Municipal Code Enforcement Officers
Training and Certification Manual

COURT RULE 80K

Department of Economic and Community Development

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INTRODUCTION

This manual provides basic information for local and state officials who want to use the land use enforcement system known as "Rule 80K" of the Maine Rules of Civil Procedure.[1]

Before Rule 80K, prosecuting a land use or environmental violation required the services of a lawyer. Rule 80K provides a simpler, speedier and less costly procedure for the prosecution of land use violations. It applies in the District Court, while prosecuting cases through a lawyer in the Superior Court remains available as an alternative. Under Rule 80K the District Court can order violators to pay fines and to stop or correct a violation. The system authorizes certified non-lawyer employees (as well as lawyers) to represent municipalities, the ("DEP") and the Maine Land Use Planning Commission (formerly the Maine Land Use Regulation Commission, or, "LURC") in the prosecution of land use violations.

Until the enactment of Rule 80K, a municipality had two options for enforcing land use laws. One was to ask the local District Attorney to prosecute the case as a civil violation. Assuming the District Attorney agreed to take the case, the only remedy available was a fine in the District Court. If the municipality wanted corrective action or cessation of the violation (i.e., injunctive relief) as well, then the municipality had to exercise its second option and hire a private attorney to bring a lawsuit in Superior Court.

Rule 80K represents a dramatic departure from the procedures previously used to prosecute land use and environmental violators in court. Keep in mind, however, that while Rule 80K is a very valuable tool for achieving compliance with land use and environmental laws, never should code enforcement officials aim straight for court without first attempting to resolve problems at the administrative level. Save the Rule 80K process for the truly difficult enforcement issues and the truly uncooperative violators.

Also, the world of court procedures is different -- one might even say "alien" -- for municipal code enforcement officers and state enforcement officials. Therefore, it is extremely important for enforcement officials to understand the court procedures, to choose cases for prosecution carefully and to be well prepared before going to court. Local enforcement officials who wish to prosecute

[1] It is recommended that a local official expecting to go to court obtain a copy of the Maine Rules of Court, which includes the Rules of Civil Procedure. A copy can be purchased through West Publishing Company by calling 1-800-328-9352. This book also includes the Maine Rules of Evidence. A copy of Rule 80K complaint appears in the Appendix at A-1.

land use cases without an attorney should familiarize themselves with the material contained in this manual. They must first be certified by the State and then be formally authorized by the jurisdiction that they represent. This manual will help individuals prepare for that certification, and then will serve as a resource in subsequent 80K prosecutions.

CHAPTER ONE
WHAT IS AN 80K ACTION?

A. Overview of 80K Action

The term "80K" is derived from the rule contained in the Maine Rules of Civil Procedure which prescribes the legal procedure which must be followed in prosecuting land use violations. Every Code Officer, whether prosecuting violations through a municipal attorney or without the assistance of counsel, should read this Rule and become familiar with its requirements.

Rule 80K provides a "Summary Procedure," which means it moves faster than other court proceedings. The violator can answer the Complaint orally in court rather than in writing, and the court can decide the main issues of the case with a minimum amount of formality. That reduces the time and expense involved, without sacrificing the due process rights of the person accused of the violation.

There are several types of ordinances and statutes which may be enforced through Rule 80K, including the following:[2]

- Subsurface wastewater disposal rules adopted by the Maine Department of Human Services;
- Local land use and zoning ordinances and other local ordinances, e.g., junkyards, automobile graveyards, electrical installations, plumbing, subsurface waste-water disposal;
- The subdivision law;
- Laws pertaining to public water supplies;
- Laws administered by health officials;
- Laws pertaining to fire prevention and protection;
- Laws pertaining to the construction of buildings for the physically disabled;
- Local building and housing codes;
- Shoreland zoning ordinances;
- Laws pertaining to harbors;
- Natural resources protection laws; and
- The state junkyard and automobile graveyard statute.

[2] The complete list of laws and ordinances which municipal code enforcement officers may enforce under Rule 80K is set forth at 30-A M.R.S. § 4452, subsections 5, 6 and 7, a copy of which is included in the appendix at A-3. "M.R.S." stands for the Maine Revised Statutes. "30-A" is the title and "4452" is the section of the statute. Enforcement officers of the Maine Department of Environmental Protection and the Maine Land Use Planning Commission (formerly the Land Use Regulation Commission, or, "LURC") are authorized to bring 80K actions by the statutes governing those state agencies. In addition, the jurisdiction of the District Court to hear 80K actions is set forth in 4 M.R.S. § 152(6-A), a copy of which is included in the appendix at A-4.

B. Who Can Commence an 80K Action?

Rule 80K actions are designed by statute to be prosecuted by non-attorneys who have completed the certification program discussed in Chapter Two. Keep in mind, however, that although you may be permitted by law to carry the case from start to finish through the legal process, you are only an agent of the municipality. Obtaining the properly documented authority from the selectmen or council is critical prior to commencing an action. There are many reasons that the Board of Selectmen may not wish to bring an 80K action against a certain violator, even though you believe that it may be justified. Once the violation notices have gone unheeded, keep the Selectmen well informed of the situation and make sure that they formally authorize you to proceed with legal action.

Also, even if you are authorized by the Board to proceed with legal action, there are cases where obtaining the assistance of an attorney is well- advised. If you believe that the case involves complex issues, do not hesitate to involve the town attorney, for your own protection. Some towns have developed a procedure where the Code Officer keeps the town attorney copied on all filings although he attorney does not actually participate in the proceedings.

Chapter Three will discuss some of the other factors which you will consider in determining whether you or the town attorney should commence the Rule 80K action on behalf of the municipality.

CHAPTER TWO
CERTIFICATION PROGRAM

A. Required Certification Programs for Municipal Code Enforcement Officers.

A municipality may not employ an individual to perform the duties of a Code Enforcement Officer who is not duly certified by the State.[3] The law specifies five areas of responsibility applicable under this certification requirement. An individual has 12 months after beginning employment to be trained and certified. A waiver of up to one year may be granted if it can be demonstrated that a hardship to the municipality will result.

Regarding the licensing of plumbing inspectors, the law now prohibits a person from holding the office of Plumbing Inspector unless certified in the same manner as Code Enforcement Officers are certified.[4] The only exception is that an individual may be temporarily authorized by the Department of Human Services, Division of Health Engineering, to be employed as a Plumbing Inspector for not more than 12 months before obtaining certification. As in the case of Code Enforcement Officers, the Department of Economic and Community Development, Office of Community Development (formerly the State Planning Office), in cooperation with the Maine Technical College system, the Department of Human Services and the Maine Department of Environmental Protection, operates the program for training and certification.

The Code Enforcement Officer Training and Certification Program provides examinations leading to certification in each area of enforcement enumerated in 30-A M.R.S. §4451.[5] A Code Enforcement Officer need only be certified in the areas of actual responsibility. For example, a Code Enforcement Officer dealing only with shoreland zoning need not be certified as a local plumbing inspector.

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[3] One of the effects of LD 1903, enacted by the 125th Legislature on April 24, 2012, was to dismantle the State Planning Office and to assign its various responsibilities and programs to other state departments and agencies. As of July 1, 2012, responsibility for certification for building officials/code enforcement officers is no longer with the State Planning Office. This role was assumed by the Department of Economic and Community Development, Office of Community Development.

[4] Plumbing inspectors were also previously certified by the State Planning Office. As with building official/code enforcement officer training, the responsibility for training plumbing inspectors was transferred from the now defunct State Planning Office to the Department of Economic and Community Development, Office of Community Development. *See* note 3 above.

[5] A copy of which is reproduced in the Appendix at A-2.

Certifications are valid for six years. A Code Enforcement Officer shall be recertified if he or she successfully completes at least 12 hours of approved training in each area of responsibility during the six year certification period.

B. Required Certification Program for Municipal and Other Land Use Regulators in The Use of Rule 80K.

In addition to the certification for municipal Code Enforcement Officers (CEO) set forth in 30-A M.R.S. §4451 and described above, a separate certification to prosecute land use violations using Rule 80K must be obtained from the State of Maine. Certification under Rule 80K is not necessary to become a certified Code Enforcement Officer. It is only necessary if that CEO wishes to prosecute land use cases in the District Court. Certification under Rule 80K is also necessary for employees of the Department of Environmental Protection and employees of the Maine Land Use Planning Commission (formerly the Maine Land Use Regulation Commission, or, "LURC") who wish to use the process in the prosecution of the state requirements that they are authorized to enforce.

Certification is obtained after completion of a Rule 80K training course and successfully completing a written examination administered by the Department of Economic and Community Development, Office of Community Development. Certification is good for six years and may be extended after completion of continuing education in legal issues and procedures.

For several years, as a result of the reorganization of state government and realignment of duties, there were some inconsistencies in Maine law and in the rules of various agencies concerning Rule 80K training. The legislature has clarified all that, enacting a statutory provision in 1997, which directed the State Planning Office (now the Department of Economic and Community Development, Office of Community Development) to establish a certification program for Code Enforcement Officers, Plumbing Inspectors, Department of Environmental Protection personnel and Maine Land Use Regulation Commission (now the Land Use Planning Commission) personnel. 30-A M.R.S. §4453. A copy of that statute is included in the Appendix at A-3(A). Remember that certification under 30-A M.R.S. §4453 indicates that the code official is familiar with court procedures. But it is other statutes, such as 30-A M.R.S. §4452 for local code enforcement officers, which list the kinds of laws, ordinances and regulations enforcement officials may prosecute under Rule 80K. See footnote 2, above.

CHAPTER THREE
WHEN TO PROCEED WITH ENFORCEMENT ACTION

A. Preliminary Enforcement Action - FOLLOW THE ORDINANCE PROCEDURES

When you have the responsibility for enforcing a land use ordinance, regulation or statute and you discover a violation, you should always follow whatever process has been established by your local community or state agency, before bringing the matter to court under Rule 80K. That includes any informal contacts and attempts to resolve the problem, if the normal practice is to try to work things out with the violator before starting the formal enforcement process. If the informal process is not successful, then you will need to take formal action, following the procedures outlined in the enforcement section of the law being violated. Usually you will need to send a notice to the violator, ordering corrective action within a stated period of time.[6] The notice should be sent both by certified mail and regular mail. Regular mail is a back-up in case the violator refuses to accept the certified letter, which is not unusual. Make the notice very specific as to what violations are asserted and which provisions of which ordinance are being violated. The notice must also inform the violator of the right to appeal the CEO's decision to the local board of appeals (if the board of appeals has jurisdiction to hear appeals of enforcement decisions pursuant to the local ordinance)[7] and of the consequences of failure to appeal, which may include losing the right to contest the contents of the Code Enforcement Officer's notice. It is also a good practice to advise the violator of the range of penalties and other remedies which may be imposed for the violation. For a more detailed discussion of these preliminary enforcement procedures, see "Legal Issues and Enforcement Techniques for Local Code Enforcement Officers" prepared by the former Maine State Planning office in consultation with the Maine Municipal Association, Legal Services Department.

Never lose sight of your goal. Voluntary compliance by the violator is always better than going to court. Serving a citation or summons and filing a complaint in court should be a last resort. This does not mean that you should "go easy" on a violator or always settle for less than full compliance. It does mean that you should give the violator a reasonable opportunity to solve the problem before looking to the court for an answer. It also means that you should be creative and think

[6] A sample notice of violation letter is included in the Appendix at A-5.

[7] Note that some municipal ordinances expressly state that the board of appeals does not have authority to entertain appeals of enforcement decisions by the CEO.

of solutions which the violator might agree to perform and which would be satisfactory to the town, city or state without having to involve a judge.

If all else fails, though, and the violation is well documented, do not hesitate to go to court. The fact that a certified official can summons a violator to court and prosecute the case without having to hire a lawyer may be enough to persuade some violators to correct a problem.

B. Which System to Use

Before you decide whether to prosecute a case yourself in District Court or to refer the matter to an attorney for prosecution, you should think seriously about whether your case is the kind where the simplified Rule 80K procedure will work well. Some of the factors you should consider in making that decision are:

1) **The complexity of the case.** Especially at the beginning of your "career" as a Rule 80K prosecutor, you probably want to avoid cases that have a lot of complicated facts, such as a long history of property transfers, disputes over the location of boundaries, uncertainties about who owns the land or who has actually caused the violations. Rule 80K works best when you have fairly simple facts--for example, the garage is 10 feet too close to the property line and there is really no dispute about that--and the reason for bringing the violator into court is not to sort out a complicated situation, but simply to force the violator to respond.

2) **The likelihood of the violator being represented by an attorney.** It may be a sad fact of life in our judicial system, but it is true. A violator represented by an experienced attorney will have the upper hand, because the attorney is likely to know more about the law, court rules and all the unwritten rules of court procedure. If you know your violator to be litigious, it may be time to call in your own counsel.

3) **The availability of the violator and the landowner within the state and the difficulty of effecting personal "in-hand" service of the complaint on the violator and landowner.** A critical first step to a Rule 80K proceeding is to make "service" of the complaint on the violator. If you are dealing with people outside the state of Maine, it is fairly complicated legally and you will then need legal help.

4) **The amount of the fine which the town, city or states wants to recover.** Remember that Rule 80K is a "summary process." It is very similar to the process used to prosecute relatively minor traffic infractions. Generally, it is not well suited to the "big" case, one with high public visibility where it is important for the municipality or state to set an example by securing large penalties and dramatic remedies. Although there are some exceptions, the design of the court system in Maine is such that the "big" cases go to Superior Court while the smaller matters are handled in the District Court. Keep that in mind as you evaluate your case.

5) **The type of corrective action which the municipality wants the court to order.** The District Court under Rule 80K can grant the same kinds of relief as can the Superior Court, but, in practice, the District Court is your best choice only if you are looking simply for some penalties and some fairly straightforward relief, such as "seal up the pipe that is leaking into the stream." That is because the District Court is typically a high volume operation where you will probably see the judge only once or twice. If the action needed to correct the violation is complicated and may require some kind of continuing oversight by the court, then the Superior Court and the use of an attorney are probably better choices.

6) **The relationship between the person responsible for the violation and the property on which the violation occurred.** You may find yourself in situations where an absentee landlord, an unresponsive tenant and perhaps even a third party like a contractor are all involved in the violation and all pointing fingers at one another. Those situations are likely to involve fairly complicated legal relationships, which you probably want the help of a lawyer to decipher.

7) **The costs (including attorney's fees) which the town, city or state wants to recover.** As you will learn later in these materials, even though the law usually entitles a city, town or the state to recover costs and attorney's fees if the government is the prevailing party, actually collecting them is sometimes a very difficult task. If you have a case where there are already substantial costs involved--perhaps consulting fees or attorney fees expended in trying to deal with the violation before even commencing a court action--it is probably wise to engage the services of a lawyer.

8) **The type of evidence which will have to be presented in court to prove the violation.** Is there a complicated chain of deeds which might have to be introduced (to prove a subdivision violation, for example)? Does proving the violation require the proof of scientific or technical facts so that you will need to present an "expert" witness? In cases where you feel you can tell the story of the violation yourself, with a minimum of complicated paper evidence or specialized expert evidence, Rule 80K is appropriate. But when the evidence gets complicated, so do the rules of evidence, and 80K may not be the preferred route.

9) **Whether the necessary information can only be obtained through a process known as "discovery."** As the name implies "discovery" is supposed to be a process for finding out about the other side's case. In practice, it often turns into a battleground where the two sides try to beat each other down. It is governed by fairly complicated court rules and is best left to lawyers (whose job is to beat the other side down?)

10) **The benefits of combining the lawsuit under consideration with another lawsuit, which could not be prosecuted under Rule 80K.** Rule 80K is a stand-alone process; you cannot combine other claims with your land use violation prosecution. There may be cases where it makes sense to combine several claims. For example an escape of pollutants which constitutes a land use violation may also have caused damage to a town's adjacent property when the pollution spread. The town's claim for damages is

not a land use prosecution and could not be brought under Rule 80K. But it could be "joined" with a land use prosecution in the Superior Court.

11) **The likelihood that the violator will want to file a "counterclaim" against the town or city or a "third party complaint" against another person and request that the case be "removed" to Superior Court.** This will be discussed in more detail below. For now, keep in mind that a violator can "remove" your 80K complaint to the Superior Court, where you will have to hire an attorney (remember that your authority to "practice law" is limited to the District Court).

12) **The authority of the enforcement officer to enforce a particular law or ordinance.** Remember that your authority under Rule 80K is limited to certain specific "land use" type violations, specified in 4 M.R.S. §152(6-A), the statute which determines the jurisdiction of the District Court. The statute is included in the Appendix to this manual at A-4. For example, if your city or town has a business licensing ordinance that regulates pinball machines or video games, that is not a land use ordinance and violations are not enforceable under Rule 80K.

13) **The willingness of the governing body to support the enforcement effort.** Even a simple Rule 80K prosecution involves certain costs. More importantly, what appears simple at the outset can easily turn into a protracted legal battle for which the municipality or state agency may end up having to use legal counsel. Especially at the municipal level, it is important to know that the city or town council or the board of selectmen agrees that the prosecution should be carried forward and is ready to stand behind you in your efforts.

Especially when you first start prosecuting 80K actions, it probably makes sense to discuss a case with the city or town attorney, or Attorney General's Office, if you are representing a state agency. Your legal counsel can then help you decide whether it is one that you should take it upon yourself to prosecute. In the beginning, you may want to have your counsel accompany you or work together with you in prosecuting several cases while you "get your feet wet," become familiar with court procedures and gain some confidence. In time, you will probably feel comfortable being on your own.

One reason a municipality may encourage or require its code enforcement officer to become Rule 80K certified is to save the expense of utilizing legal services. You, as the code enforcement official, should explain to the selectmen or your supervisor in municipal administration that utilizing the local code enforcement officer to prosecute land use violations under Rule 80K may -- or may not -- realize substantial savings in legal fees. It should be understood that you will continue to need legal advice in some cases, and that some cases which start out as Rule 80K prosecutions may become more complicated, ending up in the Superior Court where the use of an attorney is required.

You may find your legal counsel useful in another way. Sometimes just the threat of legal action by the government's attorneys is enough to cure a violation. A letter from your lawyer advising the violator that litigation will be commenced by a certain date unless the violation is corrected will occasionally solve the problem.

CHAPTER FOUR
HOW TO PREPARE THE LAND USE CITATION AND COMPLAINT

A. Citation and Complaint

1. Contents of the Citation and Complaint

Included in the Appendix at A-6 is a sample Rule 80K Citation and Complaint. It may be modified depending on the circumstances of the case. However, Rule 80K is specific about certain information which must be set forth including:

1. The name and address of the person alleged to have committed the violation (the "Defendant");
2. The name and address of the property owner (or owners) if different from that of the violator;
3. The time and place of the violation. If the violation is a continuing one, list the inclusive dates (i.e., "January 1st through February 15th," right up to the date you are filling out the complaint);
4. A brief description of the violation;
5. A summary of the provision of the statute, ordinance, or regulation being violated and a summary of the possible penalties for such a violation;
6. A request for a preliminary injunction, if desired; and any other relief sought;
7. The time, date, and place when the person accused of the violation is to appear in court (Note: This will be determined by talking to the court clerk. The hearing should be at least 20 days from the date of service of citation and complaint except where temporary restraining order is sought);
8. A statement that the person accused of the violation was advised of the violation, where applicable;
9. The signature and title of the local official filing the complaint (the "Plaintiff");
10. The signature of the alleged violator to show that he or she received the citation and the complaint, or a statement by the local official that the violator refused to sign or could not sign; and
11. A statement notifying the violator that if he or she fails to appear in court on the day specified, the court may enter a default judgment in the town or city's favor.

If an attorney will be prosecuting a violation for the municipality under Rule 80K, the attorney should sign the complaint on the line which says "Complainant", cross out those words, and type "attorney" in their place.

It may also be useful to attach an affidavit prepared by the enforcement official to every complaint, whether or not a TRO is being requested. Such an affidavit may make it easier for a judge to grant injunctive relief if the defendant defaults. The affidavit could be as simple as a statement, under oath, that the Code Enforcement Officer has read the contents of the complaint and that the information in the complaint is true of the Code Enforcement Officer's own knowledge.

2. Whom to Name as the Defendant

If the person committing the violation is not the landowner, then the enforcement official must decide whether to name both the actual violator and the landowner as defendants. This decision may depend in part on whether the landowner was actively involved in instructing the violator or in actually performing some of the work. It also may depend on whether the enforcement official had previously advised the landowner about the work to be performed and what the local ordinance requires. Under many ordinances, the mere fact that a violation exists on a parcel of land is enough to make the landowner in violation. However, the enforcement official may decide not to name the landowner as a defendant if the only basis for his or her violation is the mere fact of ownership. One reason to name the landowner as a defendant is to obtain a decision from the court which would be binding on both the violator and the landowner.

A good rule of thumb is that absent a good reason to the contrary the landowner <u>should</u> be named as a defendant. Often naming the landowner provides the enforcement officer with additional power to get the violation corrected. It also eliminates any question about whether the landowner is a "necessary party" to the proceedings.

In any event, the landowner <u>must</u> be served with a copy of the citation and complaint even if not named as a defendant.

If the land on which the violation occurred is in joint or common ownership, then all of the people with an ownership interest must be treated as "the landowner" for the purposes of preparing the complaint. Although the practice may vary in different courts, it is not necessary to name a

mortgage or lien holder as a defendant. It is believed the term "owner" as used in Rule 80K is not intended to include mortgage or lien holders.

To determine ownership, the enforcement official should check the records at the Registry of Deeds. (A brief explanation of how to conduct a title search appears in the Appendix at A-23.) If there is any confusion about who the owner is based on a review of the deeds, the enforcement official should consult with an attorney. The enforcement official should not rely on assessment records. They can be misleading because in certain cases a person other than the current owner may legally have been taxed.

In a case where the violator is not the landowner, the enforcement official must determine whether the violator is an individual, a partnership, a corporation, some other legal entity, or a combination of these in order to use the proper designation in naming the violator as a defendant. This is important partly in order to determine the proper method for serving the complaint.

It may require some investigation through the Corporations Bureau or the Motor Vehicle Division office of the Secretary of State in Augusta. The information which those agencies collect is public. Usually it can be provided over the telephone or by mail. For example, if someone observes Joe Smith in a "Smith Sand and Gravel Co." truck dumping a load of sand into a pond, the enforcement official should investigate whether "Smith Sand and Gravel" is a corporation, sole proprietorship or partnership and what Joe Smith's relationship is to the entity. It also may be necessary to determine whether Joe Smith was acting as an agent for the entity or whether he was acting on his own and outside the scope of the authority given to him. In some cases it may be necessary to name both the company and the employee, particularly if it is unclear what authority the employee was given, and see what information unfolds during testimony at the court hearing. When a business is the violator, the enforcement official may want to consult with an attorney about the proper entity or people to name as defendants.

3. Description of Violation

The description of the violation does not have to be detailed. The sample Citation and Complaint provides the violator and the judge with information regarding when the violation was first observed and what State statute or local ordinance is being violated. The purpose of the description section is to "zero in" on the specific activity which violates those laws so that anyone reading the complaint will know generally what conduct the town or city believes is in conflict with the sections of the statute or ordinance cited elsewhere in the Complaint. More detail about exactly how the

specific conduct violates the specific sections of the statute or ordinance can be provided to the judge during the court hearing.

4. Violation in Progress; Request for a Temporary Restraining Order (TRO) or Preliminary Injunction

If the enforcement official finds a violation which must be stopped quickly, before a full court hearing can be scheduled on whether a violation legally exists, he or she should consider asking the court for a Temporary Restraining Order (TRO) or Preliminary Injunction. More information about these remedies is provided later in this handbook.

5. Date, Time and Place of Hearing

The District Court or the division of the District Court in which a complaint should be filed is the one serving the town or city in which the land on which the violation occurred is located. (A list of District Courts and their territories appears in the Appendix at A-25.) In order to know what information to include in the Citation and Complaint regarding the date and time that a particular case will be heard for the first time, the enforcement officer preparing the case should contact the court clerk's office to determine the procedure being used in that particular District Court. Some courts may have scheduled certain days of the week or certain times of day for Rule 80K cases. The scheduling of Rule 80K cases varies significantly throughout the State, and may even vary from judge to judge at a particular District Court location. The clerk could explain this and tell the enforcement official the name of the person who assigns hearing dates, if the clerk does not do this. Although this initial contact with the clerk's office probably could be done over the telephone, it would be best to make an appointment and go in person to discuss it so the clerk can get to know the enforcement officials who will be using Rule 80K.

Developing a <u>good</u> relationship with the court clerk's staff is very important. If the town attorney or agency attorney is familiar with the staff in the clerk's office, that attorney might provide an introduction, by letter, telephone, or -- best of all -- in person. Alternatively, the enforcement officer could simply call the clerk's office and see if a brief meeting might be arranged at a time convenient to the clerk so that the code officer can introduce himself/herself and discuss procedures with the clerk. For some "tips" on dealing with court personnel, see the section of this manual entitled "Being a Pioneer" located at the end of Chapter 8.

Whether a case is decided at the initial hearing or whether the case must be scheduled for a full hearing at a later date will depend on the complexity of the case, issues raised by the violator's

answer, and the workload of the court. The busier courts treat the initial hearing as similar to an "arraignment" where the violator is given an opportunity to tell the judge whether he admits or denies the allegations. The case is then scheduled for a full hearing at a later date if the allegations are denied. Again, and this bears repeating because it is so important, the code official must try to ascertain in advance the practices of the particular court and of the particular judge who will be presiding; if necessary, ask the clerk to ask the judge whether the appearance date will be similar to an arraignment or will be a full scale hearing. And, if there is any doubt, be prepared for a full-scale hearing. The worst that will happen is that preparation will be done early and ready for use at a later date.

If the enforcement official has an opportunity to select a hearing date, he or she should be sure that it is not a day when the court will be closed for a holiday or some other special reason. He or she should check with the clerk or the court calendar to determine this. Another thing to consider in scheduling the hearing date is the amount of time it will take the enforcement official to serve the citation and complaint on the necessary parties. There should be enough time between the date of service and the hearing date to allow everyone an adequate opportunity to prepare for the hearing. Otherwise, the judge will postpone the hearing to allow the other side to prepare.

6. Penalty or Other Remedy Requested

The section of the complaint form called "Relief Sought from Court" lists six different options for the enforcement official to choose. More than one box can be checked depending on: (1) what the violation involves; (2) what kind of remedy or penalty will remove or minimize the violation and punish the violator, and (3) what the provisions of 30-A M.R.S. §4452 authorize the court to order either as punishment or corrective measures.

A "permanent injunction" should be requested when the enforcement official wants the court to issue an order prohibiting the violator from completing or otherwise continuing the activity which the court found to be in violation of an ordinance or statute. A permanent injunction may be preceded by a TRO or preliminary injunction, but this is not necessary.

A "civil penalty" means a monetary fine, the amount of which will be decided by the court based on the range of fines established by 30-A M.R.S. §4452(3) which may be assessed on a per-day basis. That section provides the following fines for the violation of the land use statutes or ordinances which are listed in 30-A M.R.S. §4452(3):

- The minimum penalty for starting construction or undertaking a land use activity without a required permit shall be $100, and the maximum penalty shall be $2,500.

- The minimum penalty for a specific violation shall be $100, and the maximum penalty shall be $2,500.

- The maximum penalty may exceed $2,500, but shall not exceed $25,000, when it can be shown that there has been a previous conviction of the same party within the past 2 years of the same law or ordinance.

- If the economic benefit resulting from the violation exceeds applicable penalties, the maximum penalty may be increased to twice the value of the economic benefit. "Economic benefit" includes, but is not limited to, the costs avoided or enhanced value accrued at the time of the violation as a result of the violator's noncompliance with applicable legal requirements.

The statute provides that penalties may be assessed on a per-day basis. If the local ordinance or the statute you are enforcing states that each day of violation is a separate offense, be sure to seek daily penalties. A state statute which requires that penalties be assessed on a daily basis is likely to be interpreted as mandatory, leaving the judge with no discretion to impose less than the minimum penalty for every day the violation existed. See discussion of Town of Orono v. LaPointe, 197 ME 185, 698 A.2d 1059 in the Case Law Summary at Chapter 14 of this manual.

"Removal of the violation" is sometimes called an "affirmative injunction" or "remedial action" meaning correcting or eliminating the prohibited activity or otherwise trying to restore the site to its original condition. An example would be an order to the violator to remove an illegally installed septic system or to tear down an illegal building.

If the violation was "willful," 30-A M.R.S. §4452(3)(C) states that the court must order removal of an illegal structure in most cases. If the violation was not "willful," the court has the discretion to order removal of the violation, but is not required to do so. Therefore, if the enforcement official intends to prove "willfulness," this should be noted in the complaint to put the violator on notice of this fact. The element of "willfulness" could be shown by noting in the "Description of Violation" section of the Complaint that an illegal activity was performed after the enforcement official had given information to the person regarding the requirements of the ordinance. An example would be where the person consulted the CEO about the need for a permit to build a house and then built it without a permit. Also, in the "Relief Sought" section, the words "for a willful violation" could be typed or printed after the words "Civil Penalty." Since "willfulness" involves proving the violator's

state of mind, the enforcement official should carefully review facts in support of this contention.

For violations of a shoreland zoning ordinance, the statute is tougher. In those cases, the court must order the violator to correct or mitigate the violations even if they were not willful. The only exception is if the court finds that the correction or mitigation itself would result in a threat or hazard to public health or safety, substantial environmental damage or "[a] substantial injustice." 30-A M.R.S. §4452(3)(C-1).

Under the category called "Other," the enforcement officials could ask the court to order the violator to apply for necessary permits or other local approval required by a statute or ordinance where the activity was done in compliance with the performance standards of the law but without a permit. This category also might be used where the town or city and the violator have negotiated a consent agreement to resolve the violation out of court and would like the court to approve it as a "Consent Order." It also could be used to request attorneys' fees pursuant to 30-A M.R.S. §4452 (3)(D) in appropriate cases.

If multiple violations are covered in a single complaint, it might be helpful to the judge to note on the Complaint which type of relief is being sought for which violation.

7. Insufficient Space on Land Use Citation and Complaint

If the enforcement official finds that the Land Use Citation and Complaint form provided in the Appendix at A-6 does not contain adequate space in which to provide information required in a specific section, it is permissible to complete the information on a separate sheet and attach it to the complaint form. The attachment should be headed "Addendum to Land Use Citation and Complaint" and the information contained in it should be clearly labeled regarding the section of the complaint to which it pertains. It also should be signed by the enforcement officer and dated.

B. Required Attachments

1. Ordinance Certification

A certified (attested) copy of the section or sections of the local ordinance or local or State regulation allegedly being violated must be attached to the complaint and served on the violator and landowner as well as filed with the court. A statement indicating where the complete text of the ordinance or regulation may be obtained must appear on the copy of the section which is served. If a State statute is the law being violated, this is not necessary because the judge will take "judicial notice" of a statute. A local "ordinance" is a law adopted by the town or city's legislative body (town meeting or council). A local "regulation" is a law which has been adopted by a board or committee based on

authority granted to that board by State law. An example of a "local regulation" would be local subdivision regulations adopted by the Planning Board pursuant to the state subdivision law. A State "statute" is a law adopted by the Maine Legislature. A State "regulation" is a law adopted by a State administrative agency or department based on authority delegated to that agency by statute. An example of a "State regulation" is the State Subsurface Wastewater Disposal Rules which is adopted by the Department of Human Services pursuant to 22 M.R.S. §42. A Code Enforcement Officer must be specifically authorized by local officials to enforce these state statutes or regulations within his/her town.

If the basis for the violation is a local ordinance or local regulation, then the copy of the section which will be attached to the citation and complaint should be attested by the town or city clerk. (Sample language for the clerk's certification is contained in the Appendix at A-12.)

If the violation being prosecuted involves a State regulation, the enforcement official should contact the agency to find out how to get an attested copy. If the regulation involved is the State Plumbing Code, then a letter may be sent to the Department of Human Services, Division of Health Engineering, to obtain the number of certified copies needed to serve on the violator and landowner, file with the court and introduce into evidence during the court hearing. (A sample letter to the Department of Human Services is contained in the Appendix at A-11.)

Although the attested copy of the section of the ordinance or regulation which the enforcement official filed with the court should be available to use as evidence, the enforcement official should bring an extra attested copy to court on the day of the hearing to be safe.

A non-certified enforcement official should not prepare and serve the citation and complaint without first determining whether the town or city intends to provide an attorney to prosecute the case. This is because a non-certified enforcement official cannot prosecute alone. Most attorneys would prefer to help shape the case at the outset rather than being brought into it in the middle.

2. Prior Agreements or Variances

It is advisable to also attach to the Citation a copy of any existing agreements or other decisions which affect the property such as variances, conditional use approvals and conditions, Consent Agreements or subdivision approvals. Sometimes, the property owner must be reminded of the legal effect of these decisions and that they continue to bind subsequent owners of the property. It is also helpful when the judge is reviewing the Citation if these documents are included as attachments.

C. Keeping the Municipal Officers Informed

Even though the enforcement official obtains general authorization from the selectmen or council to represent the town or city in court, that does not mean that the enforcement official should have no further contact with the selectmen or council. The enforcement official should keep them informed about individual enforcement actions and should let them know whenever he or she is considering legal action under Rule 80K. If the enforcement official does not make an effort to communicate with them and to explain why it is necessary to go to court in a given case, the selectmen or council may decide that they are not happy with the degree of authority which they previously granted to the enforcement official or may revoke that authority. The CEO using 80K is representing the municipality, but the selectmen or council are the elected policy makers of that municipality and they are the municipal officials in charge of controlling the taxpayer dollars spent on the enforcement activity.

D. Cooperation Between the DEP and Municipalities

There are occasions when the same activity or a group of related activities will constitute violations of both municipal ordinances and land use statutes administered by the DEP, such as the Natural Resources Protection Act. Enforcement officials should be aware of the opportunities for cooperation in those situations. For example, the DEP does not have any authority to issue a stop work order; its only option is to go into court and seek a temporary restraining order. A municipal code enforcement officer, on the other hand, typically has authority under local ordinances to order cessation of work. DEP staff has had some experience in obtaining administrative inspection warrants. For municipal code enforcement officers, that is typically an unfamiliar and daunting process. Those differing experiences and capabilities may provide a unique opportunity for complementary enforcement activities. The DEP reports one successful case where the municipal code enforcement officer issued a stop order, bringing the activity to a halt, while the DEP obtained an administrative inspection warrant to go on the property and get the necessary details for a Rule 80K action.

E. Checklist

Included in the Appendix to these materials at A-22, you will find a helpful checklist which can be used to aid you in making sure that you have obtained all of the necessary information for filing the Citation and Complaint. You may wish to add certain notes to this checklist as you create your own version and as you become familiar with the courts in your district.

CHAPTER FIVE
WHAT TO DO WITH THE 80K COMPLAINT

A. Serving Notice of the Complaint

1. Service on Violator

Once a Land Use Citation and Complaint form has been filled out, the next step is to "serve" a copy and an attested copy of the section of the ordinance or regulation being violated on the violator and the landowner. "Service of process" is the legal act of providing notice that a complaint is being filed with the court. The obvious purpose of "service" is to give the person against whom the Complaint is being filed a chance to prepare a response and to appear in court to present that response to the judge, either with or without an attorney.

Rule 80K provides that the Citation may be served within the state by a duly certified local or state enforcement official or other official authorized to serve process on matters falling under the rule.

Rule 4 of the Maine Rules of Civil Procedure outlines the proper method for "in hand" (in person) service depending on whether the violator or landowner is an individual, a child, a mentally incompetent person, a business, or a government official or government agency. The text of Rule 4 appears in the Appendix at A-24.

If a land use violation will be prosecuted under Rule 80K by an attorney representing the town or city and the attorney prepares the Citation and Complaint, a local enforcement official still may serve the Citation and Complaint pursuant to the authority granted by Rule 80K. The procedures are the same as those outlined in the preceding paragraph.

A good rule of thumb where service cannot be made in person is to consult with the town or city attorney. If someone other than the local enforcement official serves the Citation and Complaint, the enforcement official should take responsibility for the filing of the "Return of Service" (Proof of Service) with the District Court prior to hearing.

2. Service on the Property Owner

Whenever Rule 80K requires service on the violator, each owner of the land involved also must be served with a copy of the Citation and Complaint and an attested copy of the section of the ordinance or regulation allegedly violated. The enforcement official should determine ownership through searching records in the Registry of Deeds. (See explanation of how to conduct a title search appears in the Appendix at A-23). If there is any confusion about who the owner is based on a review

of deeds at the Registry, the enforcement official should consult with an attorney. The enforcement official should not rely on assessment records. They can be misleading since property assessments do not necessarily show the owner if the property is leased or if it was sold after April 1st. Also, if the property is in common ownership, all owners may not be listed.

In cases where the town or city is requesting injunctive relief, it is particularly important to be sure that the proper person(s) has been served as "landowner" since important property rights are being affected. Service on the landowner may be accomplished by any appropriate method provided in Rule 4.

3. Return of Service

After the violator and the landowner have been served, the person making service must file the original Citation and Complaint with the court clerk, either in person or by mailing it with a cover letter. This should be done as soon as possible and no later than 20 days after service. In addition, a "Return of Service" meaning "proof of service" must be filed with the court as provided in Rule 4(h) or (j). This is basically accomplished by filling in the section of the original complaint entitled "Return of Service" and filing it within the deadline. If the "Return of Service" is mailed to the clerk, the enforcement official should confirm receipt by calling the clerk.

