APPENDIX I – SUBDIVISIONS

I-1 30-A M.R.S.A. § 4401 et seq. (Municipal Subdivision Law)

I-2 38 M.R.S.A §§ 482, 488 (excerpts of Site Location of Development Law)

I-3 Maine Townsman legal note, "Amended Site Law", (September 1996)

I-4 Maine Townsman legal note, "Planning Board Review: Final Subdivision Plans Requirement of Seal", (July 1992)

I-5 Maine Townsman legal note, "Important Information to Include on an Approved Subdivision Plan", (July 1994)

I-6 Maine Townsman legal note, "Law Court Interprets Municipal Subdivision Law", (August/September 1994)

I-7 Maine Townsman legal note, "Protection for Old Illegal Subdivisions", (August/September 1997)

I-8 Maine Townsman legal note, "Joint Subdivision Jurisdiction Upheld", (June 1998)

I-9 Maine Municipal Association article, Paper Streets – Recent Amendment to the Law, (August 1997)

I-10 Maine Townsman legal note, "Subdivision Taking Claim Denied", (May 1998)

I-11 Maine Townsman legal note, "What Constitutes 'Intent To Avoid' Subdivision Law", (January, 2004)

SUBDIVISIONS - SUBCHAPTER IV

30A § 4401. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Densely developed area. "Densely developed area" means any commercial, industrial or compact residential area of 10 or more acres with an existing density of at least one principal structure per 2 acres.

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

2-A. Freshwater wetland. "Freshwater wetland" means freshwater swamps, marshes, bogs and similar areas which are:

A. Inundated or saturated by surface or ground water at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils; and

B. Not considered part of a great pond, coastal wetland, river, stream or brook.

These areas may contain small stream channels or inclusions of land that do not conform to the criteria of this subsection.

3. Principal structure. "Principal structure" means any building or structure in which the main use of the premises takes place.

4. Subdivision. "Subdivision" means the division of a tract or parcel of land into 3 or more lots within any 5-year period that begins on or after September 23, 1971. This definition applies whether the division is accomplished by sale, lease, development, buildings or otherwise. The term "subdivision" also includes the division of a new structure or structures on a tract or parcel of land into 3 or more dwelling units within a 5-year period, the construction or placement of 3 or more dwelling units on a single tract or parcel of land and the division of an existing structure or structures previously used for commercial or industrial use into 3 or more dwelling units within a 5-year period.

A. In determining whether a tract or parcel of land is divided into 3 or more lots, the first dividing of the tract or parcel is considered to create the first 2 lots and the next dividing of either of these first 2 lots, by whomever accomplished, is considered to create a 3rd lot, unless:

(1) Both dividings are accomplished by a subdivider who has retained one of the lots for the subdivider's own use as a single-family residence that has been the subdivider's principal residence for a period of at least 5 years immediately preceding the 2nd division; or

(2) The division of the tract or parcel is otherwise exempt under this subchapter.

B. The dividing of a tract or parcel of land and the lot or lots so made, which dividing or lots when made are not subject to this subchapter, do not become subject to this subchapter by the subsequent dividing of that tract or parcel of land or any portion of that tract or parcel. The municipal reviewing authority shall consider the existence of the previously created lot or lots in reviewing a proposed subdivision created by a subsequent dividing.

C. A lot of 40 or more acres must be counted as a lot, except:

(1) Repealed

(2) When a municipality has, by ordinance, or the municipal reviewing authority has, by regulation, elected to count lots of 40 or more acres as lots for the purposes of this subchapter when the parcel of land being divided is located entirely outside any shoreland area as defined in Title 38, section 435, or a municipality's shoreland zoning ordinance.

D-1. A division accomplished by devise does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.

D-2. A division accomplished by condemnation does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.

D-3. A division accomplished by order of court does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.

D-4. A division accomplished by gift to a person related to the donor of an interest in property held by the donor for a continuous period of 5 years prior to the division by gift does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph is transferred within 5 years to another person not related to the donor of the exempt real estate as provided in this paragraph, then the previously exempt division creates a lot or lots for the purposes of this subsection. "Person related to the donor" means a spouse, parent, grandparent, brother, sister, child or grandchild related by blood, marriage or adoption. A gift under this paragraph can not be given for consideration that is more than 1/2 the assessed value of the real estate.

D-5. A division accomplished by a gift to a municipality does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.

D-6. A division accomplished by the transfer of any interest in land to the owners of land abutting that land that does not create a separate lot does not create a lot or lots for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter. If the real estate exempt under this paragraph is transferred within 5 years to another person without all of the merged land, then the previously exempt division creates a lot or lots for the purposes of this subsection.

E. The division of a tract or parcel of land into 3 or more lots and upon each of which lots permanent dwelling structures legally existed before September 23, 1971 is not a subdivision.

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

G. Notwithstanding the provisions of this subsection, leased dwelling units are not subject to subdivision review if the municipal reviewing authority has determined that the units are otherwise subject to municipal review at least as stringent as that required under this subchapter.

~~H. Nothing in this subchapter may be construed to prevent a municipality from enacting an ordinance under its home rule authority that:~~

~~(1) Expands the definition of subdivision to include the division of a structure for commercial or industrial use; or~~

~~(2) Otherwise regulates land use activities.~~

~~A municipality may not enact an ordinance that expands the definition of subdivision except as provided in this subchapter.~~

This paragraph was repealed October 1, 2002.

H-1. This subchapter may not be construed to prevent a municipality from enacting an ordinance under its home rule authority that:

(1) Expands the definition of "subdivision: to include the division of a structure for commercial or industrial use; or

(2) Otherwise regulates land use activities.

A municipality may not enact an ordinance that expands the definition of "subdivision" except as provided in this subchapter. A municipality that has a definition of "subdivision" that conflicts with the requirements of this subsection at the time this paragraph takes effect shall comply with this subsection no later than January 1, 2006. Such a municipality must file its conflicting definition at the county registry of deeds by June 30, 2003 for the definition to remain valid for the grace period ending January 1, 2006. A filing required under this paragraph must be collected and indexed in a separate book in the registry of deeds for the county in which the municipality is located.

I. The grant of a bona fide security interest in an entire lot that has been exempted from the definition of subdivision under paragraphs D-1 to D-6, or subsequent transfer of that entire lot by the original holder of the security interest or that person's successor in interest, does not create a lot for the purposes of this definition, unless the intent of the transferor is to avoid the objectives of this subchapter.

5. New structure or structures. "New structure or structures" includes any structure for which construction begins on or after September 23, 1988. The area included in the expansion of an existing structure is deemed to be a new structure for the purposes of this subchapter.

6. Tract or parcel of land. "Tract or parcel of land" means all contiguous land in the same ownership, provided that lands located on opposite sides of a public or private road are considered each a separate tract or parcel of land unless the road was established by the owner of land on both sides of the road.

7. Outstanding river segments. In accordance with Title 12, section 402, "outstanding river segments" means:

A. The Aroostook River from the Canadian border to the Masardis and T.10, R.6, W.E.L.S. town line, excluding the segment in T.9, R.5, W.E.L.S.;

B. The Carrabassett River from the Kennebec River to the Carrabassett Valley and Mt. Abram Township town line;

C. The Crooked River from its inlet into Sebago Lake to the Waterford and Albany Township town line;

D. The Damariscotta River from the Route 1 bridge in Damariscotta to the dam at Damariscotta Mills;

E. The Dennys River from the Route 1 bridge to the outlet of Meddybemps Lake, excluding the western shore in Edmunds Township and No. 14 Plantation;

F. The East Machias River, including the Maine River, from 1/4 of a mile above the Route 1 bridge to the East Machias and T.18, E.D., B.P.P. town line, from the T.19, E.D., B.P.P. and Wesley town line to the outlet of Crawford Lake, and from the No. 21 Plantation and Alexander town line to the outlet of Pocomoonshine Lake, excluding Hadley Lake, Lower Mud Pond and Upper Mud Pond;

G. The Fish River from the bridge at Fort Kent Mills to the Fort Kent and Wallagrass Plantation town line, from the T.16, R.6, W.E.L.S. and Eagle Lake town line to the Eagle Lake and Winterville Plantation town line, and from the T.14, R.6, W.E.L.S. and Portage Lake town line to the Portage Lake and T.13, R.7, W.E.L.S. town line, excluding Portage Lake;

H. The Kennebago River from its inlet into Cupsuptic Lake to the Rangeley and Lower Cupsuptic Township town line;

I. The Kennebec River from Thorns Head Narrows in North Bath to the Edwards Dam in Augusta, excluding Perkins Township, and from the Route 148 bridge in Madison to the Caratunk and The Forks Plantation town line, excluding the western shore in Concord Township, Pleasant Ridge Plantation and Carrying Place Township and excluding Wyman Lake;

J. The Machias River from the Route 1 bridge to the Northfield and T.19, M.D., B.P.P. town line;

K. The Mattawamkeag River from the Penobscot River to the Mattawamkeag and Kingman Township town line, and from the Reed Plantation and Bancroft town line to the East Branch in Haynesville;

L. The Narraguagus River from the ice dam above the railroad bridge in Cherryfield to the Beddington and Devereaux Township town lines, excluding Beddington Lake;

M. The Penobscot River, including the Eastern Channel, from Sandy Point in Stockton Springs to the Veazie Dam and its tributary the East Branch of the Penobscot from the Penobscot River to the East Millinocket and Grindstone Township town line;

N. The Piscataquis River from the Penobscot River to the Monson and Blanchard Plantation town line;

O. The Pleasant River from the bridge in Addison to the Columbia and T.18, M.D., B.P.P. town line, and from the T.24, M.D., B.P.P. and Beddington town line to the outlet of Pleasant River Lake;

