1, article 2-B ~~or by the zoning ordinance for the area in which the land is~~
42 ~~located, whichever is larger.~~ The shoreland frontage requirement is waived to the extent
43 that the affected frontage is part of a contiguous shore path or a beach for which there is
44 or will be, once classified, regular and substantial use by the public. The shoreland

1 frontage requirement may be waived at the discretion of the legislative body of the
2 municipality if it determines that a public benefit will be served by preventing future
3 development near the shore or by securing access for the public on the particular
4 shoreland area that would otherwise be excluded from classification.

5 **Sec. 2. 38 MRSA §438-A**, as amended by PL 2005, c. 226, §2 and c. 440, §1, is
6 further amended to read:

7 **§438-A. Municipal authority; state oversight**

8 With respect to all shoreland areas described in section 435, municipalities shall
9 adopt zoning and land use control ordinances pursuant to existing enabling legislation,
10 under home rule authority and in accordance with the following requirements. ~~The~~
11 ~~deadline for municipalities to adopt a shoreland zoning ordinance meeting the minimum~~
12 ~~guidelines adopted by the Board of Environmental Protection is extended to July 1, 1992.~~

13 Notwithstanding other provisions of this article, the regulation of timber harvesting
14 and timber harvesting activities in shoreland areas must be in accordance with section
15 438-B and rules adopted by the Commissioner of Conservation pursuant to Title 12,
16 section 8867-B.

17 **1. Land use guidelines.** In accordance with Title 5, chapter 375, subchapter ~~H~~ 2, the
18 Board of Environmental Protection shall adopt, and from time to time shall update and
19 amend, ~~minimum~~ guidelines for municipal zoning and land use controls that are designed
20 to carry out the legislative purposes described in section 435 and the provisions of this
21 article. These ~~minimum~~ guidelines must include provisions governing building and
22 structure size, setback and location and establishment of resource protection, general
23 development, limited residential, commercial fisheries and maritime activity zones and
24 other zones. Within each zone, the board shall prescribe uses that may be allowed with or
25 without conditions and shall establish criteria for the issuance of permits and
26 nonconforming uses, land use standards and administrative and enforcement procedures.
27 These guidelines must also include a requirement for a person issued a permit pursuant to
28 this article in a great pond watershed to have a copy of the permit on site while work
29 authorized by the permit is being conducted. The board shall comprehensively review
30 and update its guidelines and shall reevaluate and update the guidelines at least once
31 every 4 years.

32 A. ~~Minimum guidelines~~ Guidelines adopted by the board under this subsection may
33 not require the issuance of a municipal permit for the repair and maintenance of an
34 existing road culvert or for the replacement of an existing road culvert, as long as the
35 replacement culvert is:

36 (2) Not more than 25% longer than the culvert being replaced; and

37 (3) Not longer than 75 feet.

38 Ancillary culverting activities, including excavation and filling, are included in this
39 exemption. A person repairing, replacing or maintaining an existing culvert under
40 this paragraph shall ensure that erosion control measures are taken to prevent
41 sedimentation of the water and that the crossing does not block fish passage in the
42 water course.

1 **1-A. Guidelines; limitations.** The ~~minimum~~ guidelines adopted under subsection 1
2 may not require a municipality, in adopting an ordinance, to:

3 A. Treat an increase in hours or days of operation of a nonconforming use as an
4 expansion of a nonconforming use; or

5 B. Treat as a single lot, 2 or more contiguous lots, at least one of which is
6 nonconforming, owned by the same person or persons on the effective date of the
7 municipal ordinance and recorded in the registry of deeds if the lot is served by a
8 public sewer or can accommodate a subsurface sewage disposal system in
9 conformance with state subsurface wastewater disposal rules, and:

10 (1) Each lot contains at least 100 feet of shore frontage and at least 20,000
11 square feet of lot area; or

12 (2) Any lots that do not meet the frontage and lot size requirements of
13 subparagraph (1) are reconfigured or combined so that each new lot contains at
14 least 100 feet of shore frontage and 20,000 square feet of lot area.

15 For purposes of this paragraph the term "nonconforming" means that a lot does not
16 meet the minimum standards for lot area and shore frontage required by municipal
17 ordinances adopted pursuant to this article.

18 **1-B. Notification to landowners.** This subsection governs notice to landowners
19 whose property is being considered for placement in a resource protection zone.

