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Testimony of the Maine Municipal Association

In Opposition to
LD 2003, *An Act To Implement the Recommendations of the Commission To Increase Housing Opportunities in Maine by Studying Zoning and Land Use Regulations*

March 7, 2022

Senator Daughtry, Representative Sylvester and members of the Labor and Housing Committee, my name is Kate Dufour, and I am providing testimony in opposition to LD 2003 on behalf of MMA's Legislative Policy Committee.

Municipal officials agree that increasing Maine's inventory of housing is a top priority. However, implementation of that goal needs to be done thoughtfully and take into consideration the varying needs of communities across the state. Although MMA was a member of the Housing Commission, and with input from municipal officials supported several of the recommendations in the report, the details of the legislation matter. The approach presented in LD 2003 does not address the need for the development of mutually beneficial partnerships that include the state, municipalities, and the private sector, which MMA strongly supported throughout the commission process.

While there are elements of LD 2003 our policy committee supports, when reviewed in its totality, the negative impacts on municipal planning efforts and the potential for unintended consequences far outweigh those benefits.

The municipal officials serving on the policy committee are concerned with the erosion of local decision-making authority, the one-size-fits-all approach, and the speed with which these recommendations are proposed to be implemented without requiring a study of the impacts on municipal infrastructure, residents, or natural resources.

While local leaders appreciate the financial incentives and technical assistance programs built into the bill, requiring communities of all sizes and fiscal capacities to implement all the proposed recommendations proposed in the initiative – in a single year – is just too much.

The preference among local leaders is to create the necessary state funded technical assistance programs first, and require implementation of one approach, rather than all those proposed in the legislation, in a manner that fits the community, with the end goal of creating more housing.

No two municipalities are alike. Absent in this version of the bill is support for the local ingenuity necessary to ensure that plans can be implemented in each community. Municipal

officials strongly believe local decision-making authority can be respected while simultaneously honoring the commitment to increasing levels of affordable housing in all communities.

Attached to this testimony is a review of LD 2003 conducted by MMA's Legal Services Department outlining concerns with the bill. Our request is that legislators take these concerns into consideration as the measure is worked and debated.

Additionally, I want to draw your attention to three specific elements in the bill.

Priority Development Zones. First, the requirement that 487 municipalities, even those that do not have any zoning whatsoever, adopt a priority development zone, is a significant unfunded state mandate. As proposed in Section 13 of LD 2003, all municipalities, including Beddington with a population of 50, will have to hire consultants and planners necessary to implement the requirement. Due to the lack of planners and consultants able to provide these services, municipal officials are going to have a difficult time complying with this mandate.

If the Committee decides to move forward with this initiative, Maine's Constitution (Article IX, § 21) and accompanying state statute requires the Legislature to either reimburse municipalities for 90% of the cost of the mandate or to include a mandate preamble requiring a two-thirds majority vote in each chamber for enactment.

Housing Development Review Board. Second, although we appreciate that the review board created in LD 2003 explicitly provides for planning board input, municipal officials believe the proposal puts the cart before the horse. The first step in the partnership effort should not seek to shift decision-making authority on issues that can have financial and infrastructure related impacts from those who are directly impacted to an entity that may or may not understand or have any familiarity with a community's goals. It sends a message to municipal leaders and residents that they cannot be trusted to make decisions that support state and local goals.

Rather than moving forward with this approach, municipal officials urge you to focus on incentivizing the private/public partnerships necessary to develop measurable goals and assess which entity (private or public) is better suited to implement mutually beneficial strategies that achieve identified goals. If upon assessment redirection is necessary, then we should discuss and identify the next steps.

Technical Assistance. The third is the technical assistance and incentive program found in Sections 7 and 8 of LD 2003. MMA supports these provisions, as well as a similar proposal printed as Part U of Governor Mills' supplemental budget (2003). Municipal officials view this investment as a down payment on the creation of a more robust technical assistance program, targeted at working collaboratively with municipalities to implement statewide goals.