P. The Rapid River from the Magalloway Plantation and Upton town line to the outlet of Pond in the River;

Q. The Saco River from the Little Ossipee River to the New Hampshire border;

R. The St. Croix River from the Route 1 bridge in Calais to the Calais and Baring Plantation town line, from the Baring Plantation and Baileyville town line to the Baileyville and Fowler Township town line, and from the Lambert Lake Township and Vanceboro town line to the outlet of Spednik Lake, excluding Woodland Lake and Grand Falls Flowage;

S. The St. George River from the Route 1 bridge in Thomaston to the outlet of Lake St. George in Liberty, excluding White Oak Pond, Seven Tree Pond, Round Pond, Sennebec Pond, Trues Pond, Stevens Pond and Little Pond;

T. The St. John River from the Van Buren and Hamlin Plantation town line to the Fort Kent and St. John Plantation town line, and from the St. John Plantation and St. Francis town line to the Allagash and St. Francis town line;

U. The Sandy River from the Kennebec River to the Madrid and Township E town line;

V. The Sheepscot River from the railroad bridge in Wiscasset to the Halldale Road in Montville, excluding Long Pond and Sheepscot Pond, including its tributary the West Branch of the Sheepscot from its confluence with the Sheepscot River in Whitefield to the outlet of Branch Pond in China;

W. The West Branch of the Pleasant River from the East Branch in Brownville to the Brownville and Williamsburg Township town line; and

X. The West Branch of the Union River from the Route 181 bridge in Mariaville to the outlet of Great Pond in the Town of Great Pond.

30A § 4402. Exceptions

This subchapter does not apply to:

1. Previously approved subdivisions. Proposed subdivisions approved by the planning board or the municipal officials before September 23, 1971 in accordance with laws then in effect;

2. Previously existing subdivisions. Subdivisions in actual existence on September 23, 1971 that did not require approval under prior law;

3. Previously recorded subdivisions. A subdivision, a plan of which had been legally recorded in the proper registry of deeds before September 23, 1971;

4. Airports with an approved airport layout plan. Any airport with an airport layout plan that has received final approval from the airport sponsor, the Department of Transportation and the Federal Aviation Administration; or

5. Subdivisions in existence for at least 20 years. A subdivision in violation of this subchapter that has been in existence for 20 years or more, except a subdivision:

A. That has been enjoined pursuant to section 4406;

B. For which approval was expressly denied by the municipal reviewing authority, and record of the denial was recorded in the appropriate registry of deeds;

C. For which a lot owner was denied a building permit under section 4406, and record of the denial was recorded in the appropriate registry of deeds; or

D. That has been the subject of an enforcement action or order, and record of the action or order was recorded in the appropriate registry of deeds.

30A § 4403. Municipal review and regulation

This section governs municipal review of proposed subdivisions.

1. Municipal reviewing authority. The municipal reviewing authority shall review all requests for subdivision approval. On all matters concerning subdivision review, the municipal reviewing authority shall maintain a permanent record of all its meetings, proceedings and correspondence.

1-A. Joint meetings. If any portion of a subdivision crosses municipal boundaries, all meetings and hearings to review the application must be held jointly by the reviewing authorities from each municipality. All meetings and hearings to review an application under section 4407 for a revision or amendment to a subdivision that crosses municipal boundaries must be held jointly by the reviewing authorities from each municipality. In addition to other review criteria, the reviewing authorities shall consider and make a finding of fact regarding the criteria described in section 4404, subsection 19.

The reviewing authorities in each municipality, upon written agreement, may waive the requirement under this subsection for any joint meeting or hearing.

2. Regulations; review procedure. The municipal reviewing authority may, after a public hearing, adopt, amend or repeal additional reasonable regulations governing subdivisions which shall control until amended, repealed or replaced by regulations adopted by the municipal legislative body. The municipal reviewing authority shall give at least 7 days' notice of this hearing.

A. The regulations may provide for a multi-stage application or review procedure consisting of no more than 3 stages:

(1) Preapplication sketch plan;

(2) Preliminary plan; and

(3) Final plan.

Each stage must meet the time requirements of subsections 4 and 5. [1989, c. 104, Pt. A, §45 and Pt. C, §10 (new).]

3. Application; notice; completed application. This subsection governs the procedure to be followed after receiving an application for a proposed subdivision.

A. When an application is received, the municipal reviewing authority shall give a dated receipt to the applicant and shall notify by mail all abutting property owners of the proposed subdivision, and the clerk and the reviewing authority of municipalities that abut or include any portion of the subdivision, specifying the location of the proposed subdivision and including a general description of the project.

B. Within 30 days after receiving an application, the municipal reviewing authority shall notify the applicant in writing either that the application is complete or, if the application is incomplete, the specific additional material needed to complete the application.

C. After the municipal reviewing authority has determined that a complete application has been filed, it shall notify the applicant and begin its full evaluation of the proposed subdivision.

D. The municipal reviewing authority may not accept or approve final plans or final documents prepared within the meaning and intent of Title 32, chapter 121 that are not sealed and signed by the professional land surveyor under whose responsible charge they were completed, as provided in Title 32, section 13907.

4. Public hearing; notice. If the municipal reviewing authority decides to hold a public hearing on an application for subdivision approval, it shall hold the hearing within 30 days after determining it has received a complete application. The municipal reviewing authority shall have notice of the date, time and place of the hearing:

A. Given to the applicant; and

B. Published, at least 2 times, in a newspaper having general circulation in the municipality in which the subdivision is proposed to be located. The date of the first publication must be at least 7 days before the hearing.

5. Decision; time limits. The municipal reviewing authority shall, within 30 days of a public hearing or, if no hearing is held, within 60 days of determining it has received a complete application or within any other time limit that is otherwise mutually agreed to, issue an order:

A. Denying approval of the proposed subdivision;

B. Granting approval of the proposed subdivision; or

C. Granting approval upon any terms and conditions that it considers advisable to:

(1) Satisfy the criteria listed in section 4404;

(2) Satisfy any other regulations adopted by the reviewing authority; and

(3) Protect and preserve the public's health, safety and general welfare.

6. Burden of proof; findings of fact. In all instances, the burden of proof is upon the person proposing the subdivision. In issuing its decision, the reviewing authority shall make findings of fact establishing that the proposed subdivision does or does not meet the criteria described in subsection 5.

7. Conditioned on variance. If the initial approval or any subsequent amendment of a subdivision is based in part on the granting of a variance, the subdivider must comply with section 4406, subsection 1, paragraph B.

30A § 4404. Review criteria

When adopting any subdivision regulations and when reviewing any subdivision for approval, the municipal reviewing authority shall consider the following criteria and, before granting approval, must determine that:

1. Pollution. The proposed subdivision will not result in undue water or air pollution. In making this determination, it shall at least consider:

A. The elevation of the land above sea level and its relation to the flood plains;

B. The nature of soils and subsoils and their ability to adequately support waste disposal;

C. The slope of the land and its effect on effluents;

D. The availability of streams for disposal of effluents; and

E. The applicable state and local health and water resource rules and regulations;

2. Sufficient water. The proposed subdivision has sufficient water available for the reasonably foreseeable needs of the subdivision;

3. Municipal water supply. The proposed subdivision will not cause an unreasonable burden on an existing water supply, if one is to be used;

4. Erosion. The proposed subdivision will not cause unreasonable soil erosion or a reduction in the land's capacity to hold water so that a dangerous or unhealthy condition results;

5. Traffic. The proposed subdivision will not cause unreasonable highway or public road congestion or unsafe conditions with respect to the use of the highways or public roads existing or proposed;

6. Sewage disposal. The proposed subdivision will provide for adequate sewage waste disposal and will not cause an unreasonable burden on municipal services if they are utilized;

7. Municipal solid waste disposal. The proposed subdivision will not cause an unreasonable burden on the municipality's ability to dispose of solid waste, if municipal services are to be utilized;

8. Aesthetic, cultural and natural values. The proposed subdivision will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, significant wildlife habitat identified by the Department of Inland Fisheries and Wildlife or the municipality, or rare and irreplaceable natural areas or any public rights for physical or visual access to the shoreline;

9. Conformity with local ordinances and plans. The proposed subdivision conforms with a duly adopted subdivision regulation or ordinance, comprehensive plan, development plan or land use plan, if any. In making this determination, the municipal reviewing authority may interpret these ordinances and plans;

10. Financial and technical capacity. The subdivider has adequate financial and technical capacity to meet the standards of this section;

11. Surface waters; outstanding river segments. Whenever situated entirely or partially within the watershed of any pond or lake or within 250 feet of any wetland, great pond or river as defined in Title 38, chapter 3, subchapter I, article 2-B, the proposed subdivision will not adversely affect the quality of that body of water or unreasonably affect the shoreline of that body of water.

A. When lots in a subdivision have frontage on an outstanding river segment, the proposed subdivision plan must require principal structures to have a combined lot shore frontage and setback from the normal high-water mark of 500 feet.

(1) To avoid circumventing the intent of this provision, whenever a proposed subdivision adjoins a shoreland strip narrower than 250 feet which is not lotted, the proposed subdivision shall be reviewed as if lot lines extended to the shore.

