



**MAINE MUNICIPAL
ASSOCIATION SINCE 1936**

60 Community Drive | Augusta, ME 04330-9486

1-800-452-8786 (in state)
(T) 207-623-8428
(F) 207-624-0129

Testimony of the Maine Municipal Association

In Opposition to

LD 1672 - An Act to Establish an Affordable Housing Permitting Process

January 5, 2023

Sen. Peirce, Rep. Gere and distinguished members of the Joint Select Committee on Housing, my name is Rebecca Graham, and I am submitting testimony in opposition to LD 1672 *An Act to Establish an Affordable Housing Permitting Process*, on behalf of Maine Municipal Association's 70 member Legislative Policy Committee.

To put it bluntly, in MMA's view, there is no workable path forward for this bill. At best, this bill represents a seismic and unprecedented power grab by the State. Even with the benefit of all doubt, this bill would effectively supplant local legislative authority and the ability for Maine's municipalities to determine, for themselves, the terms under which their communities will grow and develop with state-mandated, universally applicable standards wholly devoid of local input, preferences, or priorities. At worst, this bill reflects an embarrassingly ill-informed and misguided attempt to fix a perceived problem in ways so unworkable that they belie a total lack of understanding of existing and foundational principles of law, governance, and best practices for community planning.

Whether the restructuring of long-established principles of municipal home rule accomplished by this bill is intended or not, the effect is the same: Bad policy that is wholly unnecessary, legally flawed, and harms rather than helps the people and the communities its proponents claim they want to help.

Proponents of this bill contend that it aims to streamline the approval process and construction timelines for desperately needed affordable and workforce housing developments. A noble goal, for sure. However, because the language of the bill and the process it outlines for a state-created board to review local housing project is unconstitutionally vague on its face and impermissibly supplants the authority and discretion of local legislative bodies, any reviews conducted by this newly-created board are doomed before they've even begun. Rather than streamlining review processes and providing a "clear path forward" for housing developments, the language of this bill all but assures confusion, litigation, and delay. It seems doubtful that developers, even in communities with the strictest of standards, will be eager to take advantage of an alternative process if that process is, itself, so fundamentally flawed that it all but guarantees delay, legal fees, and the judicial undoing of the path forward this body promises should it enact this bill.

Further, by purporting to vest a state board with the authority to totally disregard locally enacted land use standards and to elevate state-articulated preferences, this bill disenfranchises Maine's voters and their communities, the very people the bill claims to protect.

MMA lauds the intent behind this bill: to help facilitate the construction of desperately needed affordable and workforce housing, statewide. We stand ready to help and are prepared to offer language in keeping with that goal and with the fundamental concepts at the heart of this proposal. However, as currently drafted, this bill is so structurally flawed that quick fixes or minor language suggestions simply are not possible. Still, if helpful, attached are marginal comments on some of the most problematic provisions, noted to help illustrate the source of our concerns.

An Act to Establish an Affordable Housing Permitting Process

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

Sec. 1. 5 MRSA §12004-G, sub-§14-K is enacted to read:

14-K.

<u>Housing</u>	<u>Affordable Housing Development Review Board</u>	<u>Expenses Only</u>	<u>30-A MRSA §5073</u>
----------------	--	----------------------	------------------------

Sec. 2. 30-A MRSA c. 202-B is enacted to read:

CHAPTER 202-B

AFFORDABLE HOUSING

§5071. Definitions

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

1. Affordable housing. "Affordable housing" means a decent, safe and sanitary dwelling unit for which the cost of occupancy is no more than 30% of a family's household income for a family with an income up to 80% of the area median income for rental housing and an income up to 120% of the area median income for owned housing as established by the United States Department of Housing and Urban Development.

2. Board. "Board" means the Affordable Housing Development Review Board established in Title 5, section 12004-G, subsection 14-K.

