



**Report
Of the Commissioner of Professional and Financial Regulation**

**To the Joint Standing Committee on Business, Research and Economic
Development**

Sunrise Review of L.D. 1551

“An Act to License Home Building and Home Contractors”

January 1, 2004

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Governor*

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Section I. PREFACE

A. Factors that Complicate Sunrise Review of LD 1551

This report differs in many respects from the standard sunrise report that typically follows a legislative proposal that creates a new licensing program for a previously unregulated profession. LD 1551, "*An Act to License Home Building and Home Contractors,*" was introduced during the first regular session of the 121st session. The Business, Research and Economic Development Committee held a hearing on the bill in April, 2003 and subsequently voted to carry the bill over to the next Legislative Session. The Committee further directed the Department to conduct sunrise review on the bill pursuant to Title 5, Section 12015, and to submit a sunrise report to the Committee for its consideration by January 1, 2004.

At the same time the Committee voted to carry over LD 1551, it also voted to merge the concepts contained in LD 401 (adoption of a national plumbing code), LD 688 (adoption of a state rehabilitation code) and LD 1025 (creation of a state building code office) into LD 1025 and carry LD 1025 over to the Second Regular Session. It was the Committee's hope that the break between legislative sessions would provide groups and individuals interested in various aspects of these bills to develop consensus that would assist the Committee in identifying public support for a standardized building code and for a licensing program for building contractors.

Between April and September 2003 two separate working groups emerged. The first group identified itself as the "Building Code Working Group" and was comprised of local code enforcement officials, industry and code representatives, state officials, representatives of the insurance community and a variety of other interested parties and met on a periodic basis to discuss the pros and cons of various building codes that could be adopted and used in Maine. The findings of the Building Code Working Group are contained in a Report dated October 8, 2003. The report identifies the International Residential Building Code (IRC) as the building code preferred by many, but not all, participants. The report makes it clear, however, that the group did not address certain issues considered critical to the success and effectiveness of any adopted state building code. Critical issues that remain unresolved are 1) whether if adopted; the building code would be a mandatory or a voluntary; 2) whether the building code would be enforced at the local or state level; and 3) how any enforcement of an adopted code would be funded.

A second working group formed on an informal basis at the suggestion of the staff of the Attorney General's office and identified itself as the LD 1551 "Stakeholder Group." The objective of the group was to further debate and discuss the pros and cons of licensing residential building contractors and the merits of alternative approaches to regulation. The stakeholder group included residential builders, commercial builders, professional associations representing builders and contractors, representatives of insurance companies, lumber companies and municipalities and towns. Over the course of three months of periodic meetings, a number of revisions to the original bill were discussed;

however, it is apparent that consensus was not reached on many critical issues that form the foundation of an effective licensing program.

Having reviewed all available documentation from the Building Code Working Group and the LD 1551 Stakeholder Group, as well as the information received as a result of the Department's sunrise review process, it is the Department's view that meaningful sunrise review is more difficult than usual because three key foundational or seminal issues have not been resolved. Only after the three issues discussed below are resolved by the Legislature can the Department's sunrise review provide meaningful analysis and recommendations.

1. Established Statewide Building Code

In the context of developing a licensing requirement for any occupation or profession, one of the seminal issues to determine is the standard the licensing board must apply in measuring the licensees' level of competency. The threshold foundational issue critical to the question of licensing of home contractors is the absence of agreement or consensus on whether a state-wide building code should be adopted. In the Department's view, a state building code provides such a standard by which the public would be able to evaluate the conduct of potential licensees of a regulatory program. Without an adopted state building code that is understood by all parties who might be subject to licensing requirements, and which is enforced in a consistent manner, the state does not have the tools to advance its singular objective of protecting the public. The adoption of a statewide building code is also a pre-requisite to any consideration of a state licensing program. All professions and occupations that are regulated by the State rely on statutorily-defined scopes of practice and technical codes and standards to measure or evaluate the conduct of licensees.

The Department is aware that adoption of any state wide building code has been extensively debated for several years at the local level as well as by the Legislature. The questions of which code would be best for Maine and how the chosen code would be implemented and enforced continues to be a contentious issue on which complete consensus has not been reached. Although progress has been made, the conditional language and recommendations of the Building Code Working Group in its Final Report are evidence of the lack of full agreement on these issues.

Nonetheless, whether to adopt a statewide building code is a foundational issue that must be addressed and resolved. If left unresolved, disagreement surrounding code issues will become a barrier to meaningful consideration of any form of contractor regulation by the Legislature. The absence of a mandatory statewide building code implemented and enforced either at the local level or at the state level, we believe precludes consideration of licensure of home building contractors

2. Statutory Scope of Practice

The second key foundational issue that must be resolved is the “scope of practice” for any defined group of individuals that may be regulated. The statutory scope of practice provision is the hallmark of licensing statutes for all regulated professions and occupations. The scope of practice indicates to the public which services they seek will require the service provider to have obtained a state license and, to the contrary, which services will not require a license. The original version of LD 1551 would require licensure of a “home contractor” which includes any person who undertakes, offers to undertake or submits a bid to build a dwelling or perform any home improvement. However, the bill does not define which specific services performed by a home contractor are included in the “building” or “improving” of a dwelling.