(2) The frontage and set-back provisions of this paragraph do not apply either within areas zoned as general development or its equivalent under shoreland zoning, Title 38, chapter 3, subchapter I, article 2-B, or within areas designated by ordinance as densely developed. The determination of which areas are densely developed must be based on a finding that existing development met the definitional requirements of section 4401, subsection 1, on September 23, 1983;

12. Ground water. The proposed subdivision will not, alone or in conjunction with existing activities, adversely affect the quality or quantity of ground water;

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

14. Freshwater wetlands. All freshwater wetlands within the proposed subdivision have been identified on any maps submitted as part of the application, regardless of the size of these wetlands. Any mapping of freshwater wetlands may be done with the help of the local soil and water conservation district;

15. River, stream or brook. Any river, stream or brook within or abutting the proposed subdivision has been identified on any maps submitted as part of the application. For purposes of this section, "river, stream or brook" has the same meaning as in Title 38, section 480-B, subsection 9;

16. Storm water. The proposed subdivision will provide for adequate storm water management;

17. Spaghetti-lots prohibited. If any lots in the proposed subdivision have shore frontage on a river, stream, brook, great pond or coastal wetland as these features are defined in Title 38, section 480-B, none of the lots created within the subdivision have a lot depth to shore frontage ratio greater than 5 to 1;

18. Lake phosphorus concentration. The long-term cumulative effects of the proposed subdivision will not unreasonably increase a great pond's phosphorus concentration during the construction phase and life of the proposed subdivision; and

19. Impact on adjoining municipality. For any proposed subdivision that crosses municipal boundaries, the proposed subdivision will not cause unreasonable traffic congestion or unsafe conditions with respect to the use of existing public ways in an adjoining municipality in which part of the subdivision is located.

30A § 4405. Access to direct sunlight

The municipal reviewing authority may, to protect and ensure access to direct sunlight for solar energy systems, prohibit, restrict or control development through subdivision regulations. The regulations may call for subdivision development plans containing restrictive covenants, height restrictions, side yard and set-back requirements or other permissible forms of land use controls.

30A § 4406. Enforcement; prohibited activities

The Attorney General, the municipality or the planning board of any municipality may institute proceedings to enjoin a violation of this subchapter.

1. Sales or other conveyances. No person may sell, lease, develop, build upon or convey for consideration, or offer or agree to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision that has not been approved by the municipal reviewing authority of the municipality where the subdivision is located and approved under Title 38, chapter 3, subchapter I, article 6, where applicable, and subsequently recorded in the proper registry of deeds.

A. No register of deeds may record any subdivision plat or plan that has not been approved under this subchapter. Approval for the purpose of recording must appear in writing on the plat or plan. All subdivision plats and plans required by this subchapter must contain the name and address of the person under whose responsibility the subdivision plat or plan was prepared.

B. Whenever the initial approval or any subsequent amendment of a subdivision is based in part on the granting of a variance from any applicable subdivision approval standard, that fact must be expressly noted on the face of the subdivision plan to be recorded in the registry of deeds.

(1) In the case of an amendment, if no amended plan is to be recorded, a certificate must be prepared in recordable form and recorded in the registry of deeds. This certificate must:

(a) Indicate the name of the current property owner;

(b) Identify the property by reference to the last recorded deed in its chain of title; and

(c) Indicate the fact that a variance, including any conditions on the variance, has been granted and the date of the granting.

(2) The variance is not valid until recorded as provided in this paragraph. Recording must occur within 90 days of the final subdivision approval or approval under Title 38, chapter 3, subchapter I, article 6, where applicable, whichever date is later, or the variance is void.

B-1. Whenever the subdivision is exempt from Title 38, chapter 3, subchapter I, article 6, because of the operation of Title 38, section 488, subsection 5, that fact must be expressly noted on the face of the subdivision plan to be recorded in the registry of deeds. The developable land, as defined in Title 38, section 488, subsection 5, must be indicated on the plan. The person submitting the plan for recording shall prepare a sworn certificate in recordable form and record it in the registry of deeds. This certificate must:

(1) Indicate the name of the current property owner;

(2) Identify the property by reference to the last recorded deed in its chain of title and by reference to the subdivision plan;

(3) Indicate that an exemption from Title 38, chapter 3, subchapter I, article 6, has been exercised;

(4) Indicate that the requirements of Title 38, section 488, subsection 5, have been and will be satisfied; and

(5) Indicate the date of notification of the Department of Environmental Protection under Title 38, section 488, subsection 5.

The exemption is not valid until recorded as provided in this paragraph. Recording must occur within 90 days of the final subdivision approval under this subchapter or the exemption is void.

C. A building inspector may not issue any permit for a building or use within a land subdivision unless the subdivision has been approved under this subchapter and under Title 38, chapter 3, subchapter I, article 6, where applicable.

D. Any person who sells, leases, develops, builds upon, or conveys for consideration, offers or agrees to sell, lease, develop, build upon or convey for consideration any land or dwelling unit in a subdivision that has not been approved under this subchapter and under Title 38, chapter 3, subchapter I, article 6, where applicable, shall be penalized in accordance with section 4452.

E. Any person who, after receiving approval from the municipal reviewing authority or approval under Title 38, chapter 3, subchapter I, article 6 and recording the plan at the registry of deeds, constructs or develops the subdivision or transfers any lot in a manner other than depicted on the approved plans or amendments or in violation of any condition imposed by the municipal reviewing authority or the Department of Environmental Protection, when applicable, must be penalized in accordance with section 4452.

F. Any person who sells, leases or conveys for consideration any land or dwelling unit in a subdivision approved under this subchapter and exempt from Title 38, chapter 3, subchapter I, article 6, because of the operation of Title 38, section 488, subsection 5, shall include in the instrument of sale, lease or conveyance a covenant to the transferee that all of the requirements of Title 38, section 488, subsection 5, have been and will be satisfied.

2. Permanent marker required. No person may sell or convey any land in an approved subdivision unless at least one permanent marker is set at one lot corner of the lot sold or conveyed. The term "permanent marker" includes, but is not limited to, the following:

A. A granite monument;

B. A concrete monument;

C. An iron pin; or

D. A drill hole in ledge.

3. Utility installation. A public utility, water district, sanitary district or any utility company of any kind may not install services to any lot or dwelling unit in a subdivision, unless written authorization attesting to the validity and currency of all local permits required under this chapter has been issued by the appropriate municipal officials or other written arrangements have been made between the municipal officers and the utility, except that if a public utility, water district, sanitary district or utility company of any kind has installed services to a lot or dwelling unit in a subdivision in accordance with this subsection, a subsequent public utility, water district, sanitary district or utility company of any kind may install services to the lot or dwelling unit in a subdivision without first receiving written authorization pursuant to this section.

4. Permit display. A person issued a permit pursuant to this subchapter in a great pond watershed shall have a copy of the permit on site while work authorized by the permit is being conducted.

30A § 4407. Revisions to existing plat or plan

Any application for subdivision approval which constitutes a revision or amendment to a subdivision plan which has been previously approved shall indicate that fact on the application and shall identify the original subdivision plan being revised or amended. In reviewing such an application, the municipal reviewing authority shall make findings of fact establishing that the proposed revisions do or do not meet the criteria of section 4404.

1. Recording. If a subdivision plat or plan is presented for recording to a register of deeds and that plat or plan is a revision or amendment to an existing plat or plan, the register shall:

A. Indicate on the index for the original plat or plan that it has been superseded by another plat or plan;

B. Reference the book and page or cabinet and sheet on which the new plat or plan is recorded; and

C. Ensure that the book and page or cabinet and sheet on which the original plat or plan is recorded is referenced on the new plat or plan.

SITE LOCATION OF DEVELOPMENT

Title 38 § 482. Definitions

As used in this article, unless the context otherwise indicates, the following terms have the following meanings.

1. Board. Repealed

1-A. Borrow pit. "Borrow pit" means a mining operation undertaken primarily to extract and remove sand, fill or gravel. "Borrow pit" does not include any mining operation undertaken primarily to extract or remove rock or clay.

2. Development of state or regional significance that may substantially affect the environment. "Development of state or regional significance that may substantially affect the environment," in this article also called "development," means any federal, state, municipal, quasi-municipal, educational, charitable, residential, commercial or industrial development that:

A. Occupies a land or water area in excess of 20 acres;
B. Is a metallic mineral mining or advanced exploration activity as defined in this section or an oil or gas exploration or production activity that includes drilling or excavation under water;
C. Is a structure as defined in this section;
D. Is a subdivision as defined in this section; or
E. Repealed
F. Is an oil terminal facility as defined in this section.
F. Repealed
G. Repealed
H. Repealed
I. Repealed

2-A. Exploration. Repealed

2-B. Metallic mineral mining or advanced exploration activity. "Metallic mineral mining or advanced exploration activity," in this article also called "mining," means an activity or process necessary for the extraction or removal of metallic minerals or overburden or for the preparation, washing, cleaning or other treatment of metallic minerals and includes the bulk sampling, extraction or beneficiation of metallic minerals, not including test sampling methods conducted in accordance with rules adopted by the department such as test boring, test drilling, hand sampling and digging of test pits with a limited maximum surface opening or methods determined by the department to cause minimal disturbance of soil or vegetative cover.

2-C. Hazardous activity. Repealed

2-D. Multi-unit housing. Repealed

2-E. Coastal wetlands. "Coastal wetlands" has the same meaning as in section 480-B, subsection 2.

2-F. Freshwater wetlands. "Freshwater wetlands" has the same meaning as in section 480-B, subsection 4.

3. Natural environment of a locality. Repealed

3-A. Overburden. "Overburden" means earth and other materials naturally lying over the product to be mined.

3-B. Normal high-water line. "Normal high-water line" has the same meaning as in section 480-B, subsection 6.

3-C. Passenger car equivalents at peak hour. Repealed

3-D. Oil terminal facility. "Oil terminal facility" means a facility and related appurtenances located in, on, over or under the surface of any land or water that is used or capable of being used to transfer, process, refine or store oil as defined in section 542, subsection 6. "Oil terminal facility" does not include:

A. A facility used or capable of being used to store less than 1,500 barrels or 63,000 gallons of oil;
B. A facility not engaged in the transfer of oil to or from the waters of the State; or
C. A facility consisting only of a vessel or vessels as defined in section 542, subsection 11.