Filing the Return of Service with the court constitutes a representation by the enforcement official that the copy of the Complaint which was served was a true copy. The enforcement official must write the date of service on the copies left with the violator and the landowner.

The proper form for "Return of Service" has been incorporated by the Supreme Court into the Land Use Citation and Complaint. A sample "Return of Service" appears as part of the sample Land Use Citation and Complaint which is found in the Appendix at page A-6.

B. Documents Filed With the Court

1. Original Citation and Complaint

Once the violator and landowner have been served, the original Land Use Citation and Complaint, including the Proof of Service, must be filed with the court clerk within 20 days of service. Before filing these or any other documents with the court, the enforcement official should make photocopies for his or her own file, including copies of any cover letters. A sample Return of Service form is included in the Appendix at A-7.

2. Ordinance or Regulation Violated

An attested copy of the section of the local ordinance or local or state regulation being violated

must be filed with the court clerk. A statement by the town or city clerk attesting a section of an ordinance as a true copy of the original which is in his or her custody in the town or city records must appear on the local ordinance or regulation. If the law being violated is a state agency regulation, the agency will prepare a copy in the form required by Rule 80K. A sample Ordinance Certification is included in the Appendix at A-12.

3. Letter of Authorization to Represent the Municipality, the Department of Environmental Protection or the Land Use Planning Commission

A letter authorizing a specific official to represent the town, city, Department of Environmental Protection ("DEP"), or the Land Use Planning Commission ("LUPC," formerly LURC) in court must be prepared and signed by the municipal officers, DEP, or LUPC and filed with the court clerk the first time the official files a Complaint. A sample letter is included with the Appendix at A-14. This letter would not need to be filed again until a new person is authorized to represent the town city, DEP or LUPC.

Sometimes a local ordinance requires the municipal officers (town councilors or selectmen) to be involved whenever litigation is commenced. For example, one ordinance in a greater Portland community states: "[w]hen any violation of any provision of this Ordinance ... shall be found to exist, the Building Inspector shall notify the Municipal Officers who may then institute any and all actions to be brought in the name of the Town." If an ordinance contains similar language, it would be prudent for the Code Enforcement Officer to have a specific letter authorizing the specific Rule 80K case, in addition to the general letter of authorization.

Prior to an enforcement official's first appearance in District Court under Rule 80K, the Certificate of Familiarity with Court procedures enforcement official must also file the certificate issued to him or her certifying that he or she has completed the State of Maine's certification program and is familiar with court procedures as described in Chapter One. This does not need to be done again until a new certificate is issued upon recertification.

A final word of caution -- unless you are a frequent prosecutor of Rule 80K cases in a particular court, it is possible that court personnel may misplace or otherwise lose track of the letter and certificate you have previously filed. It is a good idea to check when you file your Rule 80K complaint. Also, if you have any doubt, bring duplicates with you on the day you appear in court.

CHAPTER SIX
HOW TO OBTAIN IMMEDIATE JUDICIAL RELIEF

A. Temporary Restraining Order and Preliminary Injunction

1. When to Request a TRO or Preliminary Injunction

There may be times when an enforcement official finds a violation in progress and cannot locate the person responsible or cannot persuade the person conducting the illegal activity to stop voluntarily until the project has been reviewed and approved by the proper official(s) or until the project has been brought into compliance with the law. If the activity will cause "irreparable harm" which cannot be undone by the kind of corrective action that a court could order after a full hearing on the substance of a Rule 80K complaint, then the local official should consider requesting a type of injunctive relief called a "Temporary Restraining Order" (TRO) or a Preliminary Injunction as part of the land use Citation and Complaint filed with the court. The enforcement official should realize, however, that this type of relief is granted sparingly by the courts and only in extreme cases. Requests for injunctions are governed by Rule 65 of the Civil Rules of Procedure.[8] Sample materials to use in conjunction with a TRO are found in the Appendix at A-9.

2. Differences Between TRO, Preliminary Injunction, and Permanent Injunction

Both a TRO and an injunction order a person to act or cease acting in a particular manner. Both require a showing of "irreparable harm." The difference between them is the speed with which the court will act, the amount of evidence necessary to obtain them, and their duration. A TRO is by its very nature of brief duration. The court acts quickly on a motion for a TRO because the nature of the acts complained about is such that irreparable harm will result immediately if the court does not intercede. Because a TRO only lasts for a short time, the court does not normally require the same evidentiary showing required to obtain a preliminary or permanent injunction, both of which require more evidence. While a TRO can be granted based only on evidence contained in an affidavit

[8] The requirements for injunctive relief are set forth in Ingraham v. University of Maine, 441 A.2d 691 (Me. 1982). Before granting an injunction, the court must find that four criteria are met:

1) that plaintiff will suffer irreparable injury if the injunction is not granted;
2) that such injury outweighs any harm which granting the injunctive relief would inflict on the defendant;
3) that plaintiff has exhibited a likelihood of success on the merits (at most, a probability; at least, a substantial possibility);
4) that the public interest will not be adversely affected by granting the injunction.

attached to the motion or complaint, an injunction requires a full evidentiary hearing with the testimony of witnesses. It should be emphasized that in the case of both a TRO and a preliminary injunction, the court will be reluctant to order the requested relief without convincing evidence as to the type of irreparable harm which will occur.

3. Notice Requirement

A TRO may be issued in true emergencies without the violator being present before the judge. Rule 80K provides that, where an enforcement official believes: (1) that someone is committing a violation of a law which he or she has authority to enforce; and (2) that immediate irreparable harm will result from the violation before the violator or his attorney can attend a hearing to oppose a TRO, the enforcement official may file the original Citation and Complaint directly with the court clerk without first personally serving a copy on the violator or the landowner. The enforcement official may ask the court clerk at the same time if a judge is available to hear a request for a TRO. As a practical matter, however, the enforcement official first must have made a good faith effort to notify the other side that he or she will be requesting a TRO and the time, date, and court where the request will be made.

Courts are reluctant to issue TRO's without the presence of the other side. For that reason the enforcement official should make an effort to notify the violator before making the request for a TRO. At a minimum, he or she should try to reach the violator by telephone before going to the courthouse and should continue to try to reach him right up to the time of the hearing. If the violator does not attend, the court will proceed to hear the request and issue a TRO if appropriate. If the violator appears, the court will hear both sides before deciding whether to issue the TRO. If a TRO is issued, the court will normally set another hearing date in the near future to decide whether a preliminary injunction should be issued.

Rule 80K states that at the earliest possible opportunity following a TRO hearing, the enforcement official must serve: (1) the Citation and Complaint including the Affidavit in support of the TRO on the violator and landowner, if that was not done prior to the hearing; and (2) notice of the hearing scheduled on the preliminary injunction.

4. Examples of "Irreparable Harm"

Examples of the types of violations which would cause "irreparable harm" and which would justify a TRO or preliminary injunction are (1) the clearcutting of a forested area in the shoreland zone, (2) the existence of a badly malfunctioning septic system where raw sewage was accumulating

on the ground in a thickly-settled residential neighborhood, or (3) the filling of a stream with solid fill material in a shoreland zone.

While a court also might be willing to grant a request for a TRO to prevent the construction of a dwelling without a permit before a full hearing could be held, the enforcement official may have a more difficult time convincing the court that irreparable harm will result without a TRO since the harm may not seem as serious or immediate as in the other examples. In a case where an expensive building is being built illegally, it might be wise to seek a TRO or preliminary injunction even if it is denied as a way to convince the court to order the removal of the building later if the town or city ultimately wins its case.

5. Affidavit

The Citation and Complaint form is used where a TRO or preliminary injunction is being requested. In addition to the information in the sample form for a regular Citation and Complaint, the enforcement official should check the appropriate boxes for a TRO and/or a preliminary injunction under "Relief Sought from Court" and complete an "Affidavit". A sample Affidavit is included in the Appendix at A-9.

Included in the Affidavit should be a certification containing information regarding the enforcement official's attempts to give notice to the violator that a TRO is being requested. It should also indicate what efforts were made to give notice to the violator as well as specific reasons why notice should not be required. The "Affidavit" is a sworn statement by the enforcement official outlining facts which will support a finding by the judge that "irreparable harm" exists. It must state specific facts which show the "irreparable" damage that has or will result and must also show that it is more probable than not that the municipality will ultimately win a permanent injunction when a full trial on the merits is held. The information contained in the Affidavit may be based on the enforcement official's personal knowledge or on reliable information provided by another person. If based on another's information, the affidavit should say that it is based on "information and belief, and should indicate why the source of information is reliable. The affidavit must be sworn to before a notary public or an attorney. If statements are made on "information and belief" the person making the affidavit must swear that he or she believes those statements to be true.

6. Motion for TRO after Complaint Filed

If the enforcement official serves and files the complaint and then finds that a TRO is needed, a TRO can be requested by filing a separate "Motion" with the clerk accompanied by an Affidavit in

the same form described above. An example of such a "Motion" appears in the Appendix at A-9.

7. Bond Requirement

Rule 80K provides that if a TRO or preliminary injunction is granted, the town or city is not required to give security as a condition of the court's approval of the motion.

8. Overturning a TRO

Rule 65 provides that the person against whom a TRO is ordered without notice may make a motion to have the TRO modified or dissolved after giving at least two days' notice to the municipality or on shorter notice if approved by the court.

9. Who Must Comply With TRO or Injunction

According to Rule 65, a TRO, a preliminary injunction, and a permanent injunction are each binding only against people named as parties in the complaint, their officers, agents, servants, employees, and attorneys, and upon people "in active concert or participation" with them who have actual notice of the order by personal service or otherwise.

B. Administrative Inspection Warrants - RULE 80E

Several statutory provisions allow municipal code enforcement officers, plumbing inspectors and certain State officers the right to enter and inspect property. Those statutes seem to distinguish between outdoor inspections and inspections within a building; outdoor inspections are limited to "reasonable hours," while indoor inspections require the consent of the "owner, occupant or agent" before the inspection can occur. Unfortunately, the statutes are written somewhat ambiguously, so it is not crystal clear whether the consent is required only for indoor inspections. If you are an employee or agent of the Department of Environmental Protection or of the Land Use Planning Commission, you need to follow the advice of the Attorney General's Office, and the AG's office has consistently interpreted the statute to mean that no consent is needed for outdoor inspections (except in some unusual circumstances where there are Fourth Amendment issues, which will be discussed briefly below). If you are a municipal code enforcement official or local plumbing inspector, you should check with your municipal legal counsel if you are concerned that a property owner may object to an outdoor inspection.

You also need to be aware that the protections of the Fourth Amendment of the United States Constitution against unreasonable searches and seizures apply to inspections by administrative officers. Therefore, even though one of the statutes mentioned above might prevent you from being charged with trespassing, you could find yourself in a situation where the evidence you gather during

an inspection is "suppressed" by the court because the property owner argues successfully that you had no right to be where you were and see what you saw. This is just like suppression of police evidence in a criminal case if the court decides that police acted improperly.

Whether or not a search is unreasonable has a lot to do with the property owner's "expectation of privacy" in the particular circumstances and whether the violation you observe is in "plain view." When three apparently junked cars are lined up in an open field which you can see from a public road and there are no "no trespassing" signs or other indications that you should stay out of the field, you are probably okay to take a walk over and see whether the cars are wearing current license plates. But if you have to walk by the "keep out" signs, dodge the barbed wire and jump over a six foot tall stockade fence to find the source of that strange odor the neighbors have been complaining about, then you can safely anticipate a Fourth Amendment challenge to the evidence you discover in that place which the owner clearly expected to remain private. And when you are greeted by the growling German Shepherd, the barrel of a shotgun and the words "get the _____ off my land," that is not the time to pull out the statute books. You need the help of the court!

That help is available through what is called an "administrative inspection warrant" (the equivalent of a police officer's search warrant). And you can get it yourself without the aid of a lawyer. The process is set out in another District Court rule, Maine Rule of Civil Procedure 80E. Rule 80E allows officials and employees of the state or any municipality who are authorized to conduct inspections to apply to a District Court judge for a warrant. The request must be made in the division and district where the property to be inspected is located. If you are not sure about which court you should be using, do not hesitate to call the court which you think is the right one. The clerks know (or can easily find out) what towns they cover. And be forewarned that you will have to pay the same filing fee as if you were filing a complaint.

You should provide the court with a draft warrant, and it needs to be very detailed. The court will issue a warrant only to inspect a particularly described property for particularly described purposes. Be specific. It is not sufficient to say that you are going to search John Smith's several properties located in the Town of Smithville to see if there are violations of the Smithville Zoning Ordinance. You need to say something like: you are going to search property owned by John Smith located at 11 Smith Road in the Town of Smithville, identified on the Smithville assessor's records as Map _____, Lot _____, and described in a deed recorded in the Registry of Deeds in Book _____, Page _____, for the purpose of determining whether there are three or more unregistered

and unserviceable motor vehicles on the property constituting an unlawful junkyard.

The request for an administrative inspection warrant must be in the form of a sworn affidavit, and Rule 80E has very specific requirements for the contents of the application. One of the most important requirements is that the application/affidavit must state the grounds for "probable cause" to believe that there is a violation on the property. Because Rule 80E authorizes a search of private property, judges will typically require a strong showing of probable cause, based on specific facts stated in the affidavit on the basis of the enforcement officer's own knowledge. If the you believe that there is a violation because someone else has observed it, it is advisable to get an affidavit from that observer and submit it to the court. Otherwise, your second-hand statements will be "hearsay," and the judge may be reluctant to issue the warrant. For example, if you believe there is an unlawful junkyard on the Smith property because you drove by one day when the gate was open and you observed what appeared to be dozens of unregistered cars, you have personal knowledge of that and can put it in your own affidavit to establish probable cause for the inspection warrant. But if you have not seen anything yourself and are relying on the complaints of neighbors who have seen the wrecks being towed in day after day, then get affidavits from those neighbors to support your request for a warrant.

The application must also state that the enforcement officer has first requested permission to inspect the property and has been turned down, and that the enforcement officer has given at least twenty-four hours advance notice to the property owner of the time and place of the hearing on the application for the warrant. Only if there is an immediate threat to the health or safety of the public can the twenty-four hour notice be waived. If a warrant is issued, the inspection must take place within ten days; and no later than ten days after that, the person doing the inspection must file a "return" with the court setting forth the date and time of the inspection and listing any violations found.

An administrative inspection warrant is really a pre-Rule 80K device - - a tool which an enforcement officer will sometimes need to use in order to gather sufficient information to determine that there is a basis for bringing a Rule 80K complaint. A sample application under Rule 80E is enclosed in the Appendix at A-18.

There is also a final word of warning about Rule 80E. Especially in some parts of the state, it is not used very frequently. Consequently, you may run up against District Court personnel and even District Court judges who look at you as if you have appeared from another planet when you make

your request for an administrative inspection warrant. Do not be discouraged. Bear in mind that judges and court personnel have to deal with so many different aspects of the law that they often need help from the litigants in an unfamiliar area. Contrary to the popular myth, judges do not know it all, and practicing lawyers actually spend a lot of their time educating judges about the law in particular cases. As a practicing Rule 80K "prosecutor," you will often have to do the same, and Rule 80E is one of those areas where you may often find yourself being a teacher as well as an applicant to the court. If you are well prepared and approach the judge respectfully, most judges will welcome your guidance and work with you to achieve an appropriate result. That does not mean you will always get what you want, but you will usually get a fair chance to ask for it.

CHAPTER SEVEN
AMENDING THE CITATION AND COMPLAINT

A. General Discussion

It sometimes happens that after the Code Enforcement Officer has filed a citation and complaint, new information becomes available, or some mistake in filling out the complaint is discovered, or something new happens which is relevant to the case. In any of those situations, it may be advisable to amend the complaint.

Rule 80K states that once the original Citation and Complaint have been filed with the court it may be amended only with the permission of the court. The rule further states that "motions for appropriate amendment of the Land Use Citation and Complaint shall be freely granted." The procedure for requesting permission is to file a "Motion" with the court clerk in a form similar to the one appearing in the Appendix at A-17.

Before filing the motion and serving copies on the appropriate people, the enforcement official should contact the court clerk to find out about the procedure for scheduling a hearing on a motion requesting amendments to a citation and complaint. After a hearing date has been established, the enforcement official should serve copies of the motion and a notice regarding the hearing date on the violator named in the complaint, and the landowner, and any other person who will be affected by the proposed amendments. Service of the motion and hearing notice on the appropriate people may be by regular mail or in person. It is a good idea to schedule the motion at least 21 days after its filing date. That is because, under Rule 7 of the Maine Rules of Civil Procedure, an opposing party has 21 days to respond to the motion. In addition, Rule 7 requires the person filing the motion to include a notice to the opposing party of that 21 day requirement. If that notice is included in the motion and the opposing party does not respond within 21 days, then the objection to the motion is deemed waived.

A "Return of Service" should be included at the end of the motion and hearing notice, filled out, and filed with the clerk along with the original motion and notice. The enforcement official should keep photocopies of these for his or her file. The procedures outlined in this chapter regarding filing and service of motions and hearing notices also should be followed in connection with other motions described in this manual, except as noted.

B. Entering An Appearance

If a certified enforcement official takes over as prosecutor of a case which was being handled by an attorney or another enforcement official, the new enforcement official must file an "Entry of Appearance" in a form similar to the one which appears in the Appendix at A-15 and send copies by regular mail or deliver them in person to the violator, the landowner, and anyone else who will be affected.

CHAPTER EIGHT
REMOVAL TO SUPERIOR COURT

One of the shortcomings of Rule 80K is that it only works as long as the defendant allows it to. That is because the defendant has an automatic right to "remove" a Rule 80K case filed by an enforcement official to the Superior Court. And if the defendant does so, the city, town or state has no choice but to utilize a lawyer to prosecute the case because enforcement officials cannot prosecute cases in Superior Court. (To make matters worse, the defendant does not necessarily need to engage a lawyer if the defendant is an individual rather than a corporation).

As discussed in the case law section of these materials, in City of Biddeford v. Rory Holland, 2005 ME 121, 886 A.2d 1281 the Law Court held that the Defendant has a right to a jury trial in the Superior Court in a Rule 80K matter provided that the "Notice of Removal" is filed in the District Court before trial on or before the first appearance in court. There is an unanswered question whether, if the Town or DEP requests injunctive relief there is still a right to a jury trial because a jury cannot award injunctive relief. See DEP v. Emerson, 616 A.2d 1268 (Me. 1992).

Having your Rule 80K case pulled out from under you by a notice of removal is likely to be discouraging, especially if you have spent substantial effort preparing the case for hearing in the District Court. But you should take some comfort in knowing that the preparatory work you did will likely have laid a good foundation for the attorney who takes up the case. You will still be able to testify if the matter goes to hearing. And, by forcing the city, town or state to engage an attorney, the party who removed the case exposes himself or herself to the possibility of having to pay attorney fees under 30-A M.R.S. §4452.

CHAPTER NINE
OUTCOME OF A RULE 80K COMPLAINT

1. Findings and Conclusions

What happens when you do your job--when the enforcement official proves the existence of the land use violation "by a preponderance of the evidence"? The result is that the court will decide the case in favor of the town, city or state. But the court will have wide latitude as to exactly what remedy to award.

The court's decision will always be in writing, but it will not necessarily be in the form of detailed "findings of fact and conclusions of law." If you receive a decision from the court that does not contain findings and conclusions, and the decision is that you have won your case, then you need do nothing more.

However, if you lose, and you receive a decision which does not explain how the judge reached the decision--what facts the judge found, what evidence the judge considered, how the judge interpreted the law he or she applied--then you should ask for more by way of explanation from the court. Having written findings and conclusions will help you decide whether you have a basis for an appeal to the Superior Court. And, if do take an appeal, they are essential.

The way to get a decision with written findings and conclusions is to file a motion with the District Court within five (5) days after the original decision of the case. The procedure is outlined in Rule 52 of the Maine Rules of Civil Procedure. If the case in the District Court was not electronically recorded, it is discretionary with the judge whether or not to grant the motion for findings and conclusions (see Appendix at A-19). If the case was electronically recorded, the judge must issue findings and conclusions if a motion is made so requesting. Because of that distinction Rule 52 draws between cases which are electronically recorded and those which are not, it is a good idea always to request electronic recordings of the original Rule 80K hearing any time the case is sufficiently important or sufficiently complex that you think your municipality or agency may wish to appeal in the event of an adverse decision. (The same concept applies to defendants, who can also request electronic recordings and findings and conclusions; but it is relevant to them only if they lose and wish to appeal.) Remember, having findings and conclusions is critical if the losing party wishes to appeal. That is because, in the absence of written findings and conclusions, the appeals court will assume that the District Court judge founds the facts correctly and found all the facts necessary to support the decision.

2. Summary Judgment

You will recall that Rule 80K is itself a "summary" process: it moves cases along faster with fewer of the formalities which normally attach to a lawsuit. But it still requires a hearing--in essence, a trial--to bring a case to a conclusion. There is, however, the possibility to complete a Rule 80K case without a trial, by using the procedure available in Rule 56 of the Maine Rules of Civil Procedure called "summary judgment." A copy of the text of Rule 56 is included in the Appendix at A-24. Reduced to its basics, summary judgment means that there is no real dispute as to any important facts and the court can therefore decide the case "as a matter of law." Summary judgment will be granted if a party shows by affidavits, which are not contradicted by affidavits provided by the opposing party, that there is "no genuine issue of material fact" and no trial is required.

Summary judgment is considered an extraordinary remedy, and courts are cautious about granting it. That is especially likely to be the case in a Rule 80K action prosecuted by a local Code Enforcement Officer. Still, it may be applicable in some limited circumstances.

One example of where summary judgment might be appropriate is where the enforcement officer: (1) cites the violator for an alleged offense and specifically notes the deadline for filing an administrative appeal to the local board of appeals and the consequences failing to heed the order to take an appeal in a timely manner; and (2) the violator fails to file an appeal with the board of appeals. If the violator fails to appeal, he or she is deemed to have waived his right to contest the violation. See Town of Freeport v. Greenlaw, 602 A.2d 1156 (Me. 1992). Because the requirements regarding summary judgment are strict, it is recommended that an attorney be consulted before considering this option.

3. Levying Fines

Municipalities and state agencies do not have the power to “impose” penalties on their own; they must ask the court to impose the penalties which are provided by statute or ordinance. A municipality or state agency may negotiate the amount of a fine through a consent agreement or a consent order presented to the court, but that requires the agreement of the violator. Absent such an agreement, it takes a court order to impose a penalty on the violator. As was noted earlier, 30-A M.R.S. §4452 establishes a range of fines for violations of land use ordinances, as follows:

- The minimum penalty for starting construction or undertaking a land use activity without a required permit shall be $100, and the maximum penalty shall be $2,500.

- The minimum penalty for a specific violation shall be $100, and the maximum penalty shall be $2,500.

- The maximum penalty may exceed $2,500, but shall not exceed $25,000, when it can be shown that there has been a previous conviction of the same party within the past 2 years of the same law or ordinance.

The law also provides that the court should consider a variety of factors in setting a penalty, including:

(1) Prior violations by the same party;

(2) The degree of environmental damage that cannot be abated or corrected;

(3) The extent to which the violation continued following a municipal order to stop;

(4) The extent to which the municipality contributed to the violation by providing the violator with incorrect information or by failing to take timely action; and

(5) The economic benefit resulting from the violation. The maximum civil penalty may be increased to an amount not to exceed twice the value of the economic benefit.

In deciding what amount to request as a fine, the enforcement official should take into account the expense of correcting the violation if the judge also orders corrective action. You and the court can also take into account the attitude and behavior of the defendant.

Proving prior violations by an individual will probably be limited to proving violations occurring within the town or city filing the current action rather than proving other violations in other Maine communities. The town or city should have records indicating such violations or prior convictions. If the violation involves the Subsurface Wastewater Disposal Rules, the Department of Human Services, Division of Health Engineering also may have some useful information.

While the trial judge generally has a great deal of latitude in applying the penalty provisions of §4452, there is one circumstance in which the judge has no discretion. That is where the particular statute which has been violated (not 30-A M.R.S. §4452) indicates that the penalties must be imposed on a per day basis and that the minimum penalty specified is mandatory. See

Town of Orono v. LaPointe, 1997 ME 185, 698 A.2d 1059 where operation of a junkyard without the license required under state statute for a total of 730 days resulted in a mandatory fine of $73,000.00. The District Court had suspended all but $3,000.00 of that amount, but both the Superior Court and the Law Court decided that the minimum penalty per day was mandatory and could not be reduced.

4. Correction of the Violation

30-A M.R.S. §4452 also authorizes the court to order a violator to correct or minimize the violation. If the court finds that the violation was willful or if a shoreland zoning ordinance was violated, the court must order such corrective action unless it would:

(1) Result in a threat or hazard to public health or safety;

(2) Result in substantial environmental damage; or

(3) Result in a substantial injustice.

5. Effect of Court Decision on Landowner

If the person who actually conducted the illegal activity was not the landowner and the landowner has not been formally named as a defendant in the Land Use Citation and Complaint, then any decision issued by the court would not legally prevent the landowner from conducting the same activity. A separate Complaint would have to be filed to prosecute the landowner. That is why it is always advisable to name the landowner as a defendant in the Rule 80K action.

It is also a good policy to record the Court Order and Judgment or Consent Order in the Registry of Deeds. That way, if the property is transferred, a future owner will have notice of the violation and what is required to correct it.

6. Costs and Attorneys' Fees

30-A M.R.S. §4452 provides that if the town or city wins the case, then the court "must" award to the town or city its attorneys' fees (if any), its expert witness fees (if any), and other costs associated with the case (such as serving the citation, filing fees, mileage, photocopying, etc.), unless the court finds that such an award would be unfair to the losing party because of special circumstances. See Town of Ogunquit v. McGarva, 570 A.2d 320 (Me. 1990) and Baker v. Town of Woolwich, 517 A.2d 64 (Me. 1986) (cases involving a sizeable award of attorney's fees.) If the defendant (violator or landowner) is the winning party, then the court may award reasonable attorneys' fees, expert witness fees and costs to the defendant. See Town of Freeport v. Ocean Farms of Maine, Inc., 633 A.2d 396 (Me. 1993). This attorneys' fee provision applies whether

the case is initially prosecuted under Rule 80K or in Superior Court, if the prosecution is by an attorney. It also applies if a case is removed to Superior Court and prosecuted by an attorney. Arguably, any time spent by an attorney in helping the enforcement official prepare to prosecute the violation could be recovered as well, but the law is not as clear on this point. Also not clear is whether the Code Official's time qualifies as reimbursable "costs"; that may be up to the judge's discretion.

It is important for the enforcement official or anyone else involved in the town or city's case to keep good records of the money and hours spent in preparing and presenting the case. Although the court probably will not award costs to the town or city sufficient to cover all of the time spent by the enforcement official and others, or all of his or her mileage, photocopying and similar expenses, it is appropriate to mention these costs to the court.

A municipality should never count on being able to receive an award of attorney fees and costs at the end of a case. That is, a municipality should bring a Rule 80K action only if it is willing to pay the fare and treat any award of attorney fees as bonus miles. Remember the way the statute is worded: if the municipality prevails, the court "must" award attorney fees "unless" the court finds that such an award would be "unjust." Accordingly, the Maine Supreme Court has viewed the decision of whether or not to award attorney fees as discretionary with the trial judge, meaning that the judge has wide latitude to decide whether or not to award attorney fees and how much. See, for example, City of Ellsworth v. Doody, 629 A.2d 1221 (Me. 1993) (where the city prevailed on one of its five claims, the Superior Court properly determined that it would be unjust to award the City its attorney fees on that one claim).

The decision to award or not to award attorney fees and in what amount can be appealed by any party to the Rule 80K action, including the prevailing party. But, overturning that decision on appeal is highly unlikely, because the appeals court will interfere only if it determines that there has been an abuse of the discretion vested in the trial court. See, City of Ellsworth v. Doody, supra.

It is also possible that a municipality will succeed in an 80K action in getting an award of fines and attorneys' fees, but the violator won't pay. The municipality may have to undertake further court proceedings to collect the penalty. See section on "Collecting a Judgment" below. In that case, the municipality would also be entitled to recover its attorneys' fees spent to collect the penalties. City of Ellsworth v. McAlpine, 590 A.2d 545 (Me. 1991). Even that assumes the

violator has some assets which can be reached to satisfy the judgment. In short, don't count your attorney fees until the money is actually deposited in the municipal treasury.

The final important point about attorney fees is that you should always ask for them expressly in the Rule 80K citation and complaint. Otherwise, there are some procedural rules about filing a petition for attorney fees after judgment has been entered in the case, and such a petition must be filed within 90 days. If, however, you have asked for attorney fees in the original complaint, then the 90 day limit does not apply. See, Town of Orrington v. Pease, 660 A.2d 919 (Me. 1995).

7. Contempt of Court

If the violator fails or refuses to comply with the court's decision after having decided not to appeal the decision, the violator will be "in contempt." The enforcement official should file a motion with the court requesting a contempt order which would both penalize the violator for lack of compliance with the original decision as well as ordering compliance with the original decision.

The contempt proceeding can be handled in the District Court. Civil contempt is an "equitable civil procedural device" which does not entitle the violator to a jury trial or to removal to the Superior Court. "It is a coercive tool, available to parties who seek to enforce a previously obtained judgment." City of Rockland v. Winchenbaugh, 667 A.2d 602 (Me. 1995).

CHAPTER TEN
APPEALS

Rule 80K states that "a party entitled to appeal may do so as in other civil actions." Appeals from a decision by a District Court judge are governed by Rule 2 of the Maine Rules of Appellate Procedure. Under that rule, appeals may be filed by "an aggrieved party" may file an appeal to the Maine Supreme Judicial Court also known as the "Law Court." "Aggrieved" does not necessarily mean that you have lost the case; it could mean that you got less relief than you asked for, or smaller fines or were denied an award of attorney fees and costs. Those are all appealable issues. Generally, Appeals must be filed with the District Court Clerk within 21 days from the date on which the District Court judge's decision is made and officially recorded in the court docket book. BE CAREFUL! The 21 days begins on the day the clerk enters the judgment on the docket, not the date you find out about it. If the court mails out the decision and it gets lost in the mail and your 21 days goes by, you lose your right to appeal. So, don't be shy about calling the court clerk once a week or so after your hearing to ask if a decision has been rendered. An appeal must be based either on a misinterpretation or misapplication of the law by the judge (an "error of law") or on a clearly erroneous finding of fact. In practice, it is very hard to overturn a factual finding on appeal.

Because an appeal in a Rule 80K action goes from the District Court to the Law Court, an appeal means that the municipality or state will have to use an attorney. Remember, code officials are authorized to practice only in the District Court. If you are considering an appeal from an unsuccessful Rule 80K prosecution, you need to be sure that your municipality or the state will fund the cost of the appeal. If you were successful in the 80K prosecution and the other side files a notice of appeal, you need to contact your municipal attorney (or the Attorney General's Office for state agencies) immediately so that no deadlines are missed in the Law Court.

CHAPTER ELEVEN
COLLECTING A JUDGMENT

An overlooked area in the 80K process is the procedure for collecting the monetary fines and attorneys' fees associated with a favorable judgment.

Following the expiration of the appeal period, the enforcement officer may request a "Writ of Execution" from the court. The Writ of Execution states that a judgment was granted and specifies the amount of monetary fines and attorneys' fees. The Writ may then be recorded in the Registry of Deeds and serves as an "Execution Lien" against the property. It is recommended that an attorney be used in the process as the lien may not be effective if the proper procedures including notice to the defendant are not followed.

It is also possible to have a "disclosure hearing" following the judgment to determine the defendant's ability to pay the judgment. Again, an attorney should be consulted if this option is undertaken.

CHAPTER TWELVE
SOME SPECIFICS FOR STATE ENFORCEMENT OFFICIALS

A. Department of Environmental Protection

Certified employees of the DEP, when authorized by the Commissioner of the Department of Environmental Protection, may represent the Department in District Court. 38 M.R.S. §342(7). The process for enforcement activities by the DEP is spelled out in considerable detail in statute, at 38 M.R.S. §347-A. The procedures differ in several significant respects from those typically utilized by municipal code enforcement officers.

First, the statute specifically provides several alternatives to court enforcement. A violation of the statutes administered by the DEP may be handled through an administrative consent agreement, signed by the violator and approved by the Board of Environmental Protection and the Attorney General. 38 M.R.S. §347-A(1)(A)(1). The Attorney General may undertake criminal prosecution of certain violations where the statutes allow a criminal penalty to be imposed. 38 M.R.S. §347-A(1)(A)(2); a criminal prosecution is something which DEP staff cannot undertake. The Commissioner may hold an enforcement hearing on the alleged violation. 38 M.R.S. §347-A(1)(A)(3). And, finally, authorized DEP employees may initiate a civil action under Rule 80K, but they cannot act entirely on their own. The statute requires prior approval of the Attorney General. 38 M.R.S. §347-A(1)(A)(4).

When DEP enforcement officials do prosecute a case, there is an additional step once the complaint is filed in the District Court. 38 M.R.S. §347-A(4)(E) provides that: "The District Court shall refer the parties to mediation if either party requests mediation at or before the time the alleged violator appears to answer the department's complaint." Upon such request by either the DEP or the alleged violator, the parties are required to meet at least once with a mediator appointed by the Court Alternative Dispute Resolution Service (CADRES) at least once "and try in good faith to reach an agreement." If no agreement is reached at the first meeting, the mediation ceases at the request of either party.

Since the mediation option has been in the statute, the DEP has made a request for mediation in a handful of cases and the mediation has resulted in settlement in fewer than half of those where it has occurred. Nevertheless, the DEP views mediation as a worthwhile tool. The mediation session can serve as an opportunity for both sides to learn more about the other's position and, even if no settlement results, the issues can be narrowed and focused before the trial

of the 80K action. Interestingly, the DEP reports that it has not had an alleged violator request mediation. One plausible explanation for that phenomenon is that the request for mediation must be made before or at the initial appearance to answer the complaint, and alleged violators may simply be unaware of the availability of mediation or the need to make the request in such a short period of time.

Keep in mind that the fines and penalties for violations of DEP statutes are set forth in 38 M.R.S. §349. In other parts of this manual, there are discussions about the general land use enforcement statute, 30-A M.R.S. §4452, but that statute governs only enforcement activities by municipalities. The DEP looks to its own statutes for penalties and remedies.

B. Land Use Planning Commission (formerly Land Use Regulation Commission)

LUPC (formerly LURC) employees are authorized to prosecute cases in the District Court by 12 M.R.S. §685-C(9). As with DEP employees, they must be specifically authorized by the agency and they must be certified under 30-A M.R.S. §4453.

Penalties and remedies in LUPC enforcement actions are determined by the LUPC statute, not by 30-A M.R.S. §4452. Unlike the DEP statute, which provides considerable detail about fines and penalties, the LUPC statute is extremely open-ended. The basic rule is: "[a]ny person who violates any provision of this chapter, or the terms or conditions of any standards, rules, permits or orders adopted or issued pursuant to this chapter, is subject to a civil penalty, payable to the State, of not more than $10,000.00 for each day of the violation." 12 M.R.S. §685-C(8). Talk about giving the trial judge a <u>wide</u> range of discretion! The statute also provides that "the court may order restoration of any area affected by any action or inaction found to be in violation of any of the provisions of this chapter or of any order, standard, rule or permit of the commission, or of any decree of the court, to the condition of such area prior to the violation. When such restoration is not practicable, the court may order other actions to be taken by the person charged with the violation which are in mitigation of the damage caused by the violation." Again, the court is given wide latitude in fashioning remedies.

CHAPTER THIRTEEN
TRIAL TIPS AND TECHNIQUES

A. Preparing for Court

1. Initial Hearing

In some District Courts the first hearing which is scheduled for a Rule 80K complaint is treated as an "arraignment". This means that the violator appears only to admit or deny the allegations. If the violator denies the allegations, then another date is set for a hearing on the complaint. In other cases, the court expects both sides to be ready to argue the full case at the first hearing. The enforcement official should check with the clerk before preparing for court to determine which procedure they will face. Be prepared for multiple "hard luck" stories from the alleged violator and a request for a continuance (postponement).

Also be prepared for the possibility that the judge may fashion a procedure somewhat different from the specific process set out in Rule 80K. For example, a judge might tell the parties to return for a "preliminary hearing" to deal with a particular aspect of the case; that might be accompanied by a strong suggestion that the parties try to resolve that aspect of the case before the preliminary hearing. In other words, the next step after the initial answer to the complaint is not necessarily the full Rule 80K trial on the merits. The trial judge has a great deal of discretion in terms of when the trial is scheduled and what preliminary matters are taken up in advance.

2. Burden of Proof

Under Rule 80K the town or agency has the burden of convincing the court that the person named as the defendant in the complaint has violated the particular law or laws cited in the complaint. This means that the town or city has the "burden of proof". The court will not presume that just because a person is being prosecuted that he or she has violated a law.

Rule 80K states that a court may only find a person liable of a land use law violation "by a preponderance of the evidence." This is the "standard of proof" that guides the court in analyzing the evidence presented by the town or city and by the violator. The court must find that the evidence presented by the town or city outweighs the evidence presented by the violator, either because the town or city presented a greater amount of credible evidence or because what was presented was more convincing than what the violator presented. It must find that it is "more likely than not" that the person accused actually committed the violation which has been alleged.