Suggestions for amendments to LD 1551 made by the Stakeholder Group are equally unclear in terms of describing the actual conduct or activity that requires a license. For example, revised LD 1551 exempts a subcontractor providing window installation for a home contractor from licensure; however, the same subcontractor would have to obtain a license if he or she provided the same window installation service to a consumer directly. Thus, it is the relationship between a service provider and the consumer on a given day that determines whether a license is required, rather than the actual service or conduct itself.

In addition, the definition of “home improvement” includes the “structural repair, renovation or rehabilitation of construction or an addition to a dwelling.” Is this definition limited to what is generally thought of as carpentry type work? If so, what is the definition and scope of practice for a carpenter? The definition also includes “the removal, repair, replacement or installation of roofing, siding, insulation, windows or chimneys.” Does this mean that a person working on a foundation is not required to be licensed? What about drywallers, floor covering installers or other specialty service providers? What specific range of services is included in each category? Does “roofing” include replacing both boards and shingles or just shingles?

Without a clear statutory scope of practice adopted by the Legislature, neither potential licensees nor the public will be able to determine under what circumstances a license will be required. Currently, neither LD 1551 nor suggested changes to LD 1551 set forth in clear practical terms the specific conduct or activity that triggers licensing requirements. At the outset, regulation of a profession is the Legislature’s determination. More specifically, defining the actual conduct which will require such regulation, should not be delegated to a licensing board through the board’s rulemaking process.

3. Identified Funding Source

A third seminal issue that has not been resolved is the source of funding for any form of regulation. The cost of regulating a profession is typically borne by the licensees in that profession through the submission of dedicated license fees. In addition to licensing individual contractors, LD 1551 contemplates a required permitting and inspection process for each construction project but fails to identify a funding source other than “licensing fees” paid by “licensees.” A typical licensing program will build into the

license fee the direct costs of examination development and administration, dedicated personnel and associated equipment, as well as shared overhead costs including rent, legal service, and technology and shared staff. The permitting and inspection functions required by LD 1551 would not typically be included in the administrative cost of the licensing program. Those costs are not addressed in either the original bill or the revised bill.

As noted previously, the fact that the bill lacks specificity in defining what types of conduct would be regulated and under what specific circumstances makes it almost impossible to project both the number of potential licensees, and the total cost of the regulatory program. Comments of interested parties on this point are evidence of the lack of consensus on the objective of LD 1551. The Maine Municipal Association, for example, projects the costs of a regulatory program to be approximately \$3 million annually, based on the number of licensees it foresees. The Attorney General's consultant projects the cost of the program at \$8 million based on one required inspection for each of approximately 80,000 housing projects performed annually by an estimated 12,000 licensees. LD 1551 requires a series of three inspections per housing project which would put the actual cost of the program at \$24 million annually.

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Given the factors including the on-going simultaneous discussions of various informal working groups on different but interrelated topics, the likelihood of the introduction of amendments to LD 1551, and the lack of consensus on interpretation of provisions in either the original bill or a revised bill, the question of whether and how building contractors should be regulated has become a moving target. To the extent that these seminal issues remain unresolved, meaningful discussion by the Legislature of whether regulation in this area should occur, and if so, what specific regulatory options should be considered remains difficult. Nonetheless, even though normally not part of a typical sunrise review report, the following section attempts to outline the spectrum of options or potential regulatory approaches which the Legislature could consider with regard to the issue of home contractor regulation in general.

B. Regulatory Options

LD 1551 focuses exclusively on *licensing* of home building contractors to provide new remedies for consumers who have expressed frustration with the business practices and work product of the contractors with whom they have established business relationships. Licensing is only one of several regulatory options. These following options are organized in terms of degree of regulatory burden, from least burdensome to most extensive.

- **No change:** This option leaves in place current licensing programs for certain regulated trades including plumbing, electrical installation, the work of oil burner technicians, propane and natural gas technicians, architects, and engineers. Various related safety and installation codes have been adopted at both the state and at the

municipal level. However, building codes adopted at the municipal level cover approximately 52 percent of the state's population, and provide for permitting, inspection and enforcement at the local level.

- **Certification:** “Certification” is a regulatory term that connotes a training and/or an examination process typically administered by a private trade or professional association for the benefit of its members. Obtaining certification status by the service provider is voluntary. The state has no enforcement or regulatory role. Certification is used to enhance the competency and/or stature of those certified within the profession or occupation. A contractor certification program could require an agency to administer an examination that would cover both construction-related subject matter and basic business management and law and certify those who passed. Since certification would be voluntary, it would not prohibit anyone from practicing as a general contractor. The certification program might be most effective if combined with the adoption of a statewide building code, with the exam testing the applicants' knowledge of the code. As described, certification is not typically a state function; and therefore, if not overseen by a state agency, no state expense would be incurred.

