



DEPARTMENT ORDER

IN THE MATTER OF

TOWN OF WINDHAM) MANDATORY SHORELAND ZONING ACT
CUMBERLAND COUNTY)
SHORELAND ZONING ORDINANCE)
ORDER #51-2021) APPROVAL

Pursuant to the provisions of 38 M.R.S. §§ 435-448, the *Mandatory Shoreland Zoning Act* (“Act”), and the Maine Department of Environmental Protection’s *Guidelines for Municipal Shoreland Zoning Ordinances*, 06-096 C.M.R. ch. 1000 (amended January 26, 2015) (“Guidelines”), the Department of Environmental Protection has considered the request for approval of the Town of Windham Shoreland Zoning Ordinance (Ordinance), as amended on October 12, 2021, and FINDS THE FOLLOWING FACTS:

1. The Act requires municipalities to establish zoning controls in areas within 250 feet of the normal high-water line of great ponds and rivers; within 250 feet of the upland edge of freshwater and coastal wetlands; and within 75 feet of the normal high-water line of streams. Such zoning standards must be consistent with or no less restrictive than those in the Guidelines. 38 M.R.S. §§435 & 438-A.
2. The Act specifies that before a locally adopted shoreland zoning ordinance, or amendment to that ordinance, is effective, it must be approved by the Commissioner of the Department of Environmental Protection (“Commissioner”). The Commissioner may approve, approve with conditions, or deny the ordinance or amendment. If denied, or approved with conditions, such action must be preceded by notice to the municipality. If the Commissioner fails to act within 45 days of receipt of the ordinance or amendment, then the ordinance or amendment is automatically approved. 38 M.R.S. § 438-A.
3. On November 9, 2021, the Town of Windham submitted the following amendments to its Ordinance and Land Use Map (Map) as adopted on October 12, 2021 to the Department for review:
 - A. Throughout Chapter 199 references to “Shoreland Zoning Map” were replaced with “Land Use Map” to be consistent with Chapter 140.
 - B. Section 199-13(A) *Resource Protection District* was amended to include other areas designated resource protection on the Map
 - C. Section 199-15(Y) *Animals in the Shoreland Zone* was amended to delete the 75-foot setback and clarify the setback is measured from the normal high-water line.

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D. Section 199-17 *Definitions* was amended to include mapped areas in the definition of “Shoreland Zone”

E. The Map was amended by adding freshwater wetlands, and Outlet Brook which previously were not mapped and currently are required to be mapped to meet the minimum requirements of the Guidelines.

4. The Department reviewed the submitted amendments and determined they are consistent with the Act and the Guidelines. While consistent, further amendment of the Ordinance remains needed for the Ordinance to be fully up to date with the Act.

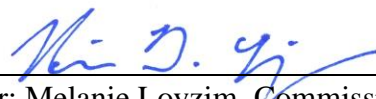
BASED on the above Findings of Fact, the Commissioner makes the following CONCLUSION:

1. The Town of Windham has adequately met the requirements of the Act, and the Ordinance and Map are consistent with the Guidelines except the Town of Windham has not yet adopted the photographic record requirement established in 38 M.R.S. § 439-A(10).

THEREFORE, the Commissioner APPROVES the ordinance, as amended on October 12, 2021.

DONE AND DATED AT AUGUSTA, MAINE, THIS 16TH DAY OF DECEMBER, 2021.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: 
 For: Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

<p>FILED December 22nd, 2021 State of Maine Board of Environmental Protection</p>



DEP INFORMATION SHEET

Appealing a Commissioner's Decision on a Shoreland Zoning Ordinance

Dated: August 2021

Contact: (207) 314-1458

SUMMARY

This document provides information regarding a municipality's rights and obligations in filing an administrative or judicial appeal of a shoreland zoning ordinance decision made by the Department of Environmental Protection's (DEP) Commissioner.

There are two methods available to a municipality seeking to appeal a shoreland zoning ordinance decision made by the DEP Commissioner: (1) an administrative process before the Board of Environmental Protection (Board), or (2) a judicial process before Maine's Superior Court.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

A municipality filing an appeal to the Board should review [38 M.R.S. §§ 341-D\(4\)](#) and [346](#), the Mandatory Shoreland Zoning laws [38 M.R.S. § 438-A\(3\)](#), and the DEP's [Rule Concerning the Processing of Applications and Other Administrative Matters \(Chapter 2\)](#), [06-096 C.M.R. ch. 2](#).