4. Person. "Person" means any person, firm, association, partnership, corporation, municipal or other local governmental entity,
quasi-municipal entity, state agency, federal agency, educational or charitable organization or institution or other legal entity.

4-A. Product. Repealed

4-B. Reclamation. "Reclamation" means the rehabilitation of the area of land affected by mining under a plan approved by the department, including, but not limited to, the stabilization of slopes and creation of safety benches, the planting of forests, the seeding of grasses and legumes for grazing purposes, the planting of crops for harvest and the enhancement of wildlife and aquatic resources, but not including the filling in of pits and the filling or sealing of shafts and underground workings with solid materials unless necessary for protection of ground water or safety.

4-C. Primary sand and gravel recharge areas. Repealed

4-D. Significant ground water aquifer. "Significant ground water aquifer" means a porous formation of ice-contact and glacial outwash sand and gravel or fractured bedrock that contains significant recoverable quantities of water which is likely to provide drinking water supplies.

4-E. River, stream or brook. "River, stream or brook" has the same meaning as in section 480-B, subsection 9.

4-F. Shoreland zone. "Shoreland zone" has the same meaning as "shoreland areas" in section 435. Terms used within this definition have the same meanings as in section 436-A.

5. Subdivision. A "subdivision" is the division of a parcel of land into 5 or more lots to be offered for sale or lease to the general public during any 5-year period, if the aggregate land area includes more than 20 acres; except that when all lots are for single-family, detached, residential housing, common areas or open space a "subdivision" is the division of a parcel of land into 15 or more lots to be offered for sale or lease to the general public within any 5-year period, if the aggregate land area includes more than 30 acres. The aggregate land area includes lots to be offered together with the roads, common areas, easement areas and all portions of the parcel of land in which rights or interests, whether express or implied, are to be offered. This definition of "subdivision" is subject to the following exceptions:

A. Repealed
B. Repealed
C. Lots of 40 or more acres but not more than 500 acres may not be counted as lots except where:

(1) The proposed subdivision is located wholly or partly within the shoreland zone;

C-1. Lots of more than 500 acres in size may not be counted as lots;
D. Five years after a subdivider establishes a single-family residence for that subdivider's own use on a parcel and actually uses all or part of the parcel for that purpose during that period, a lot containing that residence may not be counted as a lot;
E. Unless intended to circumvent this article, the following transactions may not be considered lots offered for sale or lease to the
general public:

(1) Sale or lease of lots to an abutting owner or to a spouse, child, parent, grandparent or sibling of the developer if those lots are not further divided or transferred to a person not so related to the developer within a 5-year period, except as provided in this
subsection;
(2) Personal, nonprofit transactions, such as the transfer of lots by gift, if those lots are not further divided or transferred within a 5-year period or the transfer of lots by devise or inheritance; or
(3) Grant of a bona fide security interest in the whole lot or subsequent transfer of the whole lot by the original holder of the bona fide security interest or that person's successor in interest;

F. In those subdivisions that would otherwise not require site location approval, unless intended to circumvent this article, the following transactions may not, except as provided, be considered lots offered for sale or lease to the general public:
(1) Sale or lease of common lots created with a conservation easement as defined in Title 33, section 476, provided that the department is made a party; and
G. Repealed
G-1. Repealed
H. The transfer of contiguous land by a permit holder to the owner of a lot within a permitted subdivision is exempt from review under this article, provided that the land was not owned by the permit holder at the time the department approved the subdivision.
Further division of the transferred land must be reviewed under this article.

The exception described in paragraph F does not apply, and the subdivision requires site location approval, whenever the use of a lot described in paragraph F changes or the lot is offered for sale or lease to the general public without the limitations set forth in paragraph F.

For the purposes of this subsection only, a parcel of land is defined as all contiguous land in the same ownership provided that lands located on opposite sides of a public or private road are considered each a separate parcel of land unless that road was established by the
owner of land on both sides of the road subsequent to January 1, 1970. A lot to be offered for sale or lease to the general public is counted, for purposes of determining jurisdiction, from the time a municipal subdivision plan showing that lot is recorded or the lot is sold or leased, whichever occurs first, until 5 years after that recording, sale or lease.

6. Structure. A "structure" means:

A. Repealed

B. Buildings, parking lots, roads, paved areas, wharves or areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 3 acres. Stripped or graded areas that are not revegetated within a calendar year are included in calculating the 3-acre threshold.

7. Storage facility. Repealed, 1997

Question: We have heard that the Site Location of Development Act (38 M.R.S.A. § 481 et seq.), which requires review by the Department of Environmental Protection for certain large land use activities, was amended recently to shift more review responsibilities to municipalities. Can you summarize the effect on municipalities?

Answer: Effective **July 1, 1997,** in municipalities which are "deemed to have review capacity" by DEP, the following types of projects will be reviewed only by the municipality under its local ordinances and they will be exempt from review by DEP under the Site Location Act: (1) "structures" which are between 3 and 7 acres in size ("structure" is defined in 38 M.R.S.A. §482 (6) (B) as "buildings, parking lots, roads, paved areas, wharves, or areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 3 acres"; including "stripped or graded areas that are not revegetated within a calendar year"); (2) residential subdivisions (detached single family units) of 15 or more lots that have a total land area of between 30 and 100 acres. Title 38, section 488 (19) provides a process for petitioning for DEP review in certain cases. [Note: Effective **July 4, 1996,** the Site Location Act totally exempts from DEP review residential subdivisions of up to 15 lots created in a 5 year period that occupy a total land area of up to 30 acres. These subdivisions need only municipal review under 30-A M.R.S.A. § 4401 et seq. regardless of whether they occur in a municipality deemed to have "capacity" to review them.]

A municipality is deemed to have "capacity" under 38 M.R.S.A. §488 (19) if DEP has delegated its review authority to the municipality pursuant to 38 M.R.S.A. §489-A or if it meets the following criteria:

- The municipality has a planning board and has adequate resources to administer and enforce its ordinances;
- The municipality has adopted a site plan review ordinance deemed adequate by DEP; and
- The municipality has adopted subdivision regulations deemed adequately by DEP.

DEP is required to publish a list of municipalities deemed to have "capacity" which it must develop in consultation with the State Planning Office. If a list is not published by **January 1, 1997,** all municipalities which have adopted a site plan or subdivision ordinance or regulations are automatically deemed to have "capacity" until January 1, 1998 or until the required list is published by DEP, whichever is later. The DEP list must indicate whether the municipality has "capacity" to review "structures," "subdivisions" or both. As of **January 1, 2003,** municipalities with a population of 2500 or more (based on the U.S. Census for the year 2000) are automatically deemed to have review capacity and the projects described above will be exempt from DEP review under the Site Law Location Act, whether or not the municipality has adopted site plan review and subdivision ordinances. *(By R.W.S.)*

Planning Board Review: Final Subdivision Plans Requirement of Seal

In light of two laws enacted by the Legislature within the last few years, applicants for subdivision review who present plans, preliminary or final, which have been prepared by or under the change of a professional land surveyor, should ensure that the surveyor has applied her or his seal to the plans, that *final* subdivision plans presented for approval in any event be both sealed and signed if they are prepared by or under the charge of a professional land surveyor, and that *final* subdivision plans presented for approval be at least sealed if they are prepared by some other design professional. Planning boards should understand these requirements and, if they have not already done so, take appropriate local action.

In 1991 the Legislature added a provision to the laws governing the recording of plans at the Registry of Deeds. Title 33, MRSA, Section 652(2) prohibits the register from accepting a plan for recording unless it is "embossed with the seal of an architect, professional engineer or registered land surveyor." Nothing in the State Subdivision Law (30-A MRSA § 4401 et seq.) requires that all subdivision plans be prepared by a surveyor or other design professional. However, the effect of 33 MRSA § 652(2) appears to be that any finally approved subdivision plan must bear the seal of a architect or a professional engineer or a registered land surveyor in order for the register to accept and record it. Towns and cities which have not already done so should amend their subdivision ordinances or regulations to add a requirement that any final subdivision plan submitted for local approval bear the seal of a professional land surveyor or other authorized design professional. Moreover, for reasons that will appear in the next paragraph of this legal note, the ordinance amendment should include a requirement that if the final plan is prepared by or under the responsible charge of a professional land surveyor, the plan shall include the signature as well as the seal of that surveyor. This will avoid problems for unsuspecting town officials and applicants.

A statutory provision somewhat related to the one just discussed was enacted by the Legislature in 1989. Title 32, MRSA, Section 13907 states that no municipal official "charged with the enforcement of laws, rules, ordinances or regulations may accept or approve any plans or other documents, prepared within the meaning and intent of this chapter, that are not *sealed and signed* by the professional land surveyor under whose responsible charge they were completed." That provision is part of the law regulating the "practice of land surveying." Section 13907 does not appear to require a planning board to determine whether a subdivision plan was prepared by someone authorized to "practice land surveying" as defined in 32 MRSA § 13901(16) or by someone exempt pursuant to § 13912, and to refuse to accept it if it was. Rather, Section 13907 appears only to require that the board refuse to accept, and refuse to approve, a plan if the board knows that the plan was prepared by a professional land surveyor or under such a surveyor's charge but was not signed and sealed by that surveyor. To that extent, this law does not place town officials in the position of having to judge whether the work constitutes the "practice of land surveying" and thus requires a seal. Thus, compliance with this law should not generate the same kind of controversy that we have all experienced over the past two years with the laws relating to the practice of architecture. (See E. James Hamilton, PE. Esq. "Architect's Licensing Law Amended." May 1992 MAINE TOWNSMAN, p 22). Although this particular statute need not be echoed or repeated in local ordinances, it will avoid surprise to applicants if reference to it is added to any application forms in use, or to any procedural guide a board may have for applicants, or if a board just gives a copy of this article to all applicants or prospective applicants.

