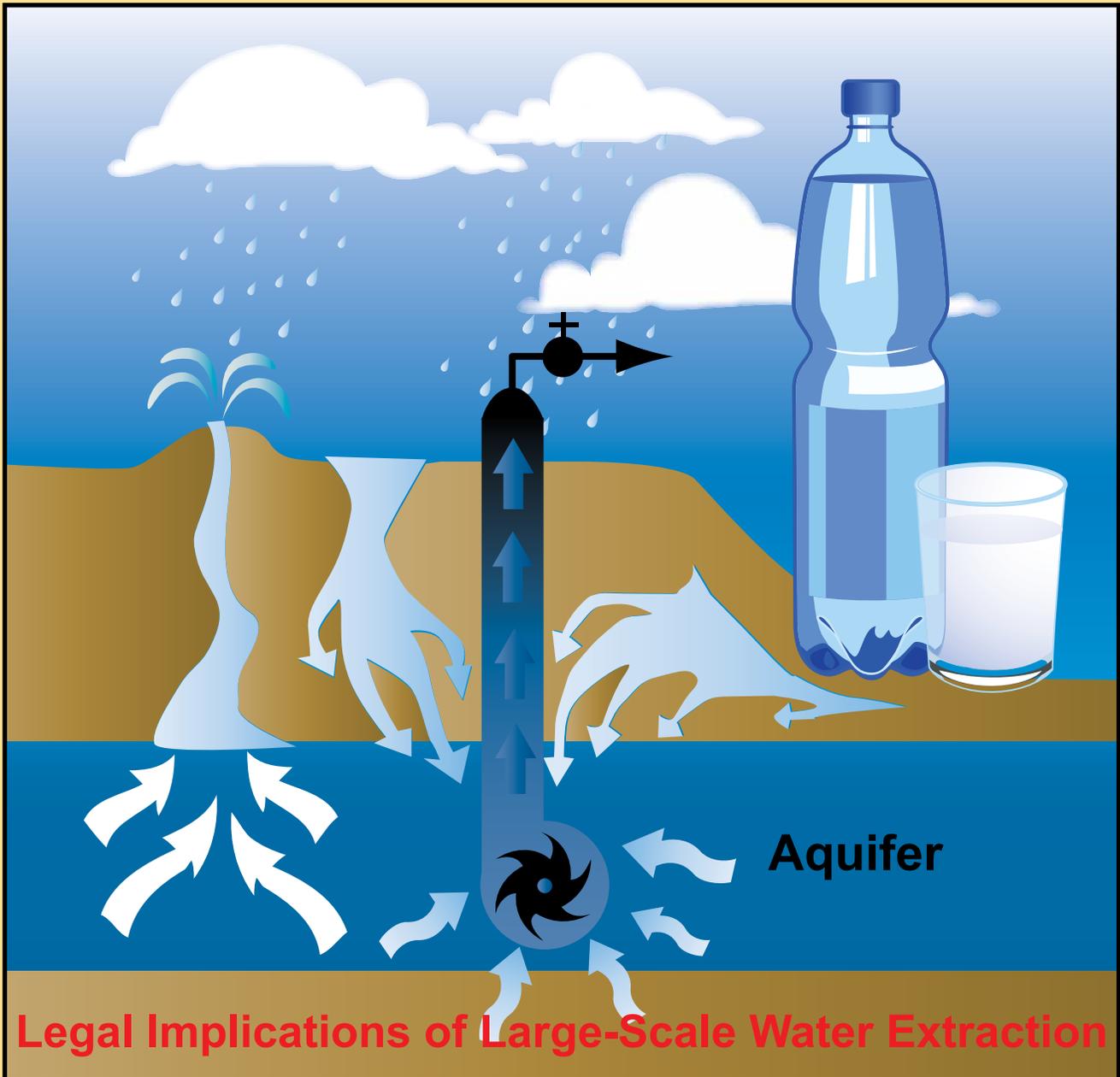


July, 2009

# maine townsman

The Magazine of the Maine Municipal Association



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# Large-Scale Water Extraction

By Leah B. Rachin, Esq.

Groundwater is one of Maine's most important natural resources. According to the Maine Geological Survey, sand and gravel aquifers occupy about 1,300 square miles of Maine's landscape. Approximately 40% of Maine's citizens use private groundwater wells for their household water supply. Another 20% are served by community water suppliers that use groundwater as their primary source. In addition to residential consumption, substantial amounts of groundwater are extracted for crop irrigation, industrial processes, golf courses, and bottling.

As evidenced by recent events in several York County municipalities, large-scale water extraction by commercial water bottlers has become a hot button issue. A proposed 30-year contract between Poland Spring and the Kennebunk, Kennebunkport and Wells Water District that would have allowed Poland Spring to buy up to 432,000 gallons of excess daily capacity drew such public opposition that the water district voted unanimously in May 2009 to permanently remove the contract from consideration.

It is in this context that a number of Maine municipalities have enacted (or are working to enact) ordinances that regulate large-scale water extraction. Such ordinances fall into two categories – rights-based and regulatory. Rights-based ordinances establish absolute prohibitions on commercial water extraction. Regulatory ordinances, on other hand, permit

extraction but only if specified criteria are met.

Water extraction ordinances give rise to a number of important legal issues for municipalities. Municipalities may be vulnerable to constitutional challenges if they enact absolute prohibitions on commercial water extraction because the law extends constitutional protections to corporations as well as to natural persons. In addition, because groundwater extraction is regulated by a number of state statutes, the extent of a municipality's home rule authority to regulate in this arena must be examined.

Maine courts have not yet had the opportunity to weigh in on the validity of municipal groundwater extraction ordinances. What follows is a discussion of the legal issues that might arise with these ordinances and a projection of how Maine courts might rule if their legality were challenged.

## RIGHTS-BASED ORDINANCES

In February and March 2009, identical rights-based ordinances were enacted by referendum in Shapleigh and Newfield. The same ordinance was voted down in Wells in early May 2009.

Drafters of rights-based ordinances are part of a growing social movement premised on the belief that citizens have a fundamental right to local self-government (without being preempted by state and federal law). Proponents of the rights-based approach object to the concept of "corporate personhood," which evolved from a series of U.S. Supreme Court cases that interpret the Constitution as giving corporations many of the same legal rights as natural persons, including freedom of expression, equal protec-

tion, and due process rights. Opponents of "corporate personhood" believe that the framers of the Constitution intended to reserve such rights for people only. In the case of rights-based ordinances, proponents believe that corporations have been allowed to exercise constitutional protections to abdicate responsibility for detrimental impacts on society, particularly with respect to the environment.

Below are the most salient features of rights-based ordinances that have been proposed in Maine:

- They declare that "all water is held in the public trust as a common resource."
- They declare that local self-government is the "inherent, inalienable, and fundamental right."
- They prohibit any corporation (with limited exceptions) from withdrawing water in the municipality.
- They do not recognize corporations as legal persons (thereby denying them constitutional protections.)
- They grant "natural communities" and "ecosystems" fundamental rights, legal personhood, and legal standing.
- They impose liability, including punitive damages, on any person, corporation, or municipality that harms a natural community or ecosystem.
- They confer legal standing on any town resident who wishes to enforce the ordinance.
- They prohibit federal and state agencies from issuing any license for extraction to any corporation.
- They make violations of the ordinance a criminal offence.
- They allow municipalities to secede if there is state or federal action attempting to preempt them.

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The Maine Municipal Association, the Attorney General's office, and town attorneys were asked at various times to comment on the legality of specific versions of rights-based ordinances. Consensus emerged that such ordinances were unlikely to survive legal challenge given the collective opinion that they violate established constitutional principles and state law.

## **RIGHTS-BASED ORDINANCES MAY VIOLATE CONSTITUTION**

Because the U.S. and Maine constitutions are the supreme law of the land, any local ordinance that conflicts with them is invalid. Moreover, under the Supremacy Clause of the U.S. Constitution, local law (whether state or municipal) cannot supersede or negate federal law.

Several provisions of the rights-based ordinances conflict with established constitutional principles. First, by divesting a corporation of its ability to exercise an available property right (e.g., water extraction), municipalities could be vulnerable to illegal "takings" claims. Second, by stating that no corporation doing business within the Town shall be recognized as a "person" under the Constitution, rights-based ordinances may also be vulnerable to equal protection challenges because they treat corporations differently than natural persons and deny them rights available to other classes of persons. (LD 1028, which would have allowed municipalities to adopt ordinances that deny corporations legal personhood, is now dead.) Third, while rights-based ordinances strip legally recognized entities (corporations) of their "personhood," they bestow constitutional rights upon "natural communities" and "ecosystems" (which are not recognized at law as "persons.")

## **RIGHTS-BASED ORDINANCES MAY CONFLICT WITH MAINE LAW**

### **Absolute Dominion Rule**

The declarations contained in the rights-based ordinances that "all water is held in the public trust as a common resource" and that all residents have "a fundamental and unalienable right to access, use, consume, and preserve water" conflict with the Maine common law rule governing groundwater ownership known as the absolute do-

minion rule.

Surface waters of ten acres or more and tidal rivers in Maine are owned by the citizens of the state. Groundwater, however, is subject to the absolute dominion rule which holds that groundwater is the property of the owner of the land above it. A landowner has the right to use the groundwater under his land and to interfere with his neighbor's supply of groundwater with limited liability subject to prohibitions against waste, malicious interference, or negligence. Despite a limited statutory exception which creates liability for withdrawals that interfere with a landowner's pre-existing beneficial domestic use of groundwater, the absolute dominion rule is alive and well in Maine, at least for the time being.

While most states have rejected the absolute dominion rule in favor of other groundwater use and ownership theories, the Law Court affirmed Maine's adherence to the absolute dominion rule in 1999. *See, Maddox v. Giles*, 728 A.2d 150 (Me.1999). In coming to its conclusion, the Law Court was deferential to the Legislature, which chose not to depart from the absolute dominion rule despite recommendations to do so from the Water Resources Management Board. This Board was created by the Legislature to undertake a comprehensive study of water law in Maine. In 1991, the Board recommended that the Legislature adopt the "reasonable use" rule, which prevents landowners from wasting groundwater and from transporting it off their land for use elsewhere. The Legislature did not follow the Board's recommendation.

The Legislature, however, may soon reconsider whether to abandon the absolute dominion rule in favor of another rule. Scores of bills regarding water were presented during the Legislature's 124<sup>th</sup> session. In response, LD 1310, entitled "Resolve, To Establish the Blue Ribbon Commission To Examine the Legal and Policy Implications of Groundwater Extraction" was signed by the governor on June 15, 2009. This resolve establishes another committee to analyze current groundwater law and states that "a reexamination of existing groundwater ownership principles may be in order given the state's responsibilities for environmental protection and

control." While the Legislature has declined in the past to abandon the absolute dominion rule, its days may be numbered.

