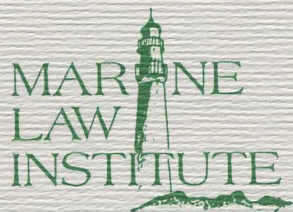


Land Use Regulations To Implement Comprehensive Plans



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Introduction: The Growth Management Act

The Comprehensive Planning and Land Use Regulation Act (also known as the Growth Management Act),¹ enacted in 1988, required municipalities² to prepare and adopt local growth management programs, consisting of a comprehensive plan and implementing ordinances and programs. The Act provided for substantial planning and implementation grants to assist towns, and established a schedule of deadlines for towns to submit their plans for State review.

In December, 1991, the Maine Legislature, as part of the budget balancing effort, amended the Act to repeal state-established deadlines for plan completion, to eliminate planning and implementation grants, and to repeal the process for State

review of local plans and implementing ordinances. But amendments passed in March, 1992 clarify that towns that want to regulate land uses are still required to adopt comprehensive plans which are consistent with the Act.³ Additional amendments reestablished a State financial and technical assistance program for municipalities engaged in planning or implementing a local growth management program. The State will be reviewing the comprehensive plans of those towns that apply for State implementation assistance grants for consistency with the Act.

Those towns that want to assert control over the future development of their community and better manage the costs of growth will continue to develop comprehensive plans and continue to take steps to implement those plans, despite the changes in the level of State involvement. Each



town with a zoning ordinance must have a comprehensive plan since, by statute, all zoning ordinances must be based on and be consistent with a comprehensive plan.⁴ The March, 1992 amendments substitute two new deadlines for the now-repealed mandatory schedule for plan completion:

- A town that receives both planning and implementation assistance grants from the State will lose its right to enforce any land use ordinance which is not consistent with its comprehensive plan after January 1, 1998;
- All other towns that do not then have comprehensive plans which are in compliance with the Act (either newly adopted plans or existing plans amended to comply), will lose their right to enforce land use ordinances on January 1, 2003.

This pamphlet discusses the primary regulatory tools which a municipality can use to implement the land use portion of its comprehensive plan; well-established, conventional zoning and newer variations on land use allocation systems. Towns may also want to consider site plan review standards, subdivision ordinances, impact fees, historic preservation provisions, or similar measures, either as separate ordinances or as part of a unified land use ordinance; these secondary tools are beyond the scope of this pamphlet, but additional information is available through regional planning councils.

Need for Land Use Regulations

By the mid-1980s, it had become increasingly clear that State land use laws (which applied only to limited areas or larger projects) and uneven local laws (which were sometimes nonexistent or imposed only minimal requirements) were prov-

ing inadequate to manage the speculative and accelerated growth being experienced in Maine. The State's quality of life and natural resources, both critical to sustainable economic prosperity, were being threatened by unplanned growth. In addition, in some municipalities, unplanned growth was causing property taxes to rise uncontrollably to pay for the increased cost of public services and facilities. In adopting the Growth Management Act, the State embraced local land use planning and regulation as important tools for directing future growth in Maine's communities, for protecting Maine's resources and economic base, and for regaining control over local spending.

The 1988 Act strengthened the State's ability to manage growth by requiring each municipality to undertake comprehensive planning and to adopt implementing ordinances and programs. While the December, 1991 amendments eliminated some deadlines, several important components of the Act continue unchanged:

- the definition of a comprehensive plan (inventory and analysis, policy development, and implementation strategy) and what it must contain is unchanged;⁵
- meaningful citizen participation in the development of the plan, including public meetings of the local planning committee and at least one public hearing on the proposed plan, is still required;⁶ and
- each comprehensive plan and each land use ordinance must still actively promote the statewide goals (10 general and 9 coast-specific) to ensure that the efforts of the State and of multiple municipalities will eventually converge to support unified policies.⁷

Comprehensive Plan and Implementation Program

The town's comprehensive plan is the critical underpinning for its land use ordinance. The comprehensive plan must include an **inventory and analysis** of municipal data, a **policy development** section discussing the findings in relation to the State goals and issues of local significance, an **implementation strategy** identifying the necessary steps and timetable for putting the plan into action, and a **regional coordination program**, developed with neighboring municipalities, to plan for the management of shared resources and facilities.