> In addition to the suggestion (above) that ordinances or regulations be amended to address the requirement of a seal on final plans for recording (and of the signature of a professional land surveyor as well as a seal if a plan was prepared by or under the charge of such a surveyor), a board could bring both of these statutes to the attention of applicants as follows. In any subdivision application form or procedural guide in use, describe for applicants the various kinds of plans required (e.g., preliminary, final), and then add the following: "Will any plan or plans you submit be prepared by a professional land surveyor? If so, ensure that they bear the signature and seal of the surveyor who prepares them or under whose charge they are prepared. Under state law (32 MRSA Section 13907), the board cannot accept for review, and cannot approve, any plan prepared by or under the charge of a professional land surveyor if the plan does not bear the signature and seal of that surveyor. Also, please note that any finally approved subdivision plan must be recorded in county registry of deeds and that state law (33 MRSA Section 652 (2) prohibits registers of deeds from accepting a plan for recording unless it is embossed with the seal of an architect, professional engineer, or registered land surveyor. Thus, if your final plan is prepared by an architect or a professional engineer, it should bear *at least* that person's seal." (*By R.W.S.)*

Maine Municipal Association
Legal Note
July 1994

IMPORTANT INFORMATION TO INCLUDE ON AN APPROVED SUBDIVISION PLAN

It recently has come to our attention that many recorded subdivision plans do not include information on the face of the plan which is required by the Municipal Subdivision Law (30-A M.R.S.A. §4401 et seq).

Title 30-A, section 4404 (13) states that before approving a subdivision plan, the planning board must determine whether the proposed subdivision is in a flood-prone area based on federal flood maps and information presented by the applicant. If the board determines that the subdivision will be within the 100-year flood elevation based on the information presented, then, if the planning board approves the subdivision, it must include a condition of plan approval requiring that principal structures in the subdivision will be constructed with their lowest floor, including the basement, at least one foot above the 100-year flood elevation. The following language could be used to satisfy this requirement:

This approval is granted subject to the following condition(s):

1. If this plan shows the subdivision or any portion of it to be within a flood hazard area, all principal structures hereafter constructed or placed therein shall be so located that their lowest floor, including basement, is at least one foot above the 100-year flood elevation.

This language should appear on the face of the plan to be recorded, preferably near the signature block.

The other statutory requirement of which many planning boards are unaware is found in the enforcement section of the Subdivision Law (30-A M.R.S.A. §4406). Section 4406 (1) (B-1) provides that if a subdivision is exempt from Site Location Act review by the D.E.P. because it qualifies for one of the exemptions in 38 M.R.S.A. § 488(5), the fact that it is exempt must be noted on the plan approved by the planning board under the Municipal Subdivision Law before it is recorded. "Developable land" as defined in 38 M.R.S.A. § 488(5), must be indicated on the plan also. The person recording the plan must prepare a sworn certificate in recordable form and record it with the plan in the Registry. The certificate must contain the information listed in 30-A M.R.S.A. § 4406 (B-1) (1)-(5). The subdivision exemption under the Site Location Act is not valid until the plan and certificate described above have been recorded; the exemption becomes void if recording does not occur within 90 days of the planning board's final subdivision approval. Any planning board needing a copy of 38 M.R.S.A. § 488(5) should contact MMA's Legal Services secretary. (*By R.W.S.)*

Maine Municipal Association
Legal Note
August/September 1994

LAW COURT INTERPRETS MUNICIPAL SUBDIVISION LAW

On May 25, 1994 the Maine Supreme Court issued a decision interpreting the Municipal Subdivision Law (30-A M.R.S.A. §4401 et seq) which changes the way most municipal attorneys have been interpreting the definition of "subdivision." In *Bakala v. Town of Stonington,* _____A.2d_____ (Me. 1994) (Decis. No. 6878), the court was asked to decide whether a subdivision is created when a non-exempt lot is conveyed out of the middle of a tract or parcel, leaving a lot retained by the seller on either side of the lot which was sold. In a unanimous decision, the Maine Supreme Court held that only two countable lots are created in this situation. The court's conclusion was based on the language now found in 38 M.R.S.A. § 4401(4) (A) which states that, in determining whether a tract of land has been divided into three lots, "the first dividing…shall be considered to create the first 2 lots and the next dividing of either of said first 2 lots, by whomever accomplished…shall be considered to create a 3rd lot." The court agreed with the owner of the lot sold out of the middle of the tract of land in question that when his lot was first created, it was "the first dividing," which, according to the statutory language quoted above, only created two countable lots. Under the statutory definition of "subdivision," a subdivision results from the creation of three countable lots within a five year period. Consequently, since no subdivision was created by the transaction in question, no planning board approval was required. (*By R.W.S.)*

PROTECTION FOR OLD ILLEGAL SUBDIVISION

Effective September 19, 1997, a subdivision which has been in violation of the Municipal Subdivision Law for 20 years or more becomes "grandfathered" and can't be treated as an illegal subdivision by the municipality and forced to comply with the statute, unless the municipality has taken any of the following actions prior to the effective date of the new law:

1) Brought a legal action in court to enjoin the illegal subdivision and enforce the statute pursuant to 30-A M.R.S.A. §4406:
2) Expressly denied approval of the subdivision by action of the municipal reviewing authority and recorded a record of that denial in the appropriate registry of deeds;
3) Denied a building permit for a lot owner in the illegal subdivision pursuant to 30-A M.R.S.A. §4406 and recorded a record of the denial in the appropriate registry of deeds; or
4) Cited the subdivision as being in violation in an enforcement action or order and recorded a record of that action or order in the appropriate registry. (*By R.W.S.)*

JOINT SUBDIVISION JURISDICTION UPHELD

The Maine Supreme Court has upheld a town's claim of jurisdiction over a proposed subdivision even though the only portion located within its boundaries was the access road and al 17 of the proposed lots were situated in a neighboring community.

In *Town of North Yarmouth v. Moulton,* 1998 Me. 96, the developers acknowledged that a joint meeting of the two towns was required (30-A M.R.S.A § 4403(1-A)) but argued that North Yarmouth's *approval* was not required because no part of the actual development was located within its boundaries. The Law Court, however, disagreed noting that the definition of "subdivision" turns not on the nature and extent of development, but on the division of land into lots and that ordinarily the entire tract or parcel in which a subdivision is located is included. The Court then observed that access was an integral part of this subdivision, that North Yarmouth had a legitimate interest in reviewing it and that the purpose of subdivision review- orderly growth and development – would be easily frustrated if the developers' narrower reading of the laws were allowed to prevail. (The statute has since been amended to clarify certain aspects of joint subdivision review, especially regarding traffic impacts on adjoining municipalities.)

Unfortunately, the Court declined to address the scope of North Yarmouth's jurisdiction or whether it could review those portions of the subdivision located outside its boundaries. MMA legal staff (which correctly advised the Town early on but played no formal role in the litigation) believes, however, that where a subdivision crosses municipal boundaries, each municipality must review that portion located within its boundaries but cannot review or impose its requirements on the extraterritorial portion. (By R.P.F.)

MAINE MUNICIPAL ASSOCIATION
Legal Services
60 Community Drive
Augusta, ME 04330-9486
William W. Livengood

Rebecca Warren Seel **Telephone: (207)623-8428**
Richard P. Flewelling
Ellerbe P. Cole
Joseph J. Wathen

TO: MUNICPAL OFFICIALS
FR: JOE WATHEN
DA: AUGUST 4, 1997
RE: PAPER STREETS – RECENT AMENDMENT TO THE LAW

Introduction. This article discusses 23 M.R.S.A. § 3032, which governs "paper streets" shown on subdivision plans recorded *before* September 29, 1987. [Another law, 23 M.R.S.A.§3031, governs paper streets on plans recorded after that date, but is not discussed here in depth]. Following a brief discussion of the recent amendments to the law, the issues are presented in a Question and Answer format. I've received calls from surveyors, planners, assessors, lawyers, code officers and public works officials on this subject, so the questions cover a lot of ground. The October and November 1996 issues of the *Maine Townsman* each include a series of questions on paper streets as well. Some of the answers given to those questions has changed as a result of the amendment to the law and a recent case; those changes are pointed out in this article.

Section 3032 was amended by Public Law 1997 Chapter 386 (effective September 19, 1997) to clarify which paper streets will be deemed vacated on **September 29, 1997**. The law now has the following results:

Used and Accepted	Not Vacated
Used but Not Accepted	Not Vacated
Constructed and Accepted	Not Vacated
Constructed and Not Accepted	Not Vacated
Accepted by Not Used	Not Vacated
Accepted but Not Constructed	Not Vacated
Not Accepted and Not Used	Vacated
Not Accepted and Not Constructed	Vacated

The amended law also allows a municipality to accept a paper street for use as a recreational easement, public easement or utility easement, in addition to a town way. It is not necessary that a paper street be accepted and built for motor vehicle use. The law still allows the municipal officers (Board of Selectmen or Council) to extend the vacation deadline for a period of 20 years.

QUESTIONS

1. I'm on the Board of Selectmen. What are our options regarding paper streets? Can or should we do anything in particular?

   Answer: The municipal officers (Council or Board of Selectmen) have three options: (1) Do nothing, and let paper streets vacate by operation of law. (2) Vote to extend the deadline on some or all paper streets (or portions of paper streets) for 20 years. This will simply preserve the existing status of those ways. (3) Ask the legislative body to accept a paper street (or portion thereof) as a town way, a public easement, a utility easement, or a recreational easement. The options are discussed further in the Question below.