Stated another way, the enforcement official must prove that it is "more probable than not" that each element of the offense exists as a fact. The "elements of the offense" means "a series of factual conclusions stated in the law being enforced, the combination of which support the legal conclusion that the law has been violated."

It is essential that the proper person(s) be named as the defendant in the complaint. It also is essential that the proper laws be cited in the complaint as a basis for the violation and prosecution. A court will not find a violation of a law if it was not properly cited in the complaint since the person would not have had proper notice of the charges against him or her and, therefore, would not have had an opportunity to prepare a defense.

Finally, it is essential that the town or city's case be supported by admissible evidence, such as, testimony of eye witnesses, personal observations by the enforcement official and photographs and physical measurements taken by the enforcement official or someone acting at his request who can testify. A case built only on second-hand, unsubstantiated information, information about the violator's reputation in the community or circumstantial evidence will not be considered.

3. Organizing the Case

Since the court's only knowledge of the violations being prosecuted is the limited information contained in the Land Use Citation and Complaint, it will be important to the success of the case to clearly identify the elements of the offense and lay the facts out in a systematic and logical way which will be easy for the judge to follow. One way to prepare is to make an outline of the sequence to follow during the presentation, listing each fact which must be proved and how to prove it. A sample outline is a follows:

4. Typical Outline of Presentation

- Summarize the violations cited in the Citation and Complaint;
- Summarize the laws cited in the Complaint and introduce attested copies of each into evidence;
- Explain how the violation came to the enforcement official's attention and what preliminary steps were taken, for example: received phone call, checked files to determine whether permits issued, went to property, found violator completing work, told him he needed permits, told him to talk to landowner, followed this with a letter to violator and to landowner describing violation and setting deadline for making necessary applications, nothing done by either one, introduce attested copies of notice of violation (see Appendix A-5) sent to each violator and attested copy of deed to owner;

- Present Evidence to Prove Violations:

    (1) Introduce attested copy of zoning map and town tax map to show where the land is in relation to the zone;

    (2) Introduce photographs showing the violation or sketch plan of site showing their location and supporting testimony;

    (3) Introduce measurements showing how far the violation is located from relevant dimensional requirements;

    (4) Introduce testimony of witness to prove when the building was constructed in relation to the adoption date of the ordinance;

    (5) Introduce information regarding the piece of equipment used to measure the distances;

    (6) Testify that no permits were ever issued by the town for these activities according to the records maintained by the enforcement official.

- Explain what corrective action and fines are authorized under 30-A M.R.S. §4452. Remember that each day may be assessed as a separate violation.

In addition to a basic outline, maintaining a "80K Checklist" similar to the one in the Appendix at A-22 may also be helpful.

As an organizational technique, it might be useful is to put information pertaining to a particular witness or a particular piece of physical evidence in separate file folders marked with tabs in numerical order. A list also should be prepared showing the contents of each numbered folder. This system should enable the enforcement official to locate material quickly both during preparation of the case and during the court hearing.

Many experienced trial attorneys carry a small notebook (known as a "Trial Notebook") with them at all times in which they can make notes about a particular case as ideas occur to them, which often happens when an attorney least expects it. This is a habit which the local enforcement official should develop.

The enforcement official generally must carefully plan how he or she will present the case before the day of the trial. If witnesses will be used, the enforcement official should determine the order in which they will testify to avoid delays in court.

The point at which exhibits will be introduced during the hearing also must be decided in advance. If possible the enforcement official should meet with the representative for the other side prior to the day of the trial: (1) to exchange lists identifying exhibits to be used; (2) to provide copies of any exhibits which are documents; (3) to agree on a numbering sequence for exhibits; and (4) to agree on ("stipulate") which exhibits can be introduced without objection (and therefore without the need to use witnesses to introduce those exhibits into evidence). Many attorneys representing violators will not agree to any of the exhibits in order to put the enforcement official "through his or her paces" and require that each exhibit be formally introduced into evidence. Once the enforcement official has shown a few attorneys that he or she has mastered this part of the process, the word probably will spread and there will be more of a willingness to stipulate to exhibits. Also, if the code enforcement official has attempted to reach agreement on exhibits and opposing counsel has declined to participate, telling that to the judge in advance of the trial will at least explain to the judge why the code official is going through the somewhat tedious process of introducing exhibits one-by-one; the judge might even order opposing counsel to sit down and attempt to work out stipulations.

A final suggestion regarding general organization is that the enforcement official may find it useful to count backward from the hearing date and note on a calendar some deadlines by which certain tasks must be accomplished in order to be ready for court - - for example, lining up witnesses and exhibits, meeting with other side, reviewing the ordinance being violated, and so forth.

The important thing is to determine what points need to be made in court and what evidence needs to be presented to support a particular point. Then be certain that all the physical evidence (photos, documents, etc.) has been collected and all of the necessary arrangements have been made for witnesses to testify. Finally, review the outline and all of the evidence, including the law being violated, as many times as is necessary to feel comfortable with it and knowledgeable about it. Also, make sure that all witnesses who will be called to testify are fully prepared and that you are comfortable and familiar with their anticipated testimony.

5. Observing Court Proceedings

In addition to becoming familiar with the evidence, another effective way to prepare is to observe court cases being presented by other people, preferably a matter being presented under Rule 80K. Seeing where the courtroom is located, how it is arranged, and how the judge and others involved conduct themselves can make the experience less intimidating when an enforcement official has to present his or her own case. It may be helpful to observe a number of different judges. The

court clerk will know when Rule 80K cases have been scheduled. Contacting the DEP or some towns or cities which have significant code enforcement activity is another way of learning about cases which have been scheduled for a hearing.

6. When to Subpoena a Witness to Testify/Use of Depositions

Generally, a witness must give his or her testimony orally in open court. If a witness will not agree to appear in court voluntarily or if there is any doubt about whether a witness will appear, procedures are available to subpoena a witness and force that person to attend. Contact your municipal or agency attorney if you feel a subpoena will be necessary. It is standard practice with some attorneys to subpoena all witnesses except municipal employees or paid expert witnesses, just as a precautionary measure. In some circumstances when the witness is unavailable, a "deposition," (sworn written statement) may be introduced into evidence as a substitute for oral testimony in court. Refer to Rule 32(a) of the Maine Rules of Civil Procedure for more details of when a deposition may be used at trial. Both sides may agree to allow the use of a deposition or other sworn statement for other reasons. If the use of a deposition becomes necessary, an attorney should be asked to assist the enforcement official.

7. Obtaining Evidence by Both Parties/"Discovery" Procedures

Essentially any information about a violation or a Rule 80K case which the enforcement official has in his or her custody is public information under the Maine "Freedom of Access" Law, 1 M.R.S. §401 et seq. Consequently, if the violator, landowner, an attorney representing either one, or even a member of the general public wants to obtain copies of any written, taped, or filmed material which the enforcement official may have, there is no reason to refuse that person the right to: (1) inspect and copy that material; or (2) to pay the town or city the cost of making copies for him or her. However, if the information being requested is not in written or recorded form and the enforcement official cannot or will not divulge it, and if the information being requested is not confidential under State law, then the violator or landowner may file a motion for discovery for "good cause" (see discussion below). Assume that the public will be able to inspect your files at any time. Have them ready and in order.

Information under the control of the landowner and the violator is not governed by the Freedom of Access Law. If there is some information which the enforcement official needs in order to prepare his or her case and the violator or landowner or some other person connected with the case will not provide it voluntarily, the enforcement official has several options. If it is

information which is public and is in the custody of some other governmental agency within the State, then it could be requested from that agency under the Freedom of Access Law.

If it is information which cannot be obtained by any of these methods, then the enforcement official may file a motion with the court requesting permission to conduct "discovery." Rule 80K states that such a motion may be granted only upon a showing of "good cause" by the person filing the motion, assuming that the parties do not agree to discovery voluntarily. "Good cause" basically means that the court must find that the requested information is essential to the case and cannot be obtained any other way.

An example of a Motion for Discovery appears in the Appendix at A-16. If discovery becomes necessary, the enforcement official should contact the town or city attorney about preparing the motion. If the motion is granted, the enforcement official should work with an attorney in the preparation of some of the particular discovery tools provided for in Maine Rules of Civil Procedure Rules 26 through 37.

8. Negotiation and Settlement

You should not lose sight of the fact that even though a Rule 80K complaint has been filed, the real goal is to obtain compliance, and if that can be done without a full court hearing, everyone is usually better off. The goal should not be to "chalk up another win" or to "teach that so and so a lesson." You should remain willing to consider reasonable offers to settle the case and may want to propose such offers yourself right up until the parties enter the courtroom. To that end, it is a good idea to get settlement authority from the municipal officers of your town or city or the appropriate person in your state agency right at the start of the case. Keep in mind that if you are still trying to reach an agreement by the time a hearing is ready to begin, judges will usually be willing to grant a continuance to allow the parties more time to try to reach a settlement.

Any settlement reached between the time the complaint is filed and the time of hearing should be presented to the judge with a request that the judge enter the terms of the settlement into the record as part of the court's order in the case. The word "order" is critical. A settlement between the parties is basically a private contract. If either side breaks the contract, someone has to bring a lawsuit to enforce it. But when a settlement is incorporated into an order of the court, then it is much more than a contract. Failing to live up to the terms of a court's order is a violation of law and puts the violator in contempt of court. Once you have gone to the trouble of filing a Rule 80K complaint, any agreement you reach should become the basis of a court order (see Appendix

at A-8) and nothing less. Judges will almost always be willing to incorporate your agreement into an order, often called a "Consent Order."

Examples of the kinds of terms typically contained in Consent Orders are an agreement to remove an illegal structure within a stated period of time, an agreement to pay a fine, an agreement to reseed a clear-cut area, an agreement to discontinue an illegal use of property within a stated time period, and an agreement to submit an application for a permit after-the-fact. Consent Orders allow real flexibility. For example, the enforcement official could negotiate a large fine and agree to waive the fine if certain corrective action is taken within a specified period of time. A sample "Consent Order" appears in the Appendix at A-20.

In negotiating settlements involving illegal structures or activities, you should balance the amount of the penalty with the seriousness of the offense. The enforcement officer should obviously not be seen as condoning illegal activity, but resolving the violation with corrective action is usually more important than penalties. The penalty should be large enough to serve as a deterrent, but need not be punitive.

The flexibility you will have to settle a case will depend on what violations were cited in the original complaint. To this end, it is often useful to cite the violator for every legitimate violation and then, if necessary, "bargain away" some of the lesser violations in the return for getting the violator to agree to the desired corrective action for the more serious violations. Remember, the violator usually needs to be offered something in return for an agreement with the enforcement official. This fact is particularly important when the violator has engaged an attorney, as the attorney must be able to show the client that he or she has done something positive on the client's behalf.

If the person actually performing the work which causes the violation is not the landowner, then a separate Consent Order should be negotiated with the landowner pertaining to any necessary corrective action involving land or buildings, or the landowner should be made a party to a three-way agreement which becomes incorporated into an order. This is because a person who does not own the property may not have legal authority to make changes to the property.

In trying to negotiate a favorable settlement, you may find it helpful to emphasize the potential costs which the court could award against the violator if the municipality wins its case. 30-A M.R.S. §4452 authorizes fines of up to $2,500 per day for first time offenders plus an award of attorneys' fees. The DEP statutes have similar provisions. Faced with these costs plus the potential for an order of remedial work (e.g., removing a building, reseeding a forest), many violators agree to settle rather

than risk going to trial.

30-A M.R.S. §4452 provides a number of factors which a judge must consider in deciding how much of a fine to award and what kind of corrective action to order. If the court finds that a violation was willful, the statute requires the court to order corrective action unless it would: (1) result in a threat or hazard to public health or safety, (2) result in substantial environmental damage, or (3) result in a substantial injustice.

In setting a fine, the statute requires the court to consider: (1) prior violations by the same person; (2) the degree of environmental damage that cannot be abated or corrected, (3) the extent to which the violation continued following the CEO's order to stop; and (4) the extent to which the municipality contributed to the violation by providing the violator with incorrect information or by failing to take timely action.

In weighing the strengths of the town's or city's case against a violator and in deciding what to include in a Consent Order, keep these statutory factors in mind. If it is highly unlikely that a judge will order a large fine or total elimination of a violation because of one or more of the factors listed in the statute, then you may have to settle for less in a Consent Order.

9. Dismissal of Complaint

Sometimes merely serving the citation and complaint on the landowner will result in a quick correction of the violation. Other times it will result in discussions with the landowner which lead the enforcement official to decide that things on the property are not as bad as you thought and there really is not a basis to go ahead with the Rule 80K action. In either of those circumstances, you may voluntarily dismiss your Rule 80K complaint under Rule 41(a) of the Maine Rules of Civil Procedure. Up until the time the alleged violator has appeared to answer the citation and complaint, you can dismiss the case unilaterally by filing a simple notice of dismissal (see Appendix A-21). After the alleged violator has answered, you will need to have both parties sign a "stipulation of dismissal," indicating that both sides agree that the case is over.

Unless you say something different in either the notice or the stipulation, such a voluntary dismissal is "without prejudice." That means that none of the issues in the case have been decided and it would be possible to file another complaint for the same violations if it becomes necessary to do so. Remember, though, that re-filing a complaint involves starting over again with service of process and filing the complaint in court. Also, a second dismissal of the same claim does bar bringing a third or subsequent complaint. Therefore, if you think the case may go forward but merely want

some kind of "cooling off" period, it makes more sense to ask for a "continuance," which is discussed below.

Even after (or, in fact during) hearing, the enforcement officer may decide to dismiss the case. It is possible, for example, that some facts will be revealed at the hearing which make you decide that the case really should not be prosecuted further. Once a hearing is commenced, however, only the judge can order dismissal.

Also keep in mind that the Rule 80K complaint cannot be filed and then left to sit in the court's files forever. If nothing happens on the court's docket (other than a motion for a continuance) for a period of two years from the date the complaint is filed, the court may dismiss the case on its own or on a motion filed by the defendant. Generally the case will be dismissed unless the code officer can show "good cause" for the two years of inactivity. And if a case is dismissed for lack of prosecution over two years, the dismissal is usually "with prejudice." That means, in simple English, "you lose." The issues in the case are considered decided in favor of the defendant and cannot be raised again in a later prosecution.

10. Continuance

If you need to have the case continued to another day because of some unexpected conflict or problem, you must file a motion for continuance with the court in accordance with Rule 40 of the Maine Rules of Civil Procedure. The reason for the requested continuance should be some serious commitment which demands that you be unavailable for the court hearing--just wanting to put it off is not likely to persuade the judge. The motion must be made at least four days before the hearing date, but the earlier the better. You want to have the opportunity to get a decision on the motion (which is likely to require a hearing in itself) early enough before the date scheduled for trial so that you can figure out what your backup plan is if the court denies the requested continuance.

Rule 40 requires that you give notice to all parties, by mail if possible, but otherwise by telephone or other oral communication. The best practice of all is to contact the defendant or the defendant's attorney and inquire if the defendant will agree voluntarily to the continuance. If so, notify the court clerk by telephone that the parties have agreed to cancel the hearing. In addition, it

is a good idea to file a formal motion for continuance, indicating in the motion that both sides have agreed. The judge will then ordinarily sign the motion without any kind of a hearing.

Rule 40(c) imposes some specific and fairly complicated requirements for a motion to continue the hearing based on the unavailability of a witness. If the reason you are considering a continuance is that one of your witnesses cannot attend, you should evaluate just how important that witness is to your case before requesting a continuance. If you or another witness can provide the same information (based on first-hand observations and not on hearsay), then you may wish to avoid the process of asking for a continuance. If you really think the witness is important, you can read Rule 40(c) carefully and supply the court with the affidavit required by that rule. Or, you can always request a continuance without the Rule 40(c) affidavit, since the decision on whether or not to grant a continuance is left to the judge's discretion, and judges may well demand less of enforcement officials bringing 80K actions than they would of lawyers seeking continuances of trials.

11. Statute of Limitations/Laches

A statute of limitations is the law's way of saying that a claim is too "stale" to prosecute. But the statute of limitations never runs out on a municipality's ability to enjoin or abate a zoning violation. That is because a building, use or activity which violates the ordinance is a continuing violation until terminated. It is like a "nuisance" at common law, where a new violation arises each day the illegal activity continues. 30-A M.R.S. §4302 expressly provides that "[a]ny property or use existing in violation of a municipal land use ordinance or regulation is a nuisance." (The ability to collect penalties for each day a violation exists is, on the other hand, subject to Maine's general six year statute of limitations; a municipality may be able to enjoin an old zoning violation, but it cannot go back more than six years to collect daily penalties.)

In some circumstances the age of a zoning violation may prevent a municipality from achieving complete abatement - - removal of a building for example. There is an equitable doctrine which goes by the name "laches," which is something like a statute of limitations - - only flexible. Laches is defined as the failure or omission to assert a right for an unreasonable and unexplained period of time under circumstances which are prejudicial to the adverse party. In simple English, it would be unfair to take enforcement action when a lot of time has gone by for no good reason.

It is still not clear whether laches applies at all in zoning cases. In 1990, in Town of Falmouth v. Long, 578 A.2d 1168 (Me. 1990), Maine's Law Court said "Maine has not, as yet, adopted laches as an affirmative defense to prevent a governmental authority from enforcing its zoning regulations."

The court then went on to discuss whether, if it applied, laches would have prevented the Town of Falmouth from enforcing against Long, and stated that it would not, even though the unlawful use had continued for fifteen years before the town commenced enforcement activity. More recently, in H.E. Sargent v. Town of Wells, 676 A.2d 920 (Me. 1996), the Law Court repeated its statement that it has never adopted laches as an affirmative defense to prevent a town from enforcing its zoning regulations, then went on to note that 18 years was not too long in the circumstances of that case. In short, if a municipality discovers a serious zoning violation which merits enforcement action, the fact that the violation has existed for a number of years does not mean that no relief is possible.

12. Estoppel

Another doctrine which may be asserted as a defense to a zoning enforcement action is the theory of "equitable estoppel." If a municipal official (like a Code Enforcement Officer) has given erroneous information, the property owner has relied on that information to undertake some activity and it was reasonable to rely on that information, then it is possible that the municipality might be "estopped" from taking enforcement action. As with all equitable doctrines, the fundamental concept is fairness.

However, equitable estoppel is seldom a good defense to an enforcement action. The property owner is presumed to know what the zoning ordinance says. So if the zoning ordinance says that a building permit is required, but the building inspector has erroneously advised the property owner not to bother with the permit, there is no estoppel. The property owner has no defense in those circumstances for two reasons: (1) reliance on the obviously incorrect statement of the building inspector is not reasonable; Town of Freeport v. Brickyard Cove Associates, 594 A.2d 556 (Me. 1991); (2) the Building Inspector had no authority to make that statement and the unauthorized act of a municipal official cannot estop the municipality. Shackford & Gooch, Inc. v. Town of Kennebunk, 486 A.2d 102 (Me. 1984).

The only reported zoning case where a municipality has been estopped is City of Auburn v. Desgrosseilliers, 578 A.2d 712 (Me. 1990). There the property owners were advised by the City to seek a zoning change in order to conduct their use, the City Council changed the ordinance accordingly, and then the City contended that the use was not permitted by the changed zoning. The court felt that it was not unreasonable for the property owners to have relied on the actions of

the City Council - - the legislative body which (unlike the building inspector in Shackford & Gooch) was authorized to write the zoning laws.

That is a fairly unusual set of facts, and in more ordinary circumstances, equitable estoppel is not often a successful defense for zoning violators. Indeed, in two recent cases the Law Court has again rejected estoppel claims by property owners. In H.E. Sargent, Inc. v. Town of Wells, 676 A.2d 920 (Me. 1996), the Code Enforcement Officer had written a letter stating that the property owner's gravel pit was "grandfathered." But, when it turned out that the letter was based on inaccurate information supplied by the property owner (even though it did not appear the inaccuracy was an intentional lie), the court held that the CEO's letter had no effect. In Town of Union v. Strong, 681 A.2d 14 (Me. 1996), Mr. Strong received a letter from the Planning Board (which was acting as the code enforcement officer for shoreland zoning) stating that he could continue to construct a deck on his home. About a year later a newly appointed Code Enforcement Officer formally ordered Strong to cease construction. Strong went ahead with the construction, claiming he could rely on the Planning Board's letter. He ended up paying a $7,500.00 civil penalty and attorney fees of $5,714.00 to the Town.

13. Selective Enforcement

In the popular mind, "selective enforcement" is a great defense to a prosecution for violation of some ordinance or statute. In legal doctrine, it is virtually no defense at all. Throughout the country, almost every court which as ever considered the question has concluded that it is not a defense to a prosecution of a zoning violation that the municipality has failed to enforce the ordinance against other persons violating it. Selective enforcement would succeed as a defense only if the violator could show that there was some conscious, deliberate effort to single out that person, for reasons unrelated to the legitimate goals of enforcing the zoning ordinance. Simple laxity in past enforcement practices, or even a rational exercise of prosecutorial discretion, is not enough to defeat a zoning prosecution if the facts show that the person being prosecuted committed the violations. Of course, a municipality should always strive to be even-handed and consistent in its enforcement of the zoning ordinance, but the courts will consider one violation at a time and typically will not admit evidence that other people are violating the ordinance as well. See, e.g., City of Rockland v. Winchenbaugh, 583 A.2d 702 (Me. 1990) (trial court properly excluded as irrelevant evidence of alleged violations by other property owners in the vicinity).

B. Evidence

1. Types of Evidence

There are a number of different types of evidence which an enforcement official may have available in proving a violation. The most obvious is the use of witnesses to testify on the witness stand under oath. This includes testimony by the enforcement official in presenting the case. Another type is called "demonstrative" evidence. This includes the use of photos, diagrams or maps to illustrate the testimony of a witness. A third type is "documentary" evidence, meaning something written, such as a copy of the ordinance which is being violated. A fourth type is "real" evidence, which means a tangible object such as a bottle of polluted water or contaminated soil.

2. Consideration by the Judge

Before any evidence may be considered by a judge in deciding a case, the enforcement official must formally offer it into evidence by calling a witness to testify or by introducing it as an "exhibit." This is true even for the ordinance which the enforcement official attached to the complaint when the case was filed with the court clerk. Before the judge can consider the ordinance, it must be formally introduced as an exhibit. Any exhibits should be numbered in numerical sequence and offered into evidence during the time that the appropriate witness is on the stand. Adhesive stamps leaving a space for the exhibit numbers are available at the Courthouse.

3. Rules of Evidence Generally

There is nothing in either Rule 80K or in the statutory provisions creating the new land use law enforcement system which states that cases filed under Rule 80K are exempt from the Maine Rules of Evidence. Consequently, the enforcement official must develop an understanding of at least the basic rules. Some of the rules of evidence, particularly those relating to "hearsay" ("second-hand") evidence, are fairly complex.

For the purposes of most land use law violation cases, it is probably safe to say that many of the complex rules of evidence will not come into play. This is because generally the prosecution of a land use violation will be based on the personal observations of the enforcement official or eye witnesses to the illegal activity, photographs, physical measurements, expert testimony, or similar types of first-hand reliable evidence. If a case will not be built upon this kind of evidence, then it is advisable either for the town or city attorney to handle the case in court or for the enforcement official to work closely with the town or city attorney in preparing the case.

In order to be admissible, there are three basic requirements which all evidence must meet:

1) the evidence must be relevant;

2) the evidence must have an adequate foundation; and

3) the evidence must not be subject to any of the exclusionary rules

4. Relevance

Rule 401 of the Maine Rules of Evidence defines "relevant" evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In other words, the evidence must have some clear bearing on some fact in the case which the enforcement official is trying to prove. Irrelevant evidence will be excluded by the judge. Even relevant evidence may be excluded by the judge if it is repetitious, unfair, or confusing. Because the court's time is under heavy demands, it is important to present only relevant evidence.

5. Foundation/Reliability

The "foundation" is the underlying basis for a piece of evidence which must exist before it is admissible. To prove that evidence is based on an adequate foundation, the enforcement official must be able to show the source of the evidence and that both the source and the evidence itself are reliable. Generally, this will involve the use of testimony by someone who actually saw or heard something pertaining to the fact which the enforcement official is trying to prove or the use of diagrams, photos, or other documents which the enforcement official can show are accurate and reliable through the testimony of a witness.

To lay a proper foundation for the testimony of a witness, the enforcement official must ask the witness a series of preliminary questions designed to show that the witness had an opportunity to observe or otherwise personally experience through one of the five senses the facts about which he or she will testify.

When a photograph or other demonstrative evidence is used, a witness must be called to lay a foundation as to the accuracy of the picture to prove that it has not been altered. The witness would testify that he or she is familiar from personal observation with the place shown in the photo and that it is an accurate and correct depiction.

The foundation needed for documentary evidence is something to prove that it is a genuine document, that it has not been altered, and that it comes from where it says it did. This can be done

through the testimony of the custodian or, in some cases, through a statement on the document by the custodian attesting its accuracy.

If real evidence is used, it is necessary to show a "chain of custody" as the foundation for its admissibility. This will involve testimony by all those who had physical possession from the time the evidence was generated (such as the taking of a water sample) until the time it is offered into evidence to show that it was not altered in any way.

6. Exclusionary Rules

There are a number of rules of evidence which prevent certain kinds of information from being admitted into evidence for any purpose, while some prevent certain information from being admitted only for certain purposes. These exclusionary rules are designed to screen out evidence which is not credible or trustworthy.

7. Witnesses Generally

Rule 601 of the Maine Rules of Evidence requires witnesses to be "competent." This means that the witness must be able to understand what he or she is testifying about and must be able to explain it to the court while under oath on the witness stand.

Rule 602 of the Maine Rules of Evidence states that a witness also must testify from personal knowledge. The rule requires that proof of personal knowledge be introduced into evidence, which can include the witness' own testimony. Generally this rule is designed to prevent one person from simply repeating what he or she has heard from another source.

Generally a witness must testify from memory on the stand. If a person takes the stand and because of nervousness or lapse of time has trouble remembering something about which he or she was going to testify, Rule 612 of the Maine Rules of Evidence allows the witness to look at notes which he or she made in order to refresh his or her memory before testifying while on the stand. However, the rule also allows the defendant to look at those notes, cross examine the witness about them, and have them introduced into evidence. The defendant's purpose in doing so would be to show that the witness really didn't have an independent memory of the facts about which he or she was testifying.

Rule 803 of the Maine Rules of Evidence also allows a witness to read notes into the court record in limited situations. If the witness made notes about an incident or fact when it occurred and was fresh in his or her mind and the notes are shown to be accurate, the witness may read those

notes as his or her testimony rather than testifying from memory, but only if the witness' recollection is insufficient to allow him or her to testify fully and accurately without the notes.

8. Hearsay

Probably the best known of the exclusionary rules is the one governing "hearsay." Rule 801 of the Maine Rules of Evidence defines "hearsay" evidence as a verbal or written statement made or an act performed out-of-court which is offered into evidence in court to prove the truth of the statement or act. The value of an out-of-court statement or act as evidence in court usually depends on the credibility of the person who made the statement or did the act out-of-court. Consequently, the hearsay rule sometimes requires that evidence of such statements or acts be excluded from what is presented to the court unless the person who said it or did it actually comes to the hearing to testify in court before the judge.

(1) For example, if X is called as a witness to testify that W told him that he saw Z dump a load of sand into the lake, X's statement is inadmissible hearsay (i.e., excluded from the evidence upon which the judge will decide the case) if offered to prove that Z dumped the sand rather than merely to prove that W spoke to X. W should have been called as a witness instead of X.

(2) Another example of inadmissible hearsay would be testimony by the enforcement official regarding his telephone conversation with an expert on coastal wetland vegetation who helped him identify the boundary of a coastal wetland. To introduce that information into evidence, the expert would have to appear in court as a witness.

(3) An example of testimony regarding a statement made out-of-court which would be admissible as an exception to the hearsay rule is testimony by a witness (including the enforcement official) regarding what he or she heard the violator say where the testimony is offered against the violator. (Note: Such testimony may be useful in proving a willful violation.)

(4) Another example is where the enforcement official needs to introduce evidence that records maintained by some other municipal official do not indicate that a necessary permit was issued. The official who is the custodian of those records may prepare a certificate in a form which complies with Rule 803 and Rule 902 of the Maine Rules of Evidence stating that a search of those records showed that a permit was not issued. The certificate could be introduced into evidence as a substitute for that official's in-court testimony. The purpose of the hearsay rule is to encourage the use of witnesses testifying from personal knowledge about what they saw first-hand who can be cross-examined and observed while under oath in court.

9. Written Documents

Rule 901 of the Maine Rules of Evidence requires that documentary evidence must be authentic in order to be admissible. Proof must be offered that the document is what it appears to be before it can be considered by the court in deciding the case. Sometimes this proof must take the form of testimony by the custodian of a record or the person who took a photo or prepared a diagram. Some documents are "self-authenticating" as defined in Rule 902 of the Maine Rules of Evidence and do not require additional proof such as the testimony of a witness in order to be admissible. Rule 902 of the Maine Rules of Evidence lists the types of documents which are self-authenticating.

Generally, Rule 1002 of the Maine Rules of Evidence requires that the original of a written document, recording, or photograph be offered into evidence if it is being offered to prove the contents. This is known as the "best evidence" rule. Rules 1004 and 1005 of the Maine Rules of Evidence provide exceptions to this requirement. Rule 1005 is particularly important where public records are concerned because it authorizes the use of a copy certified in accordance with Rule 902 by the custodian.

An example of a self-authenticating document meeting the "best evidence rule" which will be used in almost every land use case prosecuted by a local official is an attested copy of an ordinance or regulation. In the case of an ordinance, the municipal seal (if any) and statement signed by the town or city clerk attesting it as a true copy serves as a substitute for having the clerk testify as to the accuracy of the copy in court. If there is no seal, then the ordinance should be accompanied by the clerk's notarized statement.

Another example of a "self-authenticating" document is a newspaper, magazine, or similar publication, where the complete original copy is offered as evidence. (A photocopy of all or a part of such a publication usually will not meet this requirement.) A third example is a copy of a deed attested by the Registrar of Deeds. Such documents must be formally offered into evidence and marked as "Plaintiff's Exhibit", even though their authenticity is not questioned. It should be emphasized, however, that just because a document is self-authenticating, that does not necessarily mean that it will be admissible into evidence. In many cases it may be challenged on the grounds that it is "hearsay" and can only be admitted if the person who wrote or prepared it is called as a witness. In offering an attested or certified copy of a document into evidence, the enforcement official should point out that it is attested and bears the appropriate seal or stamp.

If a document is not self-authenticating, such as a soils analysis prepared by a soil scientist, a

subdivision plan prepared by an architect or engineer, or a ground water analysis prepared by a hydrogeologist, the person who prepared the document must be called as a witness to identify the document as his or her work, explain when and why it was prepared, and then answer questions about the contents.

10. Expert Witnesses

Expert witnesses may be called where necessary to prove a case. Normally, this will only be necessary where an issue is so complex that the court will need expert assistance to understand it. The witness should outline the facts in the case on which his or her expert opinion is based. Examples of when expert testimony might be important are to identify soil types or vegetation, to establish whether water is contaminated by a particular chemical, to explain how certain engineering techniques could eliminate a malfunction of a septic system, or to testify regarding a boundary survey. The primary value of an expert witness is that he or she, unlike other witnesses, can reach conclusions based on the facts and testify about those conclusions. The expert is not limited to testimony about what he or she saw or touched or smelled.

11. Diagrams

It is sometimes helpful for the enforcement official to prepare and use a diagram of the site involved in a violation in making a courtroom presentation. Generally a diagram will make it easier for the judge to visualize what the enforcement official or a witness is trying to describe. The diagram should be as accurate as possible and should be drawn to scale. In requesting permission from the judge to use a diagram, the enforcement official should make it clear that the diagram is for illustration purposes only and is not being offered as evidence.

12. Photographs

Using color photographs of the violation is an effective way to show the court what has occurred, particularly if the violation creates a serious danger to the public health or serious damage to the environment, such as an open sewer or a clear-cut. Self-developing Polaroid-type pictures probably are the most reliable since there is less chance for someone to tamper with them. Whoever took the photo should number it and make a note on a separate sheet regarding the location, time and date it was taken. If the enforcement official did not take the picture and cannot attest to its accuracy, then the person who took it should be called as a witness. The purpose of this testimony is to "lay a foundation" for its admissibility.

13. Offers to Settle

Generally, if the violator makes an offer to settle the case out of court but later withdraws that offer, the enforcement official cannot introduce into evidence any statements made in connection with such an offer or the offer itself, according to Rule 410 at the Maine Rules of Evidence.

14. Evidence of Habit, Character, or Past Conduct

Rule 406 of the Maine Rules of Evidence allows evidence to be admitted which tends to prove that a person's conduct on a particular occasion was in conformity with his or her normal habit or routine. However, "habit" evidence is only relevant and admissible to prove conduct in a business setting.

Evidence of a witness' character or past wrongful conduct is not admissible to prove the conduct in the present case of which he or she is accused. According to Rule 608, it is admissible only to show the witness' motive or intent. It also is admissible on cross-examination to impeach the witness.

15. Telephone Conversations/Tape Recording

Rule 901 of the Maine Rules of Evidence provides several ways in which information about a telephone conversation can be authenticated for the purposes of admissibility. If it was an outgoing call, the person who made the call must be able to testify that: (1) he or she called a number assigned to a particular person and the person who answered identified himself or herself as the person being called; or (2) if a business call, that he or she called a number assigned to the business and the subject matter of the conversation was related to business which is reasonably conducted by that business over the phone. Such conversations might be admissible as evidence under Rules 801 and 804 where the person at the other end makes a statement against his or her own interests.

If the telephone call was incoming, it may be authenticated in one of several ways by showing that: (1) by the nature of what the caller said, it had to be who the caller said it was; (2) the caller left a message and the receiver returned it (see discussion above regarding outgoing calls); or (3) the person receiving the call recognized the caller's voice and is not merely relying on the caller's self-identification.

Another way to authenticate a call involves the "reply doctrine." This involves a showing that the subject of the call was a letter sent to a particular individual.

If the enforcement official wants to tape record a telephone conversation, federal law requires that a beep be used every 15 seconds unless the receiver of the call gives his or her consent to be

taped. A conversation which is face to face may be taped by one of the parties to the conversation without the knowledge or consent of the other. However, from a public relations standpoint, the enforcement official should generally obtain consent before using a tape recorder.

16. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove that he or she acted negligently or wrongfully, according to Rule 411 of the Maine Rules of Evidence.

17. Marking "Exhibits"

Before the day of the hearing, the enforcement official should decide the order in which he or she plans to introduce documents, photos, or similar types of physical evidence at the hearing and write the words "Plaintiff's Exhibit No. ____" somewhere on it. The exhibits should be numbered or lettered in sequence. Photocopies of documents or photographs being used as exhibits should be given to the other side and marked with the same number or letter. The other side also should be given an opportunity to look at the exhibit in court before it is formally given to the judge as evidence. Examples of how the process of offering exhibits into evidence should be handled is discussed under the section entitled "Testimony of Enforcement Official." This can be handled another way if the judge and the other side are agreeable. The enforcement official can show the defendant all the exhibits at once, hand them all to the judge (or if the hearing is being recorded, to the clerk), and then take the stand to begin testifying. At the appropriate point during the testimony, the enforcement official must identify the exhibits, lay the necessary foundation, and then offer it into evidence. The advantage to this approach is that it will save time, since the enforcement official will not have to keep leaving the stand to show the exhibit to the other side. Whichever method is used, the enforcement official must remember that any exhibit which will be mentioned in the testimony of any witness must be offered into evidence before the witness can begin testifying about it, unless it has already been accepted as evidence earlier in the hearing.

If the document being offered into evidence is a report or diagram prepared by an expert, such as a soil evaluation or engineering study, the basic form of questioning which the enforcement official should use to "lay a foundation" for the admission of the document into evidence is as follows:

Q: Would you please identify yourself and your occupation for the court?

A: Terry Ferma. I am a registered site evaluator and hold State license number 25873 from the Department of Human Services.

Q: Could you explain what the State license signifies in terms of your

qualifications and the kind of things it allows you to do?

A: (gives explanation)

Q: Mr. Ferma, I have in my hand a document which I have previously marked Plaintiff's Exhibit #4 for identification. Do you recognize it?

A: Yes, it is the site evaluation and subsurface sewage disposal system design which I prepared for Meg A. Bucks.

Q: Your Honor, I now offer Plaintiff's Exhibit #4 into evidence.

18. Stipulations

Sometimes the process of introducing evidence can be streamlined if each side can agree in advance ("stipulate") to the admissibility of some or all of the exhibits which will be offered into evidence. Sometimes parties stipulate to certain facts which are not in dispute to avoid the need to introduce evidence to prove those facts. The purpose of stipulations is to save time and to avoid the need for witnesses or other evidence. If such an agreement is reached, then a written statement to that effect should be prepared listing the exhibits to which the parties have stipulated. This list and the exhibits should be given to the judge at the beginning of the hearing by the enforcement official. The enforcement official should state that he or she would like to offer into evidence Plaintiff's exhibits prior to beginning his or her presentation because both parties had stipulated to the admissibility of those exhibits. The other side will do the same before beginning their presentation. It is also possible to agree to a stipulation on some fact or piece of evidence during the hearing. However, this is riskier because there is little time to carefully consider the legal ramifications.