## **Legal Standing and Municipal Prosecutorial Discretion**

Rights-based ordinances give any municipal resident standing to compel their enforcement. This is contrary to the concept of prosecutorial discretion which gives municipal officials the right to determine whether or not to proceed with enforcement actions. Additionally, it conflicts with established principles regarding legal standing which require people to have suffered a "particularized injury" (meaning one that is distinct from any injury experienced by the public at large) before they may bring a lawsuit. Maine case law suggests that only municipalities, and not private citizens, have standing to initiate proceedings to enforce municipal ordinances.

## **Preemption**

The well-established theory of preemption gives supremacy to federal or state laws that either expressly, or by implication, regulate a particular area to the exclusion of local regulation. Rights-based ordinances, however, purport to deny state and federal governments the ability to preempt them. Rights-based ordinances also permit municipalities to secede from the State of Maine or United States if these levels of government attempt to preempt local authority to prohibit extraction.

## **Tort Claims Immunity**

Rights-based ordinances make federal and state officials who issue permits for water extraction liable for damages. For example, if the DEP issued a permit pursuant to its authority under the Natural Resources Protection Act or site location of development law, they could be liable under the rights-based ordinances. Such a result conflicts with Maine tort claims immunity, which protects government officials from liability if they are acting within the scope of their duties.

## **Town Meeting and Elections Law**

Rights-based ordinances prohibit municipal officers from taking any action to amend or overturn them unless such action is approved by town meeting at which two-thirds of the residents attending approve such ac-

tion. This requirement for approval by a super-majority is inconsistent with state law, which only requires a simple majority for passage. See, 21-A M.R.S. § 743(4); 30-A M.R.S. §2528. (unless a local charter says otherwise).

#### **Criminalizing Extraction**

Rights-based ordinances may conflict with Maine law because they make violation of a municipal ordinance a criminal offence. While municipalities can make violations of their own ordinances a civil offence, they cannot impose criminal liability as this power is reserved to state and federal governments.

In sum, while Maine courts have not had occasion to consider the validity of rights-based ordinances, the general sense among the municipal bar is that they would not likely be upheld given both the constitutional issues they raise and the various ways in which they conflict with state law. The possibility that rights-based ordinances may be invalidated based on existing law, however, is not a disincentive to proponents of such ordinances because part of the underlying goal of

such ordinances is to change the law (particularly with respect to absolute dominion, corporate personhood, and traditional notions of preemption). Accordingly, there is a strong likelihood that citizens in municipalities with significant groundwater resources will present such ordinances for consideration.

#### **REGULATORY ORDINANCES**

Another approach municipalities have taken to deal with of water extraction is to enact regulatory ordinances. In so doing, municipalities must determine what land use districts are appropriate for water extraction and establish specific criteria to regulate any such extraction. Regulatory ordinances require a permit before large-scale water extraction can be conducted. Before such permits will be issued, applicants must establish that their extraction activities will not adversely affect the long term sustainability of the aquifer, its recharge areas, or other ground water sources. These ordinances generally require on-going monitoring and documenta-

tion.

The regulatory approach has been taken by several Maine municipalities including Fryeburg, Denmark, Newfield, Parsonsfield, Palmyra, and Bridgton. Such ordinances are not as vulnerable to legal challenge as their rights-based counterparts. While Maine courts have yet to address either kind of water extraction ordinance, other kinds of regulatory ordinances in Maine and across the country tend to be upheld as proper exercises of municipalities' police power if they are reasonably related to the public health, safety, or general welfare. Local ordinances regulating air pollution, junkyards, public sewage use limitations, and septage spreading have all been upheld in Maine.

The experience of Maine and other jurisdictions in the analogous context of mineral extraction is helpful. While cases have been resolved both ways, a common thread can be ascertained. In those cases where the regulations bore a clear and reasonable relationship to the protection of public health, safety, and welfare,

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they were generally upheld. The cases suggest that a municipality need not include extraction as a permitted use if prohibiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole. On the other hand, in cases where there was little competent evidence to support the conclusion that extraction activities would adversely affect public health or safety (or the rights of nearby property owners), prohibitions were held to be unreasonable, arbitrary, and confiscatory.

One of the deciding factors, therefore, in determining whether extraction ordinances will be upheld is the existence of sufficient scientific or other competent evidence to support the need for the challenged regulation. Where there was scant evidence to show that quarrying would disturb underground water supplies (and most evidence was to the contrary), the impugned ordinance was struck down. However, an absolute prohibition on strip mining was upheld when significant evidence was presented to suggest that associated blasting created a sub-

stantial risk of harm to the aquifer.

The implication for water extraction in Maine is that ordinances that limit extraction to certain designated zoning districts would be more likely to survive legal challenge than an outright prohibition. Courts tend to examine with particular scrutiny zoning ordinances that entirely ban certain land uses instead of delineating appropriate areas for those uses. Municipalities must bear this in mind because most zoning ordinances state that if a use is not specifically listed as permitted, it is prohibited by default. Accordingly, the potential legal implications of imposing an absolute prohibition on commercial water extraction (whether intentionally or not) must be considered.

Ultimately, regulatory ordinances will likely be upheld as constitutional and a legitimate exercise of a municipality's home rule authority to regulate for the general health, safety, and welfare of its residents. However, if municipalities enact absolute prohibitions on large-scale extraction (whether by way of "rights-based" ordinances or simply by excluding water extraction as a permitted use), such

ordinances are more likely to be successfully challenged.

## HOME RULE & LOCAL WATER EXTRACTION ORDINANCES

The question of whether local water extraction ordinances are a proper exercise of a municipality's home rule authority brings into sharp focus the eternal tension between state regulation and local control.

Municipalities have the right to exercise any power or function that is not denied them by the Legislature either expressly or by clear implication. There is no implicit denial of authority unless the municipal ordinance would frustrate the purpose of a state law.

A number of state statutory schemes govern water extraction in Maine. What follows is an analysis of whether any of these statutes are likely to preempt local home rule authority.

**Ground Water Protection Program** (38 M.R.S. § 401 *et seq.*). This statutory scheme directs the study of groundwater and coordination between the various state agencies that regulate it. It does not, however, establish any

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specific regulations or permitting criteria. It creates a cause of action when withdrawal "causes interference with the preexisting beneficial domestic use of ground water by another landowner." This scheme expressly states that it does not limit a municipality's power to enact ordinances under its home rule authority "to protect and conserve the quality and quantity of ground water." It is therefore unlikely that it would be found to preempt local regulation.

**Groundwater Withdrawal Reporting Program** (38 M.R.S. §470-A *et seq.*). This statute creates reporting program which requires that water extraction in excess of certain threshold amounts (between 20,000 and 50,000 gallons) be reported to the state. In addition to the amount of water withdrawn, reports must include information regarding anticipated water use, water source, location of the withdrawal, and volume of the withdrawals that might be reasonably anticipated under maximum high-demand conditions. Such information is very similar to that required by a number of regulatory ordinances enacted by Maine

towns. Municipal regulation, however, does not appear to be preempted. Rather, it is expressly permitted ("[t]he department shall encourage and cooperate with...municipal agencies, boards or organizations in the development...[of] local water use policies that protect the environment from excessive drawdown of water sources...")

**Restrictions on Transport of Water** (22 M.R.S. § 2660-A). Any person intending to remove 10 or more gallons of water from a municipality must get a state permit to do so and must demonstrate that: (1) the transport of the water will not constitute a threat to public health, safety or welfare; and (2) the water withdrawal will not have an undue adverse effect on waters of the State; water-related natural resources; and existing uses, including, but not limited to, public or private wells, within the anticipated zone of contribution to the withdrawal.

Unlike the Groundwater Protection Program and the Groundwater Withdrawal Reporting Program, there is nothing in the Bulk Transport of Water scheme that expressly addresses municipal home rule author-

ity. Maine courts have held, however, that when there is a comprehensive state statutory scheme that regulates a particular area (e.g. waste management, concealed weapons, and liquor licensing) this impliedly preempts a municipality's right to do so.

There does not appear to be any language in 22 M.R.S. § 2660-A, either express or implied, that would prohibit regulatory ordinances. A town's regulation of water extraction does not conflict with the requirement that extractors seek a state permit should they wish to transport water outside of the municipality. A preemption problem may arise, however, if the municipality imposed an absolute prohibition on extraction. Because the state statute specifically provides for granting permits for out of state transport if certain conditions are met, a local absolute prohibition could be determined to be preempted by state law.

**Natural Resource Protection Act** (38 M.R.S. § 480-A *et seq.*). The Act requires any person establishing a "significant groundwater well" to get a permit from DEP. "Significant



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groundwater wells” are defined as withdrawals of 75,000 or more gallons during any week (or 50,000 gallons per day) if located within 500 feet or less from water body, or, 216,000 or more gallons per week (or 144,000 per day) if located more than 500 feet from water body. If a proposed activity includes a significant groundwater well, the applicant must demonstrate that the activity will not have “an undue unreasonable effect on waters of the state, including but not limited to, public or private wells.” The Act specifically provides that it should not be interpreted to limit the home rule authority of a municipality to protect the natural resources of the municipality through enactment of standards that are more stringent. The implication of this language is that municipalities can regulate so long as those regulations are at least as stringent as the state’s.

**Site Location of Development** (38 M.R.S. § 484). Projects that involve 20 or more acres or 3 or more acres of impervious surface must be reviewed by DEP to ensure that it will have “no adverse effect on the natural environment” including water quality. As part of the adverse effect analysis, when reviewing structures that “facilitate withdrawal of groundwater”, the DEP must review the project’s impact on

“waters of the state” (which include groundwater). The applicable DEP regulations require an analysis of any potential change in groundwater levels, saltwater intrusion, change in flow, and subsidence.

There is nothing in the Site Location of Development law that either expressly permits or prohibits local regulation of groundwater extraction. Again, the question becomes whether the state’s site law impliedly preempts local regulation. On the one hand, the statutory scheme establishes a relatively in-depth regulatory process, which has lead Maine courts to conclude that local regulation is preempted. On the other hand, there are provisions in the site law seem to imply that local regulation is permitted. For example, it allows municipalities (instead of DEP) to assume responsibility for review if their regulations are sufficient to guarantee thorough review. It also states that nothing in the site law prohibits municipalities from enacting stricter noise regulations that contained in the site law. These provisions imply that municipalities have concurrent jurisdiction to regulate areas that are subject to state site location review as long as those regulations are at least as stringent as the state’s.