3. Comprehensive plan. "Comprehensive plan" has the same meaning as in section 4301, subsection 3.

4. Department. "Department" means the Department of Agriculture, Conservation and Forestry.

5. Designated growth area. "Designated growth area" means an area of a municipality consistent with section 4349-A, subsection 1, paragraph A or B.

6. Dwelling unit. "Dwelling unit" has the same meaning as in section 4401, subsection 2.

7. Local board. "Local board" means any municipal entity with authority for approving or supervising the construction of residential buildings or enforcing municipal building laws.

As drafted, this definition could include a planning board or a code enforcement officer as a "local board." Is that the intent?

8. Neighborhood standards. "Neighborhood standards" means local land use standards relating to new development that support local goals related to quality of life, fiscal health, affordability and sustainability, including but not limited to street design and street connections between parcels; characteristics that define neighborhoods including walkability and access to destinations; location and characteristics of civic or open spaces; form, type and orientation of new buildings; and location and management of parking to reduce costs and maintain walkability.

This definition assumes that to achieve these nuances, the ordinances adopted do not use one of the 9 finite criteria that are used specifically to deliver on these principles.

131st Maine Legislature
An Act to Establish an Affordable Housing Permitting Process
L.D.

9. Permit. "Permit" means a permit for an affordable housing development or a workforce housing development under section 5074.

10. Preapproved building type. "Preapproved building type" means a type of building that has received municipal approval based on the characteristics of the building.

This term/definition/concept is unclear. What does this mean? Municipalities don't typically "preapprove" buildings. They review proposed buildings in connection with site plan or building permit applications but there isn't a "pre-approval" for the building design. The applications are either finally approved, or they are denied. When an approval is given, that approval is generally a final decision made at the local level. Is this referring to a site plan or building permit application approval? If so, that should be made clear. Or, does "preapproval" mean a use allowed under zoning? For example, zones where single or multifamily dwellings are permitted?

11. Workforce housing. "Workforce housing" means a decent, safe and sanitary dwelling unit for which the cost of occupancy is no more than 30% of a family's household income for a family with an income up to 120% of the area median income as established by the United States Department of Housing and Urban Development.

§5072. Construction

This chapter may not be construed to:

- 1. State laws.** Limit the application of state laws to an application for a permit under this chapter, except as specifically provided in this chapter; or

This language is odd. This document is a proposed state law. Why is it protecting the applicability of other state laws? This sounds like language that would have come from a local ordinance (when it's important to be clear that local laws cannot contradict state laws). This doesn't sound like language needed/appropriate in a state statute.

2. Review by local board. Prevent an applicant for a permit under this chapter from applying to a local board for a permit.

§5073. Affordable Housing Development Review Board

1. Established. The Affordable Housing Development Review Board, as established in Title 5, section 12004-G, subsection 14-K, operates under the department's Bureau of Resource Information and Land Use Planning for the purpose of making determinations on applications for permits for affordable housing and workforce housing developments submitted in accordance with section 5074.

2. Membership. The board consists of 7 members as follows.

A. The Commissioner of Agriculture, Conservation and Forestry shall appoint:

- (1) One member who works for the department;
- (2) Two members from the affordable housing development or affordable housing finance industry;
- (3) One member from municipal government; and
- (4) One member who is an architect with experience with building codes.

B. The Governor shall appoint 2 members trained in urban design.

3. Terms. Members serve one-year terms that may be renewed by the appointing authority.

Is there any limit on the number of terms? The membership of the board to be almost exclusively from those who profit from development including financial institutions, developers, architects, and designers with only one

131st Maine Legislature
An Act to Establish an Affordable Housing Permitting Process
L.D.

