



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

GERALD D. REID
COMMISSIONER

June 4, 2019

Benjamin McDougal
Code Enforcement Officer
Town of Cape Elizabeth
320 Ocean House Road
PO Box 6260
Cape Elizabeth, Maine 04107

Subject: Local Shoreland Zoning Ordinance and Statutory Items

Dear Mr. McDougal,

Thank you for taking the time to discuss the differences between Cape Elizabeth’s approved Local Ordinance (Ordinance) and the Mandatory Shoreland Zoning Act (Act). As we discussed, the Ordinance is lacking a number of definitions found in the Act and there are also some definitions in the Ordinance that are less stringent than the minimum guidelines. In consultation with the Office of the Attorney General, our opinion is that, pursuant to 38 M.R.S. §§ 438-A(2) & 439-A(4), and section 19-6-11 of the Ordinance, municipalities should adhere to the Act whenever it is more restrictive than the Ordinance.

The following definitions from the Ordinance that are less restrictive than the Act :

- Functionally Water Dependent
- Height of Structure
- Principle Structure
- Stream
- Structure
- Timber Harvesting

Additionally, the following definitions are not included in the Ordinance:

- Coastal Wetland
- Basement
- Commercial Fishing Activities
- Floodway
- Footprint
- Freshwater Wetland
- Forested Wetland
- Great Pond
- Maritime Activities

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0017
(207) 287-7688 FAX: (207) 287-7826

BANGOR
106 HOGAN ROAD, SUITE 6
BANGOR, MAINE 04401
(207) 941-4570 FAX: (207) 941-4584

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04769
(207) 764-0477 FAX: (207) 760-3143

- Outlet Stream

Regarding expansions of non-conforming structures, the Act provides that. “[N]otwithstanding any provision in a local ordinance to the contrary and except as provided in this subsection all new principal and accessory structures and expansions of such structures within the shoreland zone must meet waterbody setbacks as approved by the board.” 38 M.R.S. § 439-A (4). Specific waterbody setbacks and height requirements are incorporated into the setback requirements. *Id.* § 439-A (4)(C)(1)-(2). Because subsection 4 starts with “notwithstanding any provision in a local ordinance to the contrary and except as provided in this subsection” there is a strong argument that a municipal ordinance allowing structures to exceed these height requirements is preempted because that power is expressly denied by the legislature.

Additionally, ordinances that allow for higher structures are “not consistent with or no less stringent than the minimum guidelines adopted by the board.” The minimum guidelines adopted by the Department provide for the same height restrictions as 38 M.R.S.A. § 439-A (4)(C)(1)-(2). Therefore, there is also a strong argument that the legislature has implicitly denied this authority.

Therefore, from this point forward we advise that the Municipality adhere to the Act whenever the Ordinance is less restrictive or silent. The following is a list of the definitions from the Act that should be followed:

- **Functionally Water Dependent uses** - "Functionally water-dependent uses" means those uses that require, for their primary purpose, location on submerged lands or that require direct access to, or location in, coastal or inland waters and that can not be located away from these waters. These uses include, but are not limited to, commercial and recreational fishing and boating facilities, finfish and shellfish processing, fish-related storage and retail and wholesale marketing facilities, waterfront dock and port facilities, shipyards and boat building facilities, marinas, navigation aids, basins and channels, shoreline structures necessary for erosion control purposes, industrial uses dependent upon water-borne transportation or requiring large volumes of cooling or processing water that can not reasonably be located or operated at an inland site and uses that primarily provide general public access to coastal or inland waters. Recreational boat storage buildings are not considered to be a functionally water-dependent use.
- **Height of Structure** - "Height of a structure" means the vertical distance between the mean original grade at the downhill side of the structure, prior to construction, and the highest point of the structure, excluding chimneys, steeples, antennas and similar appurtenances that have no floor area.
- **Principle Structure** - "Principal structure" means a building other than one which is used for purposes wholly incidental or accessory to the use of another building on the same premises.
- **Stream** - "Stream" means a free-flowing body of water from the outlet of a great pond or the confluence of 2 perennial streams as depicted on the most recent, highest resolution version of the national hydrography dataset available from the United States Geological Survey on the website of the United States Geological Survey or the national map to the point where the stream becomes a river or where the stream meets the shoreland zone of

another water body or wetland. When a stream meets the shoreland zone of a water body or wetland and a channel forms downstream of the water body or wetland as an outlet, that channel is also a stream.