Ultimately, the determination of whether a particular state statute will preempt local regulation is a tough call, as evidenced by one of the Law Court’s more recent decisions on municipal home rule. In *Smith v. Town of Pittston*, 2003 ME 46, 820 A.2d 1200, the Law Court narrowly upheld a municipal ordinance that prohibited spreading of septage in Pittston on a 4-3 basis. While the majority held that the ordinance was a valid exercise of its home rule authority, a strongly worded dissent held that the ordinance was incompatible with the state’s comprehensive regulatory scheme governing the disposal of septage (the Solid Waste Management Act). While both the majority and dissent engaged in the same preemption analysis, they reached opposite conclusions. The *Smith* case exemplifies how the question of whether a state statute will preempt a local ordinance by “clear implication” is by no means clear.

In conclusion, while there is much uncertainty in this emerging area of law, one thing is sure – the Legislature and Maine courts will be called upon in the months and years ahead to address the issue of groundwater extraction. Fundamental change may well be on the horizon. [me](#)

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# Shoreland Zoning Update

By Douglas Rooks

A significant overhaul of the state's shoreland zoning rules requires all towns and cities to re-adopt their local ordinance by July 1 of this year. It's a process that has gone smoothly in some towns, but has prompted questions and some resistance in others.

The changes in the Mandatory Shoreland Zoning Act, a law first adopted in 1971, were contained in legislation passed in 2006, with subsequent rulemaking by the Department of Environmental Protection (DEP), which is charged with enforcement. The 2006 law originally specified that the re-adoption of a municipal ordinance be completed by 2008, but the first round of wetlands maps issued by the state proved to be inadequate, and the deadline was extended another year.

As of the end of June, at least 175 municipalities had completed and submitted new ordinances, and 140 of them had been approved by DEP. Still, about 450 municipalities are required to maintain shoreland zoning rules; any town with significant wetlands, coastal frontage, rivers and streams, or great ponds within its boundaries is affected, which in Maine is just about everyone, since there are 492 organized municipalities overall.

Even small towns without zoning or even a planning board are required to zone the shoreland areas, a system that is possibly unique in Maine planning law – a broad state mandate, but relying on local responsibility for carrying it out.

The thinking behind the latest amendments was that it was time for a housecleaning, according to Rich Baker, DEP's shoreland zoning coordi-

nator. The much-amended ordinances were not always easy to read and follow, and lawmakers decided that a uniform format should make things easier at the local level – eventually.

In terms of substantive changes, there are several that will affect how shoreland zoning works in most communities. The most controversial, and most debated at town meetings this year, lies in the definitions and mapping of critical or high-value wetland habitat.

Baker explains that some of the required changes resulted from the need to make shoreland zoning consistent with the Natural Resources Protection Act, which had somewhat different definitions of wetlands and could be seen, in some cases, as conflicting with the local shoreland ordinances.

## WETLANDS SCRUTINY

The change that towns noticed the most was that the increase in most, though not all, shoreland areas, is the proportion of wetland falling into resource protection zones, rather than low-density residential or general development areas.

Wetlands, particularly along the coast, are considered key incubators of fish, amphibians, and bird life, with research over the last three decades documenting the negative effects of building in sensitive areas.

Further inland, the state has required towns to begin mapping vernal pools – seasonally wet areas that are also important to amphibian and reptile reproduction. These are species that, as one wildlife expert put it, provide the “grocery store” for the larger birds and mammals that are more often noticed by humans, from bald eagles to whitetail deer.

While forestry and farming are allowed in resource protection zones, new construction of residential and commercial structures is limited. Particularly in coastal areas, there were claims by property owners that valuable shorefront lots were being rendered unbuildable, severely reducing their value.

Baker said that this is not often the case, and that the new rules specifically allow for changes in existing non-conforming structures. If a camp without a permanent foundation is converted to year-round use, for instance, the state requires that the foundation be located only “as far as practical” from a protected wetland. If various setbacks do make it impractical to site a house, landowners are guaranteed the right to build one dwelling on their property, “although at a size that might not be what they originally wanted,” Baker said – a maximum of 1,500 square feet.

Another new feature concerns municipalities with coastal bluffs, which have been newly mapped by the Department of Conservation's Bureau of Geology, from Kittery as far as Roque Bluffs (funding ran out for the final segment in Washington County.). Current setbacks are measured from the shoreline itself, without considering the distance from the edge of the bluff to the shore. The new standard instead measures the setback from the edge of the bluff. The rule was prompted by a landslide that destroyed homes in Rockland that were sited legally under the law, but were too close to the water to escape undermining by wave action.

## TIMBER HARVESTING TRIGGER

While less controversial than the wetlands rules, shoreland zoning now includes numerous changes to timber

*Douglas Rooks is a freelance writer from West Gardiner and regular contributor to the Townsman.*

harvesting restrictions, which limit how much cutting landowners can do along lakes, ponds, streams, and coastal stretches, and in the resource protection zones where wetlands have been mapped.

The forestry standards allow landowners and towns new choices in applying local regulations, and also allow municipalities to adopt new state standards, with the understanding that the state will provide expertise in enforcing the local ordinance.

Under the old forestry standards, landowners could remove only 40% of standing timber over a 10-year period within 250 feet of designated rivers, lakes and wetlands, and within 75 feet of certain streams. A new alternative standard requires leaving 60 square feet of basal area (measured at the base of trees four inches and larger) per acre. Land within the shoreland zone but not in wetlands can include clearcuts of up to 14,000 square feet, an increase from the previous limit of 10,000 square feet.

Alternatively, the state has written forest standards that municipalities can adopt in the local ordinances. If 75% of shoreland zoning ordinances include the state standards, they will go into effect. Baker said that of the plans completed so far, 80% include the state standards, which if the pattern continues would trigger state oversight and enforcement assistance.

"That's the part that has been debated the most at the local level," he said. "Many towns want the state's help, since they don't have experience in applying harvesting rules themselves."

MMA's Jeff Austin said that municipalities suggested and support the "trigger" mechanism instead of the state simply mandating new standards. This way, he said, towns that prefer to do so can keep their existing standards, though they will not get any state enforcement help.

Municipalities that use the state standards can also opt to enforce them jointly with the state, or rely on state enforcement alone. The 75% figure was set so that if only a small number of towns used the standards, the state wouldn't be obligated to gear up for enforcement.

"We'd like to see this as a model of a more collaborative approach with the state on similar planning and zoning issues," Austin said.

Also of interest for lakefront and oceanfront landowners are revised rules about clearing for views and access to the water. Originally, leaving a few large trees was considered sufficient, which created an unnatural effect and meant there were no replacements for older trees damaged or killed. Now, saplings must be maintained in the buffer, and the width of the permitted "meandering paths" to the shore – so designed to contain runoff and prevent erosion – have been reduced from 10 feet to six feet.

### **ROUGH VS. SMOOTH**

As might be expected, with several hundred towns and cities debating ordinance changes, there have been some strikingly different results. At the Arrowsic town meeting, the shoreland ordinance provoked one of the longest debates of the evening on June 17, with several speakers objecting that their previously permitted structures were now non-conforming under the new rules. Ultimately, though, voters adopted the ordinance, 48-14.

In neighboring Georgetown, a special town meeting approved shoreland rules meeting the state's requirements, but rejected, at the annual town meeting, additional requirements that would have broadened protected areas around small streams.

By contrast, the Falmouth Town Council swiftly adopted a new ordinance that was crafted by the Long Range Planning Advisory Committee. The committee met five times, from October 2008 to April of this year, to complete its shoreland zoning work, which includes extended protection to the small streams encouraged but not required by the state rules.

Rich Baker said the stream rules were a compromise, recognizing research that has found that timber harvesting around even minor perennial streams can raise water temperatures and render them uninhabitable for many species.

Planning Director Theo Holtwijk said it's no secret why such rules were more popular in Falmouth than in some other towns. "This has long been an environmentally conscious community," he said. When it comes to going the extra mile to protect habitat and natural resources, Falmouth is usually out front, he said.

The town is also conducting a sepa-

rate effort to make sure all its natural resource rules are consistent with all state and federal rules, which should make the ordinance easier to apply.

That doesn't mean that the ordinance just adds more restrictions, though, he said. Provisions in the state rules that allow for special exceptions, which unlike variances do not require a showing of hardship, may allow building on some lots that would otherwise have been prohibited.

Holtwijk said other towns could benefit from consulting the regional DEP representative about their ordinances before creating the final version. Going over the maps together, he said, allowed for questions and answers that improved the final product, he said.

### **BLUE HILL QUERIES MAPS**

Up the coast on the Blue Hill peninsula, Jim Schatz has his doubts about the new rules. He's a long-time selectman in Blue Hill, and a three-term state representative for District 37, which also includes Brooksville, Castine, Penobscot, Sedgwick and Surry.

Of those six towns, only Brooksville was expected to have an ordinance in place by July 1 that meets the state standards. The biggest problem, Schatz said, is that the aerial maps the state provided are difficult to coordinate with tax maps that delineate property boundaries. This makes it difficult to determine just how the setbacks and zones apply to a specific parcel.

He said that maps "are too generic to interface well with our tax maps." Based on this information, "It's hard to say in some cases whether a changing in zoning is appropriate or not."

Part of the problem, as he sees it, is that the state's maps, prepared by the Department of Inland Fisheries and Wildlife, were based on photos taken during the temperate months. Structures already within the shoreland zone are sometimes obscured.

Schatz said that state regulators may be more used to crafting land use restrictions in the unorganized territories, where lots sizes are much larger and there are relatively few landowners. "In our shoreland zone, there may be hundreds of landowners, many of them counting on a retirement home or subdividing their property."

He's not convinced that the new local ordinances will be easier to apply than the old ones. "I don't know what

they were thinking when they took this approach, but it isn't working well," he said. "If you want maximum protection of the resource, I guess you're happy. Otherwise, you're definitely not happy."

Schatz met with DEP representatives and other legislators in June, and emerged with the conclusion that a legislative working group should be convened to study the results of the shoreland zoning overhaul, and possibly recommend new legislative action.

At DEP, Rich Baker said that updating the previous wetland maps, which date from 1990, was essential to the new effort. The earlier maps, which are still being used by many towns, have a scale of 1-2000, and won't definitively determine how much of each property is in the resource protection zone. That much hasn't changed, he said.

"The point is that when you start a project, you have to find the wetland and measure 250 feet back," he said. Trying to offer advance assurance to each landowner who may build in the future may not be possible, he added.

### SHORELAND ZONING, PLUS

In Bowdoinham, shoreland zoning revisions became part of a larger effort to overhaul planning rules, undertaken under Bowdoinham's first town planner, Michelle Briand, who was hired two years ago.

A Land Use Planning Committee (LUPC) was formed to review 10 ordinances already in effect that dealt with subdivisions and shoreland zoning. The town rules were a hodgepodge, Briand said, and were hard for townspeople to understand and difficult to administer. "We used MMA's legal assistance line a lot," she said.