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

36 B. In addition to the notice required by this Title or by rules adopted pursuant to
37 this Title, the board shall provide written notification to landowners whose property
38 is being considered by the board for placement in a resource protection zone. Notification
39 to landowners must be made by first-class mail to the last known
40 addresses of the persons against whom property tax on each parcel is assessed. The
41 board shall prepare and file with the commissioner a sworn, notarized certificate
42 indicating those persons to whom notice was mailed and at what addresses, and
43 when, by whom and from what location notice was mailed. This certificate

1 constitutes prima facie evidence that notice was sent to those persons named in the
2 certificate. The board must send notice not later than 30 days before the close of the
3 public comment period prior to formal consideration of placement of the property in a
4 resource protection zone by the board. Upon request of the board, the municipality
5 for which the ordinance is being adopted shall provide the board with the names and
6 addresses of persons entitled to notice under this subsection. Notification and filing
7 of a certificate by the department are deemed to be notification and filing by the
8 board for purposes of this section.

9 C. Any action challenging the validity of an ordinance based on failure by the board
10 or municipality to comply with this subsection must be brought in Superior Court
11 within 30 days after adoption or amendment of the ordinance or map. The Superior
12 Court may invalidate an amended ordinance or map if the appellant demonstrates that
13 the appellant was entitled to receive notice under this subsection, that the
14 municipality or board failed to send notice as required, that the appellant had no
15 knowledge of the proposed adoption or amendment of the ordinance or map and that
16 the appellant was materially prejudiced by that lack of knowledge. This paragraph
17 does not alter the right of a person to challenge the validity of any ordinance or map
18 based on the failure of a municipality to provide notice as required by Title 30-A,
19 section 4352, subsection 9 or the failure of the board to provide notice as required by
20 this Title.

21 **2. Municipal ordinances.** In accordance with a schedule adopted by the board and
22 acting in accordance with a local comprehensive plan, municipalities shall prepare and
23 submit to the commissioner zoning and land use ordinances that are consistent with ~~or~~
24 and are no less or more stringent than the ~~minimum~~ guidelines adopted by the board and,
25 for coastal communities, that address the coastal management policies cited in section
26 1801. ~~When a municipality determines that special local conditions within portions of the~~
27 ~~shoreland zone require a different set of standards from those in the minimum guidelines,~~
28 ~~the municipality shall document the special conditions and submit them, together with its~~
29 ~~proposed ordinance provisions, to the commissioner for review and approval.~~

30 Notwithstanding section 435, a municipality may limit to 75 feet the shoreland zone
31 around a freshwater wetland that has not been rated by the Department of Inland Fisheries
32 and Wildlife as having moderate or high value ~~provided that~~ as long as the municipality
33 applies the requirements of this article regarding streams as defined under section 436-A
34 to any outlet stream from any freshwater wetland.

35 **3. Commissioner approval.** Municipal ordinances, amendments and any repeals of
36 ordinances are not effective unless approved by the commissioner. In determining
37 whether to approve municipal ordinances or amendments, the commissioner shall
38 consider the legislative purposes described in section 435, ~~the minimum and the~~
39 ~~guidelines and any special local conditions which, in the judgment of the commissioner,~~
40 ~~justify a departure from the requirements of the minimum guidelines in a manner not~~
41 ~~inconsistent with the legislative purposes described in section 435. Recognizing that the~~
42 ~~guidelines are intended as minimum standards, the commissioner shall approve a~~
43 ~~municipal ordinance that imposes more restrictive standards than those in the guidelines.~~
44 If an ordinance or an amendment adopted by a municipality contains standards
45 inconsistent with or more or less stringent than the ~~minimum~~ guidelines, the

1 commissioner, after notice to the municipality, may approve the proposed ~~ordinances~~
2 ordinance or amendment with conditions imposing the ~~minimum~~ guidelines in place of
3 the inconsistent or more or less stringent standard or standards. Those conditions are
4 effective and binding within the municipality and must be administered and enforced by
5 the municipality. If the commissioner fails to act on any proposed municipal ordinance
6 or amendment within 45 days of the commissioner's receipt of the proposed ordinance or
7 amendment, the ordinance or amendment is automatically approved. Any application for
8 a shoreland zoning permit submitted to a municipality within the 45-day period is
9 governed by the terms of the proposed ordinance or amendment if the ordinance or
10 amendment is approved under this subsection. A municipality may appeal to the board a
11 decision of the commissioner under this subsection.