*member as an elected municipal official. There are no requirements for board participation by members of the public who reside or hope to reside in such developments either historically funded through MaineHousing or a local community development grant. The numbers of members defined holding positions that profit from development outweigh those who are best positioned to make impartial, quasi-judicial decisions or have lived experience with poor development. There are no requirements that board members have any experience with planning processes or application review to serve in the role or requirements for them to declare a conflict of interest as with the higher standard that municipal and county official appeals boards must bear. **M.S.R.A Title 30-A, Section 2605: "Every municipal and county official shall attempt to avoid the appearance of a conflict of interest by disclosure or by abstention." (Emphasis added).***

4. Duties. Notwithstanding the home rule authority granted to municipalities by section 3001 and by the Constitution of Maine, Article VIII, Part Second, the board shall, with respect to an application for a permit pursuant to section 5074:

A. Consider whether to grant or deny the application for a permit, including by holding hearings relating to a development;

B. Issue or deny a permit, including with any conditions or other requirements that a local board would be authorized to include;

C. Issue decisions or other orders that any local board could issue that are enforceable by an action in Superior Court;

D. Preempt any municipal or local ordinances; and

E. Consult with state agencies with oversight over an area described in section 5074, subsection 1, paragraph A in which a development is proposed in order to ensure a consolidated review of developments and meet local and state objectives of the area.

5. Compensation. Members of the board are entitled to reimbursement of reasonable expenses incurred in order to serve on the board, including travel expenses, as provided in Title 5, section 12004-G, subsection 14-K, within available funds appropriated or allocated to the board.

6. Rules. The board shall adopt rules to implement this chapter. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. The board shall make the rules available to municipalities.

There are no requirements in the bill for the public hearings to be held during normal municipal evening hours for such reviews allowing the maximum number of residents and opportunity to participate when they are not working. Yet, the bill provides the unelected board the authority to override the very ordinances those individuals approved, stripping them of their voice unless they can obtain a day off to participate. These changes impact working class, residents who rent, and immigrant communities most harshly.

There are no requirements in the bill that hearings by the board be held in the community that will be affected by a development application or that enable a site visit by the board members to better understand the on the ground facts such decisions should consider.

§5074. Affordable housing development permits

1. Application. A housing developer may apply for a permit for an affordable housing development or workforce housing development in lieu of applying for a permit with a local board if all of the following criteria are met.

131st Maine Legislature
An Act to Establish an Affordable Housing Permitting Process
L.D.

A. The proposed development is in a designated growth area or is in an area served by a public, special district or other centrally managed water system or by a public, special district or other comparable sewer system.

B. The proposed development includes affordable housing or workforce housing as 50% of the total building square footage.

C. The proposed development is in an area described in paragraph A in which an ordinance is not consistent with a municipality's comprehensive plan for that area as evidenced by an ordinance that requires:

This section misunderstands or misinterprets existing Maine statutory and decisional law relating to comprehensive plans. Whether a municipal zoning ordinance is consistent with that municipality's comprehensive plan is, first and foremost, a decision that is vested in each municipality's legislative body. The standard for determining whether a zoning ordinance is "consistent" has been clearly articulated by Maine's Law Court - and that standard is wholly different than the "standard" outlined in subsection (1)(C). The courts or the community have the exclusive authority to determine consistency and as drafted this board will be wasting the time of developers by defining any ordinance that contains parameters listed in this section is inconsistent, despite having no nexus with a community's comprehensive plan. The court will ultimately decide is outside the authority of the state board.

(1) A minimum lot size of more than 5,000 square feet;

(2) Lot area per dwelling unit density restrictions;

(3) A minimum dwelling unit size of more than 400 square feet;

(4) Lot area or floor area ratio limits;

(5) More than 2 parking spaces per 3 dwelling units;

(6) More than 50 feet of street frontage;

(7) On-site open space;

(8) More than 10 feet of front setback; or

(9) More than 10 feet per side or 20 feet cumulatively of setback.

2. Procedures. The following procedures apply to an application for a permit.

A. Upon receipt of a permit application, the board shall notify each local board that is affected by the application by sending a copy of the application to each local board and soliciting recommendations from each local board.

B. Within 30 days of receipt of a permit application, the board shall schedule a public hearing and notify the applicant and each local board affected by the application of the date of the hearing.