The LUPC came up with a single comprehensive ordinance that included shoreland zoning, but when it went to public hearing it proved too big a change for many townspeople's taste. Included were the first zoning rules separating commercial and residential development, as well as shoreland provisions that would have afforded protection to the smaller perennial streams.

Both of those sections were ultimately removed, and the amended ordinance was adopted by town meeting on June 10. Briand said the LUPC decided to go ahead with a single ordinance anyway, using the sections that

raised fewer objections. In addition to shoreland zoning provisions, the ordinance includes subdivision rules and site review planning, as well as modified road standards.

While the wetland maps prompted much discussion, they were ultimately adopted. "The state doesn't leave much of a choice," Briand said. A remaining question is how the town will assess property whose value may have been affected by the new rules, she said.

### FINISHING UP

Baker says that the process of completing the shoreland zoning revisions "has gone slower than we hoped." He still hears a lot more questions from towns than outright resistance, though some communities, such as Farmington, have rejected proposed ordinances.

Since so many towns have their annual meetings in June, and DEP has 45 days to review the new ordinances, things will be busy into the summer, he predicted. DEP can approve, approve with conditions, or reject the ordinances being submitted.

"We rarely reject an ordinance outright," he said. "Most of the time we can work with the town, and get things back in line."

While he concedes that shoreland zoning may lack the precision involved in measuring road widths and boundary lines, that doesn't mean it's purpose is not important. "The Legislature

made these changes because there are resources that need protection," he said, "and it decided this was the best way to make sure that happens."

### WHAT COMES NEXT

Baker said that for towns that do not submit plans or where voters have rejected them, the state will begin drawing up plans based on the medium- and high-value wetland maps that will then become the governing ordinance in those towns.

"We'll probably work on those in batches of 10, but only after we've reviewed all the plans that come in," he said. As of early July, there were still two or three of those a day.

Baker said that towns or cities that continue to work on plans, even though the July 1 deadline has passed, won't see early enforcement action. Another reason it will take time is that the state, like the towns, must notify landowners whose properties have been newly assigned to the resource protection zone.

Under the old regime, 56 of the 450 municipalities required to do shoreland zoning had state-imposed plans. With so many plans still outstanding, it is impossible to say whether there will be more or fewer under the new standards.

"We recognize when towns are working in good faith," Baker said, and added that the process works better when municipalities prepare their own ordinances. **ME**

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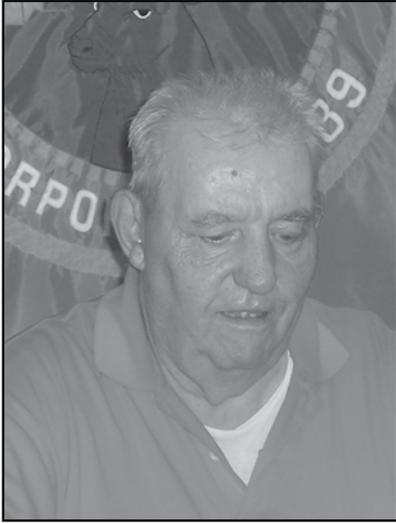
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# 'Hardy' Help at Town Office

By Liz Chapman Mockler



Neville Hardy

It's 2 p.m. Do you know where your first selectman is?

If you live on Deer Isle, you know exactly where to find Neville Hardy; right where he's been for 35 years.

At the town office.

Hardy, 70, represents one of the many traditions of municipal government which sets Maine apart from most other states in the union -- an elected official who performs both executive and administration functions for the town carrying out the policies of the legislative body (town meeting) and providing administrative guidance to town employees.

In addition to Hardy's dedication to holding selectmen office hours from 12 p.m. to 4 p.m. four days a week, the three-member board also meets on Thursday evenings.

"We just couldn't (get the town business done) coming in on a Friday night," Hardy said recently of the past practice by selectmen.

"The issues and duties were too complicated," he told the *Maine Townsman*, noting in particular the need to

keep property tax records up-to-date and the bills out on time.

Deer Isle has other attributes in common with many other small Maine towns: It still runs on a calendar year budget; it holds an annual town meeting in March that empowers voters to make the final decision on nearly all budget items; and the selectmen really do act as tax assessors every April, with pad and paper and measuring tape in hand.

## NEEDED CHANGE

When Hardy was first elected 41 years ago as third selectman, town office hours didn't exist -- and shortly thereafter the town office itself disappeared, a victim of an arson fire that remains unsolved today.

Three years later, Hardy ran for second selectman. And after one term in that seat, he was elected first selectman and took over the day-to-day demands of operating a small island community whose population swells from 1,900 year-round residents to about 5,000 during the summer.

In 1968, when Hardy was elected for the first time, the town did not even have island property mapped out -- neither parcels nor what sat on them. There was constant confusion and continuous complaints from homeowners who were upset because they did not understand how their tax bills were calculated since there weren't even tax maps. They got an annual bill and were required to pay it, regardless.

"They had no way of knowing how the town got the valuation numbers and that wasn't good," said Hardy, who tends to understate most everything in a quiet but confident way that obviously has served him well over his long municipal career.

When Hardy took office in 1969, he advocated that the town conduct its first-ever revaluation. The project was illuminating, literally.

"We found a lot of land and structures that we had no way of knowing who even owned them," he said.

Since then, selectmen update property values each year and contract with a Bangor assessor who updates the tax maps annually.

"We really didn't do (a revaluation) until the state got after us, because it's a lot of work," Hardy recalled.

Also at that time, selectmen tended to do what many did 40 years ago in small-town New England: Visit a selectman at his general store to get questions answered and find out about new local laws and rules.

Oh yes, and the latest town gossip, too.

Selectmen did not keep minutes back then, either, Hardy said, all of which both disturbed him and inspired him to seek changes in the way the town conducted its business, held elected and appointed officials accountable, and communicated with the public.

"I didn't think it was really good, or proper," Hardy said. "I figured (residents) needed somewhere to go to get information and help, so we opened up here" at the town office as soon as he was sworn in as first selectman in 1976.

Over the years, Hardy worked awhile for a lumber mill in Bangor, drove a truck for a Stonington sardine factory, patrolled the island and its environs as a deputy sheriff, and drove a school bus before retiring "a good long time ago."

A Vietnam veteran, Hardy also ran his own general store for a dozen years or so, but refused to operate it as an arm of local government.

Hardy also handles most of the road commissioner responsibilities, overseeing both winter and summer work with three employees. He volunteers for the fire department, has served on the Hancock County Budget Committee for a decade, as well as being named as the island's representative on the county 911 committee.

"I like helping the people," he said.

## TODAY'S CHALLENGES

Although Hardy has seen countless large and small changes over the years, including transitioning from a typewriter to a computer only a decade ago (he doesn't do email), he said the biggest challenge for the town today is

*Liz Chapman Mockler is a freelance writer and media advisor from Augusta.*

trying to keep pace with critical – and expensive – road work.

Selectmen decided many years ago to take over winter plowing of Maine Route 15, the only primary road through the island which leads to Stonington and then stops at the Atlantic.

Hardy said the state did the best it could to keep the state road passable, but town crews were unable to clear local roads until the state snowplows came through first.

It was not pretty. Residents, many who make a living working out of town, complained about being snowed in and forced out of work. The town's small public works staff kept the town-owned secondary roads clear, but people were just barreling into drifts once they hit the mouth of the state road.

The state now pays the town to keep Route 15 plowed, while Deer Isle residents have supported selectmen's annual plans to systematically pave and repair town roads in the summer.

"We pave sections every year and rebuild the worst ones," Hardy said. "If you fall behind, you just can't get caught up."

The town relies almost entirely on boat and vehicle excise taxes to pave, maintain and plow roads. Sand and salt alone cost \$100,000 a year, he said.

A statewide referendum in November calling for a dramatic reduction in excise taxes would be devastating to the island community, Hardy said.

If the referendum were to pass, "that would not be good," he said quietly.

Hardy has served longer than most elected and appointed municipal officials working in Maine today. He remembers the days when residents "packed the gym" for the annual town meeting and took an active role in the local school budget. There also were far more contested local races and the lack of challengers keeps many voters home on election day, he said.

Today, turnout is often small for the annual town meetings -- another fact of small-town life in Maine that Deer Isle shares with some of its counterparts. Few residents turn out to vote on the local school budget – the single costliest budget line for the taxpayers, he said.

This spring, 35 townspeople attended the public hearing on the Deer Isle-Stonington school budget; the actual balloting attracted 45 voters, Hardy said.

"We used to fill the gym when we tried to get (school) budget cuts," he said, adding that the tax bills clearly spell out that school and county government costs more than all other operations of the town.

When asked if he was disappointed by the low voter turnout, he said, "I guess probably," but added, "We hope that means (taxpayers) think things are going okay."

Even at 70, Hardy said he plans to stick around a while longer. Although only challenged for re-election a few times in four decades, the last election three years ago was much different because his opponent mailed out brochures and posted election signs around the island in an effort to unseat him.

He said he will seek re-election again next March, when his current term expires. "I've seen a lot of people come and go," he said, "but I'm not ready to go yet." 

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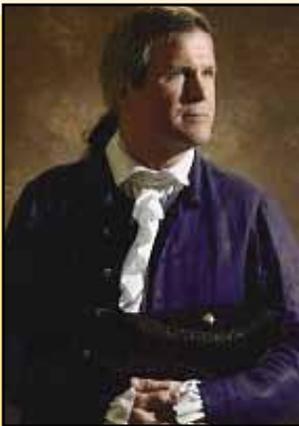
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# 2009 MMA Convention

Augusta Civic Center • October 7 & 8, 2009

**DON'T MISS THE SPECIAL FEATURES AND EVENTS**



## Opening Luncheon

**Wednesday, October 7 – 11:45 a.m.-1:00 p.m.**

Our special guest for the Opening Luncheon is Thomas Jefferson, as portrayed by speaker, writer, and actor Patrick Lee. As Jefferson, Mr. Lee will speak from an 18th and 19th century perspective, sharing experiences that parallel the challenges of today. Mr. Lee's Jefferson creates an experience that inspires people to embrace the future by bringing wisdom from the past.



## NLC Leadership Training Institute Seminar:

**1/2 Day Workshop – Wednesday, October 7 – 1:15-4:15**

Budgets can't get much tighter. Where do you start when you have to make cuts to a budget that you've already reduced? Across-the-board cuts hit services and programs that are working well. Learn how to start with a set of results that matter to citizens and to allocate available dollars to each of these results. Come away with strategies that are proven, effective tools for local leaders. **Speaker: Lloyd A. Blanchard, PhD**



## NLC Leadership Training Institute Seminar: Conducting Effective Public Meetings to Engage the Community in Dialogue

**1/2 Day Workshop – Thursday, October 8 – 2:00-5:00 p.m.**

How can you better engage the public in decision making? Examine the drawbacks of the traditional public meeting format and learn alternative methods of involving the public in a meaningful dialogue about public policy issues. Learn the difference between positions vs. interests, how to effectively frame issues for solutions, and how to engage the public as "partners in problem solving." **Speaker: Nan Stager**

## We've made some EXCITING changes this year!

It's time to block out Wednesday and Thursday, October 7 and 8, on your calendar. The 73rd Annual MMA Convention kicks off at 8:00 a.m. on Wednesday and runs through the end of the day on Thursday.