- **Registration:** The regulatory term “registration” implies that certain essential information about an identified group of individuals and entities is gathered and compiled by the state so that the public has some way of contacting the registrant if necessary. Registration is marked by the payment of a registration fee by the registrant but does not carry with it a set of standards or qualifications that must be met by the registrant before the registration is issued. It is usually the lowest level of regulation implemented by a state. In this context contractors could be required to register as a pre-requisite to practicing in the state. Registration would be mandatory but could be limited to contractors or extended to include specialty trades. Registration could be instituted as a preliminary step in a phased-in licensure program, or it could constitute an end in itself. Because registration is a function of the state, all costs associated with the registration program would be passed on to the registrants in the form of registration fees that would cover the cost of the program. These costs would include the direct costs of the program, including dedicated personnel costs as well as shared overhead costs that would include the cost of rent, technology and legal service.

- **Licensure:** Licensure is a designation used to describe the highest level of state regulation. Typically, the state grants licensure to an individual who has complied with a legislatively mandated set of minimum educational, experiential, and training and competency standards, and has paid the required licensing fee. Regulation through licensure encompasses the setting of eligibility standards, examination requirements, and a complaint process to resolve consumer complaints. The complaint process typically involves investigation of complaints and a disciplinary process whereby the licensing authority imposes discipline in situations where the licensee has violated state law or board rule. Effective licensing programs that protect the public require a clear public threat and a mechanism for protecting the public from that defined threat. The foundations for a licensure program almost always include adoption of minimum standards and a clearly defined statutory scope of practice. This level of state regulation

carries with it the highest level of state expense. The total cost of the program becomes the basis for a statutory fee cap, and license fees established through the Administrative Procedures Act rulemaking process.

Within the category of “licensure,” several sub-options might be considered, again, from least burdensome to most complex:

- Licensure of roofers: Between 2000 and 2002, the Attorney General’s Office reported that 107 of 457 or 23% of construction-related consumer concerned roofing.
- Licensure of contractors combined with registration of roofers (See “Registration” description above)
- Licensure of residential contractors and specified specialty construction trades
- **Licensure Plus**: Some states have combined contractor licensing programs with other components of a remedial program which provide disclosure of financial information as a condition of licensure and in some cases, to provide consumer remedies. These licensure models clearly increase costs associated with the program.
 - Licensure of residential contractors that includes financial requirements imposed on residential contractors Some states require a demonstration of financial stability and net worth as a condition of licensure.
 - Licensure of residential contractors that includes provision for a homeowner restitution fund
 - Licensure of residential contractors that includes a subcontractor recovery fund.

These and other combinations can be found in other states. As noted, the more complex the program, the more state expense is involved. However, until the basic elements of the desired program are established, the total costs of any program are speculative, at best.

C. Department’s Responsibility pursuant to the Sunrise statute

Consideration of any particular option discussed above will not be useful unless and until the three seminal issues previously outlined are resolved. The Department, however, is obligated to present its analysis of the statutory evaluation criteria pursuant to the Committee’s directive to conduct an independent assessment of LD 1551 as presented. Despite the complicating factors surrounding the bill, and the lack of clarity as to the bill’s specific purpose, Section II of this report sets forth the more formal “sunrise review.”

Section II. Sunrise Report on LD 1551 “*An Act to License Home Building and Improvement Contractors*”

Introduction:

Under current Maine law, building contractors are not required to obtain a state license to conduct business in the state. LD 1551, “*An Act to License Home Building and Improvement Contractors*,” was considered by the Joint Standing Committee on Business, Research and Economic Development (“the Committee”) during the First Regular Session of the 121st Legislature. The proposed legislation as printed would require building contractors of residential structures to obtain a license from the State and would establish a licensing board within the Department of Professional and Financial Regulation to regulate residential building contractors. In addition, the bill provides for adoption by the board of the International Residential Code as Maine’s state-wide building code. The Committee held a public hearing on LD 1551 and subsequently voted to carry the bill over to the Second Regular Session of the 121st Legislative Session to allow “sunrise review” to take place.

As noted in Section I of this report, after the First Regular Session ended, an informal group of interested parties led by representatives of the Attorney General’s Office met periodically between June and September, 2003 to attempt to further debate and discuss the pros and cons of licensing residential building contractors and the merits of alternative approaches to regulation. The informal group of stakeholders included residential builders, commercial builders, professional associations representing builders and contractors, representatives of insurance companies, representatives of lumber companies and representatives of municipalities and towns. The Department is not aware of the existence of an official amended version of LD 1551. For this reason, and because the public at large is aware only of the existence of LD 1551 as originally presented, this assessment is confined to the provisions of the original bill.

A. Sunrise Review

Pursuant to 5 MRSA § 12015(3), “sunrise review” must be undertaken whenever proposed legislation would license or otherwise regulate an occupation or profession that is not currently regulated in order to determine whether such regulation is necessary to protect the health, safety, and welfare of the public.

The sunrise review process consists of applying the evaluation criteria established by statute, 32 MRSA § 60-J, to the proposed system of regulation to determine whether the occupation or profession should be regulated.