C. In making a determination on a permit application, the board shall consider the recommendations of each local board affected by the application and may consider the testimony of consultants.

This section does not preserve an individual's right to file any such appeal or provide a path to standing for such an appeal, as local appeals boards do, by ensuring that the board record evidences an individual's appearance during the appeal and the basis for their support or opposition. It doesn't even provide agency or notice for the public in the community to be notified of an appeal, only the affected board and "consultants" undefined. Are consultants the adjacent landowners? Do they also have to be residents? Who has standing?

131st Maine Legislature
An Act to Establish an Affordable Housing Permitting Process
L.D.

D. Except as provided in paragraph E, the board shall issue its decision, based upon a majority vote, within 40 days of the public hearing on the permit application under paragraph B.

E. For permit applications for a preapproved building type, the board shall issue its decision, based upon a majority vote, within 10 days of the public hearing on the permit application under paragraph B. The timeline required by this paragraph may be extended by mutual agreement between the board and the applicant.

F. The board shall include in its decision on an application for a permit any findings of fact or conclusions of law necessary to explain its decision.

G. If the board does not issue a decision within the timelines required in paragraphs D and E, the application for a permit is deemed to be denied.

3. Review standards. Notwithstanding chapter 187, subchapter 4, the board shall review a permit application in accordance with this subsection and neighborhood standards. The following standards must be met:

A. A proposed development must protect the health and safety of the occupants of the proposed development;

B. If a proposed development creates a new street:

(1) The housing developer must demonstrate an ability to pay for maintenance and replacement costs for the street for 30 years;

(2) The street must conform with local road construction standards and may not be more than 20 feet wide for 2-way local roads or driveways and not more than 12 feet wide for one-way local roads or driveways; and

This section not only establishes road standards well below local construction standards, under Maine statute, municipalities are legally responsible for the repair and maintenance of roads not private developers who are unlikely to retain ownership. Local road standards almost universally require 50 feet in width to accommodate vehicles, accessible sidewalks, utility poles, and other public infrastructure that is placed in the public easement along a road. The bill does not respect local road construction requirements that are established with land-based facts and natural impacts.

Additionally, a privately maintained road cannot receive any municipal services including plowing, or trash pickup. One that is not built to a standard for emergency vehicle access with appropriate setbacks will endanger the lives of residents as well.

(3) The street must be straight in its orientation and connect to adjacent streets, including streets on adjacent parcels, or provide for future connectivity to adjacent parcels;

C. A building in a proposed development must:

This section creates a finite list of acceptable considerations disconnected from other types of concerns such as traffic impacts or types of housing needed and desired by requiring such projects to look like all other buildings in the community. Such a framework stifles innovation and quality tools used to limit future environmental degradation through smart design such as green roofs or absorbing pavement that slows down runoff or requires stormwater to be held locally before entering municipal infrastructure. §5074-3(C)(2) restricts even roof types and presumes detailed elements of such standards are contained within a comprehensive plan. These are not elements in a comprehensive plan.

131st Maine Legislature
An Act to Establish an Affordable Housing Permitting Process
L.D.

(1) Be situated close to the street and oriented parallel to the street, with a front setback that is consistent with the majority of the setbacks of buildings on the same block or in a manner that meets the requirements with the municipality's comprehensive plan and neighborhood standards;

(2) Have a roof shape and pitch that is consistent with the majority of the roofs of buildings on the same block or in a manner that meets the requirements with the municipality's comprehensive plan. Buildings in residential areas must have gable or hip roofs with a slope that meets neighborhood standards. Buildings in commercial or mixed-use areas may have flat roofs;

(3) Have a width and depth consistent with the historic pattern of the neighborhood or meet the intent of the area as described in the municipality's comprehensive plan;

(4) Be elevated a minimum of 1 1/2 feet above grade if the building does not contain ground floor retail space;

(5) Contain ramps and stairs for accessible dwelling units;