After completion of the comprehensive plan, the municipality will start the **implementation program** — actually taking those actions necessary to give life to the strategies identified in the comprehensive plan. Many of the statewide goals and coastal policies can be implemented through land use regulations (e.g., zoning, subdivision, site review, impact fee, and other ordinances).⁸ The Act's guidelines for the land use component of the local implementation program state that land use regulations shall:

- encourage orderly growth in appropriate areas of each community,
- protect designated rural areas from inappropriate development,
- promote development in patterns that will make efficient use of public services, and
- prevent development sprawl.⁹

Municipalities are required to identify and designate at least two basic types of geographic areas: **growth areas** (areas where growth will be encouraged or accommodated, where public services will be available, and where natural hazard areas located within the area will be protected)

and **rural areas** (areas where growth or other incompatible development will be discouraged). Within these two basic types of areas, towns are required to implement ordinances or policies which include density limits, cluster or special zoning, acquisition of land or development rights, or performance standards.

Within these requirements, the Act leaves each town with the discretion to select its own regulatory techniques. In most cases, it makes sense to further divide rural and growth areas into more specific zoning districts, with different density limits, special zoning requirements, and performance standards for each.

Comprehensive Zoning

The basic tool to implement land use strategies is town-wide zoning. There are many variations on zoning, ranging from conventional zoning to newer more flexible versions, which are discussed in more detail below.

For many of Maine's communities, implementing zoning throughout the town is a new and sometimes controversial task. As zoning ordinances are developed, questions often arise about property rights and the legal basis for and limits of zoning. The following discussion addresses common misconceptions and explains how zoning works.

Zoning is a Legal Use of Municipal Powers

Despite its long history of successful use, some people still claim that all zoning is illegal or unconstitutional. They assert that private landowners should be able to use their land any way they wish. This view is mistaken.

In reality, the validity of conventional zoning has repeatedly been upheld by the courts, including the Maine Law Court¹⁰ and the United States Supreme Court.¹¹ These courts have repeatedly recognized that private property rights are not

absolute and that land use controls may be used to protect the general welfare by striking a necessary balance between the interests of different private and public landowners.

Many of the early zoning ordinances were aimed at public health and safety risks inherent in the chaos and congestion typical of rapidly growing cities in the later half of the nineteenth century. They were designed to address obvious dangers of filth, stench, and unhealthy development. For example, they attempted to halt the mixing together of heavy industrial, commercial, and residential uses.

In 1925, the State of Maine joined many other states in enacting state-enabling legislation which authorized municipalities to adopt comprehensive zoning codes.¹² The validity of the enabling act and the reasonableness of a local zoning ordinance enacted pursuant to it were upheld by Maine's Law Courts in 1928.

Zoning has evolved substantially since the 1920s. The early focus, to prevent obvious harms to individuals, has broadened so that zoning is now used to prevent a wide range of public harms and to promote a broad range of public benefits, including growth management, environmental protection, historic preservation, aesthetic controls, and provisions for the special housing needs of particular groups. Subsequent Law Court decisions have consistently upheld the broad legitimacy of land use controls, including zoning, as a valid use of the police power to balance the conflicting objectives of landowners, abutters, and the community as a whole.¹³

While the legal validity of zoning as a proper use of the police power is clear, there is also growing recognition that it makes economic sense as well. In many circumstances, individual property values receive greater protection through regulations which protect the long-range public good than if there were no regulations. For example, many Maine communities experienced

unregulated, incompatible growth in the 1980s which altered the character of their town, threatened to overwhelm the unique qualities that attracted growth in the first place, and resulted in huge windfall profits for some property owners while making the property of their neighbors less attractive for its original use. The residents of many of these towns are coming to embrace the idea that zoning is not just legal, but it is also in the best interest of the town as a whole to regulate land uses to preclude this type of unwanted development.

The Growth Management Act further strengthens the case for the validity of zoning in Maine by encouraging municipalities to adopt comprehensive zoning ordinances. The Act declares that using zoning to accomplish growth management purposes is a valid exercise of the police power.

Fair Procedures Must Be Followed in Adopting/Administering Zoning Ordinances

Some critics of zoning contend that the entire process of adopting and administering land use regulations is arbitrary and unfair. However, Maine's zoning enabling legislation requires municipal zoning ordinances to be fairly adopted and administered. The State law does not restrict a municipality to adopting a particular form of zoning; consistent with home rule considerations, it allows local creativity. However, to guarantee fairness, the State statute requires municipalities adopting land use regulations to comply with the following provisions:¹⁴

- 1) the public must be given an adequate opportunity to be heard during the preparation of a zoning ordinance;
- 2) the zoning ordinance which is adopted must be pursuant to and consistent with an adopted comprehensive plan; and,

- 3) a zoning map describing each zone must be incorporated in or adopted as part of the zoning ordinance.