As noted in the Association's testimony on the Housing Opportunity Program (Part U), the abolishment of the State Planning Office in 2012 drastically reduced the state's capacity to provide the technical assistance that municipal officials of all disciplines greatly need. Just as Part U of the budget takes an important step toward recreating a model of assistance for

implementing statewide goals, so do the initiatives in LD 1995 to increase the planning capacity within the Municipal Planning Assistance Program in the Bureau of Resource Information and Land Use Planning at Department of Agriculture, Conservation and Forestry.

Investment in technical assistance is an investment not only in our communities but in the state/municipal partnerships necessary to advance the state's goals. As you continue discussions related to LD 2003, municipal leaders ask that you consider consolidating the planning, technical assistance, and financial incentive programs under one roof, rather than scatter these resources throughout multiple state agencies. This consolidation effort will help to ensure consistency in the services provided to municipalities.

Municipal officials are committed to working with the interested parties to develop compromise legislation that mutually benefits all affected parties.

Thank you for considering the municipal perspective on this issue.

Comments on LD 2003, "An Act to Implement the Recommendations of the Commission to Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions"

Maine Municipal Association Legal Services
March 7, 2022

Discussed below are legal concerns raised by the legislation proposed in LD 2003. Generally, the proposal represents an enormous alteration to the existing legal framework applicable to land use in Maine with respect to housing and residential uses.

Coordination with Existing law:

LD 2003 does not address how its new mandates will coordinate with several existing state statutes administered on the local level. To the extent there are unaddressed conflicts or inconsistencies between the requirements of LD 2003 and existing law, significant legal issues will arise both for the municipalities attempting to comply with these disparate requirements, and for the affordable housing developments themselves. As a few examples, LD 2003 does not address how it will coordinate with:

- Preemptions/requirements applicable to manufactured housing and mobile home parks (30-A MRS § 4358);
- Dwelling unit subdivisions under the municipal subdivision law (30-A MRS §§ 4401 – 4408);
- Subdivision review criteria (30-A MRS §4404) based on factors prohibited by LD 2003;
- The Growth Management Act (30-A MRS ch.187), which provides specific criteria for moratoriums and requires the comprehensive planning process to examine and incorporate a wide range of state goals. These statutes require consideration of factors that LD 2003 would prohibit (e.g., character of location, population concentration, overcrowding);
- Maine Tort Claims Act (14 MRS § 8104-B). Under Maine law, municipalities are immune from liability for tort claims based on legislative decisions, such as ordinance enactments. LD 2003 appears to create liability for municipalities based on ordinances enactments; and
- Shoreland zoning statutes, regulations and local ordinances.

Additional concerns raised by LD 2003 are discussed below:

<u>Section 3</u> – 5 MRS § 4581-A(5) -Maine Human Rights Act (MHRA):

One of the most concerning provisions in LD 2003 is the proposed MHRA amendment creating a new type of housing discrimination (and liability) based on neutral land use considerations that are not connected a protected class covered by the MHRA (e.g., race or color, national origin, religion, etc.).

The proposed § 4581-A(5) would apply to every municipal land use ordinance (and state law) that directly or indirectly limits housing – not simply ordinances or statutes focused directly on affordable housing developments. As one example, state shoreland zoning laws and minimum ordinance standards (38 MRS §§ 435-449; 06-096 CMR ch. 1000) establish shoreland zoning

districts, residential development restrictions and residential dimensional requirements based primarily on the "character of the location" and "overcrowding" concerns in relation to sensitive shoreland areas. Also, local planning boards are required to consider some of these factors in residential permit proceedings. The new MHRA provision would call much of shoreland zoning into question and provide a basis for landowners to challenge many residential shoreland zoning limits.