19. Facts Which Will Need to be Proved

Facts which typically will need to be proved in a land use case and the type of evidence which can be used include:

1) Content of ordinance or regulation being violated - need attested copy of the ordinance or regulation.

2) Content of state statute being violated - need photocopy of current version of the law (unattested); or court may simply take "judicial notice".

3) Failure to obtain permit - need testimony by enforcement official as custodian of those records.

4) Failure to comply with terms of permit - need attested copy of the permit.

5) Land ownership - need attested copy of deed from Registry of Deeds, boundary survey and testimony of surveyor in disputed cases.

6) Location of land in relation to area regulated by ordinance - need attested copy of zoning map; attested copy of tax map, U.S. Geological Survey topographical map.

7) Distance of structure from normal high water mark - bring device used to take the measurement.

8) Location of coastal wetland boundary - need expert testimony, photograph.

9) Status as a nonconforming use - need testimony of someone familiar with the use; attested copy of deed; photographs showing the use at the time of the enactment of the ordinance and testimony by person who can verify their accuracy.

10) Content of notices sent prior to filing complaint - need attested copies of letters sent by CEO or LPI marked with town seal (if any).

20. Method of Gathering Evidence Challenged

It is possible that the violator or landowner may try to challenge the admissibility of evidence gathered at the site of the violation by the enforcement official on the grounds that the enforcement official entered the property without permission and therefore was conducting a search in violation of the Fourth Amendment to the U.S. Constitution. In most cases, this will not be an issue. It is wise for an enforcement official to review the permit and permit application to determine whether an inspection of the property is allowed. However, if someone does challenge the admissibility of evidence on that basis, the enforcement official should be prepared to respond and to convince the judge to allow its use.

The rules governing the issue of whether an enforcement inspection of private property has violated the Fourth Amendment to the Constitution generally require that an enforcement official have express permission to conduct an inspection or search if the search is performed in a building or in an area immediately surrounding and associated with a building ("the curtilage"). The permission can be granted verbally or in writing by the landowner or a person having a legal right to grant access to the property, or it may be granted by a court in the form of an administrative inspection warrant. If an administrative warrant was issued, then the enforcement official should offer the warrant and the return filed with the court as evidence. (See earlier discussion of Rule 80E)

If the search will be conducted outside the area considered to be "the curtilage", the courts are more likely to find that a search is constitutional even if conducted without express permission. This

is because the courts have found that a landowner's "expectation of privacy" is much less where the land being searched is undeveloped fields or woodlands ("open fields"). If challenged, the enforcement official can point to 30-A M.R.S. §4452 (1)(A) as additional support for the right to enter land outside the curtilage without permission. However, a good rule of thumb even in these cases is to try to get express permission at least from the landowner or other person with legal authority (such as a tenant or occupant) before conducting an inspection.

There may be times when an enforcement official enters property to look for the landowner to talk about a possible violation reported by a neighbor and in approaching the house or office building to ask permission to inspect the property, the enforcement official gets a clear view of the violation from the walkway, driveway, or road. In a case such as this, a court probably would allow evidence of what the enforcement official saw to be admitted into evidence because he or she entered the property for the purpose of obtaining permission to inspect and because the information was not obtained in the course of a "search" or "inspection". Again, it would be better not to use this evidence if it is possible to get permission from the landowner or other person with legal authority to conduct a closer inspection.

21. Request for Relief

The rules of evidence do not apply during the final argument and request for relief phase of the hearing, i.e., when the judge has asked the parties to indicate the appropriate fine and/or corrective action after having found the defendant liable. See Rule 1101 of Maine Rules of Evidence.

22. Protecting the Record for Appeal

If a judge rules that certain documentary evidence offered by the enforcement official is not admissible, the enforcement official should be sure that the judge takes the document and makes it part of the record. This is necessary because if the town or city loses and wants to appeal, it is the only way that the appeals court can consider that piece of evidence.

When a judge rules that all or part of a witness' testimony is inadmissible, the enforcement officer should make "an offer of proof." For example, if the judge rules that there is an insufficient foundation for a witness' testimony, the enforcement officer should say "Your Honor, I'd like to make an offer of proof. If this witness were allowed to continue, this is what he would have said."

In order to preserve certain rights of appeal, the enforcement officer should state, on the record, his or her objection to any adverse evidentiary or procedural ruling.

C. Appearing in Court

1. Conduct and Dress Generally

Even though a Rule 80K hearing is more informal than other kinds of court proceedings, it obviously is still a serious matter. Whenever the enforcement official is asking a question or responding to one (except when on the witness stand), the enforcement official should stand. The enforcement official should also stand when the judge enters or leaves the court. The enforcement official should dress neatly and more formally than may normally be required on the job. A sport coat and tie for men and a dress or a skirt and jacket for a woman is acceptable.

The judge should be referred to as "Your Honor" and the other parties to the Rule 80K proceeding, their attorneys, and any witnesses as "Mr./Miss/Mrs./Ms." The enforcement official and any witnesses for the town or city should be courteous and respectful throughout the proceedings, making every effort to avoid unprofessional outbursts even if the other side behaves disrespectfully or unprofessionally. Poor behavior could prejudice the judge against the town or city's case.

2. Attitudes to Develop

There are a number of attitudes which an enforcement official should try to develop in preparing to prosecute a case. One is to learn to keep the presentation of the case as simple and as straightforward as possible. Another is to remain professional and objective about each case. A third is to be fair in making a presentation and in questioning opposing witnesses, avoiding sarcasm. Displaying a vindictive or sarcastic attitude will only displease the judge and work against the enforcement official in the case being presented as well as in future cases.

3. Attitudes to Avoid

The following suggestions are designed to help an enforcement official build a good reputation with the court, the court personnel and defense attorneys. A good reputation will be

reflected in good results whereas a bad reputation will hinder an enforcement official at every step and ultimately have a negative impact on his or her cases.

It is best to avoid trying to win a case by being overly dramatic or presenting a witness or piece of evidence that the enforcement official had purposely not divulged previously. If the enforcement official has good evidence and witnesses, it is best to let the other side know this in order to convince them to settle out of court.

The "take no prisoners" attitude also will not be well received by anyone. The enforcement official should not insist on going through a court hearing just for the personal satisfaction of having a judge agree with him or her if the other side is willing to enter a reasonable settlement at the courthouse steps or during the middle of the hearing. The enforcement official will have an opportunity to demonstrate the defendant's obnoxiousness before the court if the town wins the case and is asked to recommend a penalty.

The District Court judges handle many kinds of criminal cases, including assaults and burglary. They also arraign alleged rapists and murderers. They will probably not view most alleged land use law violators as being in the same league with career criminals. If the enforcement official becomes self-righteous and attempts to portray the violator as tantamount to a murderer or rapist, he will only establish himself as a zealot and little else.

4. Violator's Response to Complaint

Rule 80K states that the violator does not need to file a written answer in response to the complaint. Consequently, the first time that the enforcement official hears the violator's complete story may be on the day of the hearing when the violator or an attorney representing the violator makes a presentation.

5. The Court Hearing

On the day of the hearing the enforcement official should arrive early in order to find the courtroom and where he or she must sit. The enforcement official will present the town or city's case first, followed by the violator's presentation. After the judge enters the room and is seated, he or she will invite everyone else to sit. Then the judge will ask if the enforcement officer wants to make an opening statement. If a statement is made, it should be brief - - just highlighting the law being violated and the general nature of the case. The defendant usually will waive an opening statement. Objections to evidence generally will be made by the Defendant rather than the enforcement official. If the Defendant objects, the enforcement official should stop talking. The judge will ask why the

Defendant has objected and then ask the enforcement official to respond. Then the judge either will overrule or sustain the objection. If sustained, the enforcement official will not be able to continue what he or she was going to say. If the reason for the judge's ruling is unclear, the enforcement official should ask for clarification. Before the enforcement official objects to the Defendant's evidence, he or she should know why and be able to explain to the judge.

At the end of the enforcement official's presentation of the case, the Defendant may make a motion for "judgment as a matter of law." That motion asks the judge to find that the code enforcement official has not proved his or her case and therefore loses. That motion should not be a subject for panic. Generally, it will be denied by the judge and the Defendant then will present his or her case. This is followed by the enforcement official's opportunity for general rebuttal. Each side then will be given an opportunity for closing arguments to summarize why the defendant is or is not in violation. Before beginning closing argument, the enforcement official probably should ask whether the judge wants to hear final argument regarding penalties as well. At this point, the judge may rule on whether the Defendant is in violation or not or the judge may want to hear each side indicate what the judge should do if the Defendant is found to be in violation.

6. Sequence of Testimony

The order of presentation by each side during the hearing is as follows:

1. *Direct-testimony*: By the enforcement officer and any other witnesses for the plaintiff municipality.

2. *Cross-examination*: Questions by the defendant after plaintiff has finished examining one of plaintiff's witnesses. Generally done to impeach a witness.

3. *Redirect*: Plaintiff's opportunity to ask questions of plaintiff's witness on points brought out during defendant's cross-examination.

4. *Re-cross*: Defendant's opportunity to re-examine the witness on points brought out during redirect.

5. *Rebuttal*: Plaintiff's last opportunity to clear up any issue raised during the hearing following the completion of defendant's case.

When defendant is presenting his/her case, Plaintiff will have the same opportunity for cross and recross.

7. Witnesses

Whenever the enforcement official intends to call a person to testify to help prove the violation, the enforcement official should announce this to the judge. The person then approaches the witness stand, where he or she will be sworn in by an officer of the court or the Judge.

The first thing a witness should be asked to do by the enforcement official is to state his or her name for the record. If the witness is being called as an "expert," he or she should be asked to explain the educational background, work experience or other credentials which make him or her an "expert." When asking a witness a question, the form of the question should not "lead" the witness to the right answer. Such questions generally are prohibited by Rule 611 of the Maine Rules of Evidence. For example, "Didn't you see Mr. Looter back the truck up and dump a load of gravel at the site on November 15, 1984?" basically tells the witness what the answer should be. The proper form should be similar to the following:

Q: Do you remember where you were on November 15, 1984?

A: Yes. I was at my home at 100 Trout Lake Road looking out my picture window at the property across the street where Ms. Bucks has her summer place.

Q: What did you see?

A: I saw the defendant, Mr. Looter, and his men dumping loads of gravel and installing a tank of some sort.

Before a witness for the town or city steps down from the witness stand, whoever is representing the violator has a right to ask that witness some questions ("cross-examine" the witness). Likewise, the enforcement official has a right to cross-examine any witnesses called by the violator. After cross-examination is finished, the person who called the witness may ask questions to follow-up on points brought out during cross-examination of the witness by the other side. No new line of questioning can be conducted, though, without the court's permission. For this reason, the enforcement official must make certain that the necessary information is elicited the first time the witness is examined.

8. Use of Notes

If a witness has trouble remembering something while on the witness stand, the witness may refresh his or her memory by looking at written material, such as notes, or a physical object if that will help. However, the person representing the other side of the case has a right to examine the

material or object and have relevant portions introduced into evidence. The other side also has a right to take notes from the person using them and cross-examine the person to see if the person's recollections are really accurate. This also applies when the enforcement official is on the witness stand and needs to look at his or her own notes. It is best not to allow any witness to rely totally on notes while on the stand in case the other side decides to take the notes away for use in cross-examination.

The enforcement official should avoid "overkill" by using witnesses to repeat points which have been adequately made through the introduction of documents or photographs. The enforcement official should also only call witnesses to testify about information about which the enforcement official does not have personal knowledge or which requires an expert opinion.

9. Testimony by Enforcement Official

In many cases, the only testimony presented in support of the town, city's or state's case will be the testimony of the enforcement official. The following is an example of what such a presentation might include:

Overview of Case

Your Honor, my name is I.M. Good. I am the certified code enforcement officer and certified plumbing inspector for the Town of Happy Valley. I have held those positions since 1970. The complaint which is before you involves the installation of a subsurface sewage disposal system without a permit and the construction of a deck without a permit.

Applicable Law

It is the town's contention that these activities violate both the State Subsurface Wastewater Disposal Rules and the town's shoreland zoning ordinance. For the record the Wastewater Rules are commonly referred to as the State Plumbing Code.

Your Honor, I have here a copy of the State Subsurface Wastewater Disposal Rules and a letter from the director of the Department of Human Services, Division of Health Engineering, attesting that this is a true copy of the Rules. I have previously marked them as "Plaintiff's Exhibit #1" for identification and now offer them into evidence. (Note, The judge will ask the other side if there is any objection and then accept them into evidence.) Your Honor, I also have a copy of the town's Shoreland Zoning Ordinance and a copy of the town's Shoreland Zoning Map, both of which have been attested by the Town Clerk as true copies and stamped with the town seal. I have marked these as "Plaintiff's Exhibits #2 and #3" respectively for identification. I have provided the defendant with copies of these exhibits. I now offer them into evidence. (Judge's response.)

To summarize the relevant portions of these laws, Part 11, of the Wastewater Rules requires a permit from the local plumbing inspector before a new subsurface sewage disposal system can be constructed. Section 10(22) of the town's Shoreland Zoning Ordinance also requires a permit to be issued by the code enforcement officer for systems constructed within certain shoreland areas which have been designated as "Limited Residential District" on the town's shoreland zoning map. Sections 8(b) and 12(B)(6) of the Shoreland Zoning Ordinance require a permit to be issued by the Planning Board before a deck can be added to an existing structure which is nonconforming in some way.

Factual Presentation

Your Honor, I first became aware of the violations cited in the complaint on the morning of January 1, 1994 when I received a phone call from an unidentified person asking if the town had issued permits for a septic system and deck which were being constructed on property at 100 Trout Lake Road in Happy Valley. I checked the files in my office where I keep records on any permits which I issue as code enforcement officer or plumbing inspector or which the town's Planning Board or Board of Appeals have issued. I found nothing to indicate that any permits had been issued for either the septic system or the deck, so I drove to the property on Trout Lake Road which had a "100" marked on the mailbox. When I arrived, I found the defendant, Paul Looter, and people whom he identified as his employees completing construction of the septic system and the deck. I identified myself and asked to look at the work being done. I paced off the distance between the deck and the normal high water mark and found that it was 30 feet from the normal high water mark. I informed Mr. Looter that both the deck and the septic system required permits. I asked him to stop work until the necessary applications for permits had been reviewed and approved by the town. I also invited Mr. Looter to contact me at my office to obtain copies of the ordinance and application forms. I then returned to my office and prepared written notices of violation to send to Mr. Looter and to the property owner. Your Honor, I have a copy of a deed attested by the Madison County Register of Deeds naming Ms. Meg A. Bucks as the owner of the lot at 100 Trout Lake Road. I have marked this as "Plaintiff's Exhibit #4" for identification. I have provided defendant a copy. I now offer it into evidence. (Judge's response.)

Notice of Violation

I also have a photocopy of the first and second letters which I sent to Mr. Looter and to Ms. Bucks notifying them of the violations and I have a certified mail receipt for each letter signed by Mr. Looter and Ms. Bucks showing that they received my letters. I have marked these as "Plaintiff's Exhibits #5 through #8" for identification. Defendant has copies. I now offer them into evidence. (Judge's response.)

Application of Law to Facts

Your Honor, as I previously indicated, my records show that no disposal permit has been issued by the town for a new subsurface disposal system on this property. as required by the State Subsurface Disposal Rules. I also have no record of a shoreland zoning permit having been issued for a new system. Section 10(22) of the ordinance requires a shoreland zoning permit for systems located in shoreland areas designated as the "Limited Residential District" on the town's Shoreland Zoning Map. As you can see from the map, all of the lots on Trout Lake Road are shown as Limited Residential - Recreational District because they are within 250 feet of the normal high water mark of Happy Valley Pond. During my initial visit to the Bucks property on January 20, I observed new fill material on a space which was roughly 30 feet by 40 feet. The fill was partially covered with loam. An area measuring roughly 3 feet wide by 30 feet long looked like it had been dug up and replaced between the house and the fill. I concluded from this that a leach field, a septic tank, and septic line had been installed. Your Honor, I have a Polaroid photograph which I have marked as Plaintiff's Exhibit #9 for identification. (Show to Defendant) I took this picture on January 20 at 11:00 a.m. standing 3 feet from the northwest corner of the 30 by 40 filled area. It is an accurate picture of what I saw. I now offer it into evidence. (Judge's response.)

Regarding the deck, section 8(b) of the town's ordinance requires Planning Board approval for any expansion of a non-conforming use or structure which was in existence when the town's ordinance became effective. Section 3 states that the ordinance became effective on March 5, 1972.

Your Honor, at this time, I would like to call Fran Friendly to the stand. (Enforcement official leaves stand. Witness takes oath and is seated.)

Testimony of Witness

Q: Would you state your name and address for the court, please?

A: Fran Friendly. 102 Trout Lake Road, Happy Valley.

Q: How long have you lived at this address?

A: Twenty-two years.

Q: Are you familiar with the property at 100 Trout Lake Road?

A: Yes. That's Ms. Bucks' lot. I live right next door.

Q: What, if anything, is on Ms. Bucks' lot?

A: There's a main house which is sort of a Cape Cod style, a boat house, and an outhouse.

Q: How do you know this?

A: I can see them from my property.

Q: Do you know how long the main house has been there?

A: No, but it's been there as long as I've lived on the road.

Q: Could you describe the main house for the court?

A: Well, as I said it's basically a Cape Cod style. As of about a month ago, it now has a deck on the back side, toward the water.

Q: Was there ever a deck there before?

A: Not as long as I've lived on the road.

Q: Thank you. No further questions.

(Defendant given opportunity to ask questions. Witness leaves stand. Enforcement official resumes stand.)

Summary by Enforcement Official

Your Honor, as Mrs. Friendly has just testified, the house was on the lot before the effective date of the ordinance but had no deck attached when the ordinance was adopted. The deed to the Bucks property indicates that the lot is only 1/2 acre, which does not meet the 1 acre lot size requirement of the ordinance. This makes the original house a non-conforming use for the purposes of section 8(b) of the ordinance. With Ms. Bucks' permission, at 10:30 a.m. on January 20, 1994, I entered her property and measured the distance between normal high water mark and the edge of the house closest to the water using a Stanley Model 568, 100 foot tape measure. I determined that the house was 42 feet from the normal high water mark, which does not comply with the 75 foot setback requirement of section 11(m) of the ordinance. This is another reason that the original structure is a nonconforming use for the purpose of section 8(b) of the ordinance. Adding a deck to the house constitutes an expansion of a nonconforming structure and requires a permit from the Planning Board. I have no record that such a permit was issued. I measured the distance between the front of the deck and the normal high water mark and found that it was 32 feet from normal high water. Your Honor, I have here a photograph of the shoreline which I took on January 20, 1994, at 11:00 a.m. showing what I used as the normal high water mark for the purposes of my measurements. I took this picture with a Polaroid camera standing in the water 3 feet from the water's edge and looking toward the house. It is an accurate representation of what I saw that day. I have marked this as Plaintiff's Exhibit #10 for identification and offer it into evidence. (Judge's response.) I also have a Polaroid photograph showing the house, deck, and lake which I took on the same day

and time as the other one. I was standing 6 feet from the northwest corner of the house and looking toward the lake. This picture is an accurate representation of what I saw, I have marked it as Plaintiff's Exhibit #11 for identification (show to Defendant). I now offer it into evidence. (Judge's response.)

Your Honor, unless you are interested in testimony at this time regarding the remedies which the town is seeking, I have no further testimony.

(Judge's response. Defendant is given an opportunity to question I.M. Good, then he calls on the defendant to begin his presentation. The defendant is not represented by an attorney.)

Testimony of Violator

Your Honor, my name is Paul Looter. My address is 123 West St., Happy Valley. I was hired by the owner of the lot at 100 Trout Lake Road, Meg A. Bucks, to put in a new septic system and add a deck on her house on Trout Lake Road. The only thing that I have to say is that I don't believe that permits are required for this work. I've done similar work in other towns and never had to get permits. As far as the septic system is concerned, all we're doing is replacing an old outhouse. The State Plumbing Code says that a permit isn't necessary to replace a system. The town's ordinance doesn't require a permit for this either because it says you can "improve" and "repair" a nonconforming use without a permit. The same goes for the deck which my men built. That's an "improvement" to the main house. I really don't have anything else to add.

(Judge's response. Then the enforcement official has an opportunity to respond.)

Response by Enforcement Officer to Testimony of Violator

Your Honor, I disagree with Mr. Looter's interpretation of the Plumbing Code and the town's shoreland zoning ordinance. I do not agree that the new system which he installed is a "replacement treatment tank" for the purposes of Part II section 3(D) of the Plumbing Code. I believe that it is the construction of a new system for the purposes of section (3)(a), based on my reading of the definitions of "construction", "pit privy," "replacement system," and "subsurface wastewater disposal system" in section 1. I also disagree that the new system constitutes "an improvement" or "repair" to a nonconforming use for the purposes of section 8(b) of the town's ordinance. Those words commonly mean a change to an existing structure or system to make it better without any drastic changes to the basic structure, such as putting on a new roof, insulating, putting in new windows, and so forth. What Mr. Looter did was not an "improvement" or "repair" of the outhouse. He installed a brand new system in a different location on the lot. Regarding the deck, I

also disagree that it is an "improvement" to the house for the purposes of section 8(b). I have a copy of a Maine Supreme Court case here called

Frost v. Lucey, which appears to say that an increase in the amount of ground area covered by a structure constitutes an "expansion" of the structure. I have no other comments, Your Honor.

(Judge's response. Judge then asks the enforcement official about the relief he is requesting.)

"Yes, Your Honor, the town is asking for several things. We would like Mr. Looter to apply for the necessary plumbing and shoreland zoning permits on behalf of Ms. Bucks within a week of your decision. If he will not, then we would like them to remove or fill in the septic system and remove the deck so that they cannot be used. I have obtained several estimates from other contractors in the area regarding the cost of this corrective work which I would be happy to provide to you if Mr. Looter has no objection. We also would like you to order Mr. Looter not to complete this construction and not to perform similar work in the future without obtaining the necessary permits. And finally, we would like you to order Mr. Looter to pay a fine based on the number of days during which he has failed to correct these violations since receiving notice from me. Our shoreland zoning ordinance states that each day a violation continues constitutes a separate violation. 30-A M.R.S. §4452 outlines the range of fines and corrective action which you can order. In this case we are seeking a fine of $500. We ask for such a fine because the defendants in this case have been particularly uncooperative. In fact, when I first met Mr. Looter and told him about the legal requirements, he told me I knew what I could do with them, that I could waste my time going to court if I wanted to but the most that would happen would be a small fine which Ms. Bucks could easily pay. I think this is a good case to use to send a message about the cost of that attitude.

Thank you, Your Honor. I have no further comments at this time.

(Judge's response. Then he asks defendant for comments. Judge's response.)"

If the enforcement official is cross-examined about any of his or her testimony by the other side, he or she should answer the questions calmly, politely, and in a straightforward manner. If the enforcement official feels that a particular question and answer are misleading because they did not allow him or her to offer important information, the enforcement official should ask the court for a brief opportunity to offer rebuttal testimony to clarify statements made

in response to the defendant's questions. This request should be made when the defendant has indicated that he or she is finished questioning the enforcement official.

10. Site Visit Day of Hearing

On the day of the hearing, if at all possible, the enforcement official should take one last look at the site of the violation to see it the violation has been corrected. If it has, then the court should be made aware of this at the hearing. The town, city or state still has a right to have the hearing go on as scheduled if it wants the court to issue a permanent injunction (if there is some risk the violation will resume) or fine the violator. The Court will not usually view the property.

11. Violator Represented by an Attorney

It is only natural that an enforcement official will feel more tense and intimidated in a case where the violator is represented by an attorney. Just remember that most attorneys will conduct themselves courteously and will not deliberately try to play games with procedure or the rules of evidence in an effort to intimidate the enforcement official or witnesses. The Maine Legislature has clearly stated its intent that a Rule 80K proceeding should be less formal than other types of court action when it decided to allow non-attorneys to represent municipalities. The certification program authorized by the Legislature was not intended to provide the enforcement official with the same degree of knowledge and experience as three years of law school. If an attorney should become unreasonable in challenging the offerings of evidence or other actions taken by the enforcement official during the proceedings and the judge does nothing to curb it, the enforcement official should ask for an opportunity to respond to the objections, if one is not given (it usually will be). The enforcement official should explain that he or she thinks that the attorney's objections are excessive in light of the nature of a Rule 80K proceeding. If the judge does not agree and the enforcement official feels overwhelmed by the attorney for the violator, then the enforcement official should ask the judge either for a temporary recess so that the town, city or state attorney can be called to attend the hearing or for an adjournment or continuation to a specific future date so that the town, city or state attorney can be there. If the enforcement official plans to call the government’s attorney for help, the official should remember to let the attorney know in advance so that he or she will be available.

Once a land use complaint has been filed with the court, the enforcement official should not communicate directly with the violator or other defendant once he or she learns that person is

represented by an attorney. All conversations and correspondence should be directed to the attorney, unless the attorney has agreed otherwise.

12. The Judge

It may be helpful before the day of the hearing to find out which judge will hear the case by asking the court clerk and then talking with some local attorneys to learn what their experience has been with that judge. It also might be helpful to attend some other hearings conducted by that judge to observe how the judge handles cases. Most judges will drop hints either verbally or by gestures or facial expressions that they have heard enough evidence on a particular issue or that they are unhappy about some aspect of the case. The enforcement official should learn to recognize these hints and react to them by moving the case along.

13. Electronic Recording

It is recommended that in all cases that the enforcement official file a request in writing with the court clerk under Rule 76H of the Maine Rules of Civil Procedure in advance of the initial hearing date requesting that the hearing be electronically recorded. A sample request appears in the Appendix at A-13. The enforcement officer should check with the court clerk to determine how many days in advance of the hearing the request must be filed.

14. Meeting with Judge in Chambers

On the day of the initial hearing, the judge assigned to the case may ask the enforcement official and the other side to meet with him or her in the judge's chambers. The purpose of the meeting is to brief the judge on the case and to see if there is any possibility that the parties can settle the case without a hearing. The enforcement official should be prepared for this and should think about what key points need to be called to the judge's attention.

15. Failure to Appear

If the violator fails to appear in court on the day of the hearing, the court has the authority to find him or her in default and enter a judgment in favor of the town, city or state. However, the judge may be reluctant to order corrective action or a large fine if the defendant has not actually appeared in court. Consequently, if the violator does not attend the hearing, the judge may continue the hearing and issue an order authorizing the sheriff's office to bring the violator to the courtroom either on that day or a future date (called a "bench warrant"). However, if the judge is willing to grant a default judgment, the enforcement official should be satisfied since it will be binding on the person named in the Complaint as the Defendant unless that person goes through

the necessary court procedures to have the judgment vacated.

16. Being a Pioneer

Although Rule 80K has been around for many years, land use enforcement actions remain a very small part of the case load in the District Court. Consequently, it is still possible that you will encounter court personnel who aren't very familiar with the process -- and that may include judges. What do you do when the court clerk seems mystified at your phone call or when the judge calls you into chambers on hearing day and says "what's this all about?" First, don't panic. Remember that you are authorized, by both state statute and court rule, to do what you are doing. So you have the law on your side. It may simply take some gentle explaining to the court. That, by the way, is not all that unusual. No judge knows everything about all aspects of the law; judges frequently have to rely on the litigants to educate the court.

First and foremost, be prepared to cite chapter and verse. That is, if a court clerk or even a judge questions why a code enforcement official is appearing in court, refer to the statutes and to the rule. You might say something like this:

> Your honor, I am the Code Enforcement Officer for the Town of _____. 30-A M.R.S. §4452(1) authorizes me to represent the municipality in the District Court in the prosecution of alleged violations of the Town's zoning ordinance. I have been specifically authorized to do so by the Selectmen of the Town and have filed a letter of authorization with the clerk. Maine Rule of Civil Procedure 80K(h) authorizes a person who is not an attorney to represent a municipality in a land use enforcement action.

You need not be argumentative or demanding. Instead, you simply need to point out politely and quietly what sections of the law authorize you to proceed as you are requesting. If you have copies of the statutes to which you are referring, so much the better. Your attitude should be one of helpful confidence: you know the law you are relying on (you have read this manual after all!) and you are helping the court do its job by pointing out what the court needs to know. Most judges dealing with something unfamiliar will welcome input from the parties.

It is possible that you may run into court clerks and their assistants who are resistant to dealing with something new to them, either because they don't like their routines disrupted or because they are baffled by what you are proposing. Again, do not become combative or insistent. Instead, try to enlist their cooperation. Seeking help, rather than giving it, may be the most productive approach. With the clerk, you might want to try something like:

> When I took some training offered by the Department of Economic and Community Development, Office of Community Development last winter, they indicated that as long as I had this letter from the Selectmen in my Town, I could represent the Town at a hearing in court on a land use violation. I think it says that somewhere in Rule 80K of the Rules of Civil Procedure. Do you suppose you could check that for me, or maybe ask the judge whether there is any problem?

In most cases, your polite request for assistance is likely to be met with a positive response.

There may be times, however, when you will encounter resistance, no matter how well prepared you are and how professionally you conduct yourself. If you find yourself in a situation where you are pretty sure that Rule 80K or a statute authorizes something which court personnel or a judge are telling you cannot accomplish, that may be the time to call for help. If you feel you are getting nowhere, thank the court clerk for his or her time and indicate that you want to do some further checking and will get back to him or her. If you are in front of a judge, ask if you can have a continuance to seek assistance of legal counsel. In either case, it's time to contact your municipal or agency attorney.

CHAPTER FOURTEEN
CASE LAW SUMMARY

As an enforcement official prosecuting land use violations under Rule 80K, you are not going to be expected to pull out the names of cases and recite citations to the Atlantic Reporter (where Maine Supreme Court cases are reported). But, especially if there is a lawyer on the other side, you may hear case names brought to the judge's attention. And it may be helpful for you to have a passing knowledge of some of the cases which have been decided in the context of enforcement actions. For ease of use, this section is further divided into subcategories based on overall topic. Note, however, that many cases may involve numerous issues.

Pike Industries, Inc. v. City of Westbrook, et al., 2012 ME 78

Facts:

This is a complicated case from both a factual and procedural point of view. Pike Industries owns and operates a quarry located in Westbrook that it purchased in 2005. Artel, IDEXX Laboratories and Smiling Hill Farm own property and operate businesses near Pike's property. Quarrying operations began on one portion of the property prior to 1940 ending sometime between the 1950s and 1960s. In the late 1960s, quarrying including blasting, began at a different location on the property pursuant to a conditional approval by the City. No additional permits were issued since that time, but there has been substantial quarrying activity there until recently which was known to the City. Later, Pike received a permit from the Westbrook Code Enforcement Officer to conduct blasting on the property. The major issue in the case is whether Pike had grandfathered rights to quarry on the property and whether these rights extended to rock crushing and the operation of a concrete or asphalt plant. The CEO determined that Pike did not have rights to crush rock or manufacture concrete or asphalt. A neighborhood group and nearby businesses including IDEXX, Smiling Hill Farm and Artel contested the fact that Pike had grandfathered rights to quarry on the property. A number of appeals to the Zoning Board of Appeals and to the Superior Court ensued. The Superior Court entered a Consent Order, effectively treating quarrying as a grandfathered use, and adopting performance standards limiting that use. The Consent Order was agreed to by the City of Westbrook, Pike Industries and IDEXX, but not Artel and Smiling Hill Farm. Artel and Smiling Hill Farm filed an appeal to the Law Court.

Issue Presented: Did the Superior Court have the authority to approve the Consent Order in this

case when one of the abutters and parties to the lawsuit objected?

Holding:

The Law Court affirmed the Superior Court's judgment in part and vacated it in part, and remanded the case back to Superior Court for further proceedings. In its decision, the Law Court clarified the standards and process that a Court should employ when it reviews a proposed consent order. First and foremost, a consent order must not conflict with the requirements of applicable laws. Before proving the consent order, a court must be satisfied it does not violate the Constitution, statues, or other laws. The dilemma in this case was that the Consent Order approved by the Superior Court adopts performance standards without those standards having been formalized through a contract zone agreement or by amendments by land use ordinance. Because the standards cannot be enforced before they have been adopted, the Consent Order's enforcement provision was unenforceable. On that basis, the Law Court vacated the judgment and remanded the matter to the Superior Court. The Law Court stated, "municipalities may not come under the guise of homerule authority, circumvent the land use regulation statutes". At the same time, the Law Court emphasized that the Town has the authority to compromise disputed claims. According to the Law Court, "it would be strange public policy that authorized municipalities to sue and be sued, but then compel them to full litigate every case to a final judgment with a final possibility of resolving the dispute through good faith settlement negotiations. Accordingly, a municipal government may settle litigation and compromise land-use claims for a Consent Decree, because the authority for them falls naturally within the authority to sue and be sued".

Takeaway:

The Pike case raises the level of scrutiny that will be given to the approval of Consent Orders by the Court. The Court clarified that the falling five elements must be met before entering a Consent Order:

1) the parties have validly consented;
2) reasonable notice has been given to possible objectors that they have been afforded a reasonable opportunity to present their objections;
3) the consent decree does not violate the State or Federal Constitution, or Statutes;
4) the consent decree is consistent with legislative objectives and zoning-related policy considerations, and
5) the consent decree is reasonable and is not legally impermissible in its effects on third parties.

The Law Court confirmed the "public policy favoring the settlement of disputed claims by deferring to the reasonable judgments and compromises made by the settling parties. However, the Courts deference should be tempered by the separate public policy favoring the uniform applicability and enforcement of zoning ordinances." The Law Court also made clear that the Superior Court may enter into a consent decree or order over the objection of interveners, as long as it does not "dispose of intervener's valid claims." In other words, if the intervener has no independent claims in the action, its opposition alone is insufficient to prevent those parties from settling or ending the litigation. In this case, the Consent Decree was defective because it adopted enforcement provisions contained in 30-A M.R.S. § 4452, and because it involved performance standards that were not approved by the voters. While the Pike case contains fairly complicated legal analysis, it is important for towns to consider the five standards listed in the Court's decision before approving a consent order – perhaps the most significant requirement is that the public has an opportunity to be heard before the approval of a consent order.

Town of Lebanon v. East Lebanon Auto Sales, LLC, 2011 ME 78, 25 A.3d 950.

Facts:

- East Lebanon Auto Sales, LLC owns property on which another business (Lucky Day LLC) operates. An individual (Corbin) is the sole member of both LLC's.
- CEO found several hundred (mostly unregistered) vehicles on the parcel as well as numerous parts, debris, old furniture and trash piles.
- Between June of 2009 and June 2010, CEO visited the parcel 22 times. Each time there were fewer vehicles; however, there are always more than three unregistered vehicles as well as a debris pile with vehicle carcasses, tires, and trash.
- Neither LLC had a junkyard or automobile graveyard permit.
- Town served a notice of violation and eventually and filed 80K against East Lebanon Auto Sales, LLC and the individual principal of the LLC in her personal capacity.
- District Court in favor of the Town against East Lebanon Auto Sales (the property owner) and against Corbin individually.

Holding:

- Law Court upheld the underlying violations regarding the unlawful junkyard and automobile graveyard (because the record evidence supported such a conclusion.) However, the Law Court vacated the judgment against Corbin individually.
- Maine's LLC statute protects individual members from personal liability for claims against the LLC. In order to establish individual liability, it must be shown that the individual abused the privilege of the separate corporate entity and that an unjust result would otherwise occur if individual liability were not imposed.
    - Even though the two LLC's were closely interconnected and they were fully under her control, no record evidence to suggest that Corbin abused the privilege on incorporating or that an unjust result would follow if only the LLC was held liable.

Takeaway:

Be careful who you name as a party in an 80K because you don't want your case to be dismissed!

Eliot Shores, LLC v. Town of Eliot, 2010 ME 129, 9 A.3d 806.

Facts:

- The Eliot CEO determined that the developer created an unapproved subdivision in violation of the Town's ordinances and State law. The CEO issued a Notice of Violation, outlining the violations and notifying the developer that unless corrective action was taken he would "refer this matter to the municipal officers for possible commencement of legal action in the Maine District Court or Maine Superior Court."
- The Notice of Violation also informed the developer of his right to appeal the order to the Eliot Board of Appeals within 30 days.
- The developer appealed the CEO's decision to the Board of Appeals and after a hearing, the CEO's decision was upheld.

Holding:

- An appeal went to the Superior Court under Rule 80B and the Court affirmed the decision of the Board of Appeals.
- In a subsequent appeal, the Law Court determined that it had no jurisdiction over the matter because the Board of Appeals decision was merely "advisory in nature" consistent with its decision in *Farrell v. City of Auburn*, 2010 ME 88, 3 A.3d 385.
- The Law Court reasoned that the only significance of the Board of Appeals' decision was to provide an "advisory" opinion as to whether the CEO's violation determination was correct.
- Under the Town's ordinance, the CEO's Notice of Violation is a preliminary step that can lead to a decision by the Board of Selectmen to initiate enforcement action. "Because the Notice of Violation is a preliminary step in the enforcement process, and the CEO retains the discretion to refer the matter to the Board of Selectmen to initiate enforcement proceedings against Eliot Shores, the decisions of the Board of Appeals and the CEO are advisory in nature."