In addition, any municipality which adopts a zoning ordinance must establish a board of appeals to hear appeals from any action of the official or board responsible for enforcing the zoning ordinance.¹⁵ The primary functions will depend upon the wording of the ordinance establishing the board, but functions are likely to include interpretation appeals, special exception or conditional use permits, and decisions on variances in accordance with statutory standards.¹⁶

Zoning Does Not Have to Allow the Highest Economic Return

Occasionally landowners will assert that if the value of their land is diminished by a new zoning regulation, the municipality has an obligation to compensate them for the lost value. They argue that they are entitled to use the land for its "highest and best use" (even if that use is inconsistent with the comprehensive plan for the community), and are entitled to be paid if they lose the ability to develop it for that purpose. In fact, no landowner is guaranteed the right to develop land for maximum profit and most decreases in value caused by regulatory restrictions will not entitle the landowner to any compensation.

The U.S. Constitution and State Constitution provide that private property shall not be taken for public use without just compensation. With zoning ordinances, the legal issue is at what point restrictions become so burdensome as to be the equivalent of a taking of the property, even though there has been no formal transfer of title.

This is a complex issue, decided on a case-by-case basis rather than according to a precise formula. A number of factors may be analyzed, no one of which is controlling, including: the character of the government's regulatory action (whether it is designed to prevent significant public harm

rather than extract public benefits from the landowner); whether the regulation results in a permanent physical occupation of all or a part of the land (in which case it is more likely that a taking will be found); whether the landowner's expectation regarding development was reasonable in light of his or her knowledge of the regulatory program; the economic impact of the regulation and the ability to make some use of the remaining property interests; and whether the regulation provides some benefits to the landowner in return.¹⁷

In Maine, in determining whether a regulation constitutes an unconstitutional taking, the recent cases have generally looked at whether the regulation would "render the property substantially useless." Under this analysis, Maine courts will not find a taking unless the reduction in value is so substantial that the property has lost all practical value.¹⁸ The Law Court has stated that the opportunity to use property for future profit is not a protected property interest requiring compensation for its diminution. A property owner is not entitled to compensation for the negative effect of land use regulations so long as the private owner remains able to make some "beneficial and valuable" use of the land.¹⁹

At the time of publication, an important takings case, *Lucas v. South Carolina Coastal Council*,²⁰ is pending before the United States Supreme Court. The *Lucas* case considers whether a land use regulation can be constitutional if it deprives the owner of all economically viable use of his property when the purpose of the regulation is to prevent a serious public harm. That decision should provide additional guidance on how constitutional provisions will be applied in future cases that challenge how far regulations can go before a taking will be found.²¹

Thus, land use regulations to implement a growth management plan do not need to allow owners to develop their land for maximum profits. The regulations must be reviewed to ensure that they comply with constitutional takings lim-

its. But towns generally have a high degree of regulatory flexibility so long as they leave the owner some beneficial and valuable use of the land.

Zoning Can Make Accommodations for Existing Development Patterns

Occasionally a landowner will speak in opposition to a proposed zoning ordinance by claiming that it will require the landowner to tear down a structure or discontinue a use since the existing use will not be permitted under the proposed ordinance. This fear is unfounded.

Zoning ordinances typically only affect changes in land use occurring after the date of adoption. For example, upon adoption, a new zoning ordinance would typically control the new development of formerly vacant land,²² a change in the type of use of an existing structure (e.g., conversion from residential to retail), or an expansion of an existing structure. Generally, all structures and uses existing at the time of adoption of the zoning ordinance which would not otherwise be permitted under the new zoning ordinance are given protected "grandfathered" status. They can continue to exist as they have in the past so long as the nonconforming aspect (structure or use) is not abandoned.²³

A new zoning ordinance should establish zoning districts based on the community's sense of the most desirable future land use pattern, as described in the comprehensive plan. To some extent, that will be based on what already exists because that pattern has probably evolved as a reflection of the community needs. For example, the new business district will probably be designated in the general area of a core of existing businesses. But the new business district does not have to be drawn so it includes all of the existing retail businesses if there is a good reason to omit some. For instance, if the town wants to promote a more consolidated business area on the theory that it is important to promote a clustering of shops in an easily walked area and it is important

to prevent the intrusion of more retail uses into established neighborhoods, it might opt to draw the boundary to exclude scattered retail uses that are encroaching into residential areas. This will not have the effect of requiring those excluded shops to close; typically they (and their successors) will be able to continue to operate the existing business at that location and the landowner (and successor owners) will be able to use or rent that space for similar businesses. But the tighter boundary will prevent other retail businesses from opening outside of the new retail district.