The Annual MMA Convention is the premier meeting for municipal officials in Maine, and it provides a unique educational and networking opportunity.

### **This year's get-together features:**

- Two National League of Cities (NLC) Leadership Training Institute Seminars, one on performance budgeting in government, and one on conducting effective public meetings to engage the community in dialogue.
- Over twenty valuable workshops in important areas of municipal operation, including finance, human resources, citizen education and involvement, and emergency preparedness and response.
- The opportunity to visit with more than 100 exhibitors and stay current with services and products for municipalities.
- Several in-depth sessions designed for elected officials and managers on emergency preparedness and response.
- Chances to network with officials from across the state during social events. New this year is a Dine Around event, in place of the Wednesday evening banquet.

A complete conference program will be published in the August/September edition of The Townsman

**Registration is Open. Register today for the MMA 2009 Convention! Use the enclosed registration form to register, or online at: [www.memun.org](http://www.memun.org)**

## Social Events

Our complement of social events is your chance to network with colleagues, meet officials from across the state, and talk shop in informal settings.

**New this year is our planned Dine Around groups on Wednesday evening, in place of the annual banquet.**

**Welcoming Reception - North Wing/2nd Level** ← **NEW LOCATION!!**

**Wednesday, Oct. 7 – 4:30-6:00 p.m.**

A relaxing time for municipal officials to talk with exhibitors and each other. This reception features an open bar and top quality hors d'oeuvres.

**Dine Around - Detailed information soon!** ← **NEW EVENT!!**

**Wednesday, Oct. 7 – Beginning at 6:00 p.m.**

For our new Dine Around event, we'll help organize groups of attendees to gather at local restaurants. These casual get-togethers will promote networking in a relaxed setting, and will allow you to schedule your evening according to your preference.

**Breakfast with Exhibitors - Exhibit Hall**

**Thursday, Oct. 8 – 7:30-8:15 a.m.**

Join all attendees and exhibitors in the exhibit hall for a continental breakfast.

**Ice Cream Social / Door Prizes - Exhibit Hall**

**Thursday, Oct. 8 – 1:15-2:00 p.m.**

Immediately following the Annual Awards Luncheon, head over to the exhibit hall for our ice cream social and announcement of exhibitor door prize winners and the grand door prize winner!!

# Concurrent Workshops

More than twenty concurrent workshops will be delivered. Presenters from Maine localities, Maine state government, industry experts, national experts and Maine Municipal Association staff will deliver both nuts-and-bolts and cutting-edge material. Our tentative workshops line-up will cover topics such as:

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- Audit Standards and Allocation of Fund Balance
- Controlling Health Care Costs
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- Fraud & Embezzlement
- Effects of Foreclosures, Distress Sales, Auctions, and Short Sales
- Performance Budgeting

## In Human Resources:

- Documenting Employee Non-performance
- Reductions in Workforce
- When Employees Private Lives Affect the Workplace

## In Citizen Education and Involvement:

- Right to Know – Meeting FOAA Training Requirements
- MMA’s Citizen Education Program
- Upcoming Citizen Initiative Campaigns
- Engaging the Community in Dialogue

## In Emergency Preparedness and Response:

- Statewide Mutual Aid
- NIMS Compliance to Access Federal Grant Monies
- All Hazards Case Studies: Lessons Learned
- Senior Officials Workshop for All Hazards Preparedness

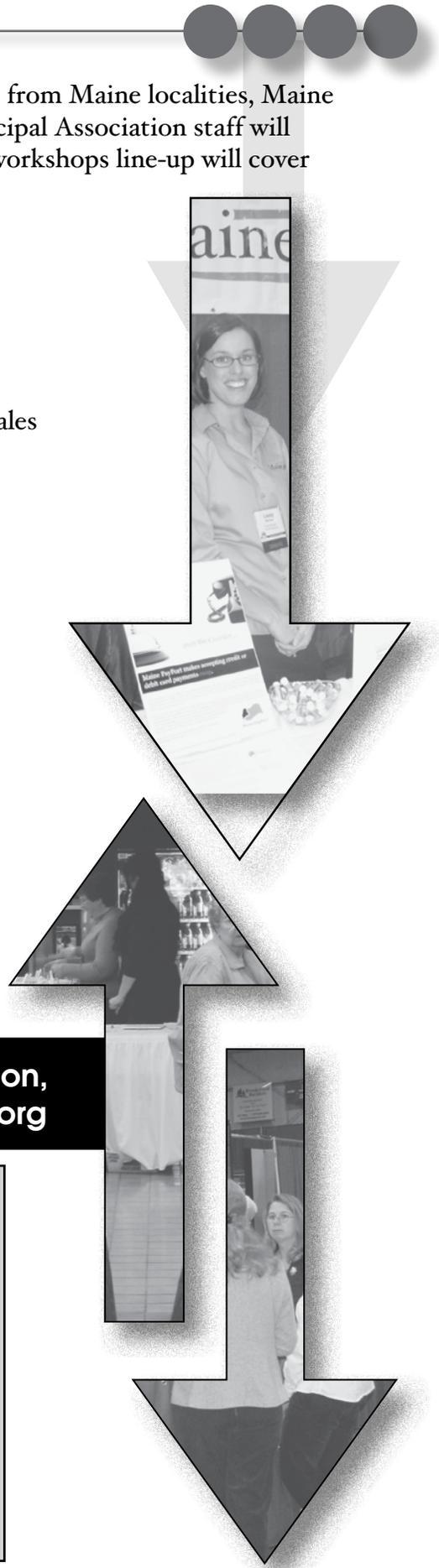
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# Registration Form

## MMA Convention – Augusta Civic Center – October 7 & 8, 2009

### One registrant per form (please photocopy for additional registrations)

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Telephone:	Fax:	
Name of Guest: <i>(Registration complimentary)</i>		

<b>WEDNESDAY SPECIAL PROGRAMMING</b> <i>(Please check if attending)</i> <input type="checkbox"/> Title 21-A (MTCCA Training) (8:00-4:15) <input type="checkbox"/> Performance Budgeting in Government (1:15-4:15)	<b>THURSDAY SPECIAL PROGRAMMING</b> <i>(Please check if attending)</i> <input type="checkbox"/> Sr. Officials Workshop for all Hazards Preparedness (7:45-11:45) <input type="checkbox"/> Conducting Effective Public Meetings to Engage the Community in Dialogue (2:00-5:00)
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CONVENTION REGISTRATION FEES (For one or both days)	COST
<input type="checkbox"/> MMA Members	\$ 60.00
<input type="checkbox"/> Non-member municipality/Gov't/or Non-profit	Pre-Registration - <i>must be postmarked or received by 9/30/09</i> \$ 75.00
<input type="checkbox"/> Non-member municipality/Gov't/or Non-profit	Registration - <i>after 9/30/2009</i> \$ 100.00
<input type="checkbox"/> Business Representative	Pre-Registration - <i>must be postmarked or received by 9/30/09</i> \$ 100.00
<input type="checkbox"/> Business Representative	Registration - <i>after 9/30/2009</i> \$ 125.00
<b>Registration Fee</b>	<b>\$</b>

WEDNESDAY LUNCHEON	Location	Cost
Opening Keynote Luncheon	Civic Center	<input type="checkbox"/> Registrant \$ 22.00
		<input type="checkbox"/> Guest \$ 22.00

<b>PLEASE NOTE:</b> <i>There will be no banquet on Wednesday evening. Look for information about restaurant groups following the Wednesday evening Welcoming Reception.</i>	Wednesday Meal(s) \$
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THURSDAY LUNCHEONS	Location	Cost
Awards Luncheon	Civic Center	<input type="checkbox"/> Registrant \$ 22.00
		<input type="checkbox"/> Guest \$ 22.00
Maine Chapter of American Public Works Association (MCAPWA)	Augusta Elks Lodge	<input type="checkbox"/> Registrant \$ 22.00

<b>Thursday Meal(s)</b>	<b>\$</b>
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<b>TOTAL (Registration Fee &amp; Meals)</b>	<b>\$</b>
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Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Fax registration form to: (207) 626-5947  Check will be mailed  Payment Enclosed  Send invoice PO #: \_\_\_\_\_

Mail form to: Convention Registration, Maine Municipal Association, 60 Community Drive, Augusta, ME 04330

**Make check payable to Maine Municipal Association**

**Questions/Cancellations:** Please call Louise Ridley at MMA, 1-800-452-8786. Notification must be given three business days in advance to obtain a refund. All cancellations are subject to a \$10 processing fee. Registrations may be transferred to another official or employee.

Please inform us of any special dietary needs or special requirements you may have due to a disability.

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# Annual Search

## Nominees for the Maine Municipal Association's Most Prestigious Award

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- ◆ *Has demonstrated the capability and willingness to “Hold the Community Together”;*
- ◆ *Has a selfless concern for others in their community;*
- ◆ *Has not received full recognition for their service in local government; and*
- ◆ *Is currently serving or has retired in the past two years*

**MMA wants to know about them! Please take this opportunity to nominate this individual and give MMA the opportunity to recognize their achievement and dedication.**

**THE NOMINATION PROCESS:** Please complete the Nomination Form and return it to MMA with up to five supporting letters. *The supporting letters are a critical part of the process.* Care should be taken to describe in detail why your Nominee should receive this award and to assure that they highlight the criteria referenced above. Please give examples of your Nominee's efforts. Nomination Forms can be downloaded from the MMA website at [www.memun.org](http://www.memun.org). *Start thinking about your Nominee now!*

**THE JUDGING:** The panel of judges will consist of three MMA Past Presidents. Please note that since there will not be an Annual Banquet this year, the award will be presented at the MMA Awards Luncheon being held in conjunction with the MMA Annual Convention on Thursday, October 8, 2009. The luncheon is scheduled for 11:45 a.m.

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3. Compiling and developing information relevant to the education and technical assistance needs of Maine's solid waste and recovery programs;
4. promoting market development and cooperative marketing opportunities.

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# Stimulus Funding Update

By Lee Burnett

The City of Albuquerque, New Mexico, population 518,000, has created 10 teams to exploit funding opportunities in the federal stimulus package, or more formally called the American Recovery & Reinvestment Act (ARRA). In contrast, the City of Hallowell, Maine, population 2,467, relies on overworked interim City Manager Todd Shea to keep abreast of opportunities. Expectations are low.