Take Away:

- This case has caused a significant uproar in the municipal zoning community. It had been established for some time that a town holds the "prosecutorial discretion" to initiate a land use violation action. However, it has always been well accepted that a Notice of Violation may be appealed to the Board of Appeals if allowed by the Zoning Ordinance--and the Board of Appeals may reverse the decision of the Code Enforcement Officer.
- This case essentially eliminated the role of the Board of Appeals in an enforcement matter and places sole authority in the hands of the CEO and the Board of Selectmen.
- In light of the Eliot Shores case, it is advisable for towns to carefully examine the provisions in their ordinances regarding appeals of a Notice of Violation. Some towns have opted to allow no appeals to the Board of Appeals of a Notice of Violation, which would enable a town to proceed directly to an enforcement action under Rule 80K without any concerns about the authority of the Board of Appeals. Other towns have opted to continue to allow an appeal of a CEO's Notice of Violation to the Board of Appeals to provide "checks and balances" on the CEO's decision.
- The Law Court's decision in *Eliot Shores* prompted a legislative amendment to 30-A M.R.S. § 2691(4), which reverses the Court's finding. *See* LD 1204 ("An Act to Clarify the Appeal Process of Code Enforcement Officers and Boards of Appeal.") Now, local boards of appeal have authority to review CEO's enforcement decisions absent an express provision in a charter or local ordinance to the contrary.

Town of Levant v. Lawrence A. Taylor, 2011 ME 64, 19 A.2d 831.

The Taylors were cited by the CEO for placement of a mobile home (unoccupied and not connected to any utilities) in violation of the Town's Land Use Ordinance. When the letter did not resolve the matter, the Town commenced a Rule 80B action. The District Court concluded that the mobile home was properly treated as a building for which a permit was required. The Court also rejected the Taylors' contention that they played no role in allowing the mobile home to be moved onto and remain on their land--and that the mobile home was located on the lot by a third-party. The District Court awarded the Town over $12,000 in attorney's fees and costs.

The Court concluded that the Taylors as owners had notice of the violation, control over the use of their land and a reasonable opportunity to correct the violation. The Court also rejected the notion that because the mobile home was not connected to utilities that it is not a dwelling for purposes of the ordinance.

Town of Vassalboro v. Leo Barnett, 2011 ME 21, 13 A.2d 784.

Facts:

- The property owner appeals the prior contempt order in prior judgment entered in favor of the Town in its Rule 80K complaint.

- The property owner alleged that he was denied his constitutional rights in the proceedings however, in their appeal to the Law Court they failed to include a proper appendix with their complaint including docket entries and pleadings.

Holding:

- The judgment of contempt was affirmed by the Law Court and the property owner was ordered to pay the Town's appellate attorney's fees and costs.

City of Biddeford v. Rory Holland, 2005 ME 121, 886 A.2d 1287.

This is a land use case brought by the City of Biddeford pursuant to 30-A M.R.S. §4452 and Rule 80K alleging that the owner of rental property had violated local codes by renting an apartment without a valid occupancy permit and by deactivating power to his tenant's apartment. The owner filed an answer and a motion to continue the case pending removal to the Superior Court. The District Court denied the owner's request as incomplete and untimely under Rule 76C(a) because he did not tender payment of the removal fee with the removal request. The District Court subsequently entered judgment for the City and imposed the minimum penalty and awarded attorney's fees.

On appeal to the Law Court, the owner asserted, in part, that he had a constitutional right to a jury trial because the City was seeking a civil penalty. The Law Court agreed. The Law Court held that in an 80K action, the alleged violator may receive a jury trial by a removal to the Superior Court under Rule 76C. The Law Court rejected the contention that he was entitled to a jury trial de novo following the District Court judgment. The Law Court further clarified that, in the context of a Rule 80K proceeding, the alleged violator must file the notice of removal on or before the date of the first appearance. Even though the owner in this case did not file his removal fee with his removal request, or seek a waiver of the fee, that he did not "knowingly" waive his right to a jury trial. The Law Court remanded the case to the District Court and allowed the owner 20 days to comply with Rule 76C regarding removal.

This is a significant case because it confirms the constitutional right to a jury trial in a Rule 80K action. Additionally, an alleged violator will have new leverage in enforcement matters by removing the case to the Superior Court seeking a jury trial. This will require the Town to retain an attorney to prosecute the case - - adding delay and additional expense to enforcement proceedings.

Sanborn v. Town of Sebago, 2007 ME 60, 924 A.2d 1061.

This case involves a permit to construct a dwelling to replace an existing mobile home. The Sebago Building Ordinance only allows an administrative appeal to the Zoning Board of

Appeals "in the event of refusal by the Code Enforcement Officer to issue a permit" (Emphasis added). The Superior Court was concerned about subject matter jurisdiction because this appeal involved the issuance of a permit rather than a refusal to issue the permit. 30-A M.R.S. §2691(4) provides that "no board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the Board and the official or officials whose action or non-action may be appealed to the Board." (Emphasis added). On this basis, the appeal was dismissed. The Law Court vacated the Superior Court's decision finding that ZBA had jurisdiction over the Shoreland Ordinance and Building Ordinance "as a matter of public policy" because of the importance of local administrative review prior to litigation.

The lesson here is to carefully check the jurisdiction of the Board of Appeals before filing an appeal - - when in doubt, file both at the Board of Appeals and with the Superior Court under Rule 80B.

Brackett v. Town of Rangeley, 2003 ME 109, 831 A.2d 422

In Brackett, the Law Court discusses the time frame to appeal the issue on a building permit. The Law Court held for the first time that a fixed time in a Zoning Ordinance should be waived or extended for a party without notice of the permit upon a showing of good cause if otherwise there would be a "flagrant miscarriage of justice." This case also weakens the Law Court's 1990 decision of Juliano v. Poland regarding the finality of building permits.

The facts of the case are as follows: The neighboring property owners discovered upon returning to their seasonal property that the neighbor had demolished and was rebuilding a non-conforming dwelling in the Shoreland Zone. The property owner had obtained a permit to renovate his non-conforming home in the Shoreland Zone from the CEO which violated local ordinances because the Planning Board should have given the approval. While rebuilding the home, the property owner discovered more defects that had been expected and decided to demolish and replace it. The new house increased the degree of non-conformity from the old house because it was larger and intruded into the setbacks. The neighbors met with the CEO and asked for a stop work order which was refused on the grounds that the property owners had relied on the permit in good faith. The neighbors filed an appeal to the Zoning Board of Appeals 9 months after the permit was issued and 27 days after they first discovered the new house next door. The ZBA found the appeal to be untimely and that the neighbors did not have good cause for being late.

The Law Court found that the appeal was timely based on a "good cause" showing. This

case needs to be contrasted with Wright v. Kennebunkport, 1998 ME 184, 715 A.2d 162 where the Court, in a footnote, reserved the question of what would happen when an extension of time was requested by an agreed party who did not have knowledge of the issuance of the building permit. The Brackett case is that case. Justice Alexander wrote in a provocative concurring opinion that he would find the original permits void regardless of whether anyone appealed timely. Alexander stated "consideration of the good cause exception would be appropriate if the permits were facially valid, having been issued by the proper permitting authority, the Planning Board. The permits here were ultra vires of a person with no more authority to issue permits than possessed by the local dog catcher." However, the Court did not expressly overturn Juliano and based this decision solely on the good cause exception for extending the appeal period. In light of this case, a municipality might want to consider its procedure for notifying property owners of the issuance of a building permit. The property owner who received the permit may also want to be responsible for providing notice to interested parties so as to avoid this type of nightmare.

Tinsman v. Town of Falmouth, 2004 ME 2, 840 A.2d 100.

In this case, the developer devised an elaborate land division scheme involving gifts, conveyances to relatives and a conveyance to a corporation known as "Namsnit, Inc." which is "Tinsman" spelled backwards. Tinsman was denied a permit to create a private road by the Falmouth Planning Board. In the ensuing appeal, the Law Court focused on Tinsman's "intent to avoid the objectives of the subdivision statute." The Law Court determined that Tinsman had the burden of showing he did not "intend" to avoid the subdivision laws. Intent is a "state of mind accompanying an act" which is a question of interpretation and thus reviewed de novo. The Law Court found that there was ample evidence supporting the Board's denial of the permit. In a more recent case, with a different result than Tinsman, Tremblay v. LURC, 2005 ME 110, 883 A.2d 901 the Law Court affirmed LURC's decision approving a 6 lot subdivision and did not accept the opponents argument that there was "intent to avoid" subdivision approval because of prior allegedly illegal transfers.

Town of Levant v. Seymour, 2004 ME 115, 855 A.2d 1159.

The property owner had filed an appeal before the Board of Appeals contesting the CEO's notice of violation on the basis that they had a grandfathered lot while at the same time the Town had filed a complaint in the District Court pursuant to Rule 80K. The zoning board of appeals

found in favor of the property owners and set aside the CEO's stop work order. The Town appealed the Board of Appeals decision to Superior Court. Meanwhile, the District Court found in favor of the Town and assessed penalties against Seymour totaling $1,800 and attorney's fees in excess of $10,000. The Superior Court then decided the Town's appeal of the Board of Appeals decision and found that the Board should have conducted a de novo hearing. Because it had not done so, the Court vacated the Board's decision and remanded the matter to the Board for further proceedings. Seymour contended that the District Court's judgment should have been dismissed for lack of subject matter jurisdiction. The Law Court found in favor of the Town finding that the jurisdiction of a board of appeals is not exclusive and it does not have the enforcement powers of the District Court. It held that the District Court was not required to wait until the administrative appeal was finally concluded before it could proceed with the enforcement actions and that the two proceedings were separate and distinct.

Isis Development v. Town of Wells, 2003 ME 149, 836 A.2d 1285.

The Law Court made clear that the judicial review of a Board's interpretation of a municipal ordinance is de novo. In Isis, the Court cleared up any prior misconception that there is any deference to the interpretation of a zoning ordinance by a local board. However, the Law Court does continue to afford deference to state agencies because of their perceived expertise in the subject area. Review by the Superior Court in an 80B action is for "abuse of discretion, errors of law and findings not supported by the evidence." Maritime Energy v. Fund Insurance Review Board, 2001 ME 45, 767 A.2d 812.

Malonson v. Town of Berwick, 2004 ME 96, 853 A.2d 224.

The Law Court expressed that the appeals court should not attempt to redefine or add a "gloss" to a local ordinance when ordinance terms are specifically defined. When they are not

defined, the court will review the terms based on their ordinary meaning and the overall intent of the ordinance.

There are hundreds of cases that have been decided about zoning and land use law, too numerous to mention here; but only a small number of those cases have involved enforcement activities, and fewer still have involved Rule 80K. Summarized below are some of the more significant and/or interesting cases decided in the context of Rule 80K or pre-80K proceedings. Also interspersed are some recent cases which do not involve Rule 80K but may be of interest to code enforcement officers for other reasons.

B&B Coastal Enterprises v. Town of Kennebunk
(United States District Court, District of Maine, Docket #03-05-P-C)

What started out as a garden-variety sign ordinance enforcement case turned into a full blown federal court case involving constitutional claims of discrimination and free speech. Having received complaints about an excessive number of signs at Bartley's Dockside Restaurant, the Kennebunk CEO issued a citation to the property owner. From there it became a Rule 80K nightmare! Bartley alleged that the CEO had made anti-semitic comments about the "Hebrew National" umbrellas situated on the property. Litigation ensued in Federal Court resulting in a full blown evidentiary hearing and comprehensive brief writing. The Federal Court specifically found that the CEO was "polite, reasonable and professional" and that there was no credible evidence of anti-semitic bias. Bartley's attorney later retracted statements he had made to the New York Times that the CEO was a "bigot." The Federal case and the separate Rule 80K case ultimately settled out of court.

Town of Boothbay v. Jenness, 2003 ME 50, 822 A.2d 1169.

The Town of Boothbay alleged that a landlord and tenant were in violation of the local zoning ordinance operating or allowing the operation of an alcohol-serving bar at "Norma's Pub and Grill" restaurant. Permits had been previously issued for the expansion of the dining room and kitchen only. The landlord and tenant both received a notice of violation from the Town.

The landlord, Jenness, argued that as a landlord she could not be held legally responsible for the actions of the tenant. The Law Court rejected this argument holding that "it is reasonable to require an owner whose land is in tenancy to take action to comply with municipal ordinances once noncompliance has been brought to the owners attention. The Law Court concluded that a landlord can be sanctioned for the continuing violation of an ordinance by a tenant when: (1) the

ordinance authorized separate penalties for the landlord; (2) the landlord has notice of the violation; (3) the landlord has a reasonable authority to control the use of the land; and (4) the landlord has been given reasonable opportunity to obtain the tenant's compliance or eviction.

The Law Court also addresses the circumstances of when the doctrine of res judicata applies to Rule 80K enforcement proceedings. As a result of the failure to appeal, an enforcement letter to the Zoning Board of Appeals referencing Town of Freeport v. Greenlaw, 602 A.2d 1156 (Me. 1992), the Court confirmed that the notice from a CEO to a violator must "refer to the provisions of the Ordinance allegedly being violated, inform the violator of the right to dispute the order and how that right is exercised by appeal and the consequences of the failure to appeal."

Because the "CEO's letter of violation can become binding on subsequent actions including the same issues, it must meet the highest level of scrutiny." The Law Court found that the Town's letter did meet this standard and affirmed the District Court's judgment awarding a fine and attorney's fees and also ordered the District court to consider the Town's attorney's fees on appeal.

City of Bangor v. Diva's, Inc., 2003 ME 51 830 A.2d 898.

This Rule 80K action involving an adult entertainment club provided the opportunity for the Law Court to issue a detailed decision on constitutional principles relative to municipal regulations of such activity. Law Court concluded: (1) the evidence was sufficient to find that activities at the club amounted to "nude entertainment;" (2) the ordinances were "content neutral" as required by the United States Supreme Court; (3) the Ordinance was not unconstitutional and did not unduly burden free speech.

Widewaters Stillwater Co., LLC v. Bacord, 2002 ME 27, 790 A.2d 597.

This case involves the citizen opposition to the construction of the Wal-Mart store in Bangor. The Law Court noted that while the Planning Board members talked about their reasons for voting against the applicant, only one stated a specific reason for his negative vote. Similar to its decision in Christian Fellowship and Renewal Center v. Town of Limington, 2001 ME 16, the Court remanded the case to the Planning Board to issue more specific findings. The Law Court specifically ordered the Planning Board to consider and vote on each of the standards contained in the local ordinance rather than making a blanket motion to approve or deny. An interesting question arises if different majorities found that all of the criteria were met but no group of three would agree that all of the criteria were met would there be an approval or denial of the project?

Two other Supreme Court cases also have resulted in a remand to the local board for specific findings, Chapel Road Associates, LLC v. Town of Wells, 2001 ME 178 and Kurlanski v. Portland Yacht Club, 2001 ME 147.

State of Maine v. Town of Damariscotta and Lake Pemaquid, Inc.
(Kennebec County Superior Court, Docket No. CV-98-84)

This case was decided on July 26, 2001 by Justice Donald H. Marden in the Kennebec County Superior Court. The DEP alleged that Lake Pemaquid, Inc. maintained 18 residential structures within the required setback from Pemaquid Pond in violation of the mandatory Shoreland Law and the Shoreland Zoning ordinances of the Town of Damariscotta. While the case was brought in Superior Court by the Attorney General's Office rather than in District Court pursuant to Rule 80K, the Court applied the civil penalty section relating to local land use laws found in 30-A M.R.S. 4452 (the same section that would be used by a CEO under Rule 80K). The DEP also pursued penalties under 38 M.R.S. 349 (enforcement of the mandatory Shoreland Zoning Act) which allows penalties of not less than $100 nor more than $10,000 for each day of violation. In its decision, the Court applied the minimum mandatory fine of $100 per day for each of the 18 cabins for a total of 84724 days in violation. The Court assessed a civil penalty in the amount of $8,472,400 plus attorneys fees and costs of $44,332.43. The Court further required all eighteen structures and accessory structures to be removed from the 100 foot setback within 30 days. This is perhaps the largest award ever in Maine in a Land Use enforcement action. The case is now on appeal to the Law Court and there is the possibility that it will be settled. Stay tuned for details!

Charlton v. Town of Oxford, 2001 ME 104, 774 A.2d 366.

William and Barbara Charlton brought a complaint against Carl Delekto, the Town of Oxford, its Planning Board and its CEO in connection with Delekto's extensive reconstruction of a neighboring property located at Thompson Lake. In 1997, Delekto obtained a building permit to build a replacement structure on Thompson Lake. The Charltons were not notified of the issuance of the permit. They did not file an appeal to the Zoning Board of Appeals. The Charltons asserted a private action for nuisance based on 30-A M.R.S. 4302 which makes "any property or use existing in violation of a municipal land use ordinance or regulation …. a nuisance." The key question in the case is whether a property owner may maintain a private right of action against the Town and developer. The Law Court ruled in the negative stating "we are hesitant to imply a private right of action where the legislature has not expressly stated that a cause of action exists."

The Law Court found that there was no legislative intent to allow a private right of action and that enforcement provisions contained in 30-A M.R.S. 4452 must be brought in the name of the municipality. The Court also found against their claims for nuisance pursuant to 17 M.R.S. 2701 and common law. The lesson of the case is that it is difficult if not impossible for an aggrieved property owner to contest a building project by private right of action - - such matters must be brought pursuant under Rule 80B or by the municipality.

Herrle v. Waterboro, 2001 ME 1, 763 A.2d 1159.

The facts of this case are complicated. The Herrles owned land in Waterboro near a gravel pit operated by Douglas C. Foglio, Sr. The Herrles requested that the CEO initiate an enforcement action against Foglio for operating a gravel pit without a conditional use permit as required by the local ordinance. Because the CEO had a conflict of interest, he referred the request to the Board of Selectmen. The Selectmen declined to take enforcement action against Foglio, concluding that the pit was grandfathered. The Herrles appealed the Selectmen's decision to the ZBA. The ZBA held that the pit was not grandfathered, finding the Selectmen's decision to be erroneous. The Selectmen requested reconsideration and the ZBA subsequently reversed its earlier decision and found that the pit remain grandfathered. The Herrles appealed to Superior Court pursuant to Rule 80B. The Supreme Court reversed the ZBA. An appeal to the Law Court ensued. The Law Court vacated the Superior Court's decision finding the ZBA's decision was merely "advisory in nature." Because the Waterboro ordinance did not specifically provide for an appeal of enforcement decisions to the ZBA, its decision should not have been reviewed by the Superior Court. The Law Court further held that it was the decision of the Selectmen "in their discretion" to bring an enforcement action against Foglio. The Law Court analogizes the Selectmen's power as being equivalent to "prosecutional discretion" in a criminal action. The Law Court also found that the Herrles would have no standing to initiate enforcement proceedings against Foglio even if a violation existed - - only local governing authorities may initiate such proceedings.

Wright v. Town of Kennebunkport, 1998 Me. 184, 715 A.2d 162.

In this hotly contested case, the CEO issued a building permit authorizing the construction of a single-family dwelling. The CEO notified the neighbor of his decision within days after the permit was issued. Approximately six weeks later the neighbor wrote to the CEO requesting that he revoke the permit because it violated provisions of the Town's Land Use Ordinance and its Flood Plain Management Ordinance. The CEO informed the neighbors that he would not revoke

the permit because they had failed to appeal to the Board within 30 days of the issuance of the permit pursuant to the Town's Land Use Ordinance. The neighbors appealed to the Zoning Board of Appeals. The ZBA concluded that the permit was issued in error and ordered it to be revoked. The property owner then filed an appeal to the Superior Court. The neighbors contended on appeal, asserted that the CEO's letter refusing to revoke the permit constituted a "decision within the meaning of the Land Use Ordinance." The Law Court disagreed with this interpretation. It stated that "an individual aggrieved by a CEO's decision to issue a permit could by-pass the 30 day appeal deadline simply by requesting that the CEO revoke the permit." The Law Court went on to say that strict compliance with the appeal procedure of an ordinance is necessary to ensure that once an individual obtains a building permit, he can rely on that permit with confidence that it will not be revoked after he has commenced construction." The Law Court left open the questions whether a court can grant an extension of time within which to appeal to an aggrieved party who does not have knowledge of the issuance of a permit until after the appeal period has expired.

Sahl vs. Town of York, 2000 ME 180, 760 A.2d 266.

In 1991, a motel owner was issued a permit to expand his motel, which permit contained no expiration date. In 1995, the Town encouraged and approved a "phased" construction on the project to minimize the impact on the construction of the Town. In 1997, the Town amended its zoning ordinance to require all shore land permits issued before 1992 be completed by 1998. The motel owner determined that he could not start and finish Phase 2 of the motel within that deadline. The CEO advised the motel owner to delay the work on the project and seek and administrative relief from the ZBA. The ZBA ruled that the permit had no expiration date and that the phasing was approved by the Town in 1995 and that it was impossible for the motel developer to complete the project within one year. Neighbors of the project filed an appeal to the Superior Court. The Superior Court sided in favor of the neighbors stating that under the plain language of the ordinance, the shore land permit had expired and that the motel owner had acquired no vested rights. The motel owner then appealed to the Law Court, which reversed the decision of the Superior Court. The case is of significance because it clarifies the concept of vested rights to boil down to three requirements: (1) there must be physical commencement of some significant and visible construction, (2) the commencement must be undertaken in good faith with the intention to continue the construction and to carry it thru to completion, and (3) commencement of construction must be pursuant to a validly issued building permit.

The Law Court also confirmed that the term abutter not only applies to land immediately adjacent, but "in close proximity."

Peterson vs. Rangeley, 1998 ME 192, 715 A.2d 930.

This case involves real estate on Rangeley Lake. The property owner applied for a permit to renovate and enlarge two cabins. The prior code enforcement officer informed the property owners that they would need a variance because they were expanding more than 30% and the camps were non-conforming structures in the shore land zone. They received a variance from the Zoning Board of Appeals. The variance contained no expiration date, and the permit issued by the CEO contained the following language: Permit shall become null and void if construction work is not started within six (6) months of date the permit is issued as noted above expires three years thereafter. The CEO issued the permit, crossed out the word six and added the numeral 12 and also added "expires three years later." The property owners (who lived out of state) planned to build in the fall of 1992. They purchased materials and began preliminary work until the fall of 1993. Through the summer of 1992, they began preliminary work on the property, but were told by the builder that they could not commence the bulk of the work until the fall of 1993. The builder then moved out of the area and the property owners were unable to locate a new builder until 1994. The new code enforcement officer met with the property owners and told them that their permit had expired, and that the Board made a mistake in granting the variance. The new CEO declined to issue a new permit. The Town contended the permit expired pursuant to the provision in the Town's ordinance that states a building permit expires "either building or work authorized by such permit is suspended or abandoned at any time after the work is commenced for a period of six months." The property owners argued that the language actually means that the permit expires only once the work authorized by the permit has been abandoned by a period of six months. The Law Court disagreed finding that the work "or" contemplates both the suspension and abandonment of work as independent grounds for expiration of the building permit. The Law Court also confirmed that it was possible to obtain a

variance for a building permit in the shore land zone. The case was remanded to the Zoning Board of Appeals for this purpose.

Turbat Creek Preservation, LLC vs. Town of Kennebunkport,
2000 ME 109, 753 A.2d 49.

In this case, the property owner contended that he had a grandfathered right to use a boathouse for overnight stays. The code enforcement officer considered the structure to be a residence and cited the property owner for violating the Town's Land Use Ordinance. The property owner contended that the Town was *estopped* from denying him the right to use the boathouse for overnight stays. The Law Court concluded that the property owner had mislead the code enforcement officer regarding the scope and intended uses of the improvements at the boathouse. The law Court stated that a town cannot be equitably *estopped* from asserting a violation in a particular use of property when the renovations of the property leading to the use received town approval based on misleading information provided by the applicant as to the nature of the renovations and the extent to the intended uses.

Juliano v. Town of Poland, 1999 ME 42, 725 A.2d 545.

A commercial bottling plant owner who obtained a building permit for additions to the plant sought review of the decision of town's board of appeals upholding the stop work order issued by the new code enforcement officer directing the owner to cease construction of the plant. In July 1995, the owner received a building permit from the prior code enforcement officer for the Town of Poland. In September 1997, the new code enforcement officer ordered Juliano to cease construction on the bottling plant because it was not permitted activity within the zone. Juliano responded by calling attention to his 1995 permit. The Law Court ruled that the stop work order issued because of the work permit obtained by Juliano in 1995 was invalidly issued, it is in essence a challenge to the former code enforcement officer's decision to issue the building permit. The Law Court determined that since the stop work order was issued nearly two years after the permit was granted, it was not timely due to the 30 day appeal period specified in the Town's ordinance. The Law Court cited Wright vs. Town of Kennebunkport, 1999 ME 184 Para. 87, 15 A.2d 162, 165. For the proposition that "strict compliance with the appeal procedure of an ordinance is necessary to ensure that once an individual obtains a building permit he can rely on the permit with confidence that it will not be revoked after the commencement of construction."

Town of Old Orchard Beach v. Suzy Mosseri
(Biddeford District Court, Docket No. CV-99-132)

This is an 80K case decided in the Biddeford District Court in November 1999 where the Town was awarded $181,000 in fines plus attorney's fees and $2,000 per day until the violation is corrected. The case involves a commercial structure that was in violation of the BOCA National Property Maintenance Code adopted by Old Orchard Beach. The property is located in the center of town where there is tourism and a public walkway. Alleged violations included peeling paint, graffiti, deteriorating vinyl siding and accumulating debris.

Town of Orono v. LaPointe, 1997 ME 185, 698 A.2d 1059.

This case is required reading for anyone involved in an 80K proceeding, because of what it says about penalties. In a nutshell: when a statute provides for a minimum penalty on a per day basis, the court has no discretion to reduce or suspend any portion of the penalty.

The District Court found that Mr. Lapointe had operated a junkyard without a permit for a total of 730 days. The court assessed the fine at $100.00 per day, totaling $73,000.00, but then suspended all but $3,000.00 of that amount. The Town appealed to the Superior Court, which ruled that the penalty cannot be suspended. The Law Court affirmed.

The case involved reading two statutes together. 30-A M.R.S. §4452, the general land use enforcement statute, provided the minimum dollar amount of $100.00. 30-A M.R.S. §4452(3)(B) states that "the minimum penalty for a specific violation is $100.00….and monetary penalties may be assessed on a per-day basis." Unlike "shall" or "must," the word "may" is usually interpreted to allow discretion. However, there was different language in the state junkyard statute, under which the enforcement action was brought. 30-A M.R.S. §3758(2) states that anyone who violates the junkyard statute "must be penalized in accordance with §4452. Each day that the violation continues constitutes a separate offense." From that language, the Law Court decided that imposing the minimum penalty for every day of violation was mandatory, not discretionary. Note, however, that the Law Court continues to view §4452 as providing the court with "discretionary authority to impose penalties for continuing violations on a per-day basis." That means that some other statute must provide the mandatory daily penalty with language similar to that found in the junkyard statute.

Can a municipal ordinance provide that mandatory daily penalty? The court in Town of Orono v. LaPointe said: "[w]hen a statute imposes a minimum civil penalty a court may not assess

a lesser penalty unless the Legislature has provided it with the discretion to do so." Clearly the state legislature has the power to set penalties to be applied by the courts and direct the courts as to how they must be applied. Municipalities, on the other hand, do not have that kind of power over the court system. The question yet to be decided is whether such a provision in a municipal ordinance would be viewed by the courts as taking away the court's discretion in the same way as the statute did in Town of Orono v. LaPointe.

City of Ellsworth v. Doody, 629 A.2d 1221 (Me. 1993)**.**

This case is principally an example of everything that can go wrong with a land use prosecution. On the facts, it appeared to be a fairly simple Rule 80K case--a building constructed within 75 feet of the normal high water mark in the shoreland zone, and four other violations of shoreland zoning. The Code Enforcement Officer commenced the case under Rule 80K. The defendants removed it to Superior Court, resulting in a three day trial. Even though the local Planning Board had made a finding that Doody's house was 65 feet from the shore, the Superior Court decided it was not bound by that finding and, after hearing conflicting testimony about exactly where the high water mark was, concluded that the City had not proved its case. According to a surveyor who testified on behalf of Doody, finding the normal high water mark under the ordinance definition was the "equivalent of wrestling with fog." Out of five violations alleged by the City, the City prevailed on only one (constructing a dock without a permit). And the court declined to award the City attorney fees for prevailing on that particular violation, in light of the fact that the City had lost the other four. The City appealed to the Maine Supreme Judicial Court (the "Law Court"), which upheld the Superior Court decision in its entirety. The lesson to be learned is that what appears at the outset to be a fairly straightforward Rule 80K prosecution can turn into a years'-long battle and can be very expensive.

Town of Hartford v. Bryant, 645 A.2d 18 (Me. 1994).

This is another interesting saga, illustrating how what appears to be a simple Rule 80K prosecution can take many twists and turns, right up through the Maine Supreme Court. Joan Bryant had cut some trees and planted some grass in the shoreland zone. When the Code Enforcement Officer determined that there was a violation, the Town demanded that Bryant sign a consent agreement requiring her to replant trees and pay a $500.00 civil penalty. Ms. Bryant agreed to plant the trees, but refused to pay the penalty and the Town filed a complaint under rule 80K. After a convoluted proceeding with a number of amended court orders, the District Court

finally ordered Ms. Bryant to plant eight hemlock trees at specified locations, and pay the Town a civil penalty in the amount of $200.00. The court refused to grant the Town its attorney fees. Ms. Bryant appealed the $200.00 penalty to the Superior Court, which affirmed the penalty and awarded the Town attorney fees in the amount of $4,000.00. Both parties appealed to the Law Court -- the Town unsatisfied with the amount of the penalty and Ms. Bryant contesting both the penalty and the attorney fees. The Law Court vacated both the penalties and the attorney fees award. The court interpreted the Town's Shoreland Zoning Ordinance as not prohibiting the cutting of certain trees as long as "a well distributed stand of other natural vegetation" was maintained. The important principle stated in the case is that "when a municipality seeks to impose penalties for violation of a zoning ordinance, we will strictly construe the provisions of the ordinance." That means, if the ordinance can be interpreted in
more than one fashion, the court will pick the interpretation more favorable to the property owner against whom the Town is seeking to impose penalties.

Town of Ogunquit v. McGarva, 570 A.2d 320 (Me. 1990).

Although not an 80K proceeding, this enforcement action brought in the Superior Court is an example of a land use prosecution gone right. Applying the penalty provisions of the local ordinance, the Superior court awarded the Town a penalty of $100,000.00 for constructing and operating a hotel without the required permits, and awarded the Town more than $23,000.00 in attorney fees. The Law Court upheld it all and went on to award the Town its attorney fees for the appeal as well. McGarva is a case which illustrates that land use violations can be very expensive for the violator.

Town of Freeport v. Brickyard Cove Associates, 594 A.2d 556 (Me. 1991).

This case is another example of a successful land use prosecution. The court awarded a civil penalty and attorney fees and ordered the property owners to restore, by planting new trees, the area where it had unlawfully clear-cut in the shoreland zone.

Town of Freeport v. Ocean Farms of Maine, Inc. 633 A.2d 396 (Me. 1993).

Things didn't go nearly so well for Freeport in the Ocean Farms case. The Law Court upheld an award of attorney fees of $25,000.00 against the Town. On the other hand, Ocean Farms had sought more than $59,000.00 in attorney fees. And it was all over the location of a short stretch of sidewalk.

Baker v. Town of Woolwich, 517 A.2d 64 (Me. 1987).

This case presented an interesting dilemma for the Law Court in terms of an award of attorney fees for a land use violation. The proceedings in the Superior Court involved both a Rule 80B appeal from the decision of the Town's Board of Appeals that a violation existed and the Town's counterclaim to enforce the Zoning Ordinance. The Town prevailed on both and sought attorney fees. While attorney fees were recoverable for the enforcement action under the land use enforcement statute, they were not recoverable for the Town's efforts in the Rule 80B appeal. The dilemma was that the Town's total legal bill of over $13,000.00 represented "an undifferentiated aggregate of its counsel's charges for defending the Town against Baker's M.R.Civ.P. 80B action as well as for pressing the Town's counterclaim for enforcement."

Taking its cue from King Solomon, the Superior Court cut the bill in half and awarded $7,268.00 to the Town. The Law Court agreed with that approach. It noted that both the 80B action and the enforcement counterclaim involved the same issues and the same court appearances, and concluded "we adopt that even split as a fair and equitable resolution of a problem for which there is available no better answer." However, after allocating one half of the fees to the enforcement action, the court went on to reduce that by one half again. The court actually decided that there were "special circumstances" present in the case, noting that the Town had allowed Baker's violation to continue for years and noting that there was no evidence that Baker's business had caused any lasting environmental damage. Baker v. Town of Woolwich is a fairly early warning from the Law Court that the authorization for attorney fees in the statute is not a guarantee that the municipality will recover all of its attorney fees if it is the prevailing party.

Town of Orrington v. Pease, 660 A.2d 919 (Me. 1995).

This is an example of a case which started in the District Court, was appealed to the Superior Court, and then went on to the Maine Supreme Court. When that happens, the Superior Court decision is virtually meaningless, because the Law Court reviews the record developed before the District Court directly. One of the things that happened in the District Court was that the Town raised a zoning violation which it had not included in the Rule 80K citation and complaint. The Law Court decided that that was acceptable, since the Peases did not object and that newly raised violation was therefore tried "by consent." While it is certainly not a recommended practice to bring up new violations on the date of the hearing, Town of Orrington v. Pease indicates that it is worth a try if for some reason you have omitted something from your

Rule 80K citation and complaint. The other interesting aspect of Town of Orrington v. Pease concerns attorney fees. The Peases' argued that the Town could not obtain attorney fees because it had not filed an application for those fees until more than 90 days after the entry of the judgment, as Maine Rule of Civil Procedure 54(b)(3) appeared to require. But the Law Court upheld the grant of attorney fees because the Town had included the request in its original citation and complaint; the Town therefore did not have to file a separate application within the 90 day period. The obvious lesson is to make sure your Rule 80K citation and complaint always requests costs and attorney fees.

City of Rockland v. Winchenbaugh, 583 A.2d 702 (Me. 1990).

This very short decision illustrates several interesting points. Winchenbaugh tried to defend on the basis that were similar violations by others in the vicinity of this property. The District Court excluded that evidence as irrelevant and the Law Court agreed. As discussed previously in this manual, "selective enforcement" is almost never an effective defense for the violator. Winchenbaugh is another case where the Law Court awarded attorney fees for the original trial in the District Court, for defending the appeal to the Superior Court and then for defending the appeal to the Law Court. The last sentence of the decision illustrates the role of the three levels of the court system. The decision was: "[r]emanded to the Superior Court with instructions to remand to the District Court within instructions to amend award of attorney fees to the City to include litigation costs incurred defending the District Court's judgment on appeal to the Superior Court and the Law Court." As you can see, it is an interesting journey, from the District Court all the way to the Law Court to find out you are entitled to attorney fees, then all the way back to the District Court for an order that says how much you are entitled to.

City of Rockland v. Winchenbaugh, 667 A.2d 602 (Me. 1995).

Court cases can be like popular movies; oftentimes there is a sequel. We will call this one Winchenbaugh II. While the parties were fighting over attorney fees in Winchenbaugh I, Mr. Winchenbaugh was apparently continuing to disregard the zoning ordinance and the City filed a motion for contempt of court alleging that Winchenbaugh failed to comply with the terms of the injunction originally entered by the District Court. Winchenbaugh asked to have that contempt proceeding removed to the Superior Court and tried to a jury. The District Court refused and found him in contempt. After a pass through the Superior Court, the case wound up at the Law Court again, where Winchenbaugh lost again. The Law Court decided that there was no entitlement to

a jury trial in a contempt proceeding. Said the Law Court "[c]ivil contempt is used to secure obedience to court orders. ... It is a coercive tool, available to parties who seeks to enforce a previously obtained judgment." Describing civil contempt as an equitable remedy, the court concluded that there is no right to a jury trial. The outcome: once again the case was remanded to the Superior Court with instructions to remand to the District Court to add even more attorney fees to the $6,918.66 Winchenbaugh had already become obligated to pay. Keep your eyes out for Winchenbaugh III.

City of Ellsworth v. McAlpine, 590 A.2d 545 (Me. 1991).

This case offers an illustration of how hard attorney fees are to collect--that is, actually get deposited into the Town Treasury. Once fees have been awarded and an order entered requiring the violator to pay, that does not necessarily mean that the defendant will hand over the money. If a defendant does not, the municipality needs to utilize collection procedures in the District Court, including one called "disclosure," where the court requires the violator to come in and answer questions about his or her assets so that the court can order some of them turned over to the Town. The good news of the McAlpine case is that the attorney fees expended in using the disclosure proceeding to collect the attorney fees from the Rule 80K proceeding can also be recovered by the municipality.

Shafmaster v. Town of Kittery, 469 A.2d 848 (Me. 1984).

This is a pre-Rule 80K case brought in the Superior Court, but it is of interest to Code Enforcement Officers. It states the principle that a Code Enforcement Officer has an independent responsibility to enforce the provisions of the Zoning Ordinance, even where the Planning Board has approved a project. That is, Planning Board approval does not relieve the Code Enforcement Officer of the obligation to enforce, if the CEO finds that the building violates a setback requirement.

Town of Falmouth v. Long, 578 A.2d 1168 (Me. 1990).

This case demonstrates that the equitable defenses of estoppel and laches are typically unsuccessful as defenses to a land use enforcement action. The Town was not barred from bringing its enforcement action even though several municipal employees had apparently been aware of the problems on the property for a number of years and the defendant dentist had operated his practice in violation of the ordinance for 15 years.