Since the new zoning ordinance will be an expression of the future desired development pattern, provisions are usually included to promote the eventual phasing out of nonconforming uses (e.g., "grandfathered uses" such as the retail shops outside of the business district). These restrictions will vary from ordinance to ordinance, but typically include provisions that if a nonconforming use is discontinued with the intent to abandon that use for more than a year, the nonconforming use cannot be resumed; that the nonconforming use will not be allowed to expand into more space; and that if a nonconforming structure is damaged by fire or other casualty, that it must be rebuilt on the same footprint within a certain time or lose the right to rebuild, except in conformance with the new zoning ordinance.

Since zoning ordinances generally bestow this grandfathered status on structures and uses existing at the time of adoption, the town will not see immediate results from the new ordinance. It will be implemented gradually as the new vision is used to review new development proposals and to keep existing uses and structures from straying farther from that vision than they already are.

Different Types of Zoning

Conventional Zoning: In its simplest form, conventional zoning divides the municipality into districts (e.g., low density residential, higher den-

sity residential, business/retail, agricultural, rural, or resource protection) and designates what group of uses will be permissible for future development in each district. A conventional zoning ordinance usually establishes detailed regulations for physical development within the district such as bulk and height restrictions (e.g., front, rear, and sideyard setbacks, maximum lot coverage, maximum building height) and density requirements (e.g., the number of dwelling units per acre). Conventional zoning attempts to avoid conflicts between neighboring properties by establishing broad categories to separate potentially incompatible uses and by establishing individual standards for placing structures on lots.²⁴

Conventional zoning has been criticized for being too rigid in segregating dissimilar land uses. It may result in a segmented, dull, transportation-inefficient pattern of land use that unnecessarily compartmentalizes different types of uses into separate geographic districts. Newer zoning techniques provide for more flexibility for intermixing uses or having small pockets of one type of use in proximity to dissimilar uses. These techniques seek to control negative impacts on neighboring uses through means other than simple geographic separation. Many of these techniques, discussed below, can be woven into conventional zoning to make it more capable of achieving community goals.

Small-Area Zoning: Certain types of land uses are not likely to be located in large, contiguous districts. For example, marine uses are likely to locate in areas dictated by the quality of access to the water; due to variable site conditions, they may very well be in scattered locations along the shore.²⁵ Similarly neighborhood retail or professional uses (e.g., the corner store and general medical practitioner's office) may have developed in scattered locations. Frequently, this pattern of development promotes more efficient travel patterns (walking to the corner store vs. driving to a regional shopping center) and serves local needs.

The municipality can maintain and encourage this pattern of land use by adopting zoning categories for these types of uses (e.g., water dependent uses, small professional offices), but then designating multiple, small districts, each of which would theoretically be as small as a single parcel. The municipality will need to take care to clearly articulate the purpose of the category and to establish clear criteria for designation in the ordinance so that similarly situated parcels are treated according to the same policy. In addition, as with all zoning or rezoning decisions, boundary designations need to be in basic harmony with the municipality's comprehensive plan.²⁶

Planned Residential Unit Development (or "Cluster Zoning" or "Open-Space Zoning"):

A conventional zoning ordinance typically results in a "grid" pattern of development with each structure being built on a lot of a minimum size and adhering to minimum front, side, and rear yard setbacks. In contrast, a planned residential unit development (PRUD) or cluster zoning provision can allow structures to be rearranged on the same amount of space to produce a more interesting, efficient, and environmentally sensitive pattern of development.

In its simplest form, a PRUD provision is incorporated in a conventional zoning ordinance as a residential development option. (Alternatively, municipalities can require cluster zoning in rural areas, provide density incentives to encourage the use of PRUD, or require the submission of two plans — with and without PRUD design). Typically, it will only be available to a developer proposing to develop a larger parcel of land (e.g., ten acres or more) and will allow only the same number of residential units to be developed as could be built on the same land using the traditional grid pattern.²⁷ Since internal minimum lot size and setback requirements are generally waived (with the development typically only having to meet setback requirements along the outer perimeter), it can allow for the development of attached housing.