“Working 50-60 hours a week running the town doesn’t leave much time to surf the web looking for grant opportunities,” acknowledges Phil Lindley, a Hallowell city councilor who is also executive director of ConnectME Authority, where he keeps abreast of stimulus funding opportunities for expanding broadband into rural Maine. Lindley voices a gripe commonly heard among small town officials: that stimulus funds are bypassing them. “We complain about that on a regular basis,” said Lindley.

The complaints may be premature since the vast majority of stimulus funding is still in Washington, unspent, unallocated. As of June 5, just 18 percent of the \$780 billion stimulus package had been awarded and six percent spent, according to the Recovery.org website. Ryan Low, Maine Commissioner of Administrative & Financial Services and state ARRA coordinator, said some money was spent quickly to create jobs, while longer-term investments are still to come. “So far, just a fraction has been spent,” he said.

Still, the anxiety about being bypassed is real and there are some things communities can do to position themselves. First, there are some new oppor-

tunities since the *Maine Townsman* last went to press:

## RECOVERY ZONE BONDS

Communities looking to finance infrastructure projects in the next 17 months should look to new kinds of public purpose bonds created by the stimulus package. Both Build America Bonds and Recovery Zone Bonds are potentially more advantageous than tax-exempt borrowing, although their applicability varies, according to Robert O. Lenna, executive director of the Maine Municipal Bond Bank. What makes these bonds different is that they are sold on the commercial bond market – a much larger pool of investors than the tax-exempt bond market – but they carry give-back options that make them comparable in cost to tax-exempt borrowing, he said.

The Build America Bonds allow either a tax break to the investor or a direct payment to the bond seller of 35 percent. Those incentives work best for bonds in the several hundred million dollar range and for many decades in duration, which will probably make them unattractive to Maine bond sellers, Lenna said.

The Recovery Zone Bonds allow a tax break or direct payment of 45 percent, although with an additional restriction that the bonds must be used to finance a project in an economically distressed area. Those incentives make Recovery Zone Bonds potentially more attractive than tax-exempt borrowing, even for small projects of short duration, Lenna said.

Lenna is still researching how “Recovery Zones” will be defined, although generally they are areas of high unemployment, poverty, foreclosures, or general distress, or an area suffering

from a military base closure. “As we find out more, if it is what we think it is, we will be saying, ‘you should be looking at this.’ If it is the best deal around, we will be saying that,” Lenna said. The Recovery Zone Bonds opportunity expires January 2011.

## COMMUNITY FACILITIES

Communities smaller than 20,000 residents looking to build or repair libraries, replace fire trucks, or build fire stations and other community facilities should reconsider the rural development program of the U.S. Department of Agriculture (USDA Rural Development). The stimulus package could make up to \$20 million available in Maine for such purposes, which is double and triple the usual allocation, said Valarie Flanders, acting director of the Rural Development program for Maine. In the past, the program has attracted only modest interest because funding was so limited. Word apparently hasn’t gotten out about the infusion of money because Flanders’ office is receiving few inquiries about the community facilities program compared to the surge in interest in its housing and business development programs, she said. The time-consuming process of obtaining local approval for capital expenditures may also be a factor, she adds.

## ENERGY PROGRAMS

Communities in northern and eastern Maine looking to replace an old furnace might consider taking advantage of a new wood heat initiative. The U.S. Department of Agriculture recently awarded Maine \$11.4 million in stimulus funding to finance the conversion of up to 15 public buildings from fossil fuel to wood heat. Only com-

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*Lee Burnett is a freelance writer from Sanford.*

munities in Aroostook, Franklin, Hancock, Penobscot, Piscataquis, Somerset, and Washington counties are eligible. The program is being administered by the Maine Office of Energy Independence, according to Congressman Mike Michaud, D-Maine.

By August, EfficiencyMaine could announce energy grants for smaller and mid-sized communities. Some \$5.8 million is available to municipalities from the \$36.8 million in stimulus funds awarded to Efficiency Maine, said Executive Director John Brautigam. "It's astonishing, it's exhilarating, it's scary," Brautigam told an audience of about 70 municipal folks attending the recent annual meeting of Southern Maine Regional Planning Commission in Sanford.

Efficiency Maine plans to award grants up to \$85,000 on a competitive basis for a variety of energy conservation, efficiency and development projects. (The 10 largest communities in Maine are not eligible because they received allotments directly from the federal government.)

Brautigam said the state's program will be closely aligned with the federal program, which funds 14 different categories of activities: energy audits and energy conservation strategies, building retrofits, public education, overhauling zoning and building codes to emphasize less energy intensive development, sequencing streetlights and converting them to more efficient bulbs, bike lanes, flex-time work policies, engine idling reduction programs, solar and other renewable energy installations, and regional approaches.

Brautigam is trying to encourage creativity. "We're trying to keep it wide open," he said. "What works in your town? ... Try some things, don't be afraid to fail. People are beginning to make the mental transition."

Potentially, there's more energy block grant money coming to Maine, although that depends on the outcome of discussions between the Department of Energy and county officials. It turns out that county governments in Maine – and elsewhere in New England – are receiving no energy efficiency and conservation block grant funds. The omission stands out because the U.S. Department of Energy announced that the 10 largest counties in each state (and counties with populations exceeding 200,000) would all be receiving

direct formula awards under the \$3.2 billion Energy Efficiency and Conservation Block Grant (EECB) program.

But when the allocations were listed in March, counties in Maine, New Hampshire, Vermont and Massachusetts were omitted from the allocation list. DOE's explanation is that county government in northern New England is so limited that it can be disregarded.

"As defined by the Census of Governments, county governments in Maine, Massachusetts, New Hampshire and Vermont perform only limited functions, and thus all counties in these states were determined to be ineligible for Program funds," according to an item published in the Federal Register on April 15.

Cumberland County and the Maine County Commissioners Association are both exploring an appeal. But first, county officials are trying to determine what happened to the missing county allocations – were they added to boost Maine's overall share or were they withheld? If they were awarded to Maine, an appeal is not likely, but if they were withheld, an appeal is more likely, said Elisabeth Trice, grants coordinator for Cumberland County. A letter has been drafted to the DOE and to Maine's congressional delegation.

"We don't know if we're being treated fairly or not," explained Trice.

As it now stands, Cumberland County, with a population of 280,000,

received zero funding, while Lincoln County, Montana with a population of 18,000, received \$80,000, she notes.

Trice takes exception to characterization of Cumberland County government as limited and notes that it runs a rural police force, county jail, a deeds office, a probate office and a civic center, and is the only county in New England to win designation as a CDBG "entitlement" community.

The DOE is already looking into the matter, according to a spokeswoman. "Secretary [Steven] Chu has discussed this issue with a number of senators in the region and is aware of the concern," spokeswoman Jennifer Stutsman wrote in an email. "We are working to develop a solution that will support energy efficiency efforts in local communities across New England."

### THINKING OUTSIDE THE BOX

Looking to the stimulus package for help with core projects like road paving may be a low-percentage game. A good example is the money recently made available for the Fire Station Construction Grant (SCG) program to build or renovate fire stations. By the time the July 10 deadline rolled around, the Department of Homeland Security expected between 5,000 and 10,000 applications and requests totaling \$30 billion. But only 100 projects will get funded because just \$210 million is available.



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There may be more payoff in thinking beyond town hall, beyond town borders, even beyond state borders.

Last January, Waterville joined with three neighboring communities for a three-day visioning exercise in reducing energy use and their carbon footprints. The Mid-Maine Sustainability Coalition has more than a 100 volunteers implementing a multi-part strategy that promotes recycling, local foods, weatherization, more efficient transportation, renewable energy sources and education. Positioning for grant money was not a motivating factor in the creation of the coalition, although it's an obvious byproduct, said Waterville City Manager Michael Roy.

"I think it's certainly a huge help," said Roy. "We have much more focus in what our priorities are ... to have a core group of people committed to the objectives ... and to implement them." He said the initiative came from people outside city hall, some affiliated with Colby College. "We had a fledgling sustainability initiative – biodiesel – but they approached us. The picture has to be bigger than just what can you do [in energy efficiency] of government buildings." The group hasn't exploited grant opportunities yet, but as a former community development director, Roy said he knows the value of "having planning and strategy in place beforehand."

Portland initially took an outside-the-box approach to using its \$683,000 Energy Efficiency and Conservation Block Grant (EECBG) money, but wasn't convinced it could put together a successful program in the allotted time and reverted to a more traditional approach. An initial plan was to use \$400,000 of its funds to weatherize privately-owned apartment buildings and to also create a city-appointed position to work with landlords to apply for other grants and tax credits.

Why would a city choose to use tax dollars on privately-owned buildings when it could use the same money to weatherize its own buildings? Because a big-picture approach would be wiser in the long run, explains City Councilor David Marshall. The impact of another oil price shock will be huge in Portland, where old, drafty apartment buildings account for a large percentage of Portland's housing stock, he pointed out. "We need to be cognizant of the fact that if we do have another (oil) shock and we get landlords not paying utility

bills and tenants not paying utility bills and the water department comes in and shuts off water, the city ends up dealing with all these scenarios," Marshall said.

This approach was applauded by Opportunity Maine, an organization pushing investments in energy conservation.

"There is nothing ... specifically geared toward those [apartment] buildings. It is uniquely difficult to get energy efficiencies there because the people paying the bills [tenants] don't get to make the decisions," said Clifford Ginn, president of Opportunity Maine. Ginn says municipalities should spend their federal stimulus funds on projects other than public buildings because municipalities – with access to tax-exempt financing and performance contracting – are more than capable of making their buildings energy efficient without help.

"Block grant money should not be used for public buildings," Ginn said point blank.

In the end, Portland decided to use its money to hire a sustainability coordinator and to get efficiencies in city-owned buildings, said Assistant City Manager Pat Finnigan. She said a motivating factor was concern they couldn't

get a brand new program up and running quickly.

Also thinking big is Kittery, which is trying to get the Maine Department of Transportation to join with New Hampshire on a joint application for \$125 million to repair two of the three bridges between Kittery and Portsmouth, New Hampshire. A joint application might give the small states of Maine and New Hampshire a leg up on the bigger states and cities in the competition for \$1.5 billion in discretionary transportation money.

There are three bridges between Kittery and Portsmouth and only the I-95 bridge is in decent condition. Memorial Bridge, which carries local traffic, may have to close within two years without repairs and Sarah M. Long Bridge, which carries the rail line to the Portsmouth Naval Shipyard, has a six to seven year life expectancy without repairs. New Hampshire has put both bridges at the top of its "red list" of priority bridge projects. Maine is not discounting the priority but also lists 278 other bridges in critical condition.