- **Structure** - "Structure" means anything temporarily or permanently located, built, constructed or erected for the support, shelter or enclosure of persons, animals, goods or property of any kind and anything constructed or erected on or in the ground. "Structure" does not include fences; poles and wiring and other aerial equipment normally associated with service drops, including guy wires and guy anchors; subsurface waste water disposal systems as defined in Title 30-A, section 4201, subsection 5; geothermal heat exchange wells as defined in Title 32, section 4700-E, subsection 3-C; or wells or water wells as defined in Title 32, section 4700-E, subsection 8. As used in this subsection, "service drop" has the same meaning as in section 952.
- **Timber Harvesting** - "Timber harvesting" means the cutting and removal of timber for the primary purpose of selling or processing forest products. "Timber harvesting" does not include the cutting or removal of vegetation within the shoreland zone when associated with any other land use activities.
- **Coastal Wetland** - "Coastal wetlands" means all tidal and subtidal lands; all lands with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous low land that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.
- **Basement** - "Basement" means any portion of a structure with a floor-to-ceiling height of 6 feet or more and having more than 50% of its volume below the existing ground level.
- **Commercial Fishing Activities** - "Commercial fishing activities" means activities directly related to commercial fishing and those commercial activities commonly associated with or supportive of commercial fishing, such as the manufacture or sale of ice, bait and nets, and the sale, manufacture, installation or repair of boats, engines and other equipment commonly used on boats.
- **Floodway** - "Floodway" means the channel of a river or other water course and the adjacent land areas that must be reserved to allow for the discharge of a 100-year flood without cumulatively increasing the water surface elevation of the 100-year flood by more than one foot.
- **Footprint** - Footprint. "Footprint" means the entire area of ground covered by the structures on a premises, including cantilevered or similar overhanging extensions, as well as unenclosed structures, such as patios and decks.
- **Freshwater Wetland** - "Freshwater wetlands" means freshwater swamps, marshes, bogs and similar areas, other than forested wetlands, which are:
 - A. Of 10 or more contiguous acres, or of less than 10 contiguous acres and adjacent to a surface water body, excluding any river, stream or brook, such that, in a natural state, the combined surface area is in excess of 10 acres; and [1989, c. 403, §4 (AMD).]
 - B. Inundated or saturated by surface or ground water at a frequency and for a duration sufficient to support, and which under normal circumstances do support, a prevalence of wetland vegetation typically adapted for life in saturated soils. [1989, c. 403, §4 (AMD).]Freshwater wetlands may contain small stream channels or inclusions of land that do not conform to the criteria of this subsection.

- **Forested Wetland** - "Forested wetland" means a freshwater wetland dominated by woody vegetation that is 6 meters tall or taller.
- **Great Pond** - "Great pond" means any inland body of water which in a natural state has a surface area in excess of 10 acres and any inland body of water artificially formed or increased which has a surface area in excess of 30 acres except for the purposes of this article, where the artificially formed or increased inland body of water is completely surrounded by land held by a single owner.
- **Maritime Activities** - "Maritime activities" means the construction, repair, storage, loading and unloading of boats, chandlery and other commercial activities designed and intended to facilitate maritime trade.
- **Outlet Stream** - "Outlet stream" means any perennial or intermittent stream, as shown on the most recent, highest resolution version of the national hydrography dataset available from the United States Geological Survey on the website of the United States Geological Survey or the national map, that flows from a freshwater wetland.