City of Auburn v. Desgrosseilliers, 578 A.2d 712 (Me. 1990).

This is one of the few cases where the doctrine of equitable estoppel did prevent the municipality from enforcing the ordinance. What appears to distinguish this case from others is that it was the City Council itself which made the representations that lead the property owners to believe they could conduct their business as planned, and the Council did that in the context of actually passing an amendment to the Zoning Ordinance.

Town of Union v. Strong, 681 A.2d 14 (Me. 1996).

This was another occasion to address the concept of "equitable estoppel" as applied to municipal enforcement activities. "Equitable estoppel" means, in simpler terms, that it would be unfair to enforce the ordinance against someone who has reasonably relied on what the municipality has said. In this case Mr. Strong got a letter from the Planning Board (which at that time was acting as the Code Enforcement Officer for shoreland zoning in the Town) stating that he could continue to construct his deck. But, about a year later, a newly-appointed Code Enforcement Officer visited the Strong home and orally ordered Strong to cease construction. Strong did not cease, went ahead and completed his deck, and then argued that he could rely on the Planning Board's letter. The Law Court disagreed.

Town of Union v. Strong also teaches several other lessons. One is that a deck attached to a house will be considered part of the principal structure rather than an accessory structure. Under an ordinance which applied a setback requirement to all "principal structures," the deck had to meet the setback requirement as well. And, unless the local ordinance says something specific to the contrary, setbacks are measured along the horizontal plane rather than "over the ground." The court noted that measuring in the horizontal plane will often result in the structures being placed further back from the high water mark, better serving the protective purposes of shoreland zoning.

Perhaps the most important lesson in Town of Union v. Strong is that attitude counts. The court went out of its way to point out that Strong demonstrated bad attitude:

> Ample evidence in the record supports the conclusion that Strong was bent on completing the deck regardless of whether the CEO or the planning board approved its construction. As noted by the court in its findings, Strong's letters to the planning board throughout this acrimonious permitting process demonstrated a lack of respect for and a stubborn resistance to the board's authority. Despite repeated warnings, Strong constructed his two car garage without ever obtaining a permit for it. Given this history and conduct, there is no basis for invoking the doctrine of equitable estoppel to prevent the Town from enforcing its zoning ordinance.

The result for Strong was a $7,500.00 civil penalty and an award of attorney fees to the Town of $5,714.00.

H.E. Sargent, Inc. v. Town of Wells, 676 A.2d 920 (Me. 1996).

This was another occasion for he Law Court to consider whether an opinion of a Code Enforcement Officer which turns out to be incorrect or inaccurate can later "estop" the municipality from enforcing the ordinance correctly. The issue in the case was whether certain excavation activity at an existing gravel pit was "grandfathered" under a zoning ordinance provision which exempted from new regulations a pit "legally operating" on a particular date. The Town interpreted the terms "legally operating" to mean operating in compliance with all required local, state and federal permits, and the applicant obtained a letter from the Maine DEP stating that the pit had not required a DEP permit under the site location law. That letter was based on certain assumptions provided by the applicant. Based on that letter from the DEP, Sargent advised the Code Enforcement Officer that it was "grandfathered" under the site location act, and the Code Enforcement Officer then wrote a letter to Sargent confirming that the pit was grandfathered under the Town's ordinance. Unfortunately for Sargent, however, a picture is worth a thousand words. At a local Board of Appeals meeting evidence was presented to show that there had been no excavation on the property at the time Sargent thought there had been and, as a result, the assumptions in the DEP's letter were wrong. Under those circumstances, the Law Court held that the Town was not prevented by the Code Enforcement Officer's letter (which was based on incorrect information provided by Sargent) from enforcing its Ordinance.

This case also involves the related doctrine called "laches," which prevents enforcement of a right that has been ignored for too long a period of time. Sargent argued that, since the pit had been in operation for approximately 18 years before the Town took any enforcement action, it was too late for the Town to proceed. The Law Court, noting that "[w]e never have adopted laches as an affirmative defense to prevent a Town from enforcing its zoning regulations," rejected Sargent's arguments.

Town of Shapleigh v. Shikles, 427 A.2d 460 (Me. 1981).

This is a pre-Rule 80K case, but it demonstrates that courts will exercise a great deal of discretion in determining what remedy to grant for a land use violation. This case stands for the proposition that establishing that a building is unlawful and was unlawfully constructed does not automatically entitle the municipality to an injunction requiring removal of the building. In fact,

getting a court to order removal of a building is a very difficult proposition. Even in McGarva, the $100,000.00 fine case discussed above, the Superior Court did not order removal of the building and the Law Court did not disturb that decision.

Town of Holden v. Pineau, 573 A.2d 1310 (Me. 1990).

Pineau has lots of interesting tidbits buried in its complicated fact pattern. For one, it establishes the proposition that even if the local zoning ordinance provides a lesser penalty, the municipality can still pursue the penalties available under the state zoning enforcement statute, 30-A M.R.S. §4452. The state statute is an independent remedy. And the Pineau case explores the relationship between an enforcement action and a pending appeal from an adverse decision by an administrative board. The Law Court upheld a District Court order requiring removal of the offending structure (radio tower), but conditioned that order upon a final decision adverse to Pineau in Pineau's pending Superior Court appeal from a decision of the Zoning Board of appeals about the legality of the tower.

Toussaint v. Town of Harpswell, 1997 ME 189, 698 A.2d 1063.

Is a kennel with eleven indoor/outdoor dog runs and the capacity to board fifteen dogs allowable as a home occupation? In Harpswell, the Code Enforcement Officer and Board of Appeals thought so, despite complaints from "summer residents of the neighborhood" about "almost continuous barking by dogs…". At the Superior Court level, the Board of Appeals was overturned, the Justice finding that "a dog kennel is unlike businesses traditionally recognized as home occupations such as dressmaking, hairdressing and tutoring…". The Law Court reversed, noting that while traditional definitions of "home occupation" speak of businesses "customarily carried on from a home," the Harpswell Ordinance defined home occupation to include businesses that are "customarily conducted on residential property." Because of the "breadth of the term," the court affirmed the Board of Appeals decision that the kennel was permissible as a home occupation.

Shadan v. Town of Skowhegan, 1997 ME 187, 770 A.2d 245.

This is not a rule 80K case, but it makes reference to one. Mr. Shadan was asserting all sorts of claims against the Town, one of which was that his constitutional rights were being violated by the Town's efforts to enforce conditions of subdivision approval against him. Those conditions were that the property be used only for seasonal structures, not for year-round residences. The Town's subdivision ordinance authorized the Town's Planning Board to "take

such steps as they deemed in the best interests of the Town to effect compliance with the provisions as hereinafter set forth." Utilizing that language, the Town instituted a rule 80K proceeding to evict Shadan because he had been living on his land throughout the year. While the 80K case was not in front of the Law Court for decision, the court held that enforcement of the subdivision regulations was not "de facto" zoning and did not deprive Shadan of any constitutional rights.

Department of Environmental Protection v. Woodman, 1997 ME 164, 697 A.2d 1295.

The DEP brought a land use citation and complaint against the Woodmans, who had created a pond by damming up a stream without obtaining a permit under the Natural Resources Protection Act. The Superior Court found a violation and ordered the Woodmans to restore the site to its condition prior to the construction of the dam. The Woodmans then persuaded the court that they were financially unable to comply with that order. Consequently, the court appointed an expert, Robert Gerber, to review the record, visit the site and make recommendations to the court as to whether the pond should be removed or whether there were other -- presumably less expensive -- forms of remediation available. Gerber reviewed the record, but did not visit the site, concluding that a site visit was not necessary; and he recommended that the dam be removed and the site restored to its original condition. The Woodmans appealed on several grounds. One was the allegation that Gerber was biased. The Law Court rejected that, because the Woodmans had not raised it at the Superior Court level. The lesson is that objections which could be cured at the trial court must be raised in the trial court. The fact that the Woodmans were representing themselves made no difference; litigants not represented by lawyers are held to the same standards as lawyers in terms of knowing the rules.

The Woodmans also objected to the court's acceptance of the Gerber report because Gerber had not conducted a site visit. The Law Court ruled that it was acceptable for Gerber to prepare his recommendations without a site visit, because of the legal rule that an expert testifying in court may rely on facts or data made known to him through sources other than direct experience. An expert may base his or her opinion on information which would be hearsay if

offered in evidence directly, if it is data of the type commonly relied on by experts forming opinions on the subject.

Fitanides v. City of Saco, 684 A.2d 421 (Me. 1996).

This is a useful case because it may well be the first time the Maine Supreme Judicial Court has looked at the difference between nonconforming uses, nonconforming lots and nonconforming structures and gotten it right. Fitanides' neighbor planned to add a repair garage to his existing used car sales lot. The lot was nonconforming (that is, too small), the existing structure was nonconforming (that is, violated the setback requirements) and -- Fitanides alleged -- that the use was nonconforming. What the court did was to analyze each of those nonconformities separately.

To decide the use question, the court looked to the use provisions in the ordinance and found that automobile dealers and automobile repair garages were allowed as conditional uses by the district regulations. The court therefore concluded that the existing use was not nonconforming (the ordinance definition of nonconforming use was one which "is not permitted in the district in which it is located…"). With respect to the nonconformity of the lot, the court, looking to a specific provision in the Saco Zoning Ordinance, found that the structure on the lot could be expanded even though the lot itself was too small. And as to the structure, the court found that the proposed addition did not, in itself, violate the setback requirements and therefore could be built without a variance. The provisions of the Saco Zoning Ordinance were very precise on those subjects, and they worth reviewing as good models. Oftentimes, people get confused because they assume that when a lot is nonconforming the building on it cannot be expanded, or when a use is nonconforming the building cannot be enlarged without a variance, or when a building violates the setback requirements it cannot be enlarged in any dimension. Under most zoning ordinances, that is not the case. Nonconformity in one of the three categories does not necessarily prevent expansions and enlargements in one of the other categories.

Otis v. Town of Sebago, 645 A.2d 3 (Me. 1994).

Is everything the Code Enforcement Officer puts down in writing appealable to the local Board of Appeals? Not necessarily. In Otis v. Town of Sebago the CEO had issued a building permit on April 15th. Construction did not commence until September. Otis was an abutter, who did not receive notice of the building permit (typically abutters do not) and did not become aware of the permit until the construction started. In December Otis wrote a letter to the CEO requesting revocation of the April permit. The CEO refused that request, by letter back to Otis. Otis then

appealed to the local Board of Appeals from the CEO's letter refusing to revoke the permit. The Board of Appeals declined to hear Otis' appeal because it was not filed within 30 days of the issuance of the building permit. The Law Court affirmed. The court stated that the Town's ordinance "does not authorize the CEO to reconsider previous decisions nor does it provide a mechanism for an aggrieved party to request that the CEO reconsider a prior decision." Consequently, the building permit became final 30 days after its issuance and the appeal to the Board of Appeals was too late. Perhaps the lesson for Code Enforcement Officers in Otis v. Town of Sebago is not to write letters in response to requests when the Code Officer is not authorized by ordinance to act on the request. That is, do not put advisory opinions in writing, because someone may attempt to appeal them to the Board of Appeals.

Pepperman v. Town of Rangeley, 659 A.2d 280 (Me. 1995).

When this case was first decided, there was some concern that it stood for the proposition that enforcement decisions of the Code Enforcement Officer could not be appealed either to the local Board of Appeals or to the Superior Court. That is not an accurate summary of the case and, further, Pepperman is probably best explained as a decision which turned on some quirky language in the local zoning ordinance and therefore really doesn't have much effect as a precedent.

In Pepperman the CEO had sent a notice of violation ordering a structure violating the zoning ordinance's setback requirement to be relocated. Pepperman appealed to the Zoning Board of Appeals under language commonly found in ordinances, authorizing the Board "to hear and decide appeals where it is alleged there is an error in any order, requirement, decision or determination by the Code Enforcement Officer…in the enforcement of this ordinance." Under that provision, the Board of Appeals heard Pepperman's appeal and denied it. Pepperman appealed to the Superior Court, which affirmed the decision of the Board of Appeals. The Town then filed a Rule 80K complaint in the District Court. But before that could be heard, Pepperman filed his appeal to the Maine Supreme Court (the "Law Court"), and the Rule 80K proceeding was stayed until the Law Court rendered its decision.

The Law Court's decision was, to put it politely, surprising. The Law Court ruled that the decision of the Board of Appeals was only "advisory," and that the Superior Court should have therefore dismissed the appeal, which the Law Court promptly did. As far as the Law Court was concerned, the Board of Appeals denial of Pepperman's appeal from the CEO's notice of violation "was nothing more than another fact for the municipal officers to consider in deciding whether to

institute an enforcement action to abate the violation. Since that denial had no legal consequences itself, the denial by the Board was not subject to judicial review by the Superior Court."

If that were a general statement of Maine law, it would indicate that a Board of Appeals can never make a binding decision about a Code Enforcement Officer's notice of violation, stop work order, notice to correct violation, etc. But Pepperman is not really a general statement of Maine law. The Law Court's decision seems to be based on this peculiar sentence in the Rangeley Ordinance describing the powers and duties of the Board of Appeals: "[t]he action of the Code Enforcement Officer…may be returned to [the Code Enforcement Officer] for reconsideration by the Board of Appeals by a majority vote of those present and voting except that there must be a minimum of three votes in favor of reconsideration." Apparently it was that notion that all the Board of Appeals can do is "return" the issue to the Code Enforcement Officer for "reconsideration" that persuaded the Law Court that the Board of Appeals was only acting as an advisor, rather than a decision-maker. By way of contrast, most zoning ordinances do say, forthrightly, that the Board of Appeals has the power to "reverse" or "modify" or "decide" that the Code Enforcement Officer has made an error -- not just send something back to the Code Enforcement Officer for "reconsideration." Pepperman should probably be treated as a case which does not have much to say except within the Town of Rangeley.

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THE RULE

RULE 80K. LAND USE VIOLATIONS

(a) **Applicability.** Except as otherwise provided in this rule, these rules shall apply to proceedings in the District Court involving alleged violations of land use laws and ordinances, whether administered and enforced primarily at the state or the local level, including but not limited to, those statutes, ordinances, codes, rules and regulations set forth in 4 M.R.S.A. § 152(6).

(b) Commencement of Proceeding; Service.

(1) *In General.* A proceeding under the rule shall be commenced by one of the following methods"

(A) A Land Use Citation and Complaint may be filled out in the manner prescribed in paragraph (1) of subdivision (c) of this rule and served upon the alleged violator within the state by any certified municipal official, any certified employee of the Department of Environmental Protection, or any other official authorized to serve civil process to enforce a statute, ordinance, code, rule or regulation to which this rule applies, if such official has reasonable grounds to believe that a violation of any provision of law as to which the official is authorized to serve process and to which the rule applies has been or is being committed. Service under this subparagraph shall be made upon an individual by delivering a copy of the Land Use Citation and Complaint to the individual personally and, if the alleged violator is an infant or incompetent person, personally to the appropriate individual specified in Rule 4(d)(2) or (3) of these rules. Service under this subparagraph shall be made upon any other entity by delivering a copy of the citation personally to one of the appropriate individuals specified in Rule 4(d) (4)-(14) of these rules.

(B) A Land Use Citation and Complaint may be filled out in the manner prescribed in paragraph (1) of subdivision (c) of this rule by any public official who has reasonable grounds to believe that a violation of any provision of law that the official is authorized to enforce and to which this rule applies has been or is being committed. The complainant shall transmit the Land Use Citation and Complaint to any officer or person authorized to serve civil process under Rule 4(c) of these rules, who may serve it, or cause it to be served, upon the alleged violator by any method provided in Rule 4(d),(e),(f),(g), or (j) of these rules.

(C) In any proceeding under this rule in which a temporary retraining order is sought, the original of a Land Use Citation and Complaint, filled out as prescribed in paragraph (2) of subdivision (c) of this rule may be filed with the court by any person authorized under subdivision (h) of this rule to represent the plaintiff, or by the plaintiff's attorney, if such person has reasonable grounds to believe that a violation of any provision of law as to which the person has such authority is being committed and that immediate and irreparable

injury, loss, or damage will result from such violation before the alleged violator can be heard personally or by counsel in opposition to the order. The person filing the Land Use Citation and Complaint shall, at the earliest opportunity, serve, or cause to be served, a copy of it on the alleged violator by any method provide in subparagraph (A) or (B) of this paragraph, together with notice of the hearing on the preliminary injunction.

(2) *Additional Service on Property Owner.* When the alleged violator is not the owner of the property on which the violation is alleged to have occurred or is occurring, the person making service on the alleged violator shall serve, or cause to be served, a copy of the Land Use Citation and Complaint upon the owner of the property by any appropriate method provided in Rule 4 of these rules.

(3) *Return of Service.* As soon as practicable after service upon the alleged land use violator, and the property owner if appropriate, the person making service shall cause the original of the Land Use Citation and Complaint to be filed with the court, together with the appropriate proof of service as provided in Rule 4(h) or (j) of these rules.

(4) *Proceedings in Name of Municipality or State.* All proceedings arising under the provisions of locally administered and enforced laws and ordinances or regulations shall be brought in the name and to the use of the municipality. All proceedings arising under laws administered or enforced by the State shall be brought in the name of the State.

(c) Content of Land Use Citation and Complaint.

(1) A Land Use Citation and Complaint that is to be served as provided in subparagraph (1)(A) or (B) of subdivision (b) of this rule shall contain the name and address of the alleged violator; the name and address of the property owner if different; the time and place of the alleged violation or, if they are not know, the time and place at which it was first observed by the complainant; a brief description of the alleged violation; a summary of the law or ordinance provision which is alleged to have been violated, including the penalties for violation; if a preliminary injunction is sought, a statement to that effect; the time, date, and place the alleged violator is to appear in court; where applicable, a statement that the alleged violator was advised of the violation; the signature and title of the complainant; and the signature of the alleged violator acknowledging receipt of the citation and complaint or a statement that the alleged violator refused to sign, or was unable to sign. If the violation alleged is of a state agency rule or a municipal ordinance or regulation, an attested or certified copy of the section or sections alleged to have been violated, together with a statement describing the place where the complete text may be obtained, shall be attached to the original of the Land Use Citation and Complaint. The Land Use Citation and Complaint shall notify the alleged violator that in the event of failure to appear on the date specified, a judgment by default may be entered.

(2) A Land Use Citation and Complaint that is to be filed with the court as provided in subparagraph (1)(C) of subdivision (b) of this rule shall contain the matters provided in paragraph (1) of this subdivision and a statement that a temporary restraining order is sought. It shall be accompanied by the affidavit and the certificate required by Rule 65(a) of these rules.

No other summons, complaint, or pleading shall be required of the municipality or the State, but motions for appropriate amendment of the Land Use Citation and Complaint shall be freely granted.

(d) **Temporary Restraining Order and Preliminary Injunction: Security.** The applicant for a temporary restraining order or a preliminary injunction under this rule shall not be required to give security as a condition upon the issuance thereof.

(e) **Pleadings of Defendant.**

(1) *Oral.* The alleged violator shall appear at the time and place specified, either personally or by counsel, and shall answer to the complaint orally.

(2) *No Joinder.* Proceedings pursuant to this rule shall not be joined with any action other than another proceeding pursuant to this rule, nor shall an alleged violator file a counterclaim or cross-claim.

(f) **Venue.** A land use violation proceeding under this rule shall be brought in the division in which the violation is alleged to have been committed.

(g) **Discovery.** Discovery shall be had only by agreement of the parties or by order of the court on motion for good cause shown.

(h) **Authority of Complainant.** A person who is not an attorney may represent a municipality under 12 M.R.S.A. § 4812-C(2), 30-A M.R.S.A. § 4221 (2), or 30-A M.R.S.A. § 4452 (1), or the State under 38 M.R.S.A. § 342(7), if the person files when the court with first appearing a written authorization from the municipal officers or the Commissioner of the Department of Environmental Protection, as appropriate, and a current certificate of familiarity with court procedures awarded under a program established by the Commissioner of Human Services as provided in 30-A M.R.S.A § 4221 (2).

(i) **Standard of Proof.** Adjudication of an alleged land use violation shall be by a preponderance of the evidence.

(j) **Appeal.** A party entitled to appeal may do so as in other civil actions.

STATUTES

Title 30A M.R.S.A. § 4451. Training and certification for code enforcement officers

1. Certification required; exceptions. Beginning January 1, 1993, a municipality may not employ any individual to perform the duties of a code enforcement officer who is not certified by the office, except that:

A. An individual other than an individual appointed as a plumbing inspector has 12 months after beginning employment to be trained and certified as provided in this section;

B. Whether or not any extension is available under paragraph A, the office may waive this requirement for up to one year if the certification requirements cannot be met without imposing a hardship on the municipality employing the individual; and

C. An individual may be temporarily authorized in writing by the Department of Human Services, Division of Health Engineering to be employed as a plumbing inspector for a period not to exceed 12 months.

A person employed by a municipality or municipalities as a code enforcement officer for at least 3 years prior to January 1, 1990 is deemed certified under this section and, 5 years after the effective date of this paragraph, is subject to the recertification requirements of subsection 6.

2. Penalty. Any municipality that violates this section commits a civil violation for which a forfeiture of not more than $100 may be adjudged. Each day in violation constitutes a separate offense.

2-A. Code enforcement officer; definition and duties. As used in this subchapter, "code enforcement officer" means a person certified under this section and employed by a municipality to enforce all applicable laws and ordinances in the following areas:

A. Shoreland zoning under Title 38, chapter 3, subchapter I, article 2-B;

B. Comprehensive planning and land use under Part 2, Subpart VI-A;

C. Internal plumbing under chapter 185, subchapter III;

D. Subsurface wastewater disposal under chapter 185, subchapter III; and

E. Building standards under chapter 141; chapter 185, subchapter I; and Title 25, chapters 313 and 331.

3. Training and certification of code enforcement officers. In cooperation with the Maine Technical College System, the Department of Environmental Protection and the Department of Human Services, the office shall establish a continuing education program for individuals engaged in code enforcement. This program must provide basic and advanced training in the technical and legal aspects of code enforcement necessary for certification.

4. Examination. The office shall conduct at least one examination each year to examine candidates for certification at a time and place designated by it. The office may conduct additional examinations to carry out the purposes of this subchapter.

5. Certification standards. The office shall establish by rule the qualifications, conditions and licensing standards and procedures for the certification and recertification of individuals as code enforcement officers. A code enforcement officer need only be certified in the areas of actual job responsibilities. The rules established under this subsection must identify standards for each of the areas of training under subsection 2-A, in addition to general standards that apply to all code enforcement officers.

6. Certification; terms; revocation. The office shall certify individuals as to their competency to successfully enforce ordinances and other land use regulations and permits granted under those ordinances and regulations and shall issue certificates attesting to the competency of those individuals to act as code enforcement officers. Certificates are valid for 5 years unless revoked by the District Court. An examination is not required for recertification of code enforcement officers. The office shall recertify a code enforcement officer if the code enforcement officer successfully completes at least 12 hours of approved training in each area of job responsibility during the 5-year certification period.

A. The District Court may revoke the certificate of a code enforcement officer, in accordance with Title 4, chapter 5, when it finds that:

(1) The code enforcement officer has practiced fraud or deception;

(2) Reasonable care, judgment or the application of a duly trained and knowledgeable code enforcement officer's ability was not used in the performance of the duties of the office; or

(3) The code enforcement officer is incompetent or unable to perform properly the duties of the office.

B. Code enforcement officers whose certificates are invalidated under this subsection may be issued new certificates provided that they are newly certified as provided in this section.

7. Other professions unaffected. This subchapter may not be construed to affect or prevent the practice of any other profession.

30A § 4452. Enforcement of land use laws and ordinances

1. Enforcement. A municipal official, such as a municipal code enforcement officer, local plumbing inspector or building inspector, who is designated by ordinance or law with the responsibility to enforce a particular law or ordinance set forth in subsection 5, 6 or 7, may:

A. Enter any property at reasonable hours or enter any building with the consent of the owner, occupant or agent to inspect the property or building for compliance with the laws or ordinances set forth in subsection 5. A municipal official's entry onto property under this paragraph is not a trespass;

B. Issue a summons to any person who violates a law or ordinance, which the official is authorized to enforce; and

C. When specifically authorized by the municipal officers, represent the municipality in District Court in the prosecution of alleged violations of ordinances or laws, which the official is authorized to enforce.

2. Liability for violations. Any person, including, but not limited to, a landowner, the landowner's agent or a contractor, who violates any of the laws or ordinances set forth in subsection 5 or 6 is liable for the penalties set forth in subsection 3.

3. Civil penalties. The following provisions apply to violations of the laws and ordinances set forth in subsection 5. Except for paragraph H, monetary penalties may be assessed on a per-day basis and are civil penalties.

A. The minimum penalty for starting construction or undertaking a land use activity without a required permit is $100, and the maximum penalty is $2,500.

B. The minimum penalty for a specific violation is $100, and the maximum penalty is $2,500.

B-1. Notwithstanding paragraph B, the maximum penalty is $5,000 for any violation of a law or an ordinance set forth in subsection 5, paragraph Q, if the violation occurs within an area zoned for resource protection.

C. The violator may be ordered to correct or abate the violations. When the court finds that the violation was willful, the violator shall be ordered to correct or abate the violation unless the abatement or correction results in:

(1) A threat or hazard to public health or safety;

(2) Substantial environmental damage; or

(3) A substantial injustice.

C-1. Notwithstanding paragraph C, for violations of the laws and ordinances set forth in subsection 5, paragraph Q, the violator shall be ordered to correct or mitigate the violation unless the correction or mitigation results in:

(1) A threat or hazard to public health or safety;

(2) Substantial environmental damage; or

(3) A substantial injustice.

D. If the municipality is the prevailing party, the municipality must be awarded reasonable attorney fees, expert witness fees and costs, unless the court finds that special circumstances make the award of these fees and costs unjust. If the defendant is the prevailing party, the defendant may be awarded reasonable attorney fees, expert witness fees and costs as provided by court rule.

E. In setting a penalty, the court shall consider, but is not limited to, the following:

(1) Prior violations by the same party;

(2) The degree of environmental damage that cannot be abated or corrected;

(3) The extent to which the violation continued following a municipal order to stop; and

(4) The extent to which the municipality contributed to the violation by providing the violator with incorrect information or by failing to take timely action.

F. The maximum penalty may exceed $2,500, but may not exceed $25,000, when it is shown that there has been a previous conviction of the same party within the past 2 years for a violation of the same law or ordinance.

G. The penalties for violations of a septage land disposal or storage site permit issued by the Department of Environmental Protection under Title 38, chapter 13, subchapter 1, are as prescribed in Title 38, section 349.

H. If the economic benefit resulting from the violation exceeds the applicable penalties under this subsection, the maximum civil penalties may be increased. The maximum civil penalty may not exceed an amount equal to twice the economic benefit resulting from the violation. Economic benefit includes, but is not limited to, the costs avoided or enhanced value accrued at the time of the violation as a result of the violator's noncompliance with the applicable legal requirements.

4. Proceedings brought for benefit of municipality. All proceedings arising under locally administered laws and ordinances shall be brought in the name of the municipality. All fines resulting from those proceedings shall be paid to the municipality.

5. Application. This section applies to the enforcement of land use laws and ordinances or rules which are administered and enforced primarily at the local level, including:

A. The plumbing and subsurface waste water disposal rules adopted by the Department of Human Services under Title 22, section 42, including the land area of the State which is subject to the jurisdiction of the Maine Land Use Regulation Commission;

B. Laws pertaining to public water supplies, Title 22, sections 2642, 2647 and 2648;

C. Local ordinances adopted pursuant to Title 22, section 2642;

D. Laws administered by local health officers pursuant to Title 22, chapters 153 and 263;

E. Laws pertaining to fire prevention and protection, which require enforcement by local officers pursuant to Title 25, chapter 313;

F. Laws pertaining to the construction of public buildings for the physically disabled pursuant to Title 25, chapter 331;

G. Local land use ordinances adopted pursuant to section 3001;

H. Local building codes adopted pursuant to sections 3001 and 3007;

I. Local housing codes adopted pursuant to sections 3001 and 3007;

J. Laws pertaining to junkyards, automobile graveyards and automobile recycling businesses and local ordinances regarding junkyards, automobile graveyards and automobile recycling businesses, pursuant to chapter 183, subchapter I.

K. Local ordinances regarding electrical installations pursuant to chapter

L. Local ordinances regarding regulation and inspection of plumbing pursuant to chapter 185, subchapter III;

M. Local ordinances regarding malfunctioning subsurface waste water disposal systems pursuant to section 3428;

N. The subdivision law and local subdivision ordinances adopted pursuant to section 3001 and subdivision regulations adopted pursuant to section 4403;

O. Local zoning ordinances adopted pursuant to section 3001 and in accordance with section 4352;

P. Wastewater discharge licenses issued pursuant to Title 38, section 353-B;

Q. Shoreland zoning ordinances adopted pursuant to Title 38, sections 435 to 447, including those which were state-imposed; and

R. The laws pertaining to harbors in Title 38, chapter 1, subchapter I, local harbor ordinances adopted in accordance with Title 38, section 7 and regulations adopted by municipal officers pursuant to Title 38, section 2.

6. Septage and sludge permits issued by the Department of Environmental Protection. A municipality, after notifying the Department of Environmental Protection, may enforce the terms and conditions of a septage land disposal or storage site permit or a sludge land application or storage site permit issued by the Department of Environmental Protection pursuant to Title 38, chapter 13, subchapter 1.

7. Natural resources protection laws. A code enforcement officer, authorized by a municipality to represent that municipality in District Court and certified by the State Planning Office under section 4453 as familiar with court procedures, may enforce the provisions of the natural resources protection laws, Title 38, chapter 3, subchapter I, article 5-A and Title 38, section 420-C, by instituting injunctive proceedings or by seeking civil penalties in accordance with Title 38, section 349, subsection 2.

30A § 4453. Certification for representation in court

The office shall establish certification standards and a program to certify familiarity with court procedures for the following individuals:

1. Code enforcement officers. Code enforcement officers as set forth in sections 4451 and 4452 and Title 38, section 441;

2. Plumbing inspectors. Plumbing inspectors as set forth in sections 4221 and 4451;

3. Department of Environmental Protection. Department of Environmental Protection employees as set forth in Title 38, section 342, subsection 7;

4. Maine Land Use Regulation Commission. Maine Land Use Regulation Commission employees as set forth in Title 12, section 685-C, subsection 9; and

5. Humane agents and state veterinarians. Humane agents and state veterinarians as set forth in Title 7, section 3909, subsection 2.

Title 4 § 152. District Court; civil jurisdiction

The District Court has jurisdiction in the following civil matters: [1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

1. Jurisdiction exercised by trial justices and municipal courts. The civil jurisdiction exercised by all trial justices and municipal courts in the State on September 16, 1961; [1983, c. 796, §1 (rpr).]

2. Civil actions for money damages. Original jurisdiction, concurrent with that of the Superior Court, of all civil actions when no equitable relief is demanded, except those actions for which exclusive jurisdiction is vested in the Superior Court by statute; [1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

3. Civil actions to enforce liens. Original jurisdiction, concurrent with the Superior Court, of all civil actions to enforce liens under Title 10, chapter 603 and under Title 35-A, section 706, and the court shall determine the amount pursuant to Title 10, section 3258; [1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

4. Exclusive jurisdiction. Original jurisdiction, not concurrent with that of the Superior Court, of mental health commitment hearings under Title 34-B, chapter 3, subchapter 4, mental retardation certification hearings under Title 34-B, chapter 5, habitual truancy actions under Title 20-A, chapters 119 and 211 under which equitable relief may be granted and small claims actions under Title 14, chapter 738; [RR 2001, c. 2, Pt. A, §2 (cor).]

5. Other actions. Original jurisdiction, concurrent with that of the Superior Court, of the following types of actions, and in these actions the District Court may grant equitable relief: [1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

A. [1999, c. 731, Pt. ZZZ, §4 (rp); §42 (aff).]

B. Actions to quiet title to real estate under Title 14, sections 6651 to 6658;

[1983, c. 796, §1 (rpr).]

C. Actions to quiet title to real estate under Title 36, section 946;

[1983, c. 796, §1 (rpr).]

D. Actions for breach of implied warranty and covenant of habitability under Title 14, section 6021;

[1983, c. 796, §1 (rpr).]

E. Actions to foreclose mortgages under Title 14, chapter 713, subchapter VI;

[1985, c. 293, §1 (amd).]

F. Actions for restitution under Title 5, section 213;

[1989, c. 392, §1 (amd).]

G. Actions for illegal evictions under Title 14, section 6014;

[1989, c. 392, §1 (amd).]

H. Actions for the foreclosure of mortgages of real and personal property and for redemption of estates mortgaged;

[1989, c. 392, §1 (new).]

I. Actions to compel the specific performance of written contracts and to cancel and compel the discharge of written contracts, whether under seal or otherwise, when full performance or payment has been made to the contracting party;

[1989, c. 392, §1 (new).]

J. Actions for relief in cases of fraud, duress, unjust enrichment, trust, accident or mistake;

[1989, c. 392, §1 (new).]

K. Actions concerning nuisance and waste;

[1989, c. 392, §1 (new).]

L. Actions concerning partnership, and between partners or part owners of vessels and of other real and personal property to adjust all matters of the partnership and between the part owners, compel contribution, make final decrees and enforce their decrees by proper process in cases where all interested persons within the jurisdiction of the court are made parties;

[1989, c. 392, §1 (new).]

M.

[1999, c. 731, Pt. ZZZ, §4 (rp); §42 (aff).]

N. Civil actions for redelivery of goods or chattels taken or detained from the owner and secreted or withheld so that the goods or chattels cannot be replevied, and in civil actions by creditors to reach and apply in payment of a debt any property, right, title or interest, legal or equitable, of a debtor or debtors, which cannot be attached on writ or taken on execution in a civil action, and any property or interest conveyed in fraud of creditors;

[1989, c. 392, §1 (new).]

O. Actions in which the pleading demands a judgment:

(1) To exclude a person from a vested or contingent interest in or lien upon specific property within the State;

(2) That a vested or contingent interest in or lien upon specific property within the State be enforced;

(2-A) That real property be partitioned by sale; or

(3) Otherwise affecting title to any real property;

[1999, c. 547, Pt. A, §1 (amd).]

P. Actions to compel the compliance with court orders including the right to appoint persons to sign instruments as provided for in the Maine Rules of Civil Procedure;

[1989, c. 392, §1 (new); c. 919, §§1, 18 (amd).]

Q. Actions in which the equitable relief is sought through an equitable defense, a counterclaim, a cross-claim or other responsive pleading or reply permitted by the Maine Rules of Civil Procedure; and

[1989, c. 392, §1 (new); c. 919, §§1, 18 (amd).]

R. Actions to enforce access to health care under Title 22, section 1715.

[1989, c. 919, §§2, 18 (new).]

Nothing in this subsection may be construed to affect the right of any party to remove an action to the Superior Court in accordance with the Maine Rules of Civil Procedure; [1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

6. Environmental laws. [1989, c. 878, Pt. A, §6 (rp); 1993, c. 349, §3 (amd).]

6-A. Environmental laws. Original jurisdiction, concurrent with that of the Superior Court, to grant equitable relief and impose penalties in proceedings involving alleged violations of a local environmental ordinance or regulation or a state environmental law or rule, including, but not limited to, the following: [2005, c. 240, §§1-3 (amd).]

A. The laws pertaining to the Maine Land Use Regulation Commission, Title 12, chapter 206-A;

[1989, c. 878, Pt. A, §7 (new).]

B. The minimum lot size law, Title 12, sections 4807 to 4807-G;

[1989, c. 878, Pt. A, §7 (new).]

C. Shoreland zoning ordinances enacted under Title 30-A, section 3001, and in accordance with Title 38, sections 435 to 446 and section 449;

[1991, c. 377, §1 (amd).]

D. The plumbing and subsurface waste water disposal rules adopted by the Department of Health and Human Services under Title 22, section 42;

[1989, c. 878, Pt. A, §7 (new); 2003, c. 689, Pt. B, §6 (rev).]

E. Laws pertaining to public water supplies, Title 22, chapter 601, subchapter IV;

[1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

F. Local ordinances enacted under Title 22, section 2642, and in accordance with Title 30-A, section 3001;

[1989, c. 878, Pt. A, §7 (new).]

G. Local land use ordinances enacted under Title 30-A, section 3001;

[1989, c. 878, Pt. A, §7 (new).]

H. Local building codes adopted pursuant to Title 30-A, section 3001, and in accordance with Title 30-A, chapter 185, subchapter I;

[1989, c. 878, Pt. A, §7 (new).]

I. Automobile junkyards, Title 30-A, chapter 183, subchapter I;

[1989, c. 878, Pt. A, §7 (new).]

J. Regulation and inspection of plumbing, Title 30-A, chapter 185, subchapter III;

[1989, c. 878, Pt. A, §7 (new).]

K. Malfunctioning domestic waste water disposal units, Title 30-A, section 3428;

[1989, c. 878, Pt. A, §7 (new).]

L. The subdivision law, Title 30-A, chapter 187, subchapter IV; local subdivision ordinances enacted under Title 30-A, section 3001; and subdivision regulations adopted under Title 30-A, section 4403;

[1989, c. 878, Pt. A, §7 (new).]

M. Local zoning ordinances enacted under Title 30-A, section 3001, and in accordance with Title 30-A, section 4352;

[1989, c. 878, Pt. A, §7 (new).]