Under the law, the sunrise review process may be conducted in one of three ways:

1. The Joint Standing Committee of the Legislature considering the proposed legislation may hold a public hearing to accept information addressing the evaluation criteria;
2. The Committee may request the Commissioner of Professional and Financial Regulation to conduct an independent assessment of the applicant's answers to the evaluation criteria and report those findings back to the committee; or
3. The Committee may request that the Commissioner establish a technical review committee to assess the applicant's answers and report its finding to the commissioner.

Copies of 5 MRSA § 12015(3) and a summary of the sunrise review process are included in Appendix A.

B. Charge from Committee

In a memorandum dated May 16, 2003, the Joint Standing Committee on Business, Research and Economic Development requested that the Commissioner of Professional and Financial Regulation conduct an independent assessment of LD 1551, "*An Act to License Home Building and Improvement Contractors*," in accordance with the state's sunrise review procedures and submit a report of findings to the Committee by January 1, 2004. A copy of the committee's request is attached as Appendix B.

C. Independent Assessment by Commissioner

The requirements for an independent assessment by the commissioner are set forth in 32 MRSA § 60-K. The commissioner is required to apply the specified evaluation criteria set forth in 32 MRSA § 60-J to responses and information submitted to, or collected by, the commissioner.¹ After conducting the independent assessment, the commissioner must submit a report to the committee setting forth recommendations, including any draft legislation necessary to implement the report's recommendations.

The commissioner's report to the Joint Standing Committee on Business, Research and Economic Development must contain an assessment as to whether answers to the evaluation criteria are sufficient to support some form of regulation. In addition, if there is sufficient justification for some form of regulation, the report must recommend an agency of state government to be responsible for the regulation and the level of regulation to be assigned to the applicant group. Finally, the recommendations must reflect the least

¹ In conjunction with its solicitation of written comments, the Department publicized and held a public meeting of interested parties at the Gardiner Annex on October 15, 2003 to allow participants to supplement their written submissions and provide new information. A list of participants at the public meeting is attached as Appendix C.

restrictive method of regulation consistent with the public interest. Copies of 32 MRSA §§ 60-J and 60-K are included in Appendix A.

D. Evaluation Criteria

As part of the independent assessment process, the commissioner must review the responses to the evaluation criteria submitted by the “applicant group” seeking licensure. In the absence of a typical applicant group, the Department has considered the input of all individuals and groups that submitted a written submission or participated orally at the October 15th public meeting.

The department’s analysis is structured utilizing the evaluation criteria set forth in 32 MRSA § 60-J, and is presented in this report as follows:

1. The evaluation criteria, as set forth in the statute;
2. A summary of the responses submitted by interested parties ; and
3. The department’s independent assessment of the response to the evaluation criteria.

Evaluation Criterion #1: Data on group proposed for regulation. A description of the professional or occupational group proposed for regulation, including the number of individuals or business entities that would be subject to regulation; the names and addresses of associations, organizations and other groups representing the practitioners; and an estimate of the number of practitioners in each group.

Responses:

Information submitted by the Attorney General’s Office indicates that under the broadest interpretation of LD 1551, as many as 12,000 individuals and companies would be required to obtain a state license to offer construction and improvement services for dwellings.² LD 1551 defines “home contractor” to mean a person who “undertakes, offers to undertake or submits a bid to build a dwelling or perform any home improvement.” Alternatively, the Attorney General’s Office suggests that a more limited interpretation of the bill might produce a licensee pool of about 10,500. This figure would not include “do-it-yourselfers” and subcontractors who work for general contractors.

The trade or professional organizations represent some portion of the potential licensees include the following: Maine Homebuilders and Remodelers Association (120-150 members), Mid-Coast Builders Alliance (100 members in mid-coast region), and Associated Constructors of Maine.

² *Economic Impact Analysis of Proposed Home Contractor Regulation,*” issued by Planning Decisions, Inc., page 4. (Attached as Appendix D).

Department assessment:

As noted in the Introduction, subsequent to the Committee's decision to carry over LD 1551 to allow for sunrise review, the Attorney General's Office continued to organize meetings of parties that had expressed interest in participating in further discussions of the bill and its impact on the public, on the interested parties and on the business community. During these meetings, questions were raised and debated with regard to the meanings of the core definitions that under normal circumstances would provide the basis for estimating the size of the licensee pool.

In part because the bill does not define the actual conduct or "scope of practice" that would require licensure, the number of potential licensees that may be subject to regulation cannot be reasonably estimated. In the absence of clear statutory definitions of the specific conduct and activity that would delineate the potential regulated community, and to avoid unproductive speculation, the Department relies on information provided the Attorney General's Office on this criterion. Planning Decisions, Inc. is a consulting firm retained by the Attorney General's Office to provide a cost/benefit analysis for purposes of sunrise review. In its report, Planning Decisions indicates that "approximately 12,000 firms doing nearly \$1.8 billion in sales could fall under the purview of LD 1551."³ Any revisions in the bill's definition of "home contractor," "general contractor," or "home improvement or repair" would presumably increase or decrease that estimate.

It is also worth noting that the total membership of the various trade and professional associations participating in these discussions is less than 400 as compared to the 12,000 licensees who would be subject to licensure.