The following should be used in place of **Sec19-4-4 Nonconforming Buildings and Structures**:

A. All new principal and accessory structures, excluding functionally water-dependent uses, must meet the water body or wetland setback requirements approved by the board. An expansion of a legally existing nonconforming structure pursuant to this subsection may not create further nonconformity with the water body or wetland setback requirement. [2013, c. 320, §8 (NEW).]

B. Expansion of any portion of a structure within 25 feet of the normal high-water line of a water body or upland edge of a wetland is prohibited, even if the expansion will not increase nonconformity with the water body or wetland setback requirement. Expansion of an accessory structure that is located closer to the normal high-water line of a water body or upland edge of a wetland than the principal structure is prohibited, even if the expansion will not increase nonconformity with the water body or wetland setback requirement.

(1) Notwithstanding this paragraph, if a legally existing nonconforming principal structure is entirely located less than 25 feet from the normal high-water line of a water body or upland edge of a wetland, that structure may be expanded as follows, as long as all other applicable standards of land use adopted by the municipality are met and the expansion is not prohibited by paragraph A.

(a) The maximum total footprint for the principal structure may not be expanded to a size greater than 800 square feet or 30% larger than the footprint that existed on January 1, 1989, whichever is greater. The maximum height of the principal structure may not be made greater than 15 feet or the height of the existing structure, whichever is greater. [2013, c. 320, §8 (NEW).]

C. All other legally existing nonconforming principal and accessory structures that do not meet the water body or wetland setback requirements may be expanded or altered as follows, as long as other applicable standards of land use adopted by the municipality are met and the expansion is not prohibited by paragraph A or B.

(1) For structures located less than 75 feet from the normal high-water line of a water body or upland edge of a wetland, the maximum combined total footprint for all structures may not be expanded to a size greater than 1,000 square feet or 30% larger than the footprint that existed on

January 1, 1989, whichever is greater. The maximum height of any structure may not be made greater than 20 feet or the height of the existing structure, whichever is greater.

(2) For structures located less than 100 feet from the normal high-water line of a great pond classified as GPA or a river flowing to a great pond classified as GPA, the maximum combined total footprint for all structures may not be expanded to a size greater than 1,500 square feet or 30% larger than the footprint that existed on January 1, 1989, whichever is greater. The maximum height of any structure may not be made greater than 25 feet or the height of the existing structure, whichever is greater. Any portion of those structures located less than 75 feet from the normal high-water line of a water body or upland edge of a wetland must meet the footprint and height limits in subparagraph (1).

(3) In addition to the limitations in subparagraphs (1) and (2), for structures that are legally nonconforming due to their location within the Resource Protection District when located at less than 250 feet from the normal high-water line of a water body or the upland edge of a wetland, the maximum combined total footprint for all structures may not be expanded to a size greater than 1,500 square feet or 30% larger than the footprint that existed at the time the Resource Protection District was established on the lot, whichever is greater. The maximum height of any structure may not be made greater than 25 feet or the height of the existing structure, whichever is greater, except that any portion of those structures located less than 75 feet from the normal high-water line of a water body or upland edge of a wetland must meet the footprint and height limits in subparagraph (1). [2013, c. 320, §8 (NEW).]

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

(1) "Water body" means a great pond, river or stream.

(2) "Wetland" means a coastal wetland or freshwater wetland. [2013, c. 320, §8 (NEW).]

Plans approved by the municipality for expansions under this subsection must be filed in the registry of deeds of the county in which the property is located within 90 days of approval.

Again, thank you for meeting and discussing these issues. I hope this information is helpful and if you or any other municipal officials have questions relating to shoreland zoning, you may reach me at 441-7419 or by e-mail colin.a.clark@maine.gov.

Sincerely,



Colin A. Clark
Shoreland Zoning Coordinator

Cc Katherine Tierney AGs Office
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