N. All laws administered by the Department of Environmental Protection, Title 38, chapters 2 to 16;

[1989, c. 878, Pt. A, §7 (new).]

O. Local ordinances regarding air pollution control enacted pursuant to Title 38, section 597;

[2005, c. 240, §1 (amd).]

P. The laws pertaining to harbors in Title 38, chapter 1, subchapter 1; local harbor ordinances adopted in accordance with Title 38, section 7 and regulations adopted by municipal officers pursuant to Title 38, section 2; and [2005, c. 240, §2 (amd).]

Q. Local ordinances and ordinance provisions regarding storm water, including, but not limited to, ordinances and ordinance provisions regulating nonstorm water discharges, construction site runoff and postconstruction storm water management, enacted as required by the federal Clean Water Act and federal regulations and by state permits and rules;

[2005, c. 240, §3 (new).]

7. Air quality laws. [1989, c. 311, §2 (rp).]

8. Consent to minor's abortion. Original jurisdiction, concurrent with that of the Probate Court, to grant equitable relief in proceedings brought under Title 22, section 1597-A; [1999, c. 547, Pt. B, §5 (amd); §80 (aff).]

9. Licensing jurisdiction. Except as provided in Title 5, section 10004; Title 8, section 279-B; Title 10, section 8003, subsection 5; Title 20-A, sections 10712 and 10713; Title 29-A; Title 32, chapters 2-B, 114 and 135; and Title 35-A, section 3132, exclusive jurisdiction upon complaint of an agency or, if the licensing agency fails or refuses to act within a reasonable time, upon complaint of the Attorney General to revoke or suspend licenses issued by the agency. The District Court has original jurisdiction upon complaint of a licensing agency to determine whether renewal or reissuance of a license of that agency may be refused. The District Court has original concurrent jurisdiction to grant equitable relief in proceedings initiated by an agency or the Department of the Attorney General alleging any violation of a license or licensing laws or rules. [2005, c. 65, Pt. C, §1 (amd).]

Notwithstanding any other provisions of law, a licensing agency may not reinstate or otherwise affect a license suspended, revoked or modified by the District Court pursuant to a complaint filed by the Attorney General without the approval of the Attorney General; [2005, c. 65, Pt. C, §1 (amd).]

10. Appellate jurisdiction. Exclusive jurisdiction to review disciplinary decisions of occupational licensing boards and commissions taken pursuant to Title 10, section 8003. Title 5, chapter 375, subchapter VII governs this procedure as far as applicable, substituting "District Court" for "Superior Court"; [1999, c. 731, Pt. ZZZ, §4 (amd); §42 (aff).]

11. Actions for divorce, separation or annulment. Original jurisdiction, not concurrent with the Superior Court, of actions for divorce, annulment of marriage or judicial separation and proceedings under Title 19-A, except as otherwise specifically provided. [1999, c. 731, Pt. ZZZ, §4 (new); §42 (aff).]

Actions for divorce, annulment or separation pending in the Superior Court may be transferred, upon agreement of the parties, from the Superior Court to the District Court in accordance with rules adopted by the Supreme Judicial Court. An action so transferred remains in the District Court, which has exclusive jurisdiction thereafter, subject to the rights of appeal to the Law Court as to matters of law; [1999, c. 731, Pt. ZZZ, §4 (new); §42 (aff).]

12. Property matters between spouses. Original jurisdiction, not concurrent with the Superior Court, of actions to hear and determine property matters between spouses as provided in Title 19-A, section 806 and to make all necessary orders and decrees relating to these matters, to issue all necessary process to enforce the orders and decrees and to cause all the orders and decrees to be enforced. This subsection does not apply to or affect actions initiated in the Superior Court before the effective date of this subsection; [1999, c. 731, Pt. ZZZ, §4 (new); §42 (aff).]

13. Desertion and nonsupport. Jurisdiction over complaints for desertion and nonsupport or nonsupport of dependents in the district where either the spouse, the dependent or the respondent resides; and [1999, c. 731, Pt. ZZZ, §4 (new); §42 (aff).]

14. Civil violations. Jurisdiction over all civil violations, as provided in Title 17-A, section 9, and traffic infractions. [1999, c. 731, Pt. ZZZ, §4 (new); §42 (aff).]

FORMS, INSTRUCTIONS & SAMPLES

NOTICE OF VIOLATION

_____
Code Enforcement Officer
TOWN OF _____
_____, Maine

_____
(date)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

_____
_____
_____

Re: NOTICE of Violations and ORDER to Correct Violations of the Zoning Ordinance
Property Located at _____, _____, Maine
Assessor's Map _____, Lot _____
DATE OF ISSUANCE: _____

Dear _____:

Pursuant to Section _____ of the Zoning Ordinance of the Town of _____, Maine ("Zoning Ordinance"), you are hereby notified of the following violations of the Zoning Ordinance on the above-referenced property:

1. _____

_____

_____

_____

2. _____

_____

_____

You are hereby ORDERED to take the following actions to correct those violations:

1. _____

_____

_____

_____

2. _____

_____

_____

Unless these violations are corrected by the dates indicated above, I will refer this matter to the municipal officers for possible commencement of legal action in the Maine District Court or the Maine Superior Court. If the Town is the prevailing party in enforcement litigation, you may be liable for the Town's attorney fees and costs plus civil penalties. Fines of up to $2,500.00 per violation per day may be imposed.

If you wish to dispute anything in this Notice and Order, you may appeal to the _____ Board of Appeals pursuant to Section _____ of the Zoning Ordinance. Such appeal must be filed in the office of the Code Enforcement Officer at the _____ Town Hall on forms provided by the Town, together with the appropriate filing fee, within thirty (30) days after the date of issuance of this Notice and Order. Failure to appeal within thirty (30) days may deprive you of your ability to contest the contents of this Notice and Order in any subsequent proceedings. However, filing an appeal to the Board of Appeals does not relieve you of your responsibility to correct the violations or of your liability for civil penalties.

If you have any questions about what you need to do to comply with this Order, please contact me immediately,

Sincerely,

_____
Code Enforcement Officer

State of Maine
County of _____ ss

DISTRICT COURT
CIVIL ACTION
DOCKET NO. _____

_____)
(Name of Town))
Plaintiff) **LAND USE CITATION**
) **AND COMPLAINT**
vs.) **Pursuant to M.R.Civ.P. 80K**
)
_____)
(Name of Violator))
)
Defendant)

THE PLAINTIFF ALLEGES:

1. Violation:

Date of Violation, or When First Observed by Complaining Official
Month _____ Day _____ Year _____ Time _____ AM/PM
Location of Violation _____
City/Town _____

2. Description of Violation:

_____
_____
_____
_____
_____
_____
_____

3. Legal Basis of Complaint:

_____ Violation of State Law:
Title _____, Section _____ OR State Agency Rule # _____
Adopted by the Department of _____

_____ Violation of Municipal Ordinance or Regulation:
Title _____, Section _____, Page _____, Summary of law,
Ordinance, or regulation allegedly violated

_____
_____
_____

Penalty Provision : Section _____ Page _____
Penalty Amount: _____

4. Relief Sought From Court:

_____ Temporary Restraining Order (Attach Affidavit)
_____ Preliminary Injunction
_____ Permanent Injunction
_____ Civil Penalty
_____ Removal of Violation
_____ Other

Dated: _____

_____
[Insert Name of Code Enforcement Officer]
Certified Code Enforcement Officer,
[Insert Name of Town]
[Insert Mailing Address]
[Insert Town, State and Zip Code]
[Insert Telephone Number]

Citation

You are herby summoned to appear in Maine District Court at the location, date and time indicated below to answer to the above Complaint.

In the event of your failure to appear and state your defense on the court date specified a judgment by the default may be rendered against you. Your are advised to call the District Court to verify the date and time of your appearance.

- Address of Court:
- Telephone Number of Court:
- Date and Time of Hearing:

_____
Signature of Complainant

NOTICE TO PROPERTY OWNER
[If not Alleged Violator]

To Property Owner:

Name: _____
(Last) (First) (Middle)

Mailing Address: _____
(Street) (City/Town) (State)

You are hereby notified that the original of this Citation and Complaint has been or will be served on the above named _____ and that if you wish to defend your own interest you should appear in District Court at the above indicated date, time and place.

You are advised to call the District Court to verify date and time of appearance.

Date: _____

_____
Signature of Complainant

ACKNOWLEDGEMENT OF RECEIPT

I acknowledge receipt of this Citation and Complaint.

DATED: _____ _____
Signature of Alleged Violator

DATED: _____ _____
Signature of Property Owner
(If Applicable

Complete the following as applicable:

_____ Violator/Property Owner (specify) has signed above to acknowledge receipt of this Citation and Complaint

_____ Violator/Property Owner (specify) refused to sign

_____ Violator/Property Owner (specify)was unable to sign.

Signing this Citation and Complaint does not constitute an admission of violation(s).

State of Maine
County of _____, ss

DISTRICT COURT
CIVIL ACTION
DOCKET NO. _____

Dept. of Environmental Protection)
)
Plaintiff)
)
vs.)
)
_____)
(Name of Violator))
)
Defendant)

LAND USE CITATION & COMPLAINT
Pursuant to M.R.Civ.P. 80K

THE PLAINTIFF ALLEGES:

1. Violation:

Date of Violation, or When First Observed by Complaining Official
Month _____ Day _____ Year _____ Time _____ AM/PM
Location of Violation _____
City/Town _____

2. Description of Violation:

_____
_____
_____
_____
_____
_____
_____

3. Legal Basis of Complaint:

_____ Violation of State Law:
Title _____, Section _____ OR State Agency Rule # _____
Adopted by the Department of _____

_____ Violation of Municipal Ordinance or Regulation:
Title _____, Section _____, Page _____, Summary of law,
Ordinance, or regulation allegedly violated

_____
_____
_____

Penalty Provision : Section _____ Page _____
Penalty Amount: _____

4. Relief Sought From Court:

_____ Temporary Restraining Order (Attach Affidavit)
_____ Preliminary Injunction
_____ Permanent Injunction
_____ Civil Penalty
_____ Removal of Violation
_____ Other

Dated: _____

_____
[Insert Name of DEP Employee]
Certified DEP Employee,
[Insert Mailing Address]
[Insert Town, State and Zip Code]
[Insert Telephone Number]

Citation

You are herby summoned to appear in Maine District Court at the location, date and time indicated below to answer to the above Complaint.

In the event of your failure to appear and state your defense on the court date specified a judgment by the default may be rendered against you. Your are advised to call the District Court to verify the date and time of your appearance.

- Address of Court:
- Telephone Number of Court:
- Date and Time of Hearing:

_____
Signature of Complainant

State of Maine
County of _____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO. _____

_____)
(Name of Town))
Plaintiff)
)
vs.) **RETURN OF SERVICE**
)
_____)
(Name of Violator))
)
Defendant)

On the _____ day of _____, 20__ I made service of the

_____ upon the _____, _____
(Document served) (Defendant/Property Owner) (Name)

at _____.
(Address of Place of Service)

_____ By delivering a copy in hand.

_____ By leaving copies at the individual's dwelling house or usual place of abode with a person of suitable age or discretion who resided therein; and whose name is _____

_____ By delivering a copy to an agent authorized to receive service of process, and whose name is _____; at _____

_____ By (describe other manner of service): _____.

DATED: _____

_____
Signature of Person Making Service

_____
Title

State of Maine
County of _____, ss

DISTRICT COURT
CIVIL ACTION
DOCKET NO. _____

Dept. of Environmental Protection)
)
Plaintiff)
)
vs.) **RETURN OF SERVICE**
)
_____)
(Name of Violator))
)
Defendant)

On the _____ day of _____, 20__ I made service of the

_____ upon the _____, _____
(Document served) (Defendant/Property Owner) (Name)

at _____.
(Address of Place of Service)

_____ By delivering a copy in hand.

_____ By leaving copies at the individual's dwelling house or usual place of abode with a person of suitable age or discretion who resided therein; and whose name is _____

_____ By delivering a copy to an agent authorized to receive service of process, and whose name is _____; at _____

_____ By (describe other manner of service):
_____.

DATED: _____

_____
Signature of Person Making Service

_____
Title

A-7-DEP

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____)
(Name of Town))
Plaintiff)
)
vs.) **ORDER**
)
_____)
(Name of Violator))
)
Defendant)

Attorney for alleged violator _____

Authorized Representative/Attorney of Complainant _____

Admit/Deny_____

Finding _____

Other disposition: Dismissed _____ Transferred _____

Appealed _____ Continued _____

Hearing Date _____ Amount of Civil Penalty _____

Amount Paid _____

Correction or Abatement Ordered _____ Deadline _____

Failed to Appear _____ Warrant Issued _____

DATED: _____ _____
Judge, District Court

State of Maine
County of _____, ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO. _____

Dept. of Environmental Protection)
)
Plaintiff)
)
vs.) **ORDER**
)
_____)
(Name of Violator))
Defendant)

Attorney for alleged violator _____

Authorized Representative/Attorney of Complainant _____

Admit/Deny_____

Finding _____

Other disposition: Dismissed _____ Transferred _____

Appealed _____ Continued _____

Hearing Date _____ Amount of Civil Penalty _____

Amount Paid _____

Correction or Abatement Ordered _____ Deadline _____

Failed to Appear _____ Warrant Issued _____

DATED: _____ _____
Judge, District Court

A-8-DEP

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____)
(Name of Town))
Plaintiff)
)
vs.) **MOTION FOR TEMPORARY**
) **RESTRAINING ORDER**
_____)
(Name of Violator))
)
Defendant)

NOW COMES Plaintiff in the above-encaptioned matter, by through its certified Code Enforcement Officer, and moves that Motion for a Temporary Restraining Order be granted in this matter pursuant to M.R.Civ.P.65(a). As set forth in the Affidavit of the undersigned, irreparable injury, loss and damage will result if Defendant is allowed to continue cutting trees on his property in violation of the (Insert Name of Town)'s Shoreland Zoning Ordinance. The Affidavit of the undersigned further describes what efforts have been made to give Defendant notice of this Motion and the reasons supporting the claim that notice should not be required.

WHEREFORE, Plaintiff prays that its Motion for Temporary Restraining Order should be granted, together with its costs, attorneys' fees and such other relief as the court deems appropriate.

Dated: _____.

_____
(Name of Code Enforcement Officer),
Code Enforcement Officer

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____ (Name of Town) Plaintiff	)
vs.	) **AFFIDAVIT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER**
_____ (Name of Violator) Defendant	)

(Name of Code Enforcement Officer), being first duly sworn, depose and state as follows:

1. My name is (Name of Code Enforcement Officer). I am the duly appointed and certified Code Enforcement Officer and Plumbing Inspector for the (Name of Town).

2. I am also certified by the State Planning Office as being familiar with Rule 80K court procedures.

3. The matters set forth in this affidavit are based on my own personal knowledge, information or belief; and, so far as upon information and belief, I believe any such information to be true.

4. On _____, I observed the Defendant, _____, preparing to cut trees within the (Name of Town)'s Shoreland Zone.

5. Specifically, I saw him pulling out a chainsaw from his pickup truck at his residence which is located on _____ in (Name of Town).

6. I approached him and identified myself and asked him if he was aware of the requirements of (Insert Name of Town)'s Shoreland Ordinance relating to timber harvesting and that what he was preparing to do would violate the Ordinance.

7. Mr. _____ stated that he was not familiar with the Shoreland Ordinance, so I gave hem a copy of the Ordinance and told him to call me at my office if he had any questions.

8. On _____, I observed (Name of Alleged Violator) cutting trees and approached him again. He state to me that he was not doing anything wrong and demanded I leave the property.

9. I returned to his property on ____(Date)____ and attempted to serve him with a Land Use Citation and Complaint for the violations described above. He refused to accept service of Citation and Complaint. I told him that I would be seeking a Temporary Restraining Order preventing him from engaging in the above stated activities in the (Name of County) District Court on _____at _____a.m./p.m. As I left the property on _____, he began cutting trees again. I am also attaching to this Affidavit photographs which I took ____(Date)____ which I am prepared to offer into evidence which graphically demonstrate the irreparable nature of the harm. Without question, the cutting performed by Mr. _____ exceeds the amounts allowed by the Town's Shoreland Zoning Ordinance (cite relevant provisions of Ordinance). An attested copy of this Ordinance is attached and incorporated herewith.

10. I am fearful that unless a temporary restraining order is granted in this case that irreparable injury, loss and damage to Shoreland Zone will result.

11. It is my belief that Mr. _____ will attempt to avoid service of the Citation and Complaint in this matter and therefore, I am asking that the requirements of service of Rule 4 of the Maine Rules of Civil Procedure be waived for the purposes of the Motion for Temporary Restraining Order.

Dated: _____

_____

(Name of Code Enforcement Officer),

Code Enforcement Officer

(Name of Town)

(Mailing Address)

(Town, State and Zip Code)

(Telephone number)

STATE OF MAINE

County of _____, ss. _____, 20__

Personally appeared the above-named (Name of Code Enforcement Officer), Code Enforcement Officer and Plumbing Inspector for the (Name of Town), and made oath to the truth of the foregoing statements based on his own personal knowledge, information or belief, and so far as upon information and belief, he believes such statements to be true.

Before me,

_____

Notary Public

Printed Name:

Commission Expires:

LETTER TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES REQUESTING CERTIFICATION OF STATE RECORDS

(Date)

Director
Department of Health and Human Services
Division of Health Engineering
State House Station #10
Augusta, Maine 04333

Dear Director:

As Local Enforcement Official for the Town of _____, I am preparing a court action for violation of the State of Maine (Plumbing or Subsurface Wastewater Disposal Rules).

I am requesting a copy of section of the State of Maine (Subsurface Wastewater Disposal Rules) with an attached affidavit stating that the copy is a true copy of that section of the Rules which have been duly adopted by the Department of Health and Human Services under the provisions of 22 M.R.S.A. § 42 and have been filed in the office of the Secretary of State in accordance with statutory requirements.

Trial is scheduled for ___(Date)___.

Very truly yours,

(Code Enforcement Officer's Name)
(Address)
Town of _____
Telephone No. _____

ORDINANCE CERTIFICATION

I, _____ the duly appointed Town Clerk for the Town of _____, hereby certify pursuant to 30-A M.R.S.A. § 3006 that the attached is a true and accurate copy of the _____ of the Town of _____, Maine as relates to _____ and that portion of the Zoning Map shown outlined in yellow as relates to _____ as has/have been in effect without change from _____ to the date hereof, except as amended on _____as shown.

Dated: _____, 20___

_____

Signature

Town Clerk

(Address)

(Telephone)

LETTER REQUESTING ELECTORNIC RECORDING

Name of Town
Address

Date

Clerk

_____ District Court
Address

Re: Inhabitants of the (Insert Name of Town) v.(Insert Name of Alleged Violator), Docket #

Dear Sir/Madam:

On behalf of the Plaintiff in the above-encaptioned matter, I am writing to request that the hearing scheduled _____, 20__ pursuant to M.R.Civ.P.76(H)(a) be electronically recorded.

Please call me if you have questions regarding the above.

Very truly yours,

Code Enforcement Officer

LETTER AUTHORIZING LOCAL OFFICIAL TO REPRESENT MUNICIPALITY IN COURT

Office of the Selectmen
Name of Town
Address

(Date)

Clerk of Court
_____District Court
Address

Dear Sir or Madam:

At a duly advertised meeting of the Town of _____ Board of Selectmen held on _____, 20__, the Selectmen, in their capacity as the municipal officers of the Town of _____ voted to authorize (Code Enforcement Officer) to represent the Town of _____ in the prosecution and settlement of land use law violations pursuant to 38 M.R.S.A. § 441, 30-A M.R.S.A. § 4452 and 30-A M.R.S.A. § 3221.

(Code Enforcement Officer) is the only appointed code enforcement officer and certified local plumbing inspector for the Town of _____ and was certified by the Executive Department, State Planning Office as being familiar with 80K court procedures. Her appointment as Code Enforcement Officer expires on _____, 20__. She was certified by the State Planning Office for familiarity with court procedures on _____, 20__.

Sincerely,

(SEAL)

_____

_____

_____

Selectmen
Town of _____

(Note: Cite 38 M.R.S.A. § 441 only for officials involved in Shoreland Zoning enforcement)

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____	)
(Name of Town)	)
Plaintiff	)
	)
vs.	) **ENTRY OF APPEARANCE**
	)
_____	)
(Name of Violator)	)
	)
Defendant	)

NOW COMES _____, CERTIFIED Code Enforcement Officer for the Town of _____ and enters his/her appearance in the above captioned matter on behalf of Plaintiff, Town of _____.

Dated: _____

_____
(Name of Code Enforcement Officer),
Certified Code Enforcement
Officer and Building Inspector
Town of _____
_____ Street
Town, State, Zip Code
Telephone Number

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____)
(Name of Town))
Plaintiff)
)
vs.)
)
_____)
(Name of Violator))
)
Defendant)

MOTION TO ALLOW DISCOVERY PURSUANT TO M.R.Civ.P.80K WITH INCORPORATED MEMORANDUM OF LAW

The Plaintiff, through its certified local code enforcement officer and plumbing inspector, moves that this Court enter an order permitting Plaintiff to conduct discovery pursuant to M.R.Civ.P.80K(g) for the following reasons:

1. Plaintiff believes that there is good cause for the granting of such a discovery order.

2. On _____, 20__ the Plaintiff's Code Enforcement Officer visited the Defendant at Defendant (Name of alleged violator)'s office at (street/road) in (Name of Town).

3. Plaintiff's Code Enforcement Officer requested that Defendant provide him with copies of receipts for materials purchased for the construction of illegal leachfield located at 184 Pond Road in (Name of Town), a copy of the soils analysis performed at the site, and a copy of the design sketch of the leachfield.

4. Defendant has refused to voluntarily provide the requested documents and continue to refuse to comply with Plaintiff's request.

5. Plaintiff needs the requested documents in order to know what volume of fill material was used to construct the leachfield, the exact location of the leachfield, and whether the size of the leachfield is appropriate for the soils in which the leachfield and septic system were constructed.

6. An order for discovery is necessary because Plaintiff cannot obtain the information described above from any other source.

Dated: _____

_____
(Name of Code Enforcement Officer)
Certified Code Enforcement Officer
Town of _____, Plaintiff

NOTICE

You are hereby notified that if you fail to file an opposition to this Motion within 21 days after the filing of this Motion you will be deemed to have waived all objections to this Motion which may be granted without further notice or hearing.

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____	)	
(Name of Town)	)	
Plaintiff	)	
	)	
vs.	)	**MOTION TO AMEND RULE 80K LAND USE AND COMPLAINT WITH INCORPORATED MEMORANDUM OF LAW**
	)	
_____	)	
(Name of Violator)	)	
	)	
Defendant	)	

Plaintiff, by and through its certified local Code Enforcement Officer and certified Local Plumbing Inspector, moves that this Court grant an order amending the Land Use Citation and Complaint filed by Plaintiff in the above-captioned Rule 80K proceeding as follows:

1. To add a reference to § 10(26) of the (Name of Town) Shoreland Zoning Ordinance under the section of the complaint entitled "Legal Basis of Complaint: Violation of Municipal Ordinance or Regulation": § 10(26) requires a permit from the Code Enforcement Officer for filling involving more than 10 cubic yards of material. The leachfield excavation involved 25 cubic yards of fill, according to the bill sent to the property owner, Meg A Bucks (Plaintiff's Exhibit A).

2. To delete "(Name and number of street/road)" and replace it with "(New name and number of street/road)" on the "Notice to Property Owner." This is necessary to correct a typographical error.

WHEREFORE, Plaintiff prays that this Court order the requested amendments pursuant to M.R.Civ.P.80K(c)(2) which states that "motions for appropriate amendment of the Land Use Citation shall be freely granted."

Dated: _____

_____

(Name of Code Enforcement Officer),

Code Enforcement Officer

(Address)

(Town, State and Zip Code)

(Telephone number)

NOTICE

You are hereby notified that if you fail to file an opposition to this Motion within 21 days after the filing of this Motion you will be deemed to have waived all objections to this Motion which may be granted without further notice or hearing.

(NAME OF TOWN)
(Mailing Address)
(Town, State and Zip Code)

(Date)

_____, Clerk
District Court
Address

Re: Inhabitants of the (Insert Name of Town) v. (Insert Name of Alleged Violator), (Name of County) District Court Docket NO.#

Dear Ms. _____:

Please find enclosed for filing Plaintiff's "Motion to Amend Rule 80K Land Use Citation and Complaint with Incorporated Memorandum of Law" and Notice of Hearing form. I have served copies of these to the Defendant and the landowner. Pursuant to our telephone conversation, I have scheduled a hearing on this motion for (Insert date) at (Insert time).

Thank you.

Sincerely,

(Name of Code Enforcement Officer)
Certified Code Enforcement Officer
and Plumbing Inspector

cc: (Name of Alleged Violator)

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____	)	
(Name of Town)	)	
Plaintiff	)	
	)	
vs.	)	**APPLICATION FOR ADMINISTRATIVE**
	)	**INSPECTION WARRANT**
_____	)	**PURSUANT TO M.R.Civ.P.80E**
(Name of Violator)	)	
	)	
Defendant	)	

I, _____, being first duly sworn, depose and say under oath as follows:

My name is _____. The facts set forth herein are true based upon my personal knowledge.

1. This is an application pursuant to M.R.Civ.P.80E for an Administrative Inspection Warrant to enter upon and inspect certain property located in the Town of _____, _____ County, Maine. The property is shown on the Town Assessor's records as Map_____, Lot_____. According to the Assessor's records, the owner of the property is _____ Company. I am authorized under 30-A M.R.S.A. § 4452(1)(A) and under Section _____ of the Town of _____ Zoning Ordinance to enter onto property in order to inspect for compliance with the Zoning Ordinance. The purpose of the requested inspection is to determine whether _____Company is unlawfully extracting said and gravel from the property without a permit from the Town of _____ Planning Board, as required by Section _____ of the Town of _____ Zoning Ordinance.

2. The inspection being sought is not part of a general area inspection.

3. I have probable cause to believe that there is located on the premises to be inspected a gravel extraction operation being operated without the permit required by Section _____ of the Town of _____ Zoning Ordinance. The grounds for probable cause arise from my personal observations on [list dates]. On each of those dates, although I was denied access to the interior portion of the property, I parked on the public street at the driveway entrance to the property and observed activity there for at least two hours on each of those dates. During all of the times that I was parked in that location, I observed a steady flow of large dump trucks going to and from the property. The trucks would enter the property empty and leave with full loads of sand and gravel material. Most of the trucks were marked with the name _____ Company. In

addition, at those times when there was not a truck coming or going I could hear the sounds of heavy equipment coming from the interior of the property and could observe clouds of dust which, in my experience as a Code Enforcement Officer, are often associated with digging, processing and loading sand and gravel.

4. On _____, 20_____, I went to the business office of _____ Company and spoke with a Mr. _____, who identified himself as the company's President. I requested permission to inspect the property and he denied that request.

5. On _____, 20_____, [at least twenty-four hours in advance of the hearing] I gave _____ Company written notice of the time and place at which I intend to present this application to the court.

Dated: _____

_____

Code Enforcement Officer

STATE OF MAINE

County of _____, ss. ____[Date] , 20__

Then personally appeared before me the above-named _____, in his capacity of Code Enforcement Officer for the Town of _____, and made oath that the foregoing statements are true based on his personal knowledge.

Before me,

_____

Notary Public

Printed Name:

Commission Expires:

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____)
(Name of Town))
Plaintiff)
)
vs.)
)
_____)
(Name of Violator))
)
Defendant)

ADMINISTRATIVE INSPECTION WARRANT

Application having been made before me by _____, Local Plumbing Inspector for the Municipality of the Town of _____, that he has reason to believe that on the premises known as _____, Town of _____, County of _____, State of Maine there is located certain plumbing or work or construction regulating by the Maine State Plumbing Code and other related statutes which he is authorized by 30-A M.R.S.A. § 4221 and Section ____ of the Maine State Plumbing Code, to inspect, name, _____ and as I am satisfied that there is probable cause to believe that such plumbing, work, or construction is located on the premises so described.

YOU ARE HEREBY COMMANDED to allow inspection of said premises by _____, Local Plumbing Inspector, serving this warrant and making the inspection in the daytime, for the purposes of inspecting plumbing, work, or construction to insure compliance with the Maine State Plumbing Code and related statutes.

Dated the _____ day of _____, 20_____.

_____
District Court Judge

NOTICE OF APPLICATION FOR ADMINISTRTIVE INSPECTION WARRANT

TO:

This is to notify (Name of Alleged Violator), the owner (or occupant) of the premises known as (Address), in the Municipality of (Name of Town), County of _____, State of Maine that on the _____ day of _____, at _____ o'clock, the Local Plumbing Inspector intends to present an application for an Administrative Inspection Warrant for the inspection of the above named premises. This application shall be made before the District Court, District Number _____, Division of _____. You have the right to be present to state your opposition, if any, to the issuance of the warrant.

DATED: _____

_____

(Name of Code Enforcement Officer),
Local Plumbing Inspector
(Name of Town)
(Mailing Address)
(Town, State and Zip Code)
(Telephone Number)

This notice was delivered in hand to _____ on the _____ day of _____, 20__, at _____ o'clock a.m./p.m.

_____

(Name of Code Enforcement Officer),
Local Plumbing Inspector

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____	)	
(Name of Town)	)	
Plaintiff	)	
	)	
vs.	)	**MOTION FOR FINDINGS AND**
	)	**CONCLUSIONS OF LAW**
_____	)	**UNDER M.R.Civ.P.52**
(Name of Violator)	)	**WITH INCORPORATED**
	)	**MEMORANDUM OF LAW**
Defendant	)	

The Plaintiff, through its certified local code enforcement officer and plumbing inspector, moves that this Court find the facts specially and state separately its conclusions of law in the above-captioned Rule 80K proceeding.

The Plaintiff also moves this Court to direct the entry of the appropriate judgment if it differs from the judgment which was entered on _____.

Plaintiff prays that this Court grant the requested relief pursuant to M.R.Civ.P.52

DATED: _____

_____

(Name of Code Enforcement Officer)
Certified Code Enforcement Officer
and Plumbing Inspector
(Name of Town)
(Mailing Address)
(Town, State and Zip Code)
(Telephone Number)

NOTICE

You are herby notified that if you fail to file an opposition to this Motion within 21 days after the filing of this Motion you will be deemed to have waived all objections to this Motion which may be granted without further notice or hearing.

State of Maine
County of_____ ss

DISTRICT COURT
CIVIL DOCKET
DOCKET NO _____

_____)
(Name of Town))
Plaintiff)
)
vs.)
) **CONCENT ORDER**
_____)
(Name of Violator))
)
Defendant)

The parties have agreed to resolve the above-captioned matter by the entry of the following Stipulations and Order which has been reviewed and approved by the Court:

STIPULATIONS

1. Defendant, _____, is a resident of _____. He resides and operates a timber business located on _____ in the Town of _____.

2. The Town of _____Shoreland Zoning Ordinance (the "Ordinance") was adopted on _____.

3. Section 8(b) of the Ordinance requires a Shoreland Zoning permit from the Planning Board in order to expand a non-conforming use. Section 10 of the Ordinance requires a Shoreland Zoning permit from the Code Enforcement Officer to install a subsurface disposal system. Permits are required when these activities are conducted in the areas shown as the Limited Residential District on the Town's zoning map.

4. Section 3 of the Maine Subsurface Wastewater Rules as adopted by the Department of Health and Human Services, Division of Health Engineering requires a permit from the Plumbing Inspector to install a new subsurface wastewater system.

5. On or about _____, Defendant and his employees constructed an attached wooden deck on the south side of a residential structure owned by _____ located in the Town of _____. Reference is made to the deed from _____ to _____, dated _____ and recorded in the _____ County Registry of Deeds in Book _____, Page _____.

6. Defendant and his employees also constructed a new subsurface wastewater disposal system on this property on or about _____.

7. Defendant constructed the wastewater disposal system without the permit required by the above-described Wastewater Disposal Rules. The lot located at _____ is located in the Limited Residential District as shown on the Town's Shoreland Zoning Map. The lot is one-half acre and was recorded prior to the effective date of the Ordinance. The residence on this lot sets back 44' from the normal high water mark and was constructed prior to the effective date of the Ordinance. Section 11 of the Town's Ordinance currently requires a lot size of one acre and a setback of 75 feet. Therefore, the structure is a non-conforming use.

8. Defendant constructed the deck and the subsurface disposal system without the permits required by the Town Shoreland Zoning Ordinance.

9. The Town's Code Enforcement Officer provided proper notice of these violations to Defendant and the landowner _____. (Notice of the violations included a right to appeal to the Town's Board of Appeals).

10. No appeal of the Code Enforcement Officers order to correct the violation was filed.

11. In the event that all aspects of the Order set forth below are complied with by Defendant, Plaintiff agrees to release and take no further enforcement action against Defendant for the aforesaid causes of action.

It is herby ORDERED as follows:

1. Defendant shall file applications with the Planning Board and the Plumbing Inspector for permits to construct the deck and subsurface wastewater disposal system and to pay the required application fee of $50.00 for the Shoreland permit and $50.00 for the disposal system. Complete application shall be filed on or before _____. The Planning Board and the Plumbing Inspector shall approve or deny the application within ten days of receipt. On or before _____, the deck and disposal system shall either be in compliance with the requirements of the Town's Shoreland Ordinance and the State's Subsurface Wastewater Disposal Rules, including acquisitions of the necessary permits or they shall be removed by Defendant;

2. Defendant shall pay the Town the sum of $_____ by _____ as a penalty for failing to apply for the necessary permits.

The Clerk is instructed to reference this Order on the docket pursuant to M.R.Civ.P.79(a)

DATED: _____, 20____

_____

Judge, District Court

SEEN AND AGREED

_____	_____
Witness	Town of _____ By: _____, Certified Code Enforcement Officer And Plumbing Inspector, Plaintiff
_____	_____
Witness	_____, Defendant

STATE OF MAINE
(Insert name of County), ss.

District Court
Civil Action Docket
Docket #_____

(INSERT NAME OF TOWN),	)	
	)	
Plaintiff	)	**NOTICE OF DISMISSAL PURSUANT**
	)	**TO M.R.Civ.P. 41(a)**
V.	)	
	)	
INSERT NAME OF ALLEGED VIOLATOR),	)	
	)	
	)	
Defendant	)	

Plaintiff, through its duly authorized and certified local code enforcement officer and plumbing inspector, pursuant to M.R.Civ.P. 41(b) and hereby dismisses the above encaptioned action without prejudice.

Dated: _____

_____
(Insert name of Code Enforcement Officer),
Certified Code Enforcement Officer and
Plumbing Inspector
(Insert Name of Town)
(Insert Mailing Address)
(Insert Town, State and Zip Code)
(Insert telephone number)

RULE 80K CHECKLIST

1. Name, Address and Telephone No. of Violator:

2. Name, Address and Telephone No. of Property Owner (If different than violator):

3. Deed Reference:

   _____Book _____, Page_____
   _____County Registry of Deeds
   _____ Copy of Deed in File

4. Town Tax Map and Lot Number

   ____ Map _____, Lot _____
   ____ Copy of Tax Map in file

5. Court Filing Information:

   a) Location of Court:
   b) Docket No.:
   c) Date of Filing Complain:
   d) Date(s) of Service of Complaint Upon Violator and Property Owner:
   e) Date of Filing Return of Service with Court:

6. Initial Hearing Date/Time:

7. Description of Violation/Dates Observed:

8. Violations Cited:

_____ Violation of State Law or Regulation (specify)
_____ Violation of Local Ordinance or Regulation (specify)

9. Relief Sought:

____ TRO
____ Preliminary Injunction
____ Civil Penalty
____ Removal of Violation
____ Request Electronic Hearing
____ Attorneys' Fees
____ Other _____

10. Physical Evidence/Exhibits:

____ Notice(s) of Violation
____ Ordinances, Codes
____ Plans, Sketches
____ Deed
____ Tax Map

11. List of Witnesses:

Will witnesses attend voluntarily? If not, they must be subpoenaed.

12. Request Electronic Recording

13. Post Judgment Matters:

____ Record Order at Registry

____ Request Writ of Execution for Court

____ Record Writ of Execution at registry of Deeds. Provide proper notice to Defendants.

SUMMARY OF HOW TO CONDUCT A TITLE SEARCH

To perform a title search, the "chain of title" for the property in question should be traced back at least 40 years. The first step is to determine the present owner of the property and the exact location and description through a check of the assessor's records. The title searcher then should go to the County Registry of Deeds and search the "grantor-grantee index" under the present owner's name. Starting with the most recent index and working back in time, the examiner should keep checking under the present owner's name as grantee (buyer) until he or she finds the deed and date upon which the present owner acquired title to the property. After locating that information, the title searcher should trace the name of the current owner's seller in the grantee index to determine when that person acquired it and whether his or her deed description is the same as that contained in the deed of the present owner. This process should be continued for a period going back at least 40 years prior to the date on which the current owner acquired title.

After completing that portion of the search, the title examiner then should trace the owner's name forward in the index as "grantor" (seller) from the date of his or her deed to see if the owner has transferred title to someone else. To be absolutely sure that the owner has not sold the property, the title searcher should look at every deed where that person is listed as a grantor, even if the index says that the property is located in another town. In addition to searching the grantor-grantee index, the title examiner also should check the "Interim Index" and the "Day Book" for more recent transactions.