Other examples include the Growth Management Act (30-A MRS ch. 187) which requires that zoning ordinances are supported by a comprehensive plan addressing numerous factors and state goals. Several provisions in the Act require that comprehensive plans (including portions addressing residential development) be based on factors involving the character of the location, concentration of population or overcrowding of land. These include statutory criteria for developing a comprehensive plan (§ 4326) and transferable development rights program (§ 4328). Also, the undue hardship zoning variance statute (30-A MRS § 4353(4)) includes criteria and requires findings that "granting the variance will not alter the essential character of the locality." LD 2003 would invalidate this provision. The "practical difficulty" and "single-family setback" variances tests in § 4353 raise similar issues. In addition, the statutory subdivision review criteria (30-A MRS § 4404) are based on considerations prohibited by LD 2003, and will therefore, be invalid.

Prohibiting municipalities (or the state) from considering the character of an area, concentration of population, or overcrowding deprives municipalities of the most fundamental (and reasonable) criteria for making rational zoning decisions or protecting public health and safety in relation to housing. In fact, § 4581-A(5)(A) will call every municipal land use ordinance addressing residential matters into question because such ordinances unavoidably are based on the "unique characteristics" of the municipality itself. A specific housing project may have vastly different impacts on the community, on health and safety, sanitation, sewer /water resources, or traffic safety depending on whether it is located in a densely built city neighborhood, rural area or within a sensitive natural resource. Land use regulations that cannot take such realities into account may be vulnerable to legal challenge, as virtually all incorporate the three factors prohibited by § 4581-A(5).

Generally, courts will not uphold ordinance provisions unless they meet a "rational basis" test (meaning that the goals underlying the ordinance further a legitimate government interest and the restrictions rationally relate to those goals or purposes). For example, most municipal land use restrictions relating to residential lots, dimensional requirements and development impacts properly refer to legitimate government interests, such as preserving ecologically sensitive areas (regulating based on the "character of the location"), or ensuring the current infrastructure (sewer, water, roads) is sufficient to sustain the development (regulating based on the "concentration of the population" or "overcrowding" of land). By removing such basic criteria from consideration, §4581-A(5) will likely increase the probability that residential land use regulations will be challenged as unconstitutionally arbitrary. It also increases the likelihood that those regulations will actually be irrational, overbroad and ineffective in addressing the needs of Maine citizens.

LD 2003 Section 3 – 5 MRS § 4581-A(5) - Definition of "Housing Accommodations"

Proposed section 4581-A(5) uses the term "housing accommodations," which is defined in the MHRA as "any building or structure or portion thereof, or any parcel of land, developed or undeveloped, that is occupied, or is intended to be occupied or to be developed for occupancy, for residential purposes." 5 MRS § 4553. This broad definition means § 4581-A(5) will apply to municipal (and state) limits on *any* type of structure or land to be used as housing, including tents, yurts, tiny homes of any type, mobile homes, campsites, campers, trailers, etc., regardless of whether they are affordable, temporary or permanent housing. The criteria listed in § 4581-A(5) could not influence regulations on any these housing accommodations even if compelling health, safety, environmental or sanitation and similar concerns existed.

LD 2003 Section 7 - 30-A MRSA 4364(1)

Subsection 4364(1)(B) is ambiguous; it is unclear what is intended for DECD to "assist in the formal review of municipal building and development permits." For example, is the DEDC required to issue a decision or advisory opinion? Must the DECD participate in, or review local decisions before they are issued? Any of these possibilities may create ambiguities in the appeal process.

From a legal perspective, it would be better to allow DECD the ability to provide input during a local permitting process, rather than a role in decision-making. For a good example of a legal and practical approach, see 38 MRS § 438-A(6-A), which requires a municipal board of appeals to send copies of shoreland zoning variance applications to the DEP for review and comment at least 20 days before acting on a variance request. Comments submitted by DEP must be entered into the record and considered by the board of appeals. This opportunity for input preserves DEP's standing to appeal if it disagrees with the local decision.