The major advantages to the developer are that substantial savings can be realized in road construction and utility installation costs, and that it allows the flexibility to more fully develop sites with different areas (e.g., ledge, wetlands, ravines, streams) by designing around those features. The advantages to the municipality depend on how the ordinance is structured. The PRUD provision can be designed to promote affordable housing;²⁸ to require the developer to set aside open space for use by the occupants or, in some cases, the public; to preserve the visual character of the town; or to protect environmentally sensitive areas.²⁹ For example, it may require clustering of development away from environmentally sensitive areas, in a pattern of development that is compatible with the surrounding area, and which reserves substantial open spaces for active and passive recreation. Specific detailed standards have to be developed by each municipality, depending on local goals and the balance of incentives required.³⁰

Performance Standards: Performance standards are regulations which set permissible levels of external impacts of development. The most common performance standards are probably standards in industrial zones which set limits on emissions from the site such as dust, heat, noise, and smoke. Performance standards are also commonly used in residential zones to establish design standards for cluster housing developments. Performance standards can also be used to protect environmentally sensitive lands by establishing requirements for noninterference with natural processes and wildlife, such as through required buffers, erosion controls, and storm water runoff standards.³¹

As discussed above, convention zoning tries to limit conflicts between neighboring uses by dividing uses into different groups and then only allowing one particular group of uses in a particular geographic area. Performance standards can be incorporated into conventional zoning to add a more site-specific level of control on the negative

effects of permitted uses.

In developing performance standards, it is important for the standards to be clearly stated and, where possible, to incorporate quantitative measures; to be rationally related to permissible municipal objectives; and to be applied uniformly to similar development proposals. The municipality will need to consider its technical ability to review applications for compliance with the standards, and should clearly establish in the zoning ordinance that the burden is on the applicant to demonstrate compliance with the standards. Similarly, in developing performance standards, the municipality should tailor those standards to its ability to monitor and enforce those standards.³²

Performance Zoning: Performance zoning carries the use of performance standards one step further. The discussion immediately above related to performance standards being integrated into conventional zoning to strengthen the ability to control external impacts of the permitted uses; they added a regulatory level of detail to how permitted uses are sited and operated within the constraints of conventional zoning. In contrast, in performance zoning, the underlying conventional zoning (e.g., designating permitted uses, density limitations, etc.) is eliminated and the town relies exclusively on designating standards for permissible impacts of a proposed use. The critical factor in this type of regulation is not the proposed use, but rather the projected impact of the use on key features of the natural and built environment.

For example, performance zoning may allow any use — residential, recreational, commercial, industrial — in an area so long as the applicant can demonstrate that it will not exceed specified standards. These standards may address permissible demand on public water supply, maximum change in rate and volume of surface water runoff, maximum site coverage by impervious surfaces, permissible methods for wastewater treatment, maximum traffic generation, protection of aquifer recharge areas, non-degradation of wetlands and

bodies of water, and may specify other maximum levels of permissible stress on the natural environment and the public infrastructure (e.g., water, sewer, schools, roads, drainage systems).

While it is theoretically possible to use these performance standards in lieu of conventional zoning, this approach requires fairly sophisticated standards and a technically trained staff. It is more likely that performance zoning will be used as a very specific overlay zone (e.g., aquifer recharge overlay zone, shoreland overlay zone) in conjunction with conventional use-based zoning. A proposed use would be required to meet both the use/density limitations of the underlying zone and the performance standards of the overlying performance district.

Floating Zones: A "floating zone" is a zoning district which is created in the zoning ordinance in the usual manner (e.g., purpose statement, designation of permitted uses, density restrictions, performance standards, etc.); the crucial difference is that while the zone exists in the text, the town reserves judgment on the specific parcels to be included in that district. By Maine statute, the town must designate the outlines of the larger area which might host the floating zone in the future, but the district itself is not mapped. The zone "floats" above the outlined area as a possible zoning district, waiting until an applicant comes forward with a specific request to have a particular parcel rezoned to the floating zone designation. Usually, even if a specific parcel is rezoned to the floating zone, it will continue to float above the rest of the designated portion of the town pending subsequent rezoning requests.

Floating zones are most commonly used for particularly intensive land uses or uses which a community can support only in a few locations such as shopping centers, industrial uses, and very high density residential developments. The town may want to make provisions for that type of future use as part of the comprehensive zoning ordinance. But it may be reluctant to zone specific sites for those particularly intensive uses until a

specific proposal is advanced by a land owner. The floating zone allows the town to acknowledge that type of use may be permitted, but defers the final decision on which parcels of land should be zoned for that use.