While the examiner is searching the grantor-grantee index, he or she should make a note of all mortgages on the property and when they are discharged, if at all. Mortgages are indexed under the owner's name as grantor of the mortgage. The index should be examined for the period during which the present owner held the property. Since it is possible that the present owner purchased the property subject to the mortgage, the index should be searched back 40 years to be absolutely sure. After checking the "Interim Index" and "Day Book," the examiner should look up each mortgage which has not been discharged and note the name and address of the holder.

Throughout the search, the title examiner should take note of any liens on the property which have been recorded in the various books previously mentioned.

MISCELLANEOUS COURT RULES

SECTION A-24

RULE 4. PROCESS

(a) Summons: Form. The summons shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(b) Same: Issuance. The summons may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (a) of this rule. The plaintiff's attorney shall deliver to the person who is to make service the original summons upon which to make return of service and a copy of the summons and of the complaint for service upon the defendant.

(c) Service. Service of the summons and complaint may be made as follows:

(1) By mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copes of a notice and acknowledgement form and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this paragraph is received by the sender within 20 days after the date of mailing, service of the summons and complaint shall be made under paragraph (2) or (3) of this subdivision.

(2) By a sheriff or a deputy within the sheriffs county, or other person authorized by law, or by some person specially appointed by the court for that purpose. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(3) By any other method permitted or required by this rule or by statute.

(d) Summons: Personal Service. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual other than a minor or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode; or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective.

(2) Upon a minor, by delivering a copy of the summons and of the complaint personally (a) to the minor and (b) also to the minor's guardian if the minor has one within the state, known to the plaintiff, and if not, then to the minor's father or mother or other person having the minor's care or control, or with whom the minor resides, or if service cannot be made upon any of them, then as provided by order of the court.

(3) Upon an incompetent person, by delivering a copy of the summons and of the complaint personally (a) to the guardian of the incompetent person or a competent adult member of the incompetent person's family with whom the incompetent person resides, or if the incompetent person is living in an institution, then to the director or chief executive officer of the institution, or if service cannot be made upon any of them, then as provided by order of the court and (b) unless the court otherwise orders, also to the incompetent person.

(4) Upon a county, by delivering a copy of the summons and of the complaint to one of the county commissioners or their clerk or the county treasurer.

(5) Upon a town, by delivering a copy of the summons and of the complaint to the clerk or one of the selectmen or assessors.

(6) Upon a city, by delivering a copy of the summons and of the compliant to the clerk, treasurer, or manager.

(7) Upon the United State, by delivering a copy of the summons and of the complaint to the United States attorney for the district of Maine or to an assistant United State attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the United States District Court for the district of Maine and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency provided that any further notice required by statute or regulation shall also be given.

Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency, provided at any further notice required by statute or regulation shall also be given. If the agency is a corporation the copy shall be delivered as provided in paragraph (8) or (9) of this subdivision of this rule.

Upon any other public corporation, by delivering a copy of the summons and of the complaint to any officer, director, or manager thereof and upon any public body, agency or authority by delivering a copy of the summons and the complaint to any member thereof.

(8) Upon a domestic private corporation (a) by delivering a copy of the summons and of the complaint to any officer, director or general agent; or, if no such officer or agent be found, to any person in the actual employment of the corporation; or , if no such person be found, to the Secretary of State, provided that the plaintiff's attorney shall also send a copy of the summons and of the complaint to the corporation by registered or certified mail, addressed to the corporation's principal office as reported on its latest annual return; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, provided that any further notice required by the statute shall also be given.

(9) Upon a corporation established under the laws of any other state or country (a) by delivering a copy of the summons and of the complaint to any officer, director or agent, or by leaving such copies at an office or place of business of the corporation within the state; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, provided that any further notice required by the statute shall also be given.

(10) Upon a partnership subject to suit in the partnership name in any action, and upon all partners whether within or without the state in any action on a claim arising out of partnership business, (a) by delivering a copy of the summons and of the complaint to any general partner or any managing or general agent of the partnership, or by leaving such copies at an office or place of business of the partnership within the state; or (b) by delivering a copy of the summons and of the complaint to any agent, attorney in fact, or other person authorized by appointment or by statute to receive or accept service on behalf of the partnership, provided that any further notice required by the statute shall also be given.

(11) Upon the State of Maine by delivering a copy of the summons and of the complaint to the Attorney General of the State of Maine or one of the Attorney General's deputies, either (a) personally or (b) by registered or certified mail, return receipt requested; and in any action attacking the validity of an order of an officer or agency of the State of Maine not made a party, by also sending a copy of the summons and of the complaint by ordinary mail to such officer or agency. The provisions of Rule 4(f) relating to completion of service by mail shall here apply as appropriate.

(12) Upon an officer or agency of the State of Maine by the method prescribed by either paragraph (1) or (7) of this subdivision as appropriate, and by also sending a copy of the summons and of the complaint by ordinary mail to the Attorney General of the State of Maine.

(13) Upon all trustees of an express trust, whether within or without the state, in any action on a claim for relief against the trust, except an action by a beneficiary in that capacity, (a) by delivering a copy of the summons and of the complaint to any trustee, or by leaving such copies at an office

or place of business of the trust within the state; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the trust, provided that any further notice required by the statute shall also be given.

(14) Upon another state of the United States, by the method prescribed by the law of that state for service of process upon it.

(e) Personal Service Outside State. A person who is subject to the jurisdiction of the courts of the state may be served with the summons and complaint outside the state, in the same manner as if such service were made within the state, by any person authorized to serve civil process by the laws of the place of service or by a person specially appointed to serve it. An affidavit of the person making service shall be filed with the court stating the time, manner, place of service. Such service has the same force and effect as personal service within the state.

(f) Service Mail in Certain Actions.

(1) *Outside State.* Where service cannot, with due diligence, be made personally within the state, service of the summons and complaint may be made upon a person who is subject to the jurisdiction of the courts of the state by delivery to that person outside the state by registered or certified mail, with restricted delivery and return receipt requested, in the following cases: where the pleading demands a judgment that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state, or that such an, interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to any property.

(2) *Divorce Cases.* Service of the summons and complaint may be made in an action under Rule 80(a) upon a person who is subject to the jurisdiction of the courts of the state by delivery to that person, whether in or outside the state, by registered or certified mail, with restricted delivery and return receipt requested.

(3) *Service Completion.* Service by registered or certified mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused, provided that the plaintiff shall file with the court either the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons and complaint was sent to the defendant by ordinary mail.

(g) Service by Publication.

(1) *When Service May be Made.* The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service by publication in an action described in subdivision (f) of this rule, unless a statute provides another method of notice, or when the person to be served is one described in subdivision (e) of this rule.

(2) *Contents of Order.* An order for service by publication shall include (i) a brief statement of the object of the action; (ii) if the action may affect any property or credits of the defendant described in subdivision (f) of this rule, a description of any such property or credits; and (iii) the substance

of the summons prescribed by subdivision (a) of this rule. The order shall also direct its publication once a week for 3 successive weeks in a designated newspaper of general circulation in the county where the action is pending; and the order shall also direct the mailing to the defendant, if the defendant's address is known, of the order as published.

(3) *Time of Publication; When Service Complete.* The first publication of the summons shall be made within 20 days after the order is granted. Service by publication is complete on the twenty-first day after the first publication. The plaintiff shall file with the court an affidavit that publication has been made.

(h) Return of Service. The person serving the process shall make proof of service thereof on the original process or a paper attached thereto for that purpose, and shall forthwith return it to the plaintiff's attorney. The plaintiff's attorney shall, within the time during which the person served must respond to the process, file the proof of service with the court. If service is made under paragraph (c)(1) of this rule, return shall be made by the plaintiff's attorney filing with the court the acknowledgment received pursuant to that paragraph. The attorney's filing of such proof of service with the court shall constitute a representation by the attorney, subject to the obligations of Rule 11, that the copy of the complaint mailed to the person served or delivered to the officer for service was a true copy. If service is made by a person other than a sheriff or the sheriff's deputy or another person authorized by law, that person shall make proof thereof by affidavit. The officer or other person serving the process shall endorse the date of service upon the copy left with the defendant or other person. Failure to endorse the date of service shall not affect the validity of service.

(i) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) Alternative Provisions for Service in a Foreign Country.

(1) *Manner.* When service is to be effected upon a party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) *Return.* Proof of service may be made as prescribed by subdivision (h) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

[Amended effective February 15, 1990; February 15, 1991; February 15, 1992; February 15, 1993; May 1, 2000; January 1, 2002]

Advisory Committee's Note – 2000

In subdivision (1) and subdivision (2), the term "minor" is substituted for the term "infant".

Advisory Committee's Note – 2002

Rule 4(f) is amended to permit service by registered or certified mail in action arising under Rule 80(a) regardless of whether the person to be served is in or outside the state. The former rule permitted such service only upon persons outside the state and only in actions for divorce or annulment. The intent of the amendment is to afford litigants, many of whom are *pro se*, an easy and inexpensive means of serving initial process.

RULE 7. PLEADINGS ALLOWED: FORM OF MOTIONS

(a) **Pleadings.** There shall be a complaint and an answer, and a disclosure under oath, if trustee process is used; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim denominated as such; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third- party answer.

(b) **Motions and Other Papers.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or under Rule 26(g), shall be made in writing, shall state with particularity the grounds therefore and the rule or statute invoked if the motion is brought pursuant to a rule or statute, and shall set forth the relief or order sought.

(A) Any motion except a motion that may be heard ex parte shall include a notice that matter in opposition to the motion pursuant to subdivision (c) of this rule must be filed not later than 21 days after the filing of the motion unless another time is provided by these Rules or set by the court. The notice shall also state that failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing. If the notice is not included in the motion, the opposing party may be heard even though matter in opposition has not been timely filed.

(B) In addition to the notice required to be filed by subparagraph (1)(A) of this subdivision, a motion for summary judgment served on a party shall include a notice (i) that opposition to the motion must comply with the requirements of Rule 56(h) including specific responses to each numbered statement in the moving party's statement of material facts, with citations to points in the record or in affidavits filed to support the opposition; and (ii) that not complying with Rule 56(h) in opposing the motion may result in entry of judgment without hearing.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) Any party filing a motion, except motions for enlargement of time to act under these rules, for continuance of trial or hearing, or any motion agreed to in writing by all counsel, shall file with the motion or incorporate within said motion (1) a memorandum of law which shall include citations of supporting authorities, (2) a draft order which grants the motion and specifically states the relief to be granted by the motion, and (3) unless the motion may be heard ex parte, a notice of hearing if a hearing date is

available. When a motion is supported by affidavit, the affidavit shall be served with the motion.

(4) Any party filing a motion for enlargement of time to act under these rules or for continuance of trial or hearing, shall include in the motion a statement that (1) the motion is opposed, or (2) the motion can be presented without objection, or (3) after reasonable efforts, which shall be indicated, the position of an opposing party regarding the motion cannot be determined.

(5) Motions for reconsideration of an order shall not be filed unless required to bring to the court's attention an error, omission or new material that could not previously have been presented. The court may in its discretion deny a motion for reconsideration without hearing and before opposition is filed.

(6) If a motion is pursued or opposed in circumstances where the moving or opposing party does not have a reasonable basis for that party's position, the court, upon motion or its own initiative, may impose the sanctions provided by Rule 11 upon the party, the party's attorney, or both.

(7) Except as otherwise provided by law or these rules, after the opposition is filed the court may in its discretion rule on the motion without hearing. The fact that a motion is not opposed does not assure that the requested relief will be granted.

(c) Opposition to Motions.

(1) Any party opposing a motion that was filed prior to or simultaneously with the filing of the complaint shall file a memorandum and any supporting affidavits or other documents in opposition to the motion not later than the time for answer to the complaint, unless another time is set by the court.

(2) Any party opposing any other motion shall file a memorandum and any supporting affidavits or other documents in opposition to the motion not later than 21 days after the filing of the motion, unless another time is set by the court.

(3) A party failing to file a timely memorandum in opposition to a motion shall be deemed to have waived all objections to the motion.

(d) In addition to the requirements of this rule, motions for summary judgment are subject to the requirements of Rule 56.

(e) Reply Memorandum. Within 7 days of filing of any memorandum in opposition to a motion, or, if a hearing has been scheduled, not less than 2 days prior to the hearing, the moving party may file a reply memorandum, which shall be strictly confined to replying to new matter raise in the opposing memorandum.

(f) Form and Length of Memoranda of Law. All memoranda shall be typed or otherwise printed on one side of the page of 8 ½ X 11 inch paper. The typed matter must be double spaced in at least 12 point type, except that footnotes and quotations may appear in 11 point type. All pages shall be numbered. Except by prior leave of court, no memorandum of law in support of or in opposition to a nondispositive motion shall exceed 10 pages. Except by prior leave of court, no memorandum of law in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or a

motion for injunctive relief shall exceed 20 pages. No reply memorandum shall exceed 7 pages.

(g) The use of telephone or video conference calls for conferences and non-testimonial hearings is encouraged. The court on its own motion, or upon request of a party, may order conferences or non-testimonial hearings to be conducted by telephone conference calls or with the use of video conference equipment. The court shall determine the party or parties responsible for the initiation and expenses of a telephone or video conference or non-testimonial hearing.

RULE 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment, or a conflicting commitment that could not be broken or scheduled at another time without subjecting the witness or others to legally enforceable sanctions or significant risk of physical detriment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought, in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any State has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefore.

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Transcript. Regardless of the method by which a deposition was recorded or is to be used in court proceedings, a party using a deposition in court proceedings under this rule shall provide to the court an accurate written transcript of the deposition.

(d) Effect of Errors and Irregularities in Depositions.

(1) *As to Notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) *As to Completion and Return of Deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, indorsed, transmitted, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal: Effect Thereof.

(1) *By Plaintiff; by Stipulation.* Subject to the provisions of Rule 23(e) and of any statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action; provided, however, that no action wherein a receiver has been appointed shall be dismissed except by order of the court. A dismissal under this paragraph may be as to one or more, but fewer than all claims, but not as to fewer than all of the plaintiffs or defendants. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this state or any other state or the United States an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the counterclaim shall remain pending for independent adjudication by the court despite the dismissal of the plaintiff's claim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) *On Court's Own Motion.* The court, on its own motion, after notice to the parties, and in the absence of a showing of good cause to the contrary, shall dismiss an action for want of prosecution at any time more than two years after the last docket entry showing any action taken therein by the plaintiff other than a motion for continuance.

(2) *On Motion of Defendant.* For failure of the plaintiff to prosecute for 2 years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(3) *Effect.* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

(d) Costs of Previously-Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. A motion for summary judgment may not be filed until the expiration of 20 days from the commencement of the action.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, but within such time as not to delay the trial, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Proceedings on Motion. Any party opposing a motion may serve opposing affidavits as provided in Rule 7(c). Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by subdivision (h) show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleading, but must respond by affidavits or as otherwise provided in this rule, setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for

judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Statements of Material Fact. In addition to the material required to be filed by Rule 7, a motion for summary judgment and opposition thereto shall be supported by statements of material facts as addressed in paragraphs (1), (2), (3), & (4) of this rule.

(1) *Supporting Statement of Material Facts.* A motion for summary judgment shall be supported by a separate, short, and concise statement of material facts, set forth in numbered paragraphs, as to which the moving party contends there is no genuine issue of material fact to be tried. Each fact asserted in the statement shall be set forth in a separately numbered paragraph and shall be supported by a record citation as required by paragraph (4) of this rule.

(2) *Opposing Statement of Material Facts.* A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. Each such statement shall begin with the designation "Admitted," "Denied," or "Qualified" (and, in the case of an admission, shall end with such designation). The opposing statement may contain in separately titled section additional facts, each set forth in a separately numbered paragraph and supported by a record citation as required by paragraph (4) of this rule.

(3) *Reply Statement of Material Facts.* A party replying to the opposition to a motion for summary judgment shall submit with its reply a separate, short, and concise statement of material facts which shall be limited to any additional facts submitted by the opposing party. The reply statement shall admit, deny or qualify such additional facts by reference to the numbered paragraphs of the opposing party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by paragraph (4) of this rule. Each reply statement shall begin with the designation "Admitted," "Denied," or "Qualified" (and, in the case of an admission, shall end with such designation).

(4) *Statement of Facts Deemed Admitted Unless Properly Controverted; Specific Record of Citations Required.* Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted. An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. The court may disregard any statement of fact not supported by a

specific citation to record material properly considered on summary judgment. The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts.

RULE 65. INJUNCTIONS

(a) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry as the court fixes, unless within the time so fixed the order, for good cause shown, is extended or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(b) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (b)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is

found to have been wrongfully enjoined or restrained, provided, however, that for good cause shown and recited in the order, the court may waive the giving of security.

A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) Form and Scope of Restraining Order or Injunction. Every restraining order and every order granting a preliminary or permanent injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Statutes. These rules do not modify any statute relating to temporary restraining orders and preliminary injunctions in domestic relations actions, actions affecting employer and employee or any other actions where an injunctive proceeding is conducted according to statute.

(f) Presentation to Other Justice or Judge. When an application for an injunction or for an order or decree under this rule is made to one justice or judge and has been acted upon by that justice or judge, it shall not be presented to any other justice or judge except by consent of the first justice or judge which may be oral.

RULE 80E. ADMINISTRATIVE INSPECTION WARRANTS

(a) Who May Secure. An official or employee of the state or of any political subdivision of the state who is authorized by law to conduct inspections of premises may apply to a District Court Judge, in the division and district in which the property to be inspected is located, for a warrant to inspect particularly described premises for particularly described purposes authorized by law.

(b) Contents of Application. The application shall be in the form of a sworn affidavit and shall set forth the following facts:

(1) The statutory or other authority pursuant to which the applicant claims to be authorized to conduct inspections, the premises to be inspected, and the purpose of the inspection.

(2) Whether such inspection is sought as part of a general area inspection and if so, the area being inspected and the grounds of probable cause to believe that there is located on the property in said area violations of statutes, ordinances, or regulations the applicant is authorized to enforce.

(3) If the inspection is not part of a general area inspection, the grounds of probable cause to believe that there is located on the particular premises to be inspected violations of statutes, ordinances, or regulations the applicant is authorized to enforce.

(4) That the applicant has requested permission from the owner or occupant of the premises to be inspected to conduct such inspection and that such permission has been denied.

(5) That the applicant has at least 24 hours in advance of the presentation of the application given written notice to the owner or occupant of the premises to be inspected of the time and place at which the applicant intends to present the application to the court.

(6) The requirements of subdivisions (4) and (5) of this rule may be dispensed with if the application sets forth facts showing probable cause to believe that there are located on the premises to be inspected violations of law which constitute an immediate threat to the health or safety of the public.

(c) Issuance. Upon a finding of probable cause the District Court Judge shall issue a warrant to the applicant, but if the owner or occupant of the premises is present at the time of presentation of the application no warrant shall issue until said owner or occupant has been afforded an opportunity to state any opposition to the issuance of the warrant.

(d) Contents. The warrant shall specify the grounds of probable cause, the premises to be inspected, the purpose of the inspection, and the person authorized to conduct the inspection.

(e) Execution. The person to whom a warrant is issued shall execute the same by conducting the inspection authorized during normal business hours within 10 days after issuance of the warrant. The person, executing the warrant shall at the time of execution deliver a copy thereof to the owner or the occupant of the premises inspected or leave a copy on said premises in a conspicuous place.

(f) Return. Not later than 10 days after execution of the warrant the person executing it shall file a return with the court from which the warrant issued

setting forth the date and time of the inspection and any violations of law found upon the inspected premises.

COURT PERSONNEL

SECTION A-25

DISTRICT COURT CLERKS, COURT DAYS AND TOWNS BY DIVISION

FIRST DISTRICT

Division of Eastern Aroostook (Caribou)

Clerk: Vickie Harris Tel: 201-493-3144
County Courthouse, 144 Sweden St., Ste 104, Caribou, ME 04736-2399

Court days: Special Hearings: First and Third weeks of the month; Regular Hearings Tuesday and Thursday during second and fourth weeks of the month.

Caribou	New Sweden	Washburn
Caswell Plt.	Perham	Westmanland Plt.
Connor	Stockholm	Woodland
Limestone	Wade	

Also including all unorganized territory to the north of these up to the boundary of the division of Western Aroostook.

Division of Western Aroostook (Fort Kent)

Clerk: Linda Cyr Tel. 207-834-5003 linda.cyr@maine.gov
139 Market St., PO Box 473, Fort Kent, ME 04743

Court day: Friday

Division of Western Aroostook (Madawaska)

Clerk: Linda Cyr Tel. 207-728-4700 linda.cyr@maine.gov
645 Main St., Madawaska 04756
Court days: Fort Kent – Second & Forth Friday; Madawaska – Second and Fourth Wednesday.

Allagash	Grand Isle	St. Francis
Cyr Plt.	Hamlin Plt.	Van Buren
Eagle Lake	Madawaska	Wallagrass Plt.
Fort Kent	New Canada Plt.	Winterville Plt.
Frenchville	St. Agatha	

SECOND DISTRICT

Division of Central Aroostook (Presque Isle)

Clerk: Sandra Thomas Tel. 207-764-2055 sandra.thomas@maine.gov
27 Riverside Drive, P.O. Box 794, Presque Isle, ME 04769-0794
Court days: Wednesday, Thursday and Friday.

Ashland	Fort Fairfield	Nashville Plt.
Blaine	Garfield Plt.	Portage Lake
Castle Hill	Mapleton	Presque Isle
E Plt.	Mars Hill	Squapan
Easton	Masardis	Westfield

Also including all unorganized territory north of these to the boundaries of the divisions of Eastern and Western Aroostook.

SECOND DISTRICT (cont.)

Division of Southern Aroostook (Houlton)

Clerk: Mary Ellen Blinn Tel. 207-532-2147
26 Court St., P.O. Box 457, Houlton, ME 04730-0457
Court days: Monday and Tuesday

Amity	Hodgdon	North Yarmouth Academy Grant
Bancroft	Houlton	Oakfield
Benedicta	Island Falls	Orient
Bridgewater	Linneus	Reed Plt.
Cox Patent	Littleton	St. Croix
Crystal	Ludlow	Sherman
Dudley	Macwahoc Plt.	Sliver Ridge Plt.
Dyer Brook	Merrill	Smyrna
Forkstown	Molunkus	Upper Molunkus
Glenwood Plt.	Monticello	Webbstown
Hammond Plt.	Moro Plt.	Weston
Haynesville	New Limerick	
Hersey		

THIRD DISTRICT

Division of Southern Penobscot (Bangor)

Clerk: Susan Wells Tel. 207-941-3040 susan.wells@maine.gov
73 Hammond St., Bangor, ME 04401
Court days: Daily

Alton	Eddington	Milford
Argyle	Glenburn	Olamon
Bangor	Grand Falls Plt.	Old Town
Bradley	Greenbush	Orono
Brewer	Greenfield	Orrington
Cardville	Hampden	Summit Twp.
Clifton	Hermon	Veazie
Costigan	Holden	

Division of Western Penobscot (Newport)

Clerk: Ronda Nelson Tel. 207-368-5778 ronda.h.nelson@maine.gov
12 Water St., Newport, ME 04953
Court Days: Up to four days per week.

Bradford	Dixmont	Levant
Carmel	Etna	Newburgh
Charleston	Exeter	Newport

Corinna	Garland	Plymouth
Corinth	Hudson	Stetson
Dexter	Kenduskeag	

FOURTH DISTRICT

Division of Northern Washington (Calais)

Clerk: Karen K. Moraisey Tel 207-454-2055 karen.moraisey@maine.gov
382 South St. Ste. B, P.O. Box 929, Calais, ME 04619-0929
Court Days: Tuesday and Thursday (1st, 3rd and 4th full weeks); Wednesday and Thursday (2nd full week)

Alexander	Eastport	Robbinston
Baileyville	Forest City	Talmadge
Baring	Grand Lake Stream	Topsfield
Brookton	Indian Township	Vanceboro
Calais	Kossuth Twp.	Waite
Charlotte	Lambert Lake	Wesley
Codyville Plt.	Meddybemps	Woodland
Cooper	Pembroke	T26, E.D.
Crawford	Perry	T36, M.D.
Danforth	Pleasant Point	T37, M.D.
Dyer	Princeton	

Division of Southern Washington (Machias)

Clerk: Marilyn Braley Tel. 207-255-3044 marilyn.braley@maine.gov
47 Court St., P.O. Box 526, Machias, ME 04654-0526
Court days: Every Monday and varied other days. Arraignments: First Wednesday of month

Addison	Devereaux Twp.	Marshfield
Beals	East Machias	Milbridge
Beddington	Edmunds	Northfield
Centerville	Harrington	Rocque Bluffs
Cherryfield	Jonesboro	Steuben
Columbia	Jonesport	Trescott
Columbia Falls	Lubec	Wesley
Cutler	Machias	Whiting
Deblois	Machiasport	Whitneyville
Dennysville	Marion Twp.	

Also including all unorganized territory in Washington County south of the boundary of the division of Northern Washington.

FIFTH DISTRICT

Division of Central Hancock (Ellsworth)

Clerk: Cheryl Tims Tel. 207-667-7141 cheryl.a.tims@maine.gov
50 State St., Ellsworth, ME 04605-1992
Court days: Monday, Tuesday, Thursday, Friday; Wednesday for case management.

Amherst	Ellsworth	Otis

Aurora	Franklin	Penobscot
Blue Hill	Frenchboro	Sedgwick
Brooklin	Gouldsboro	Sorrento
Brooksville	Green Lake	Stonington
Bucksport	Hancock	Sullivan
Castine	Lamoine	Surry
Dedham	Mariaville	Verona
Deer Isle	Orland	Waltham
Eastbrook	Osborn	Winter Harbor

Also including all unorganized territory in Hancock County north and east of Ellsworth.

Fifth District
Division of Waldo (Belfast)
Clerk: Terri Curtis Tel. 207-338-3107
District Court Bldg., 103 Church St., Belfast, ME 04915
Court days: Every Tuesday – Criminal Cases only; Every other Tuesday – Criminal Arraignments & Trials. * Call for other court day specifics.

Belfast	Liberty	Searsport
Belmont	Lincolnville	Stockton Springs
Brooks	Monroe	Swanville
Burnham	Montville	Thorndike
Frankfort	Morrill	Troy
Freedom	Northport	Unity
Islesboro	Palermo	Winterport
Jackson	Prospect	
Knox	Searsmont	

Division of Southern Hancock (Bar Harbor)
Closed as of July 1, 2006

SIXTH DISTRICT
Division of Sagadahoc (Bath/Brunswick)
Clerk: Anita Alexander Tel. 207-442-0200 anita.m.alexander@maine.gov
147 New Meadows Rd., West Bath 04530-9704
Court days: Monday through Friday.

Arrowsic	Freeport	Topsham
Bath	Georgetown	West Bath
Bowdoin	Harpswell	Woolwich
Bowdoinham	Phippsburg	
Brunswick	Richmond	

Division of Lincoln (Wiscasset)
Clerk: Beth Kelley Tel. 207-882-6363 beth.kelley@maine.gov

32 High Street, P.O. Box 249, Wiscasset, ME 04578
Court days: Call for Court Days.

Alna	Edgecomb	Southport
Boothbay	Jefferson	Waldoboro
Boothbay Harbor	Monhegan Island	Westport
Bremen	Newcastle	Whitefield
Bristol	Nobleboro	Wiscasset
Damariscotta	Somerville	
Dresden	South Bristol	

Division of Knox (Rockland)
Clerk: Penny Reckards Tel. 207-596-2240 penny.reckards@maine.gov
62 Union St., Rockland, ME 04841-0544

Court days: Call for Court Days.

Appleton	Matinicus	South Thomaston
Camden	North Haven	Thomaston
Cushing	Owls Head	Union
Friendship	Rockland	Vinalhaven
Hope	Rockport	Warren
Isle au Haut	St. George	Washington

SEVENTH DISTRICT

Division of Southern Kennebec (Augusta)
Clerk: Michelle Garwood Tel. 207-287-8075 michelle.garwood@maine.gov
145 State St., Augusta, ME 04330-7495
Court days: Daily

Augusta	Hallowell	Readfield
Chelsea	Litchfield	Togus
China	Manchester	Wayne
Farmingdale	Monmouth	West Gardiner
Fayette	Pittston	Windsor
Gardiner	Randolph	Winthrop

Division of Northern Kennebec (Waterville)
Clerk: Judy Pellerin Tel. 207-873-2103 judy.pellerin@maine.gov
18 Colby St., Waterville, ME 04903-0397
Court days: Monday through Friday

Albion	Mount Vernon	Unity Plt.
Belgrade	North Belgrade	Vassalboro
Belgrade Lakes	North Vassalboro	Vienna
Benton	Oakland	Waterville

Clinton	Rome	Winslow
East Vassalboro	Sidney	

EIGHTH DISTRICT

Division of Southern Androscoggin (Lewiston/Auburn)

Clerk: Susan Bement susan.bement@maine.gov
(civil information: 207-795-4801) (criminal & bail case information 207-795-4800)
(small claims information: 207-795-4801)
71 Lisbon St., P.O. Box 1345, Lewiston, ME 04243-1345
Court days: Daily.

Auburn	Lisbon	Poland
Durham	Livermore Falls	Sabattus
Greene	Livermore	Turner Minot
Leeds	Mechanic Falls	Wales
Lewiston	Minot	

NINTH DISTRICT

Division of Southern Cumberland (Portland)

Clerk: Deborah L. Sullivan deborah.sullivan@maine.gov
(civil): 207-822-4200; (traffic and criminal): 207-822-4204.
County Courthouse, 205 Newbury St., P.O. Box 412, Portland, ME 04112-0412
Court days: Daily

Cape Elizabeth	New Gloucester	South Portland
Cumberland	North Yarmouth	Westbrook
Falmouth	Portland	Windham
Gorham	Pownal	Yarmouth
Gray	Scarborough	

Division of Northern Cumberland (Bridgton)

Clerk: Belinda Becher Tel. 207-647-3535
3 Chase St., Ste 2, Bridgton, ME 04009
Court days: Monday, Tuesday, Wednesday, Thursday. Second Tuesday of each month for Oxford County cases; every other Tuesday for Cumberland County cases.

Baldwin	Harrison	Raymond
Bridgton	Hiram	Sebago
Brownfield	Kezar Falls	Standish
Casco	Lovell	Steep Falls
Denmark	Naples	Stow
Fryeburg	Porter	Sweden

TENTH DISTRICT

Division of Eastern York (Biddeford/Saco)

Clerk: Kathryn Jones Tel. 207-283-1147 ext. 226
25 Adams St., Biddeford, ME 04005
Court days: Daily. Monday through Friday

Arundel	Hollis	Old Orchard Beach
Biddeford	Kennebunk	Saco
Buxton	Kennebunkport	
Dayton	Lyman	

Division of Western York (W. York)
Clerk: Rita Howard Tel. 207-459-1400
447 Main St., Sprinvale, ME 04083
Court days: Daily

Acton	Limerick	Sanford
Alfred	Limington	Shapleigh
Berwick	Newfield	Waterboro
Cornish	North Berwick	
Lebanon	Parsonsfield	

Division of Southern York (York, South York)
Clerk: Doreen Emhoff Tel: 207-363-1230 doreen.r.emhoff@maine.gov
11 Chase's Pond Rd., York , ME 03909
Court days: Call for court dates

Eliot	Ogunquit	Wells
Kittery	South Berwick	York

ELEVENTH DISTRICT

Division of Southern Oxford (South Paris)
Clerk: Laura J. Nokes Tel: 207-743-8942
District Court Bldg., 26 Western Ave., South Paris, ME 04281
Court days: Call for court dates.

Albany	Mason Plt.	Stoneham
Bachelders Grant	Norway	Sumner
Buckfield	Otisfield	Waterford
Greenwood	Oxford	Woodstock
Hartford	Paris	
Hebron	South Paris	

Division of Northern Oxford (Rumford)
Clerk: Trudy DeSalle Tel: 207-364-7171 trudy.desalle@maine.gov
Municipal Bldg., 145 Congress St., Rumford, ME 04276
Court days: Criminal Court-first, third, fourth Tues; Family court-days vary; Civil Court – first, third and fourth Friday.

Adamstown	Hanover	Parmachenee
Andover	Lincoln Plt.	Peru
Bethel	Lynchtown	Richardsontown
Bowmantown	Magalloway Plt.	Riley
Byron	Mexico	Roxbury
Canton	Milton Plt.	Rumford
Dixfield	Newry	Upper Cupsupic
Gilead	North Andover	Upton
Grafton	Oxbow	

TWELFTH DISTRICT

Division of Somerset (Skowhegan)

Clerk: Melanie Adams Tel. 207-474-9518
47 Court St., P.O. Box 525, Skowhegan 04976-0525
Court days: Daily

Anson	The Forks Plt.	Palmyra
Athens	Harmony	Parlin Pond
Bingham	Hartland	Pittsfield
Brighton Plt.	Highland Plt.	Pleasant Ridge Plt.
Cambridge	Hobbstown	Ripley
Canaan	Jackman	Rockwood
Caratunk	Long Pond Plt.	St. Albans
Carrying Place	Madison	Sandwich Academy Grant
Concord Plt.	Mercer	Seboomook
Cornville	Moose River	Skowhegan
Dennistown Plt.	Moscow	Smithfield
Detroit	Moxie Gore	Solon
Embden	New Portland	Starks
Fairfield	Norridgewock	West Forks Plt.

Also including all unorganized territory in Somerset County.

Division of Franklin (Farmington)

Clerk: Vicki L. Hardy Tel. 207-778-8200
129 Main St., Ste 2, Farmington, ME 04938
Court days: Call for court dates

Alder Stream	Farmington	Phillips
Avon	Freeman	Rangeley
Beattie	Industry	Rangeley Plt.
Berlin	Jay	Redington
Carrabassett Val.	Kibby	Salem
Carthage	Kingfield	Sandy River Plt.
Chain of Ponds	Langtown	Seven Ponds

Chesterville	Letter D	Skinner
Coburn Gore	Lowelltown	Strong
Coplin Plt.	Madrid	Temple
Crockertown	Mt. Abraham	Washington Township
Dallas Plt.	New Sharon	Weld
Davis	New Vineyard	Wilton
Eustis	Perkins	Wyman

Also including all unorganized territory in Franklin County

THIRTEENTH DISTRICT

Division of Central Penobscot (Lincoln)

Clerk: Sharon Webster Tel. 207-794-8512 sharon.webster@maine.gov
52 Main St., Lincoln, ME 04457
Court days: Call for court days.

Burlington	Lee	Springfield
Carroll	Lincoln	Webster Plt.
Chester	Lowell	Winn
Drew Plt.	Mattamiscontis	Woodville
Edinburg	Mattawamkeag	T2, R8
Enfield	Maxfield	T2, R9
Howland	Passadumkeag	T3, R1
Kingman	Prentiss	T3, R9
LaGrange	Seboeis Plt.	T5, R1
Lakeville Plt.		

Division of Piscataquis (Dover-Foxcroft)

Clerk: Lisa Richardson Tel. 207-564-2240
163 E. Main St., Dover-Foxcroft, ME 04426-1395
Court days: Monday and Thursday

Abbot	Elliottsville	North East Carry
Atkinson	Frenchtown	Orneville Plt.
Barnard	Greenville	Parkman
Beaver Cove	Guilford	Sangerville
Big Squaw Mtn.	Katahdin Iron Works	Sebec
Blanchard Plt.	Kingsbury Plt.	Shirley
Bowerbank	Kineo	Sugar Island
Brownville	Lake View Plt.	Wellington
Capens	Lily Bay	Willimantic
Chesuncook	Medford	Williamsburg
Days Academy Grant	Milo	
Dover-Foxcroft	Monson	

Also including all unorganized territory in Piscataquis County

Division of Northern Penobscot (Millinocket)
Clerk: Rebecca Hanscom Tel. 207-723-4786 rebecca.a.hanscom@maine.gov
207 Penobscot Ave., Millinocket, ME 04462-1430
Court day: Wednesday (also open some Tuesdays)

Davidson	Indiana Township	Mount Chase Plt.
East Millinocket	Long A Twp.	Patten
Grindstone	Medway	Stacyville
Hopkins Academy Grant	Millinocket	TA, R7

Also including all unorganized territory in Penobscot County north of Millinocket.

Maine District Courts – Quick Reference

Androscoggin (Lewiston/Auburn) – District VIII
Androscoggin (Livermore Falls) – District XI
Aroostook (Caribou) – District I
Aroostook (Fort Kent) – District I
Aroostook (Houlton) – District II
Aroostook (Presque Isle) – District II
Bath/Brunswick (West Bath) – District VI
Cumberland (Bridgton) – District IX
Cumberland (Portland) – District IX
Franklin (Farmington) – District XII
Hancock (Ellsworth) – District V
Kennebec (Augusta) – District VII
Kennebec (Waterville) – District VII
Knox (Rockland) – District VI
Lincoln (Wiscasset) – District VI
Oxford (Rumford) – District XI
Oxford (South Paris) – District XI
Penobscot (Bangor) – District III
Penobscot (Lincoln) – District XIII
Penobscot (Millinocket) – District XIII
Penobscot (Newport) – District III
Piscataquis (Dover-Foxcroft) – District XIII
Somerset (Skowhegan) – District XII
Waldo (Belfast) – District V
Washington (Calais) – District IV
Washington (Machias) – District IV
York (Biddeford/Saco) – District X
York (Springvale) – District X
York (York/South York) – District X