Evaluation Criterion #2: Specialized skill. Whether practice of the profession or occupation proposed for regulation requires such a specialized skill that the public is not qualified to select a competent practitioner without assurances that minimum qualifications have been met.

Responses:

Individual consumers who submitted comments typically indicated that home builders and home improvement contractors need specialized skills. Generally, these consumers do not specify whether the skills needed are technical construction skills or financial and business skills or both.

Trade and professional groups generally assert that specialized skills are required in order to produce a structurally sound structure. Most commenters agreed that a competent builder needs knowledge and familiarity with the applicable building code and the ability

³ "Economic Impact Analysis of Proposed Home Contractor Regulation," issued by Planning Decisions, Inc., Table 3, **Indices of Construction Businesses Covered by LD 1551, 2001 values (est.)**, pg. 8, attached as Appendix D.

to comply with the provisions of that code. Some commenters stated that they consider the manufacturers' installation guidelines for their building materials are important.

Department assessment:

There is no doubt that "specialized skill" is required for at least some, if not all components of home construction. Despite this, the Department is not aware of any nationally accepted set of minimum qualifications or standards for home builders. Consumers generally attempt to educate and protect themselves from negative consequences by taking time to interview more than one builder, ask for names of several other clients who have contracted with the builder, and require the builder to supply information about his or her financial situation and past financial history. The consumer choosing a builder often has access to tangible work product of the builder and the testimony of prior clients as a guide. Whether consumers who have submitted comments actually performed this kind of personal research is not known. It should be noted that some consumers who responded to the Department's request for consumer input stated that they had done their homework and were pleased with the work of the builder they chose, but the second time they hired the same builder for another purpose, problems with the construction project developed and they became dissatisfied.

Evaluation Criterion #3: Public health; safety; welfare. The nature and extent of potential harm to the public if the profession or occupation is not regulated, the extent to which there is a threat to the public's health, safety or welfare and production of evidence of potential harm, including a description of any complaints filed with state law enforcement authorities, courts, departmental agencies, other professional or occupational boards and professional and occupational associations that have been lodged against practitioners of the profession or occupation in this state within the past 5 years.

Responses:

Most consumers provided information that they had experienced economic or financial harm; they paid a builder to perform a task but the builder failed to perform the work without returning their money, or performed the work in such a way that the consumer was caused to pay a second builder to complete the work to their satisfaction, thus increasing the cost of the project.

A smaller number of the consumers who responded indicated their opposition to a licensure program because of their belief that licensure would increase the cost of building and they saw no justification for any increase.

The Attorney General's representative submitted a listing of complaints received between 2000 and 2002 relating to home construction and improvement. Of the 447 complaints

received, 294 related to one or more of the building activities subject to licensure under LD 1551. About half of those related to “new construction” or “roofing.”

Department Assessment:

The issue raised by the proposed legislation, and this evaluation criteria in particular, is whether the public’s health, welfare and safety is jeopardized if residential builders and home improvement contractors are not regulated. The complaint information provided by the Attorney General’s office does not provide sufficient detail in terms of the specific facts and circumstances surrounding each complaint. Consistent indexing to provide complaint context would need to be developed and analyzed in order to draw any meaningful inferences relevant to this assessment.

Economic Harm: Consumer complaints of economic harm must be considered in the context of the residential building industry in Maine overall. The Department relies on information contained in Planning Decisions’ cost benefit report to put the threat to public safety or welfare in perspective. Table 5 of the report on page 12 indicates that the Attorney General’s Office assigned an adjusted total dollar value to the 100 complaints received in 2002 of approximately \$1.5 million. In comparison to the \$788 million spent on home improvement activity during the same period, the financial “damages” of \$1.5 million associated with these complaints represent approximately 2/10th of one percent of total expenditures. Obviously, the 100 complaints reported to the AG do not reflect the total number of complaints relating to home contracting work in Maine. Planning Decisions asserts that this relatively small percentage could be related to the reluctance of consumers to report problems.

Viewed from another perspective, the report estimates that there are approximately 80,000 housing projects in Maine each year. The 100 complaints submitted to the Attorney General in 2002 represent a problem rate of approximately 1/10th of one percent of total projects. Even assuming, as the report does, that not all consumers who could file a complaint actually did file a complaint; the likely rate of problems occurring with home contractor work in this state appears to be relatively low.

Physical Harm: Certain components of the building and construction industry that pose serious threats to public safety, including electrical installations and wiring, the installation of oil burning appliances and other heating equipment fueled by compressed gas, and the installation of boilers, pressure vessels, and elevators, have been identified as public safety issues and are already regulated by the State. Technicians who install and maintain these units are subject to the adopted state code in that particular trade or occupation including the National Electrical Code (NEC), various chapters of the safety and installation codes of the National Fire Protection Association (NFPA), and the American Society of Mechanical Engineers Installation and Safety Code for Elevators and Vertical Lifts (ASME) and boilers and pressure vessels.

With respect to construction of residential dwellings, towns and municipalities have jurisdiction over and responsibility for the construction process and the structural soundness of residential structures through operation of the local building permit and inspection process. The Maine Municipal Association provided information indicating that “approximately 73 communities having 53% of the state population have adopted building codes.” “Furthermore, most of these municipalities employ professional staff that inspects completed construction for compliance with the building code.”