LD 2003 Section 8 - 30-A MRSA 4364-A(1):

The working group established to evaluate how municipal ordinances impact affordable housing overlaps with existing statutes requiring a local comprehensive planning committee to draft/update comprehensive plans. The existing process is more comprehensive, integrating multiple local considerations and compelling state goals, including affordable housing. See 30-A MRS 4326(1)(H). The existing Municipal Planning Assistance program in the Department of Agriculture, Conservation and Forestry, already provides technical assistance and review of comprehensive plans. See 30-A MRS §§ 4331, 4345, 4346, 4347-A.

LD 2003 Section 9 - 30-A MRSA 4364-B:

This provision does not address whether it overrides local ordinances or provides any authority for local officials to ignore existing local requirements. This may create confusion and ambiguities impacting the status of local decisions.

The provision states no minimum number of units required for a development to take advantage of the relaxed density standards. Is the intent to include projects adding a single dwelling unit as "affordable housing developments"?

How will the affordability limits in § 4364-B(1) be determined at the time the permit is approved (before construction)? Should the legislation provide some guidance to local decisionmakers on this issue? For example, are marketing materials from the developer sufficient? Would this be a condition imposed on the permit?

The provision should clarify whether it applies state-wide or only in municipalities with zoning ordinances. Subsection 4364-B(2) requires density to be calculated based on density allowed in the "zone." There are numerous municipalities that have not enacted generalized zoning and/or do not regulate density through a non-zoning land use ordinance.

Similarly, it is not clear whether similar provisions in § 4364-C referring to "zone" apply only to municipalities that have zoning. Likewise, § 4364-D(1), imposes requirements based on "zone," but specific requirements are established for municipal zoning ordinances only in § 4364-D(3).

The density requirements appear to conflict with shoreland zoning laws and minimum requirements concerning dwelling units and lot area. A provision similar to § 4364-C(4) should be added to clarify.

LD 2003 Section 10 - 30-A MRS 4364-C:

By mandating that all residential zones permit multi-family housing with up to four dwelling units, the bill effectively prohibits single-family and low-density zoning. This is a substantial departure from traditional zoning models.

The provision does not require that the multi-family dwelling units be affordable. Is this intended?

Adding a definition of "multi-family" structure would be helpful. In most land use contexts, "multi-family" does not include duplexes; this point should be clarified.

Under existing law, placement of 3 or more dwelling units on a lot within a 5-year period creates a subdivision under 30-A MRS § 4401(4), requiring subdivision review and compliance with criteria listed in 30-A MRS § 4404. Based on the "notwithstanding" language in § 4364-C, it appears that subdivision review would no longer be required for most dwelling unit subdivisions. Is a substantial narrowing of the subdivision law's scope intended? This point needs clarification.

Regarding § 4364-C(2), generally, a permit cannot be granted for a subsurface wastewater disposal system unless the lot meets the minimum size and frontage requirements in 12 MRS §§ 4807 – 4807-G and associated DHHS regulations. Shoreland zoning and mobile home parks may have specific size requirements for lots with subsurface wastewater systems. This may impact developments on small lots.

Subsection 4364-C(3)(C) does not seem workable. A variance may only be granted under applicable statutes on a case-by-case basis; the municipality would not know in advance which situations will involve variances. Moreover, the well-established intent of variance statutes is to allow variances from a zoning plan extremely rarely and generally only to prevent unconstitutional takings of property rights.

It isn't clear whether subsection 4364-C(4) intends to ensure that shoreland zoning remains in effect for housing in the shoreland zone (due to the "notwithstanding" language in paragraph 1) or whether it requires all housing structures (in any zone) to comply with shoreland zoning standards.

Section 4364-C refers generally to "housing" and "housing structures" which are very broad terms, undefined in LD 2003. Relevant state laws and most ordinances use the terms "dwelling units" and/or "multi-family" to categorize similar residential structures.