"I have to respect the difficult situation Maine is in. But it doesn't change the real need we have to get these bridge repairs, especially Memorial

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Bridge, funded as quickly as we can," said Ben Porter of the group Save Our Bridges. The two bridges are critical to the entire seacoast region, he said.

"If you knock out Memorial Bridge, businesses in Kittery die and some businesses in Portsmouth die. If you knock out Sarah Long Bridge then you lose the rail link to the Shipyard. Part of the Shipyard's productivity is predicated on rail and all of a sudden its base closure time and it's not a viable entity and you lose 5,000 jobs," said Porter.

Porter said he spoke to Maine Transportation Commissioner David Cole who told him the Kittery bridge repairs are competing with an east-west highway connector and a rail link to Eastport. DOT spokesman Herb Thompson said Maine may still join New Hampshire, but needs to complete its analysis.

"That possibility is still in the mix; it is part of our consideration," said Thompson. "We're still doing our homework."

Kittery Town Manager Jonathan Carter doubts the state would be as slow to commit to the repairs if it involved bridges between other communities in Maine.

"It's no different than if the state took away a bridge between Bangor and Brewer. What do you think the outcry would be? Or between Lewiston and Auburn?" said Carter.

### REPORTING REQUIREMENTS

Stimulus funding comes with new reporting requirements – chiefly documenting the jobs impact of projects and accounting for how the money is spent in more transparent ways. "It is absolutely not going to be anything like what you are used to," predicts Ryan Low, Maine's ARRA coordinator. For example, how does a school district document job impact if a planned lay-off was scaled back as a result of receipt of stimulus funds, but still implemented, asks Low. "What would you have done if you hadn't received the funds, would you have laid off or would you have raised taxes? It's totally speculative. You have no idea what you would have done ... so much of this is Monday morning quarterbacking. So far the jobs thing concerns me most, but ask me next week and I might say something different."

Low said he's not impressed with the early track record of the federal

government's attempt to cut the red tape. He said state stimulus coordinators were told at an orientation meeting that they would not be compelled to "fill out lengthy forms," but that promise was followed by a series of guidance documents exceeding 50 pages. "It's guidance of the guidance," said Low.

It's not yet known how burdensome those reporting requirements will be. Portland's only experience with stimulus reporting requirements to date was an audit visit by the Environmental Protection Agency (EPA) to check out a stormwater separation project, said Assistant City Manager Pat Finnigan. She said they haven't had to report anything yet because they haven't received any money. She said their grant awards have been posted on the city's website. "[website posting] is not a requirement, but you feel duty bound because transparency is what it's all about," she said.

Already, transparency is proving to be a challenge for some, observes Phil Nadeau, Lewiston's deputy city manager. Nadeau surveyed the websites of members of the Maine Service Center Coalition and found no postings of stimulus funding awards. Some communities have yet to receive any stimulus funds, he said, but he believes others are not fulfilling the spirit of the stimulus law.

"It's very unfortunate," said Nadeau. "If they have websites and they're not using them, then I think it's regrettable."

Low echoes Nadeau's concern. He said transparency goes beyond providing an accounting to the feds through standard reporting channels. "If you live in Manchester, Maine and you want to know what's going on in your town, do you want to go to a giant federal data base? It should be available locally." **[mt]**



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# People

The North Yarmouth Board of Selectmen's voted unanimously on July 7 to hire **Damaris "Marnie" Diffin** as the town's administrative assistant. Diffin is currently the town manager of Islesboro, where she has been employed since 1994. Diffin also served as administrative assistant for the Town of Durham prior to Islesboro. She will start her new job in early August.

**Paul Bernier** has resigned as the first regional community development director for the towns of Frenchville and St. Agatha. Bernier was hired in 2003 and is credited for securing more than \$6 million in federal and state grants; he was named Maine's 2006 Community Development Block Grant program administrator. He resigned to accept the job as public works director for the unorganized territories of Aroostook County.

An estimated 500 firefighters from throughout the northeast gathered June 16 in Biddeford for the funeral of **Debra Cole**, 40, a South Portland firefighter and paramedic who died of an apparent stroke while on duty on June 11. Cole also served as a volunteer captain in the village of Goodwin Mills in Lyman.

Greenville Selectman **Bonnie DuBien** was honored for her 19 years of service during a selectmen's meeting in June. DuBien, chairman of the board for the past five years, will not seek re-election when her term expires this year. DuBien, who also has served on the school board, was presented with a plaque and a clock for her longtime efforts on behalf of the community.

**Lionel Gilbert**, who has logged more than 70 years of service to the town of Manchester, retired from the planning board in June after 35 years. Previously, Gilbert worked for 35 years as the town tax collector and treasurer, as well as serving one term as selectman.

Longtime Dexter police officer and **Sgt. James Gudroe** has been named chief after almost 30 years with the department. Gudroe, 58, has worked as acting chief since the resignation in April of **Arthur Roy**.

**Robert Hagopian** received 162 votes to win a Madison selectman seat,

defeating two other candidates for the three-year term.

**Philip Haines** held off three other candidates to win the open seat on the Vassalboro Board of Selectmen. Haines received 155 votes, followed by **Lee Trahan** with 134, **Roland H.J. Poulin** with 81, and **Stephen Rogers** with 49.

Cape Elizabeth Town Councilor **Paul McKenney** has announced he will resign in December with one year remaining on his term. McKenney said his council work took away time and energy for his family and work demands. He was elected to the council in 2005 to serve the remaining two years of a vacated seat and was re-elected in November 2007. He will serve until year's end to avoid the need for and cost of a special election.

Canton resident **Donald St. Lau-**

**rent** has been named the new highway department foreman for the town of Livermore. St. Laurent replaces **Moe Laverdierre**, who is retiring in late August.

**Gerald Sampson**, former Lisbon code enforcement officer and assessor, was hired by Paris selectmen last month to replace **Claude Rounds**, who leaves the municipal code enforcement job to work for a private firm in Lewiston-Auburn. Sampson, a resident of Buckfield, has 15 years of experience and will work 24 hours a week.

**Donald Shepley** received 222 votes to win a seat on the Hermon Town Council, followed by **Donna Pulver**, who will fill the second open seat after collecting 214 votes. **Brooke Green** received 199 votes and former Councilor **Louis "Buzzy" LaChance** won the support of 141 voters. 



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**Bar Harbor:** Voters rejected a moratorium on development in the village of Town Hill during last month's annual town meeting. More than 1,000 residents attended the meeting, reportedly the highest town meeting turnout in nearly 30 years. The proposed moratorium, prompted by a proposal from Hannaford Bros. to build a store in the area, was defeated by a vote of 499-606.

**Camden:** Voters approved a six-month moratorium in June stopping franchise stores from locating in the downtown district while ordinances are being developed to better regulate this type of commercial development in the downtown area. The vote was prompted by a citizen petition and passed by a vote of 230-180. The petition was inspired after the chain, Dunkin' Donuts, sought approval to open a store in the historic downtown.

**Dayton:** Town meeting voters in early June approved spending \$258,000 from surplus to hold the property tax rate steady for the municipal budget. Meanwhile, the new school district that includes Dayton, Old Orchard Beach and Saco is expected to increase the town's tax rate by 1.1 mills.

**Dover-Foxcroft:** A special town meeting will be held in July to consider imposing a moratorium on new subdivisions and mobile home parks. The request was made to selectmen by the town planning board, which asked for time to update the local land use ordinance. Voters will decide on the moratorium this month and vote on the revised land use ordinance in November.

**Gouldsboro:** Voters in June narrowly affirmed the town's \$1.50 per-bag solid waste fee – an incentive to recycle passed during a special town meeting last August. The vote was 90-86.

**Hope:** After lengthy consideration, on June 15 annual town meeting voters approved two percent pay raises for town employees as well as endorsing \$6,000 for stipends for the town's 20 volunteer firefighters.

**Jonesport:** The municipal building ceiling over the fire department and assessor's office collapsed in late May for an unknown reason, bringing down tiles, insulation, wiring and light

fixtures.

**Kennebunk:** Voters in both Kennebunk and neighboring Wells held their final annual town meetings in June. Attendance was 136 and 118, respectively, illustrating one of the key reasons the towns are moving to referendum-style town meetings so more residents will vote on local spending and issues.

**Phillips:** A severe thunder and rain storm in late June washed out seven roads, including state Route 142 to Salem. Crews worked 12 hours to remove rocks, mud and trees so the roads could be opened to one-lane traffic. Roads in some of the surrounding Franklin County towns also flooded, but Phillips sustained the most damage.

**Pownal:** In what was described as a "protest vote" by citizen petitioners, town residents voted 342-64 to reverse its support for the town joining Freeport and Durham in a new consolidated school unit. The school consolidation law passed two years ago does not have withdrawal language in it that would allow towns to change their minds once a vote is taken to form a regional school unit (RSU). Last November, voters from all three towns approved the new RSU.

**Readfield:** Residents favored building new athletic fields during the annual town meeting in June, but rejected a plan to buy the former Readfield Grange property for \$40,000, which town officials described as "an incredible deal."

**South Portland:** Despite support

from the voters who did show up for June balloting to change the city charter and to borrow \$3 million for a new wastewater treatment pump station, turnout was too low for the measures to take effect under the charter's rules.

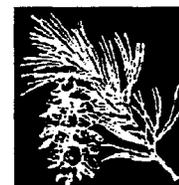
**Stockton Springs:** A section of coast has been destroyed by the heavy rains of June, causing a landslide on June 25 that forced road closures and warnings to residents to stay away. Three homes were believed at risk, particularly should another landslide occur. All three are summer homes situated where a 200-foot section of the coastal bluff collapsed into the Penobscot River.

**Van Buren:** Town meeting voters were told the municipal surplus stood at \$1.7 million, far higher than thought when auditors first started reviewing financial records. Town Manager Thomas Cannon said a surplus of \$500,000 is sufficient for the town of about 2,600 residents. Voters decided not to add more to the surplus this year, as well as to increase the ambulance budget by \$165,300 to \$512,400 allowing more ambulance staff to be hired.

**Veazie:** The town has donated its 1980 fire truck to neighboring Beddington after replacing it with a newer model. Fire officials said Beddington was one of 50 towns that requested the 1980 pumper truck. A common theme among all the applying towns was that they felt they could not afford to buy even used fire trucks at their present cost. **mt**

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# Municipal Bulletin Board

## CITIZEN EDUCATION

Last fall, MMA embarked on a Citizen Education Program aimed at creating greater citizen understanding of, participation in, and appreciation for Maine local government.

A Citizen Education Working Group of the MMA Executive Committee and MMA staff worked with a communications and marketing consultant to develop a logo and brand for the program. A decision was made to spend the first year of the program working with five pilot communities who would identify citizen education projects that they wanted to work on.