The Department has received no information to demonstrate that regulation of residential construction currently in effect at the local or municipal level does not adequately protect the public from the risks of physical harm in those localities. It appears that at least for a significant portion of the state and state population, appropriate regulation is in place.

Evaluation Criterion #4: Voluntary and past regulatory efforts. A description of the voluntary efforts made by practitioners of the profession or occupation to protect the public through self-regulation, private certifications, membership in professional or occupational associations or academic credentials and a statement of why these efforts are inadequate to protect the public.

Responses:

Some trade associations representing building contractors submitted information about voluntary certification programs in which contractors may participate, including a voluntary certification program administered by the Department of Environmental Protection to certify contractors on erosion control practices, by the Department of Human Services, Division of Health Engineering which administers a voluntary certification program for septic system installers, by the Maine Concrete Technicians Certification Board to certify individuals who test qualities of concrete, by building material manufacturers and suppliers to train contractors in the intended use of their products, and by the Midcoast Builders Alliance and the Maine Home Builders and Remodelers Association for members relating to building and structural issues. The Department is also aware that certain community colleges in Maine offer building trade training but has no specific information on those programs.

Maine Municipal Association provided information with respect to considerable efforts of municipalities to regulate construction practices of the residential contractors. It asserts that “More than 70 municipalities, encompassing over half of the state population, have adopted building codes governing the construction of residential property. Furthermore, most of these municipalities employ professional staff that inspects completed construction for compliance with the building code.”

Department Assessment:

The Department views voluntary state and private certification programs to be important ways of protecting the public. More important, however, is the enforcement of

construction practices of residential contractors by municipalities that have adopted building codes. That is a significant factor in providing public protection at the local level.

Evaluation Criterion #5. Costs and benefits of regulation. The extent to which regulation of the profession or occupation will increase the cost of goods or services provided by practitioners and the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers.

Responses:

Some consumers asserted that the cost of regulation would be minimal when compared to the money that a licensing program would save consumers.

Representatives of the building and construction industry believe regulation will increase the cost of doing business given the costs associated with a state administered licensing program that includes examination, licensure and continuing education that LD 1551 would require of many of their members as well as the additional costs associated with bonding and insurance. They assert that when their members' business costs increase, the increase is passed on to consumers who will ultimately bear the additional cost.

Maine Municipal Association focused on one component of cost associated with LD 1551—the costs associated with the adoption and enforcement of a state-wide building code. It asserts that a conservative estimate of the cost of code adoption and enforcement would be \$3 million and questions whether the adoption and enforcement of such a code would reduce consumer complaints.

Planning Decisions concluded that the only feasible way of analyzing the cost and benefit of a regulatory program is to calculate the current cost to consumers of “shoddy or unacceptable home construction activity” which it estimates to be roughly \$24 million annually. If the proposed program resulted in the elimination of \$24 million in unacceptable construction activity, and the actual costs of administering the licensing program amounted to less than \$24 million, there would be a net benefit that would justify regulation.

Department Assessment:

Because of the many unknown factors associated with the concept of contractor licensing, including the number of licensees, the number of building projects and the number of inspections or enforcement actions that might be required, there is no easy way to predict at this time what the actual cost of a licensure and enforcement program might be. Of particular concern is the bill's building permit and inspection component. Planning Decisions states that census information indicates that there are roughly 80,000 residential projects in Maine each year. LD 1551 requires three inspections to be performed for each project at various stages of construction. Using the report's estimate

that one inspection per project would cost \$8 million, a total of \$24 million would be necessary to pay for the cost of 240,000 inspections each year.

MMA's program cost estimate, although clearly offered as a conservative estimate in the absence of solid information about residential housing projects, is based on the number of potential licensees. It assumes that each licensee would have one project and be inspected once.

Although certain costs of a licensing program can be ascertained by examining the history of other programs that include similar components, the bill's lack of detail and specificity with regard to the size of the regulated community, and the level of the regulating entity's involvement in the permitting and inspection program makes any set of estimates speculative, at best.

Another significant element of the cost of state regulation of the residential building industry is the level of cost passed along to the consumer as a result of anticipated increases in labor costs. Planning Decisions, Inc. notes that "there is a difference of approximately \$4.00 per hour between average hourly wages of licensed and unlicensed trades people." In the event that state regulation was established, that wage differential would likely be borne by consumers in the form of increased construction costs. That level of increased costs, estimated by Planning Decisions to be in the range of \$40 million annually⁴ would need to be part of the consideration in performing the "cost-benefit analysis."

Evaluation Criterion #6: Service availability under regulation. The extent to which regulation of the profession or occupation would increase or decrease the availability of services to the public.

Responses:

Commenters, including some individual consumers thought that a new regulatory program for residential building contractors might weed out problem builders and considered that a benefit to the public. Other consumers thought that regulating residential builders would limit their choices and that problem builders would operate outside the state regulatory program. Small contractors stated their fear that they would be forced out of business financially because of increased costs associated with examination, licensure and continuing education, bonding and insurance.