(6) Be within one story high of the average height of buildings located in the surrounding neighborhood or consistent with the intent for the area in the municipality's comprehensive plan;

(7) Meet all state building code standards in accordance with Title 10, section 9724; and

(8) Be evaluated to meet state requirements for private water and wastewater services or meet local system capacity if on public water and sewer services or contain a package system for smaller lot sizes less than 20,000 square feet;

D. Interior and exterior parking for a proposed development must be located 20 feet back from the front of a building, except when there is a driveway. Parking must be screened from the street by buildings, low walls, fences or hedges;

E. Driveways in a proposed development in a neighborhood may not be more than 10 feet wide. Driveways in a proposed development in a commercial or mixed-use area may not be more than 20 feet wide;

F. In areas in which there is a majority of retail space along the street, the proposed development must provide ground floor retail space to a minimum depth of 20 feet from the front of the building, with store fronts designed in a manner that is consistent with the historic pattern of the design of retail space;

G. Building materials for the proposed development must be made of quality materials consistent with materials historically used in the neighborhood or consistent with the intent for the area in the municipality's comprehensive plan;

H. The proposed development must have a scale, floorplate, form, height and other basic architectural features that are consistent with the features on buildings within 250 feet of the proposed development or in a manner that meets the intent for the area in the municipality's comprehensive plan;

I. In residential areas, porches must be a minimum of 8 feet deep and covered stoops must be provided along the street front of the building with a width consistent with others in the neighborhood. Covered stoops are required on secondary doors; and

J. Comply with all state environmental and wetlands laws and rules.

This section gives deference to state wetland laws which are the base regulatory standard that local ordinances are built on to protect finite local ecologies. While they permit the filling in of wetlands for a compensation fee, once all the wetlands in a community have been filled, these ecosystems are irreplaceable. Both the state and the community require stricter local ordinances for retaining wetlands in

131st Maine Legislature
An Act to Establish an Affordable Housing Permitting Process
L.D.

balance with development in areas in danger of development which is why the state has established the minimum standard to allow the community flexibility to adopt stricter ones where necessary.

4. Preapproved buildings. Preapproved buildings are deemed to meet all of the standards in subsection 3.

5. Comprehensive review. Notwithstanding any provision of law to the contrary, for a development in an area described in subsection 1, paragraph A, the board has authority to review and make determinations necessary to issue permits for:

A. An area designated as a historical district by a municipality by ordinance;

B. A shoreland area as established in Title 38, section 435; or

C. An area not listed in paragraph A or B with a designation that makes it subject to additional local or state oversight.

6. Monitoring. An applicant who has a permit approved under this section shall pay to a municipality a one-time fee for the municipality to delegate its annual property reporting to a housing authority as defined in section 4702, subsection 2 or nonprofit organization.

7. Reconsideration; appeals. This subsection governs reconsiderations and appeals of a decision of the board.

A. An applicant may submit a request for reconsideration by the board. This paragraph may not be construed to limit a person's lawful right to appeal a final agency action under paragraph B.

B. An appeal from a decision of the board under this section must be to the Superior Court, pursuant to the provisions of the Maine Rules of Civil Procedure, Rule 80B.

8. Fees. The fee for an application for a permit under this section is \$5,000. Except as provided in subsection 6, a municipal fee may not be assessed except fees to connect utilities and apply for building permits.

This section inappropriately limits local requirements for project specific impacts such as environmental degradation, and impacts on urban impaired streams, requirements to limit the conveyance of runoff to stormwater infrastructure. Instead, the language shifts the burden for infrastructure expansion onto local property taxpayers by preempting impact fees that appropriately link development with the burden it places on shared municipal infrastructure. Again, these fees are adopted and approved by the very people disenfranchised from participating in boards proceedings.

SUMMARY

This bill establishes the Affordable Housing Development Review Board under the Department of Agriculture, Conservation and Forestry's Bureau of Resource Information and Land Use Planning in order to issue permits for the development of affordable housing and workforce housing.