DEADLINE TO SUBMIT AN APPEAL TO THE BOARD

Not more than 30 days following the filing of a license decision by the Commissioner with the Board, a municipality may appeal to the Board for review of the Commissioner's decision. The filing of an appeal with the Board, in care of the Board Clerk, is complete when the Board receives the submission by the close of business on the due date (5:00 p.m. on the 30th calendar day from which the Commissioner's decision was filed with the Board, as determined by the received time stamp on the document or electronic mail). Appeals filed after 5:00 p.m. on the 30th calendar day from which the Commissioner's decision was filed with the Board will be dismissed as untimely, absent a showing of good cause.

HOW TO SUBMIT AN APPEAL TO THE BOARD

An appeal to the Board may be submitted via postal mail or via electronic mail and must contain all signatures and required appeal contents. An electronic filing must contain the scanned original signature of the appellant(s). The appeal documents must be sent to the following address.

Chair, Board of Environmental Protection
c/o Board Clerk
17 State House Station
Augusta, ME 04333-0017
ruth.a.burke@maine.gov

The DEP may also request the submittal of the original signed paper appeal documents when the appeal is filed electronically. The risk of material not being received in a timely manner is on the sender, regardless of the method used.

At the time an appeal is filed with the Board, the appellant must send a copy of the appeal to the Commissioner of the DEP (Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333-0017). Please contact the DEP at 207-287-7688 with questions or for contact information regarding a specific licensing decision.

REQUIRED APPEAL CONTENTS

A complete appeal must contain the following information at the time the appeal is submitted.

1. *Aggrieved status.* The appeal must demonstrate that it is submitted on behalf of the municipality subject to the Commissioner's decision and must explain how the municipality may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions regarding compliance with the law, conditions, or other aspects of the written decision or of the review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific criteria that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the shoreland zoning ordinance to changes in specific conditions imposed on the shoreland zoning ordinance.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for public hearing must be filed as part of the notice of appeal, and it must include an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any witnesses would testify. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the ordinance, the request and the proposed supplemental evidence must be submitted with the appeal. The Board may allow new or additional evidence, to be considered in an appeal only under very limited circumstances. The proposed supplemental evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention

at the earliest possible time in the review process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Requirements for supplemental evidence are set forth in [Chapter 2 § 24](#).

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A municipal shoreland zoning file is public information made accessible by DEP. Upon request, the DEP will make the material available to review and photocopy during normal working hours. There may be a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the shoreland zoning ordinance was processed, and the procedural rules governing the appeal.* DEP staff will provide this information upon request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* A municipality proceeding with shoreland zoning matters pending the outcome of an appeal runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will acknowledge receipt of an appeal, and it will provide the name of the DEP shoreland zoning staff member assigned to the specific appeal. The notice of appeal, any materials admitted by the Board Chair as new or supplemental evidence, any materials admitted in response to the appeal, relevant excerpts from the DEP's administrative record for the ordinance review, and the DEP staff's recommendation, in the form of a proposed Board Order, will be provided to Board members. The appellant and parties of record are notified in advance of the date set for Board consideration of an appeal or request for public hearing. The appellant will have an opportunity to address the Board at the Board meeting. The Board will decide whether to hold a hearing on appeal when one is requested before deciding an appeal. The Board's decision on appeal may be to affirm all or part, affirm with conditions, order a hearing to be held as expeditiously as possible, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant and parties of record of its decision on appeal.

II. APPEALS TO MAINE SUPERIOR COURT

Maine law generally allows aggrieved persons to appeal final Commissioner or Board decisions to Maine's Superior Court (see [38 M.R.S. § 346\(1\)](#); 06-096 C.M.R. ch. 2; [5 M.R.S. § 11001](#); and M.R. Civ. P. 80C). Parties to the shoreland zoning ordinance decision must file a petition for review within 30 days after receipt of notice of the Commissioner's or Board's decision. The laws cited in this paragraph and other legal procedures govern the contents and processing of a Superior Court appeal. The filing of an appeal to the Board is not a prerequisite for a judicial appeal.

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board Clerk at 207-287-2811 or the Board Executive Analyst at 207-314-1458 bill.hinkel@maine.gov, or for judicial appeals contact the court clerk's office in which the appeal will be filed.

Note: This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, is provided to help a person to understand their rights and obligations in filing an administrative or judicial appeal. The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.