In establishing a floating zone, it is important to specify in the ordinance the criteria to be considered by the town when it reviews a request to have a particular site rezoned to the floating zone. For example, if the zone would permit a particularly intense use, factors to be considered might include whether the site is well situated to accommodate increased traffic, the availability of town services, and the sensitivity of the site to adverse environmental impacts. The floating zone's consistency with the comprehensive plan and enumeration of criteria in the ordinance text will establish the rational basis for the action and prevent any rezoning from being deemed an unsupported "spot zoning."

Point Systems: Another variation on zoning, used most commonly in rural areas, is to determine permissible densities on an individual site (or whether development should be allowed at all) according to a system of points awarded for site suitability or retention of rural character. This varies from conventional zoning, which would designate a uniform density throughout a single zoning district.

Typically, this system calculates the minimum lot area required per dwelling unit according to a point system which reflects the overall suitability of a site for residential development. While the town has flexibility to design its own indicators of suitability, typical factors include the percentage of the site suitable for private underground wastewater disposal systems, with soils suitable for accommodating a house with basement, located away from wet areas (flood hazard areas, wetlands, ponds, perennial streams or other water bodies), and with soils of low to medium erodibility.³⁹ The greater the proportion of the site which meets these standards, the higher the num-

ber of points; the higher the points, the smaller the minimum lot size.

Contract/Conditional Zoning: The final variation on zoning, contract, and conditional zoning are relatively new techniques in Maine's communities. Contract zoning is defined as a process by which a property owner agrees to conditions or restrictions not imposed on similarly zoned properties in exchange for a rezoning. Conditional zoning is defined as a process by which a municipality rezones property to permit the use of that property subject to conditions not generally applicable to other properties similarly zoned. Both are expressly authorized by statute.³⁴

While there are subtle technical differences between conditional and contract zoning, essentially each allows a municipality and applicant to negotiate and reach agreement on a rezoning of the applicant's land in exchange for the applicant agreeing to (or agreeing not to object to) certain conditions and restrictions on the use of the land over and above the conditions that would otherwise be imposed by the original zoning. Typically, the conditions and restrictions will continue so long as the rezoning is in effect.

Maine law states that all contract or conditional rezoning must be consistent with the local comprehensive plan, must establish rezoned areas which are consistent with the existing and permitted uses in the original zones, and only include conditions and restrictions which relate to the physical development or operation of the property.³⁵ In addition, the statute addresses specific procedural requirements: the rezoning action must be preceded by a public hearing; notice of the public hearing must have included a copy of the proposed conditions and restrictions, and the notice must have complied with specified timing and publication requirements.

To avail itself of contract/conditional rezoning, a municipality must authorize its use in the zoning ordinance. It may opt to make this zoning tech-

nique available town-wide, or only in specific zones.

This zoning technique is most useful in allowing a town to negotiate very explicit terms under which a project that needs a rezoning can go forward; the conditions will be designed to protect the public interest and perhaps provide for a public benefit, while at the same time adjusting the zoning requirements to permit the applicant's project. However, municipalities need to take care to use this technique only in limited circumstances under standards established by the town, and guard against using it in response to every rezoning request. It is critical that contract/conditional rezonings be consistent with the comprehensive plan.

For example, this technique might appropriately be applied to a large tract of land which the comprehensive plan and zoning ordinance designate for one use, but for which the comprehensive plan also identifies that a particular alternate use might be appropriate under a given set of circumstances. Contract or conditional rezoning might be used to negotiate the limitations on intensity of use, site improvements, and developer-funded off-site improvements to the public infrastructure which will allow the site to be rezoned to accommodate this alternate use.

Similarly, contract or conditional zoning might be used to deal with structures in transitional areas which the comprehensive plan has identified might change from one major type of use to another.³⁶ Or it might prove appropriate where a strict reading of the zoning ordinance will not allow a particular use that would have very significant public benefits, where the land use impacts will be negligible, and where non-land use parts of the comprehensive plan strongly support that type of use. Each community that adopts this tool will need to develop its own criteria for when it may be invoked.