12 **4. Failure to adopt ordinances.** If the commissioner determines, after notice to a
13 municipality, that the municipality has failed to adopt ordinances as required under this
14 article or that an ordinance that the municipality has adopted does not satisfy the
15 requirements and purposes under this article, and that the commissioner is unable to make
16 the ordinance consistent with the ~~minimum~~ guidelines by the imposition of conditions, as
17 set forth in subsection 3, then the commissioner shall request and the board may adopt,
18 acting in accordance with Title 5, chapter 375, subchapter ~~H~~ 2, suitable ordinances, or
19 suitable provisions of ordinances, on behalf of the municipality. Notwithstanding
20 subsections 2 and 3, if the board determines that special water quality considerations on a
21 great pond warrant more restrictive standards than those contained in the ~~minimum~~
22 guidelines, the board may adopt the additional standards for all municipalities outside the
23 jurisdiction of the Maine Land Use Regulation Commission, ~~which~~ that about those
24 waters. Following adoption by the board, these ordinances or provisions are effective and
25 binding within the municipality and must be administered and enforced by that
26 municipality. The board may adopt modifications to ordinances adopted pursuant to this
27 subsection. Preparation and notice of proposed modifications, prior to consideration by
28 the board, may be initiated by the commissioner.

29 **5. Exemptions.** Any areas within a municipality that are subject to nonmunicipal
30 zoning and land use controls may be exempted from the operation of this section upon a
31 finding by the commissioner that the purposes of this chapter have been accomplished by
32 nonmunicipal measures.

33 **6-A. Variances.** A copy of a request for a variance under an ordinance approved or
34 imposed by the commissioner or board under this article must be forwarded by the
35 municipality to the commissioner at least 20 days prior to action by the municipality. The
36 material submitted must include the application and all supporting information provided
37 by the applicant. The commissioner may comment when the commissioner determines
38 that the municipal issuance of the variance would not be in compliance with the
39 requirements of state law for a zoning variance or that the variance would undermine the
40 purposes stated in section 435. These comments, if submitted by the commissioner prior
41 to the action by the municipality, must be made part of the record and must be considered
42 by the municipality prior to taking action on the variance request.

43 **7. Exclusion of recreational boat storage buildings.** Notwithstanding subsection
44 3, the exclusion of recreational boat storage buildings from the definition of "functionally

1 water-dependent uses" is deemed to be incorporated into each municipal shoreland
2 zoning ordinance on the effective date of this subsection, regardless of any prior approval
3 of the ordinance by the commissioner.

4 **Sec. 3. 38 MRSA §439-A, sub-§4-A, ¶E**, as amended by PL 1999, c. 243, §7, is
5 further amended to read:

6 E. A municipality may permit an expansion that causes the maximum floor area
7 limits established in paragraph C to be exceeded by not more than 500 square feet if:

8 (1) The principal structure is set back at least 50 feet from the normal high-
9 water line or upland edge of a wetland;

10 (2) An existing well-distributed stand of trees and other vegetation, as defined in
11 the ~~minimum~~ guidelines adopted by the Board of Environmental Protection,
12 extends at least 50 feet inland from the normal high-water line or upland edge of
13 a wetland for the entire width of the property or, if such a stand is not present, a
14 written plan by the property owner to reestablish a buffer of native trees, shrubs
15 and other ground cover within 50 feet of the normal high-water line or upland
16 edge of a wetland is approved by the municipal planning board. The plan must
17 be implemented at the time of construction and must be designed to meet the
18 ~~minimum~~ guidelines adopted by the Board of Environmental Protection as the
19 vegetation matures. Rules adopted pursuant to this subparagraph are routine
20 technical rules pursuant to Title 5, chapter 375, subchapter ~~H-A 2-A~~; and

21 (3) The municipal planning board approves a written mitigation plan. The plan
22 must be developed, implemented and maintained by the property owner. A
23 mitigation plan must provide for the following mitigation measures.

24 (a) Unstabilized areas resulting in soil erosion must be mulched, seeded or
25 otherwise stabilized and maintained to prevent further erosion and
26 sedimentation to water bodies and wetlands.

27 (b) Roofs and associated drainage systems, driveways, parking areas and
28 other nonvegetated surfaces must be designed or modified, as necessary, to
29 prevent concentrated flow of storm water runoff from reaching a water body
30 or wetland. Where possible, runoff must be directed through a vegetated area
31 or infiltrated into the soil through the use of a dry well, stone apron or similar
32 device.

33 The written plans required pursuant to subparagraphs 2 and 3 must be filed in the
34 registry of deeds of the county in which the property is located.

35 A copy of all permits issued pursuant to this paragraph must be forwarded by the
36 municipality to the department within 14 days of the issuance of the permit.

37 SUMMARY

38 This bill prohibits municipalities from adopting shoreland zoning ordinances that are
39 more stringent than state guidelines. Under current law, municipalities are authorized to
40 adopt ordinances that are consistent with or more stringent than minimum state
41 guidelines.