2. If we do nothing, what happens to the paper streets?? Can we be sued for doing nothing?

   Answer: If the municipal officers allow paper streets to vacate by operation of law, then the public rights of access terminate on September 29, 1997. Private rights of access (held by other lot-owners in the subdivision) do not terminate automatically on that day, but are subject to termination if a certain process is followed. This result differs from what I stated in the September 1996 Townsman. This is discussed in detail in Question 10.

   Although someone could sue the municipality on the grounds that the municipal officers failed to take certain action, the plaintiff (person who filed suit) would likely lose since the law imposes no duty on the municipal officers to act on paper streets. The municipal officers and municipality are immune from liability for claims arising from the exercises of discretionary authority or legislative authority, see 14 M.R.S.A. § 8111 and § 8104-B.

3. If we vote to extend the time period for 20 years regarding some of the paper streets, what is the effect? Do we need particular grounds to grant an extension? Can we be sued if we vote to extend the time frame for some streets and not others?

   Answer: Extending the time period for 20 years simply preserves existing rights and interests. In particular, it leaves open the time in which the municipality may accept the paper street for public uses. It also allows the holders of private access rights more time in which to use or construct the way, and prevents a person claiming ownership from implementing the § 3033 process during that time. That process is discussed further in Question 10.

   23 M.R.S.A. § 3032 (2) does not require any particular grounds for voting to extend the time period. However, we recommend that the municipal officers have a rational basis for doing so. Otherwise, someone may claim that the decision was based on unlawful grounds (such as discrimination), or was arbitrary and capricious. An example of a valid reason is that the paper street in question may have some possible public benefit in the future, but it is too soon to determine that. Therefore, municipal officers are extending the time period so that the matter can be reviewed over the next few years, and a more informed decision can be made. This avoids having to later vacate ways which were accepted in a rush and turned out not to have any public benefit.

A person with standing may sue the town if the deadline is extended for only certain paper streets. However, that claim is unlikely to succeed, since the decision is discretionary or legislative in nature, see 14 M.R.S.A. § 8104-B and § 8111. The municipality may still run up some legal fees defending itself, but the plaintiff has a difficult case.

Some officials have asked whether they should extend the deadline if the only reason is to preserve private rights of access (there is no municipal or public interest in the street). The municipal officers can do this, but may get heat from people who wanted the way vacated. As I see it, an extension of time is not necessary where the only issue is private rights of access. As is discussed in Question 10, private rights of access do not terminate automatically on September 27, so the extension is not critical in most cases.

4. If we (the legislative body) accept a paper street as a public easement or as a recreational easement, can we restrict the development and use of the way, such as not paving it and not allowing motorized vehicles?

Answer: If the municipality accepts a paper street as a recreational easement, I recommend that the acceptance article include any restrictions on use and development. Also, the municipal officers should adopt an ordinance under 30-A M.R.S.A. § 3009 which mirrors the restrictions in the acceptance article. Section 3009 covers public ways generally; it is not limited to actual roads. This gives the municipality two grounds for asserting the validity of the restriction, if it is challenged. 23 M.R.S.A. § 3032 does not define "recreational easement", so the municipality should do so. If someone disagrees, the burden is on him or her to prove that the definition or restrictions are invalid.

The term "public easement" is defined in 23 M.R.S.A. § 3021. Public easements are commonly open to motor vehicle use, but I believe that they can be restricted by an ordinance adopted under 30-A M.R.S.A § 3009.

Don't forget to review your local road standards ordinances, as these may require that a public easement be built to certain specifications before it can be accepted by the municipality.

5. If we accept a paper street as a recreational easement, do we increase our liability to persons using the way? Do we have any duty to build or maintain a recreational easement to a certain standard? If we accept the way as a recreational easement, can the abutting landowners be sued by someone who, for example, falls on the path?

Answer: No state law imposes any standards of construction or maintenance for recreational easements. You may have a local ordinance which does so, but I'm not aware of any towns that have such an ordinance. 14 M.R.S.A. § 8104-A(2)(A)(3) provides immunity to the municipality from claims associated with outdoor recreational facilities. However, you should ask your insurance carrier as well, because if you have insurance coverage you may have waived your immunity. Also, you may be liable for damages caused by the negligence of municipal officials.

For example, if a member of the recreation department is using a power saw to trim brush in the recreational easement, ad strikes a hiker with the blade, the municipality may be liable.

The abutter who owns the land beneath the recreational easement is not liable for injuries suffered by users of the way, unless that abutter somehow caused the injury, see 14 M.R.S.A. § 159-A.

6. If we accept a paper street as a utility easement, is it limited to public utilities, or can private facilities also be located there?

Answer: Section 3032 does not limit the easement to public utilities. The municipality can under its home rule powers adopt an ordinance regulating or restricting placement of private utilities in the easement, to avoid overburdening the easement. This should be done by an ordinance adopted by the legislative body. The ordinance could delegate administrative authority to the municipal officers or other officials, as is done in 35-A M.R.S.A. § 2502.

Make it clear to anyone placing or maintaining a private utility line that he or she is responsible for compliance with the Dig-Safe law (23 M.R.S.A. § 3360-A) and for damages caused by his/her activities. The ordinance or permits granted under the ordinance should spell this out.

7. If we accept a paper street as a recreational easement, and want to keep it unpaved and free of motor vehicles, can we prevent private easement holders (i.e., other lot-owners in the subdivision) from paving the way or driving their vehicles on it?

Answer: Such restrictions are presumed valid, but may be challenged by a private easement-holder. As is discussed in Question 10, all lot-owners in the subdivision enjoy a private right-of-way over the streets shown on the plan. In my opinion, that private right of access cannot be exercised in such a manner as to destroy or unreasonably hamper public use of a properly-accepted public way. I believe that the private rights in a public way are subject to an ordinance regulating operation of vehicles adopted by the municipal officers under 30-A M.R.S.A. § 3009. However, every case presents a different fact pattern, and only a judge can make the final decision. For example, if the paper street that the town wants to keep as a walking path is the sole access to a buildable lot, a court might rule that the landowner has the right to build the road. For cases involving competing easement rights, see *Cleaves v. Braman,* 103 Me. 154 (1907); *Hultzen v. Witham*, 146 Me. 127; *Bearce v. Dudley*, 88 Me. 410 (1896); *Burr v. Stevens*, 90 Me.500 (1897); and *Poire v. Manchester,* 506 A.2d 1160 (Me. 1986).

8. We want to accept a paper street as a recreational easement, and the abutters do not object. However, the street as laid out on the plan crosses several lots at odd angles. The abutters would like the easement to run along their sidelines. Can we just make an agreement with the abutters in question and change the location of the way?

Answer: An agreement of that sort will not bind everyone. The other lot-owners in the subdivision have a private right-of-way over the street as shown on the plan, and might insist on using it despite the agreement reached between the town and certain abutters.

9. If a paper street is deemed vacated, who owns the land were the paper street was located?

Answer: Public rights are terminated automatically, but private rights of access (held by the subdivision lot-owners) are not automatically extinguished on September 29, 1997. Instead, further action must be taken before private rights are terminated. This differs from the advice given in my September 1996 article. My reasoning follows.

First, keep in mind the distinction between public rights of access and private rights of access. When a subdivision plan is recorded, there is an *incipient* dedication to public use of all streets (including paper streets) shown on the plan. "Incipient" means that the public's access rights cannot be fully exercised until the road is accepted by the municipality, see *Bartlett v. City of Bangor*, 67 Me. 460 (1878). Subdivision lot-owners, on the other hand, have a private right of way – an easement – over all the streets shown on the plan, including paper streets. This is not merely an incipient right which depends on other events before it ripens, see *Harris v. South Portland*, 118 Me. 356, 108 A. 326 (Me. 1919), and *Callahan v. Genneston Park Development Corp*., 245 A.2d 274 (Me. 1997).

In a recent case, the Maine Supreme Court stated that incipient rights (that is, the public rights) terminate automatically on September 29, 1997, but that private rights of ownership and access are determined by the process set out in 23 M.R.S.A. § 3033. See *Glidden v. Belden*, 684 A 2d 1306 (Me. 1996) at 1314-1316. This reasoning is consistent with, and not a deviation from, the common law concerning private easements.

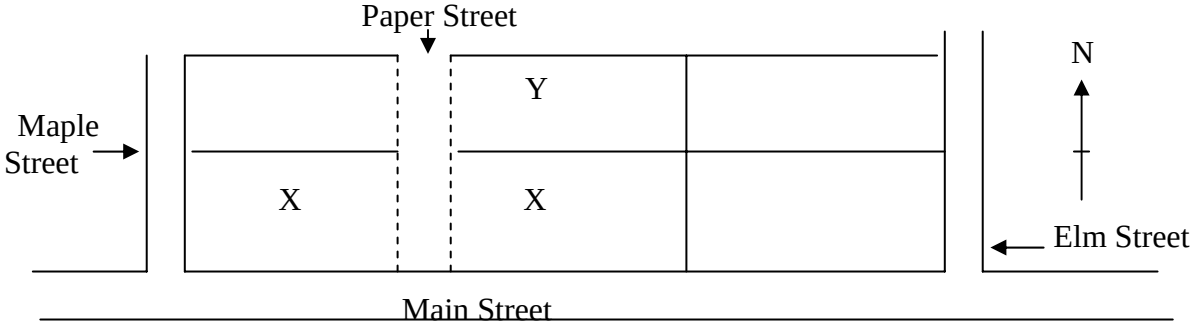
Under the common law, private easements (unlike public easements) are not lost by mere non-use see *Phillips v. Greg*, 628 A.2d 151 (Me. 1993) and *Witt v. McKenna*, 600 A.2d 105 (Me. 1991). A private easement may be abandoned, but abandonment requires affirmative acts, in addition to non-use, as evidence of the intent to abandon. See *Chase v Eastmen*, 563 A.2d 1099, (Me. 1989) and for a detailed discussion see Hermanson & Richards, *Maine Roads and Easements*, 48 Me. L. Rev. 197, 262-268 (1996). Acts of intent to abandon a private easement include a failure by the easement-holder to object to someone blocking the way (see *Bolduc v. Watson*, 639 A.2d 629 (Me. 1994).