Conclusion

As a town develops land use regulations to implement its comprehensive plan, many different resources are available. As discussed above, there are a variety of land use regulatory tools and techniques. In most communities, one or more types of zoning will be used in combination with a variety of other techniques such as site plan review and subdivision review. Many publications discuss these techniques and the ordinance preparation process in more detail. Towns may also learn from the systems developed by other towns.

But it is critical to remember that local conditions, problems, and regulatory systems vary greatly; what is right for one town may not serve the needs of another. The need to tailor land use regulations to address local opportunities, to respond to local political realities, and to take staffing and enforcement capabilities into account makes the ordinance development process both creative and challenging.

There is a danger of being overwhelmed by the breadth of the process and by the number of options available. During the initial drafting, the key is to consistently keep an eye on the recommendations contained in the comprehensive plan, to very clearly recognize what part of the comprehensive plan is driving a particular ordinance provision, and to return to the comprehensive plan text as necessary to revise and rework draft ordinances. It is also important to remember that, while every effort should be made to make the ordinance as good as possible, the ordinance can be amended after adoption if necessary so long as it remains consistent with the comprehensive plan. Each town should review and revise its comprehensive plan and implementing ordinances periodically to adjust for changed conditions, to re-evaluate goals, and to improve the effectiveness of the ordinance.

Resources for Additional Information

Office of Comprehensive Planning, Department of Economic and Community Development, *How to Prepare A Land Use Ordinance: A Manual for Local Officials*, May, 1990.

Office of Comprehensive Planning, Department of Economic and Community Development, *Coastal Management Techniques: A Handbook for Local Officials*, October, 1988.

Craighead, Paula, M., ed., "The Hidden Design In Land Use Ordinances: Assessing the Visual Impact of Dimensions Used for Town Planning in Maine Landscapes," MAC/USM Design Arts Project, March, 1991. (USM New England Studies Program, 11 Granite Street, Portland, Maine 04103, \$11.45 including postage and handling).

Southern Maine Regional Planning Commission, "1991 Model Subdivision Regulations: Model Regulations for Maine Planning Boards" March, 1991. (Available through Regional Planning Councils.)

Office of Community Development, Department of Economic and Community Development, State House Station 130, Augusta, Maine 04333, (207) 624-6800.

Regional Planning Councils

Endnotes

1. 30-A M.R.S.A. §§ 4311-4344
2. Unorganized townships and plantations within the jurisdiction of the Maine Land Use Regulation Commission (LURC) were exempted from this requirement.
3. 1992 Maine Laws, Chapter 722, Sec. 6, approved March 23, 1992. The amendments

provide that comprehensive plans and land use regulations adopted under former Title 30, chapter 239, subchapter V or VI remain in effect until amended or repealed in accordance with the Growth Management Act; that a zoning ordinance not consistent with a comprehensive plan adopted under the Growth Management Act is void 24 months after adoption of the plan; and that any land use ordinance not consistent with a comprehensive plan adopted in accordance with the Growth Management Act is void after January 1, 1998 in municipalities that received planning assistance and implementation grants under the Act before they were eliminated, and void after January 1, 2003 in all other municipalities.

4. 30-A M.R.S.A. § 4352(2).
5. 30-A M.R.S.A. § 4301(3).
6. *Id.*, § 4324(3), (4), and (8).
7. *Id.*, § 4312(3) and Coastal Management Policies Act, 38 M.R.S.A. § 1801.
8. But some of the statewide goals need to be approached in different ways such as through the creation of affordable housing programs, purchase of shoreway access easements, adoption of capital improvements programs to finance necessary public facilities, and participation in State and Federal programs to combat water and air pollution. These are beyond the scope of this pamphlet.
9. *Id.*, § 4312(3)(A).
10. *York Harbor Village Corp. v. Libby*, 126 Me. 537, 140 A. 382 (1928).
11. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
12. Me. Pub. Laws 1925, Ch. 209, § 1, expanding to a larger number of municipalities in Me. Pub. Laws 1927, Ch. 172.
13. *Wright v. Michaud*, 160 Me. 164, 200 A.2d 543 (1964).
14. 30-A M.R.S.A. § 4352.
15. 30-A M.R.S.A. § 4353.
16. *Id.*, (4).
17. Blaesser, B. & A. Weinstein, ed., *Land Use and the Constitution: Principles for Planning Practice*, Planners Press (1989), p. 68-69. See also the U.S. Supreme Court cases: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).
18. *Seven Islands Land Co. v. Maine Land Use Reg. Comm'n*, 450 A.2d 475, 482 (Me. 1982).
19. *Hall v. Board of Env'tl. Protection*, 528 A.2d 453 (Me. 1987) (no taking resulted from the denial of a sand dune permit to build a single-family home since the owners could still make use of their property by hooking up a camper to utilities on the site).
20. 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 60 U.S.L.W. 3374.
21. *Lucas*, the owner of coastal property, claimed that South Carolina's Beachfront Management Act operated to deprive him of all economically viable use of his property and constituted a regulatory taking for which compensation was required. The trial court agreed, finding a regulatory taking and awarding him damages. The Supreme Court of South Carolina reversed, holding that the regulations are justified to prevent a serious public harm thus no damages are due even if no economically