It isn't clear how subsections 4364-C and 4364-D relate to each other. Section 4364-C allows structures containing up to 4 residential dwelling units on a lot; while § 4364-D allows accessory dwelling units (including those within an existing structure) to be located on lots. Are the accessory dwelling units counted toward the 4 units allowed in § 4364-C, or are the ADU's allowed in addition to the 4 units allowed under § 4364-C?

LD 2003 Section 11 - 30-A MRS § 4364-D:

There is no maximum size limit on accessory dwelling units, which could potentially exceed the principal structure's size.

Clarification on whether subsection 1 applies to all municipalities or only those with zoning would be helpful. (In contrast, § 4364-D(3) clearly is limited to zoning ordinances).

Subsection 4364-D(3)(B) seems to require that a municipality rezone a single lot if a landowner constructs an accessory dwelling unit. There is no guarantee the municipal legislative body will approve re-zoning amendments; concerns as to illegal spot zoning are also raised. It would be better (and possibly the intent) to rephrase the provision to require that the structure be "considered a single-family dwelling under applicable zoning requirements."

Subsection 4364-D(3)(F) seems to imply that every accessory dwelling unit must comply with minimum shoreland zoning standards, regardless of the zone where it is located. It also does not allow for municipal shoreland zoning ordinances that are more stringent than the minimum required.

Subsection 4364-D(3)(G) conflicts with the existing tiny home law (30-A MRS § 4363), which allows tiny homes under 400 s.f. as accessory dwelling units.

Subsection 4364-D(3)(H) would be burdensome, if not impossible, to enforce.

Subsection 4364-D(5)(B) isn't necessary; 30-A MRS § 4452 already authorizes municipal fines and penalties for land use violations.

The same legal problems arise regarding variances with § 4364-D(5)(C) as with § 4364-C(3)(C).

LD 2003 Section 12 - 30-A MRSA 4364-E:

Subsection 4364-E(3) appears to allow appeals only by an applicant whose permit was denied. This excludes those whose permits were granted but who challenge permit conditions, and excludes abutters, the municipal officers, and other parties impacted by the development who

would normally have standing to appeal. Are these entities excluded from appeal entirely or must they proceed through the existing appeal process to the local board of appeals and Superior Court?

Does the right to appeal occur after the initial permit decision or at the time the entire local process (including local appeals to the board of appeals) is concluded? Existing law and many ordinances require that an appeal of a zoning or land use permit be made to the local board of appeals unless the ordinance requires an appeal to Superior Court. See 30-A MRS §§ 4353, 2691. To provide a clearly defined appeal process and eliminate confusion, the provision should be reworded to coordinate with or revise existing appeal laws. All aggrieved parties should have notice of the proceeding and the statute should state the standard of review (e.g., appellate, *de novo*).

The provision does not define the term "housing project." Clear parameters defining the projects that may be appealed to the board are essential.

LD 2003 Section 13 - 30-A MRSA 5250-U:

The requirement that all municipalities designate a priority development zone is an unfunded mandate (30-A MRS § 5685) because it will require all municipalities to adopt zoning ordinances and a comprehensive plan (see 30-A MRS §§ 4301(15-A); 4352(2)). The bill does not contain a mandate preamble.

It would be preferable to limit this requirement to municipalities that have adopted town-wide zoning, and to require those municipalities to include a priority zone within their comprehensive plan. (30-A MRS § 4326). Note that many of the objectives stated in this section are addressed in existing statutes. For example, municipal comprehensive plans must address affordable housing needs and to identify "growth" areas where development should be encouraged. It would be less burdensome for municipalities to incorporate priority development areas within the existing comprehensive planning process.

Any ordinance adopted pursuant to § 5250-U would likely violate section 3 of LD 2003 (5 MRS § 4581-A), which prohibits ordinance restrictions referencing the character of the location and concentration of population. Residential land outside the priority zone is necessarily restricted in in comparison based on criteria prohibited in §4581-A(5). An ordinance incorporating the priority growth area could itself be challenged as violating the Maine Human Rights Act.