In January of this year, the following five communities were selected to participate in the program during 2009: Ellsworth, Liberty, Milford, Saco and St. Albans. This spring, MMA staff went to each of these communities and met with elected and administrative officials to welcome them to the pilot community phase of the program and to get them thinking about a project they could undertake this year.

On April 28, representatives of all five pilot communities met in Augusta with MMA staff and two members of the Citizen Education Working Group to brainstorm on some ideas for pilot community projects. Each community selected a project to work on.

The City of Ellsworth is looking at ways to make their current citizen communications more effective. MMA staff has been evaluating their website communications. Recently, the city launched streaming video of council and other board meetings on its website. Ellsworth has a great relationship with the regional technical college which has a TV station and their local chamber of commerce. MMA's communications staff have been exploring alternatives for other communities to cost-effectively utilize video and website technology.

The Town of Liberty has been working for several months on increasing volunteerism and volunteer opportunities in their community, both for town-sponsored activities as well as non-profit organizations in the town and region. Town officials have had two meetings over the past several

months to develop strategies for accomplishing this goal. Several ideas have surfaced to promote more volunteerism and town officials are actively evaluating and implementing them.

Town officials in Milford have wanted to get more involved in local civic education. A couple of months ago, the town manager contacted the local school superintendent and came away from that conversation encouraged that a dialogue had been started with an initial positive response from the school administration. Unfortunately, the superintendent recently announced that he was taking a job with a new school system, so we are regrouping on this project.

The City of Saco is also interested in civic education; however, their goal is directed more at the recent high school graduates and other "early adults" who have limited knowledge of city services and how to use them. MMA has shared some information about "Citizens' Academies" with Saco officials and we are still exploring this concept with them to see if it might

work to help them accomplish their citizen education goal.

The Town of St. Albans has a very straight-forward citizen education goal. Town Manager Rhonda Stark wants to create a new town seal/logo. MMA staff met with Rhonda in early June and discussed different ideas for how this project would be accomplished. The town recently started planning for a bicentennial celebration in 2013. Even though this celebration is four years away, it was felt that the planning and development of a town seal/logo would more effectively be accomplished if it was tied to this important historic event.

As part of this year's MMA Convention, a session is being planned about the MMA Citizen Education Program and the experiences of the five pilot communities. For more information regarding the MMA Citizen Education Program, contact Michael Starn, Director of Communications & Educational Services, at MMA; [mstarn@memun.org](mailto:mstarn@memun.org) or 1-800-452-8786 ext 2221. 

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## BOARD MEETING MINUTES

**Question:** Are municipal boards legally required to take minutes of their meetings?

**Answer:** As a general rule, no. State law does not require minutes or a record of most municipal board meetings. But here are some important exceptions:

**Board of appeals meetings.** The secretary of the board must maintain a permanent record of all board of appeals meetings, including a transcript or tape recording, if made, and all papers, exhibits, applications and decisions, including findings and conclusions (see 30-A M.R.S.A. § 2691(3)). A board of assessment review is also governed by these requirements (see 30-A M.R.S.A. § 2526(6)(G)).

**Conditional approval or denial of applications.** Maine's Freedom of Access Act ("Right to Know" law) requires a written record of every decision by any board or official involving the conditional approval or denial of an application, license, certificate or any other type of permit, with findings and reasons (see 1 M.R.S.A. § 407(1)).

**Dismissal or refusal to renew contracts.** The Right to Know law also requires a written record of every decision involving the dismissal or refusal to renew the contract of any public official, employee or appointee, again, with findings and reasons (see 1 M.R.S.A. § 407(2)).

**Conflicts of interest.** Any official with a financial ("pecuniary") conflict of interest must disclose it and abstain from participating in the decision in which the official has a conflict. This disclosure and abstention must be recorded with the municipal clerk (see 30-A M.R.S.A. § 2605(4)).

**Executive sessions.** A motion to go into executive session must be approved by a public, recorded vote of 3/5 of the members present and voting (see 1 M.R.S.A. § 405(3)). The motion must also indicate the precise nature of the business to be discussed and cite the legal authority for the executive session. (There is no requirement for minutes or a recording of the executive session itself, however, and we generally recommend against it.)

**General assistance fair hearings.** The general assistance fair hearing authority must make a tape recording of every fair hearing (see 22 M.R.S.A. § 4352). The applicant must pay the cost of preparing any transcript required to appeal the decision, however. (All records and proceedings relating to general assistance are of course strictly confidential, see 22 M.R.S.A. §§ 4306, 4321.)

Even though minutes are not generally required, we strongly recommend them as a way of accurately recording the decisions of a board. Minutes need not be overly detailed. The time and date of the meeting, the members in attendance, the business discussed, and the motions made and votes taken should be sufficient in most cases. Where specific findings are required, however, a mere narrative of the discussion will not suffice (see "Minutes Are Not 'Findings'," *Maine Townsman*, "Legal Notes," July 2007).

Where minutes are taken, they will generally be public records. (Notable exceptions include records of general assistance, poverty abatement and concealed weapons proceedings.) Minutes that have yet to be approved by a board (if that is the custom) may be marked "draft" before being made

available to the public. They cannot be withheld simply because they have not been approved yet, however.

Minutes are also subject to the State Archives Advisory Board's rules for disposition of local government records (see "Disposition of Records," *Maine Townsman*, "Legal Notes," May 2009). According to the rules, official minutes of board meetings must be retained permanently.

For more on any of these subjects, use the keyword(s) search feature on our website at [www.memun.org](http://www.memun.org). (*By R.P.F.*)

## 'DRAFT' RECORDS ARE PUBLIC

**Question:** A reporter asked to see the minutes of our last board meeting, but we refused since they are only in draft form and have not been approved by the board yet. Were we right or wrong?

**Answer:** Sorry, you were wrong. It may seem sensible, but the notion that records do not become public records until they have been approved or finalized is pure fiction.

Maine's Freedom of Access ("Right to Know") law defines "public records" as "any written, printed or graphic matter or mechanical or electronic data... that is in the possession or custody of an agency or public official..."

# Municipal Calendar

**BY AUGUST 1** — Urban Rural Initiative Program (URIP) certification forms must be returned to MaineDOT Community Services Division prior to August 1st. This is an annual certification that must be completed by a municipality to receive URIP funds. Effective July 1, 2008, there is a requirement for municipalities to provide information on how the previous fiscal year's funds were expended.

**ON OR BEFORE AUGUST 15** — Monthly/Quarterly expenditure statement and claim for General Assistance reimbursement to be sent to Department of Human Services, General Assistance Unit, DHS #11, Augusta, ME 04333 (22

MRSA §4311).

**BETWEEN MAY 1 AND OCTOBER 1** — Municipal officers may initiate process to close certain ways during winter months (23 MRSA §2953). For further information, see the MMA Municipal Roads Manual.

**BY SEPTEMBER 1** — Clerks of organized plantations shall make return to the Secretary of State, on blanks furnished by him for that purpose, of the names of the assessors and clerks of their plantation and that the same have been sworn. There is a penalty for failure to make such a return (30-A MRSA §7005).

and has been received or prepared for use in connection with the transaction of public or governmental business.” 1 M.R.S.A. § 402(2).

Nothing in this definition supports any distinction between “official” and “unofficial” records or between preliminary and final records. Whether draft meeting minutes, a preliminary report, a proposed ordinance, or whatever, if a record would qualify as a public record in its final form, the draft version is also a public record. As such, it is subject to public inspection and copying within a reasonable time after a request is made (see 1 M.R.S.A. § 408). Where a draft record is readily accessible, we suggest it be made available promptly, if possible (but marked “draft” so there is no confusion about its status).

For other common misconceptions about Maine’s Right to Know law, see “Right-to-Know: Common Myths,” *Maine Townsman*, May 2007.

For more on meeting minutes, see “Board Meeting Minutes,” *Maine Townsman*, “Legal Notes,” July 2009.

For more on the Right to Know law generally, see MMA’s “Information Packet” on the subject, available at [www.memun.org](http://www.memun.org). (By R.P.F.)

### ONLY ‘AGGRIEVED PARTY’ HAS STANDING TO APPEAL

A recent Maine Law Court decision clarifies the test for “standing” to appeal a zoning decision to a board of appeals.

In *Nergaard v. Town of Westport Island*, 2009 ME 56, two island residents appealed the Planning Board’s approval of town-proposed improvements to a public boat-launching facility. The Town’s Shoreland Zoning Ordinance

(like many zoning ordinances) provided that only an aggrieved party can appeal. The ordinance defined “aggrieved party” as an abutting landowner, a landowner whose property is directly or indirectly affected by the decision, or any person who has suffered a particularized injury as a result.

The appellants argued that although they were neither abutters nor nearby landowners, they had a particularized injury because they frequently drive by the site and risk damage to their vehicles and personal injury due to increased traffic. But neither the appeals board nor the Court was persuaded. As both noted, over 1600 vehicles drive by the site every day – the appellants were no different than any other motorists who use the same road daily. Their potential injury or harm was not distinct from the harm posed to the public at large, so it was not particular to them.

The appellants also claimed they had standing because the Planning Board had granted them party status on the basis of their travel habits and opposition to the project. As the Court observed, though, party status below does not demonstrate “aggrieved party” status above. To establish standing to appeal, one must show both that they were a party below and that they are an aggrieved party on appeal. Here, where the appellants were neither abutters nor affected landowners, their only hope was to show particularized injury. But where the only harm they alleged was the same as experienced by the driving public, their claim of “drive-by standing” was rejected.

James N. Katsiaticas, Esq., formerly with MMA’s Legal Services and now

with Perkins Thompson of Portland, represented the Town. (By R.P.F.)

### VOTER REGISTRAR UPDATE

The 2007 law barring a registrar of voters from holding or being a candidate for any other local office except clerk has been amended.

The ban apparently was “news” to many registrars when we reported on it earlier this year (see “Who May Be a Registrar?,” *Maine Townsman*, “Legal Notes,” March 2009). And judging by their reactions, registrars neither understood nor appreciated the limitation, especially in small towns where the registrar traditionally has held a variety of other local offices.

PL 2009, c. 253, § 8 amends 21-A M.R.S.A. § 101(1) to limit the ban to the office of municipal officer (selectman or councilor). Other local offices, such as collector and treasurer, may once again, along with clerk, be held by the registrar. The change takes effect September 12, 2009.

As reported earlier, a registrar remains ineligible to hold or be a candidate or a treasurer for a candidate for any state or county office. Also, a registrar may not be an officer of any party committee or an employee of any party or candidate. In addition, a registrar may not serve when a member of the registrar’s immediate family becomes a candidate for any state, county or local office; the registrar must instead appoint a deputy to serve from the time of filing to the time of election, with the registrar’s costs paid to the deputy during this time.

For more on registrars, including compensation, office hours and expenses, and training, see 21-A M.R.S.A. § 101. (By R.P.F.) 

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