Another reason to conclude that private rights are not automatically vacated is based on the distinction between §3031 and § 3032 of Title 23. Section 3031 (2), which applies to paper streets on plans recorded *on or after* September 29, 1987, automatically terminates private easement rights if the holder of those rights does not construct and use the way within 20 years after the plan is recorded. However, § 3032 contains no such language, and nothing in the legislative history indicates that the Legislature meant to diverge form the common law with respect to private easement rights in subdivision plans recorded before September 29, 1997.

11. If private rights of access do not automatically terminate on September 29, 1997, how does § 3032 work?

Answer: The following examples illustrate how § 3032 works:

Example A: Landowner X owns a double lot which is bisected by a paper street. Behind (to the north) of X's lot is a vacant lot owned by Y's lot has no access other than the paper street. The paper street has never been accepted by the municipality, nor has it been used or constructed by Y or any other person and no extension was granted.



After September 29, 1997, X decides to install an in-ground swimming pool for his kids, and plans to locate it directly on the paper street. At this point, the public rights have terminated by operation of law, but Y still has an existing private right of way over the paper street. X records a notice under 23 M.R.S.A. § 3033, and provides the required notices to lot-owners and parties in interest. Neither Y nor any other person responds to X's notice within the statutory timeframe, so private rights in the paper street can no longer be asserted. X can now build his pool, and Y's lot is landlocked.

EXAMPLE B: Same facts as above, except that Y timely responds to X's notice and follows up with a lawsuit to resolve the matter. Since Y will be landlocked if the paper street is terminated, the court finds in Y's favor, based on the language in § 3033 (3)(B)(1).

EXAMPLE C: Same facts as in Example A, but instead of using the§ 3033 process, X puts a chain link fence around his entire double lot, effectively preventing any access over the paper street. Y's first inclination is to hire a bulldozer to knock a hole I the fence, but Y's lawyer advises that Y file a declaratory judgment action to resolve the access issue. The court finds that Y has a right of access but is landlocked by X's action, and order X to allow Y access over the paper street.

Note that if Y failed to take any action against X for several years after the fence was erected, a court might rule that Y had lost his right of way in the former paper street. That conclusion is possible under 14 M.R.S.A. § 813 if the way was obstructed forty 20 years or more. Even if the way was obstructed for less than 20 years, a court might find that Y had abandoned his rights under a common law analysis, see *Ballard v. Butler*, 30 Me. 94,99 (1849) and *Bolduc v. Watson*, 639 A.2d 629,630 (Me. 1994).

12. If a paper street is vacated, will abutting owners receive a deed or other document form the municipality or the State?

Answer: No. Vacation occurs by operation of law, and no deeds or other documents will be issued by the State or the municipality to abutters. The municipal assessors may amend their tax maps to depict the additional useable area of lots where the public and private rights of access have been extinguished, although this will probably not occur all at once (see Question 15).

13. If a paper street is vacated, is there any paperwork for abutters to record in the Registry of Deeds or to file with the municipal clerk?

Answer: No, an abutter does not have to do anything to show acceptance of the land which was formerly the paper street. The law automatically presumes that the abutter owns to the centerline, and nothing more need be done by the municipality or the landowner. The abutter will need to take some action only in certain situations. For example, if another person claims access or ownership rights in a paper street which is adverse to the abutter's interests, then either party can commence an action under 23 M.R.S.A. § 3033 or a declaratory judgment action.

14. What if an abutter does not want the additional land when a paper street is vacated? Can she refuse to accept it?

Answer: No, because the presumption of ownership occurs by operation of law, and is not a voluntary conveyance (which requires delivery and acceptance of a deed). Technically the abutter is not getting any new land. The land under the paper street was part of the lot when the subdivision plan was recorded, but it was subject to public and private access rights.

15. If a paper street is vacated and an abutter's lot is thereby enlarged, does the abutter have any new rights under or zoning and land use ordinances?

Answer: The abutter does not get any new rights, but his or her useable lot area may be larger; depending on the ordinance this might allow him or her to develop the property in a way not allowed when the paper street was in place. For example, say a zoning ordinance requires 40,000 square feet (exclusive of easements) for a duplex, and 20,000 square feet for a single family home. If a lot contains 38,000 square feet while the paper street exists, but 41,000 square feet when the street vacates, the owner would have sufficient area to build a duplex (the owner must also meet setbacks, lot coverage and all other requirements).

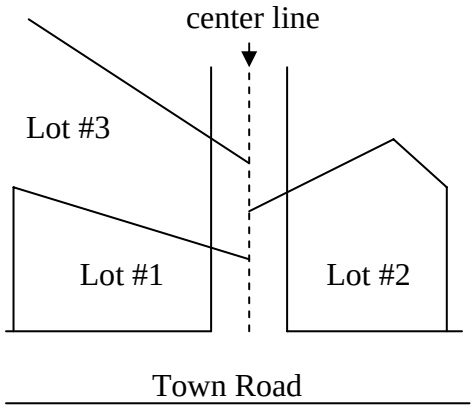
Likewise, sideyard and backyard setbacks might be measured form a different point following a street vacation, which could allow the placement of structures in an area not previously allowed. Every zoning and land use ordinance is different, so it is important to read the ordinance to determine if the vacation of a paper street has any impact in a given case.

Keep in mind that the "additional" land is not necessarily free from private access rights after September 29, so the abutter should commence the § 3033 process before making any substantial improvement in or near the paper street.

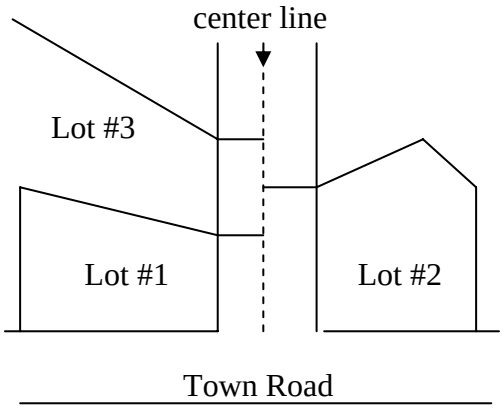
16. Or zoning ordinance has a "grandfather" clause which allows non-conforming lots of record (those legally existing at the time of the ordinance adoption) to be developed within certain guidelines. If a paper street is abandoned and an abutting lot gains more land, does this adversely affect its grandfathered status, since the lot as it exists after vacation was not "of record" at the time the ordinance was adopted?

Answer: No, vacation should not destroy the lot's grandfathered status. Keep in mind that the abutting lot is presumed to have extended to the centerline from the date that the subdivision plan was recorded. For zoning purposes the land under the paper street may not have been considered useable area and therefore not counted in the lot size calculation. Vacation does not reduce the size of the lot, so there should be not adverse affect on the grandfathered status.

17. We have some paper streets that will by vacate by operation of law, but the abutting lots are oddly-shaped, as shown below. Should the lot lines be treated as extending on their present angles, or do all lot lines extend perpendicular to the centerline? In other words, is illustration A or B the correct outcome?



Example A



Example B

Answer: There is no Maine Law Court case directly on point, but the methods preferred by the courts generally is to extend the lot lines at right angles to the centerline of the paper street, as shown in illustration B above. For more on this issue, see *Maine Roads and Easements*, Maine Law Review, Vol. 48, No. 2, at pages 305-309.

18. We have a paper street that was never accepted by the town, but has been regularly used by the abutting lot-owners and other people. Will the vacation law apply to this situation at all? If not, what legal status does the street have?

Answer: No. Since the street has been used, it is not deemed vacated under 23 M.R.S.A. § 3032. The street continues as a private right-of-way for subdivision lot-owners, but public access rights are less certain. Arguably, since the incipient dedication to public use has not been terminated by operation of law, the legislative body of the town can still vote to accept the way as a public way. On the other hand, a court might rule that the failure of the town to accept the way within a reasonable time after the plan was recorded terminated the incipient dedication, see Harris v. City of South Portland, 118 Me. 35 (1919). If the town is seriously interested in accepting the street as a public way, it should resolve this issue by bringing a declaratory judgment action. Or, it may be cheaper and faster to take the street by eminent domain, and avoid the incipient dedication issue altogether.

19. We have a paper street that is 600 feet long. The abutters have built and used the first 200 feet or so, but the rest of the way has never been built, used, or accepted by the town. Does any of the way vacate under 3032, or none of it since a portion has been used?

Answer: As I see it, the portion of the paper street which has been constructed or used does not vacate, but the remainder of the way is deemed vacated. As is discussed in Question 10, this means that the public rights of access terminate, although private rights remain and can be extinguished only if other action is taken.

20. As the town's Code Enforcement Officer, I am responsible for issuing building permits. I've recently been approached by several landowners who want building permits to place a structure (after September 29, 1997) in or near the paper street abutting their lots. Should I issue the permits if the applications meet all other provisions of the ordinance?