- viable use of the property remains. The case has been argued before the Supreme Court; a written decision is expected in the summer of 1992.
22. The ordinance may allow development on grandfathered nonconforming lots (e.g., lots that fail to meet new minimum lot sizes) if the lot existed as a separate, legally described lot prior to adoption of the ordinance (e.g., a prior approved and recorded subdivision; a vacant lot previously separately conveyed by legal description). This is a complex area which depends on the exact wording of the ordinance.
 23. See, e.g., *Clardy v. Town of Livermore*, 403 A.2d 779 (Me.) (new minimum frontage requirement had only prospective application absent express intent to the contrary).
 24. For additional guidance on developing a basic zoning ordinance, see Office of Comprehensive Planning, Department of Economic and Community Development, *How to Prepare a Land use Ordinance*, May, 1990.
 25. See *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances*, Department of Environmental Protection (March 24, 1990), p. 10 (notes that municipalities may designate multiple small areas which may be as small as a single parcel for the Commercial Fishing/Maritime Activities Districts so long as they follow a consistent set of criteria in making the designation.)
 26. *LaBonta v. City of Waterville*, 528 A.2d 1262 (Me. 1987), (rezoning of land from residential to commercial found to be consistent with the comprehensive plan since, on the basis of the evidence before it, the city council was justified in concluding that the zone change was in basic harmony with the comprehensive plan because the change struck a reasonable balance among the City's various zoning goals.)
 27. However, some towns do offer a density bonus for use of the PRUD ordinance. See, e.g., Freeport's cluster housing ordinance. While the most common cluster development provisions are exclusively for residential use, some PRUD provisions apply to mixed residential and commercial development.
 28. For example, see the Town of Cumberland's PRUD provisions.
 29. For example, see the Town of Brunswick's "open space" zoning to protect a watershed area.
 30. For further discussion, see *How to Prepare a Land Use Ordinance*, pp. E-6-10; Craighead, ed., *The Hidden Design in Land Use Ordinances*, USM New England Studies Program (March, 1991); and Solotaire, et al., *Managing Residential Growth: How Your Towns Can Do It*, Allagash Environmental Institute (1979), p. 20-21.
 31. See, e.g., *How to Prepare a Land Use Ordinance*, Appendix E and the City of Portland Zoning Ordinance for examples of some performance standards for specific uses, particularly "cluster development," referred to as "Planned Residential Unit Development" (PRUD) in Portland's R-3 and R-5 zones. See also Southern Maine Regional Planning Commission, *1991 Model Subdivision Regulations: Model Regulations for Maine Planning Boards*, Article XI, Performance Standards, pp. 60-89, March, 1991.
 32. For example, it is relatively easy to adopt noise performance standards, but their adoption may give a community a false sense of protection unless the municipality possesses the correct equipment and the trained people to respond to noise complaints.

33. For more detail, see excerpts from Gorham's Rural District ordinance contained in DECD, *How to Prepare a Land Use Ordinance*, p. C-13-15.
34. 30-A M.R.S.A. § 4352(8).
35. *Id.*
36. For example, this technique was used in two 1990 conditional rezonings of historic residential structures along India Street in Portland, at the interface of a declining residential neighborhood and growing retail area. The properties were rezoned from a residential to a commercial designation, with negotiated conditions to limit the commercial use to

ground floor space only, to require continued residential uses in the upper floors, to require certain improvements to the exterior of the building, and to allow this hybrid of uses only so long as the original structures remained. If the buildings are torn down, the zoning reverts to the original residential zoning. The intent of this rezoning was to allow the owners a greater return so that they could generate enough income to rehabilitate the buildings, to retain some residential presence on those sites, and to retain neighborhood character by protecting against destruction of the buildings to make way for new retail structures (which might have happened if the zoning did not revert upon removal of the existing structures).

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