Department Assessment:

In general, imposing licensing requirements where none exist typically results in a decrease in the number of service providers and in the availability of services. A decrease in the availability of services in the absence of compelling documented safety

⁴ "Economic Impact Analysis of Proposed Home Contractor Regulation," issued by Planning Decisions, Inc., pg. 5. (Appendix D).

issues and concerns or a clearly demonstrated countervailing benefit does not result in a benefit to the public. Moreover, it is unrealistic to presume that all unethical or unlicensed builders who do not obtain a license under the provisions of the bill would close their operations. Thus, even with licensing, there will still likely be some degree of poor contractor workmanship which will continue to occur.

Evaluation Criterion #7: Existing laws and regulations. The extent to which existing legal remedies are inadequate to prevent or redress the kinds of harm potentially resulting from non-regulation and whether regulation can be provided through an existing state agency or in conjunction with presently regulated practitioners.

Responses:

Some interested parties noted the existence of the Maine Home Construction Contract Law as being relevant to the Department's independent assessment. The Home Construction Contract statute offers consumers a civil remedy for violations of contract by the contractor. It requires that contracts for home construction or repair work in excess of \$3000 must be in writing and contain specific information including price, description of work, warranties and estimated completion date.

Department Assessment:

The Department agrees that the Home Construction Contract Act (10 MRSA ch. 219-A) provides consumers with the most effective civil remedy for breach of contract by a building contractor. Although Maine does not currently license home contractors, the Department notes the existence of a number of state laws set forth below that provide some degree of protection for the public in the home construction field.

- Home Construction Contract Act ,10 MRSA ch. 219-A
- Unfair Trade Practices Act, 5 MRSA ch. 10
- Mechanics Lien Law, 10 MRSA ch. 603
- Home Repair Fraud, 17-A MRSA ch. 37
- Registration of Transient Sellers (Door to Door Home Repair Services) 32 MRSA ch. 37
- Regulation of Construction and Improvements, 30-A MRSA ch.185
- Warranties for Sale and Installation of Solar Energy Equipment, 10 MRSA ch. 221
- Insulation Contractors, 10 MRSA ch.219
- Construction Contracts, 10 MRSA ch.201-A
- Oil and solid fuel technicians and installations, 32 MRSA ch.33
- Plumbers and plumbing installations, 32 MRSA ch. 49
- Electricians and electrical installations, 32 MRSA ch. 17
- Maine Manufactured Housing Installation and Warranty Law 10 MRSA ch. 9551
- Title 11, United State Bankruptcy Code

- Uniform Commercial Code/Contract Law, 11 MRSA

These statutory provisions and remedies are in addition to whatever civil remedies a consumer may attempt to obtain in the courts through a negligence or breach of contract claim.

Evaluation Criterion #8: Method of regulation. Why registration, certification, license to use the title, license to practice or another type of regulation is being proposed, why that regulatory alternative was chosen and whether the proposed method of regulation is appropriate.

Responses:

The Attorney General's Office favors licensure over any other method of regulation because "mere registration, certification, license to use the title, or any other form of regulation would inadequately protect consumers." Licensure, it asserts, "provides the consumer with assurance of minimal competence and access to a licensing board that can hold a contractor accountable for incompetence."

Department Assessment:

As noted in the discussion of regulatory options in Section I of this report, distinctions between registration, certification and licensure were not the focus of the consumer input the Department received. The term "registration" implies that certain information about an identified group of individuals and entities is gathered and compiled by the state so that the public has some way of contacting the registrant if necessary. Registration is marked by the payment of a registration fee but does not carry with it a set of standards or qualifications that must be met before the registration is issued. It is the lowest level of regulation that can be implemented by a state.

Certification is a term that connotes training or an examination process administered usually by a private trade or professional association. Obtaining certification status by the service provider is voluntary. The state has no enforcement or regulatory role. Certification is used to enhance the stature of those certified within the profession or occupation.

Licensure is a designation used to describe the highest level of state regulation. The state grants licensure to an individual who has complied with a legislatively mandated set of minimum educational, experiential, and training and competency standards, and has paid the required licensing fee. Regulation through licensure encompasses the setting of eligibility standards, examination requirements, and a complaint process to resolve consumer complaints. The complaint process typically involves investigation of complaints and a disciplinary process whereby the licensing authority imposes discipline in situations where the licensee has violated state law or board rule.

Effective licensing programs that protect the public require a clear public threat and a mechanism for protecting the public from that defined threat. In most regulated professions the foundation for licensure is a set of nationally accepted minimum standards and a clearly defined scope of practice. LD 1551 lacks both of these critical components of an effective licensing law.

Evaluation Criterion #9: Other states. Please provide a list of other states that regulate the profession or occupation, the type of regulation, copies of other states' laws and available evidence from those states of the effect of regulation on the profession or occupation in terms of a before-and-after analysis.

Responses:

None submitted on this criterion.