Answer: Not necessarily. As is discussed in Question 10, public rights in the paper street are lost after September 29, but the private access rights of other lot-owners remain in existence. The abutting lot-owners should follow the § 3033 process before placing a pool, garage or other structure on the paper street. Your ordinance may allow you to deny the permit on the basis that the land in question is still encumbered by a private easement. If the ordinance is silent on this point, you may have no basis to deny the permit, but you should make a note on the permit about the possible existence of private access rights. Also, you should recommend that the landowner contact her attorney about clearing up the title before proceeding with construction. That way, if the owner ignores your recommendation and constructs a building, but is later required to move it, she cannot hold the town or the CEO liable.

21. We have several subdivisions which were recorded in the late 1800's. Many of the subdivision plans show narrow paths which are referred to as bridle paths or walking trails. Are these things considered paper streets?

Answer: Yes, a court would probably find that these access routes to be paper streets. The Glidden case involved a rangeway which was laid out in the 1700's (although not recorded until much later). The Court likened the range plan to a subdivision, and treated the rangeways (the access ways dividing the ranges) as paper streets. Based on that broad reading of § 3032. I believe that access ways shown on subdivision plans as trails or paths are subject to § 3032. In other words, ways other than those designated as "roads" or "streets" may be paper streets.

Remember that if these paths and promenades have been used or constructed, they would not be deemed vacated.

22. We have several paper streets which have never been accepted by the town, nor "constructed" as that phrase is used in or Road Standards Ordinance. However, abutters and other people have been using the way both on foot and sometimes with vehicles. Some of these paper streets are easily-visible beaten paths. Is this sufficient "use" to keep the way from being vacated on September 29?

Answer: Every paper street will differ, and only a court can determine what use is sufficient to avoid the operation of § 3032. Municipal officials, (Selectmen, Councilors, Planning Board, CEO, and others) have no power to make this decision. If residents bring these disputes or questions to you regarding their private rights, refer them to private attorneys. If your question focuses on public rights of access, then the safest course is to go to court before accepting the road as a public way. The municipality could go ahead and accept a road on the basis that a beaten path is sufficient evidence of use, but that acceptance may be challenged.

23. I am the municipal assessor. After September 29, 1997, can I start changing the tax maps to show the additional taxable area of lots abutting paper streets?

Answer: Don't rush into this. As is discussed in question 10, the "additional" land is still encumbered by private rights-of-way after September 29, 1997. While subject to private easement rights, land under the paper street may have little taxable value (such as it has had in the past). If and when the private access rights are extinguished, its tax value will increase. Unfortunately, the local assessors may not always learn of the termination of private rights, since the law does not require that the municipality be given direct notice of proceedings under § 3033. There will be a notice in the Registry, although it may not come to the assessors attention.

If a landowner claims that his land is now landlocked as a result of the automatic vacation, verify this before granting an abatement. In most cases, a private right of way will remain in place after September 29. If it turns out that private rights-of-way have also been terminated, then the landowner may be correct.

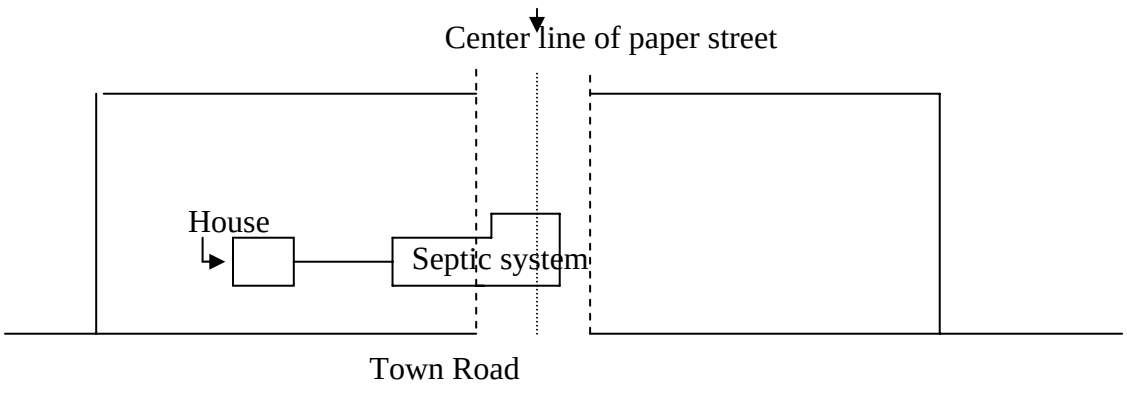
24. I'm the CEO, and I received a complaint from an abutter about a structure located on a paper street –all the way across the street. What jurisdiction do I have? Who resolves this?
Answer: You may have jurisdiction under a local ordinance over a setback violation, but that is unrelated to the title and access issues. Those issues are resolved by a judge, so you should direst the parties to private counsel. The process for resolving ownership and access issues is set out in 23 M.R.S.A. § 3034. That law applies only to building located within the way for at least 20 years, and creates timeframes for the filing of notice. The timeframes vary depending on the recording date of the subdivision plan.

Section 3034 will generally terminate the incipient public access rights in a case where the structure has existed for at least 20 years. However, private rights-of-way (such as those held by other lot-owners in the subdivision) are not affected, see § 3034 (1). The status of private rights of access should be resolved in a civil action between the private parties.

If the structure has not been in place for at least 20 years, § 3034 apparently does not apply. However, the ownership and access issues must still be resolved through a private civil action.

You may need to await the outcome of the title action before proceeding with an action to enforce the setbacks or other provisions of a local land use ordinance.

25. I am the CEO, and I've received a complaint about a septic system which is apparently located under a paper street, but over the centerline, as illustrated below. This system has been there more than 20 years. Do I have any jurisdiction here? Does the 20 years make a difference? Is it considered a structure? How should I respond?



Answer: This may be a violation of a local ordinance or the plumbing code, so you or the LPI may have a land use violation on your hands. You have no jurisdiction to resolve any title or access issues, so should direct the parties to hire private attorneys for that. The 20-year period is one element of prescriptive use, which will undoubtedly be an issue. However, there is more to proving prescriptive rights than establishing the 20-year period.

23 M.R.S.A. § 3034 does not define "structure", but I do not think that the law was intended to include underground structures. The burden on the easement-holder to object to a structure placed within the paper street. This is not hard to do if the structure is a house or garage, but it's more difficult if the structure is buried beneath the earth. This will be one of the issues for the judge to decide.

SUBDIVISION TAKINGS CLAIM DENIED

The Maine Supreme Court had denied a claim that requiring deeded access to a fire pond as a condition of subdivision approval constituted an unlawful taking of private property.

In Curtis v. Town of South Thomaston, ___A, 2d ___ (Me. 1998), the developers appealed the approval of their subdivision, which was contingent on construction of a fire pond and their granting an easement to the Town for access, on grounds that the easement represented an uncompensated taking of their property contrary to both state and federal constitutions. Citing the U.S. Supreme Court's landmark decisions in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S.374 (1994), however, the Law Court applied a two-part analysis to determine whether the required dedication was logically related in substance and scope to legitimate regulator objectives and thus a lawful exercise of the police power rather than an unconstitutional taking.

First, the Court searched for an "essential nexus" between a legitimate government interested and the condition – and found in the Town's interest in public safety and the development's lack of an adequate proximate water supply for firefighting, for which subdivision approval could have been denied altogether.

Next, the Court made sure there was "rough proportionality" between the required access and the development's impact on the Town's ability to provide fire protection. The Court found it especially significant that the Town had an ordinance requiring fire ponds and deeded access in all circumstances similar to this one (and which MMA staff attorneys had previously advised the Town was enforceable and applicable in this case). This, to the Court, meant that the requirement represented a carefully crafted rule of general applicability, not a "plan of extortion" directed at a particular landowner. Beyond this, the Court found the requirement as applied to be no greater than necessary to provide adequate fire protection to the subdivision.

The Curtis case is a good illustration of the legitimate use of dedication requirements in land use regulation and development review and stands in sharp contrast to other examples, such as *Nollan, Dolan, and Kittery Water District v. Town of York*, 489 A.2d 1091 (Me. 1985), where approval was essentially held hostage in return for public access concessions that were unrelated or disproportionate to the development. For a detailed discussion of land use takings law, see the two-part feature article entitled "Regulatory Takings" in the August and September 1993 issues of the *Maine Townsman*.

(By R.P.F.)

What Constitutes 'Intent To Avoid' Subdivision Law?

The municipal subdivision law (30-A M.R.S.A. §§ 4401-4407) has long exempted certain transfers, including gifts to relatives and transfers to abutters, "unless the intent of the transferor is to avoid the objectives of the subdivision statute." Now, for the first time that we know of, the Maine Supreme Court has construed this language and found an illegal subdivision.

In *Tinsman v. Town of Falmouth*, 2004 ME 2, the landowner engaged in a complicated series of transfers involving his wife, his parents, a corporation wholly owned and controlled by him, and others. When he applied for approval of a private way to access several lots, however, the Planning Board denied him on grounds that the lots were part of an unapproved subdivision, and he appealed.

Before the Law Court, he argued that the transfers were permissible exceptions under the subdivision law and that he lacked the intent to avoid its objectives. The Town countered that his intent was clearly apparent from the record, and the Court readily agreed, citing, among other things: his background in real estate development; his admission that some of the transfers were in fact intended to avoid subdivision requirements; testimony by the town planner that approval would be difficult to obtain due to poorly drained soils; numerous transfers between him and his corporation, without consideration, over a short period of time; and the sequence of the transfers.

Importantly, the Court also decided that because the landowner sought exemption from subdivision approval, *he* had the burden of proving that he did not intend to avoid the objectives of the subdivision law. This evidently proved impossible given the pattern of, and parties to, the intricate web of conveyances in *Tinsman*. *(By R.P.F.)*