Department Assessment:

Licensing methodology for professions and occupations in other states is generally driven by the political climate in existence at the time a profession is first subject to regulation. Information obtained by the Department indicates that as many as 31 states have implemented some form of regulation of building construction, ranging from registration, certification, to complex licensing programs with tiers of regulation of residential, commercial and specialty license categories. Nineteen states do not license building contractors at the state level. (See Attached Appendix E) The majority of states that do license contractors provide for licensing of both residential and commercial contractors.⁵

Evaluation Criterion #10: Previous efforts to regulate. Please provide the details of any previous efforts in this state to implement regulation of the profession or occupation.

Responses: The Attorney General submitted an exhibit showing the history of legislative proposals to license building contractors.

Department Assessment:

The Department accepts the Attorney General's exhibit (Attached as Appendix F) as factual. None of the prior legislative attempts has resulted in enactment of laws which would regulate home building contractors.

Evaluation Criterion #11: Mandated benefits. Please indicate whether the profession or occupation plans to apply for mandated benefits.

⁵ "Contractor's State Licensing Information Directory," printed by National Association of State Contractors Licensing Agencies, 2003 Edition.

Responses:

This criterion is not relevant to the subject matter.

Evaluation Criterion #12: Minimal competence. Please describe whether the proposed requirements for regulation exceed the standards of minimal competence and what those standards are.

Responses:

None were submitted on this criterion.

Department Assessment:

LD 1551 does not specify minimum standards and qualifications to be eligible for licensure as a residential building contractor or home improvement contractor. The bill reserves for the proposed licensing board the authority to adopt rules establishing such license requirements.

The Department asserts that the formulation of licensing standards and qualifications is a function of the Legislature which should not be delegated to a licensing board. A board's role is to implement the standards adopted by the Legislature.

Evaluation Criterion #13: Financial analysis. Please describe the method proposed to finance the proposed regulation and financial data pertaining to whether the proposed regulation can be reasonably financed by current or proposed licensees through dedicated revenue mechanisms.

Responses: None submitted on this criterion.

Department assessment:

The proposal provides for a licensing program presumably funded through licensing fees paid by licensees. If the proposal includes permitting and inspection components, the overall cost of the program will be significantly higher. If it were determined that the permitting and inspection fees could not reasonably be borne by licensees, other dedicated funding sources to cover the cost of those components would have to be identified.

Licensing programs within the Department of Professional and Financial Regulation are dedicated revenue agencies and must be self-supporting through license fees paid by individual licensees. It is difficult to precisely determine the cost of establishing any new

licensing program. That task is made more difficult with respect to this proposal because of the unknown factors such as the number of potential licensees, the number of proposed sub-categories of licensure and lack of certainty with regard to the elements of permitting and inspections. For the purpose of this evaluation criterion, the Department has attempted to estimate the start-up costs and initial annual operating costs that would be associated with beginning a new contractor licensing program within the Office of Licensing and Registration. The assumptions used for this estimate do not include the cost of inspection and permitting enforcement functions. Any such requirements would impose significantly higher start-up and operating costs.

Total projected start-up costs including the cost of examination development, licensing system technology, personnel and related office equipment, and initial rulemaking total approximately \$1 million, of which about \$400,000 would be one-time costs. The projected on-going costs of this program would not be unlike the costs for other similar regulatory programs within the Office of Licensing and Registration. These costs would include those associated with personnel, board member per diem and travel, technology, investigation and enforcement, communications, equipment, rent, legal services, and general operating expenses totaling between \$620,000 and \$700,000 annually.

Typically, since no dedicated revenue is available to be used for this program, a general fund working capital allocation would be needed to defray program costs for the first two years covering start-up and operating expenses.

Section III. Recommendations of the Commissioner

State sunrise review law requires the commissioner to engage in a two-step evaluation process guided by 13 evaluation criteria. First, the commissioner must evaluate the information provided by the applicant group in support of its proposal to regulate or expand regulation of a profession. Second, the commissioner must recommend whether the committee should take action on a proposal. If the commissioner's recommendation supports regulation or expansion, the report must include any legislation required to implement that recommendation. The recommendation must reflect the least restrictive method of regulation consistent with the public interest.

The Department concludes that any attempt to regulate building contractors must be preceded by the adoption of a mandatory statewide building code. A mandatory statewide building code is essential to provide the building and construction trade with the minimum standard against which construction trades will be measured.

With respect to any profession or occupation that is being considered for regulation by the state, the proponents of regulation bear the burden of providing the public with a clear

description of the type of conduct that warrants state oversight. This becomes even more important when the suggested regulation involves numerous subcategories of persons engaged in related but different conduct. A clear explanation of the conduct of individuals and businesses proposed for regulation has not been presented in any version of LD 1551. Other professional licensing in Maine and contractor licensing laws in all other states with contractor licensing programs specifically identify the actual conduct that merits the creation of a state regulatory program. There is no question that the work of defining the specific conduct that is subject to regulation is difficult. But when weighed against the significant cost of such a program to the State and the impact on the public in terms of increased construction costs and on small businesses in the form of new license fees, the work of defining actual conduct that triggers state oversight is necessary.

In conclusion, the case has not been sufficiently made that the potential benefit of having licensed home contractors justifies the burden associated with home contractor licensing, in terms of both increased cost to the consumer public and the increased cost to the regulated community.