

Introduction



The Setting

Kennebunkport offers a truly outstanding natural and cultural environment for both residents and visitors. The combination of a rocky coastline, beaches, harbors, restaurants, historic villages, cultural and social activities, and a vibrant, natural hinterland creates an extremely desirable place to live and to visit.



Maintaining the character of Kennebunkport in the face of continuing change requires vigilance and continuing re-evaluation of the Town's goals and policies.

The Evolution of Planning & Land Use Regulation in Kennebunkport

It was August 1961, and in Kennebunkport more than just the weather was hot. Lines were being drawn, both on maps and between citizens. The issue was zoning, and for the first time, townspeople were being faced with the prospect of having restrictions placed on the use of their land.

In more than 300 years of local history, in time of wealth and in times of deep poverty, one fact had never changed: Citizens had a right to do with their land just as they pleased. People whose families had struggled for generations to make a living from the sea were an independent lot. They guarded their liberties jealously and didn't take kindly to this kind of rule-making. And yet, a new issue was facing the community. Those "from away" were moving into Kennebunkport in ever-increasing numbers. The town was changing, and many argued that some individual rights would have to be sacrificed for the good of all.

Where exactly did this concept of land use regulation come from? And what are the legal constraints to regulation?



The 10th amendment to the US Constitution delegates all powers not specifically assigned to the federal government to the States "or to the people." It was customary under English common law that these municipal "police powers" include the authority to regulate health, safety, morals, and the general welfare.

The Constitution's 5th amendment granted certain rights to property owners, as it states in part: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In 1868, the 14th amendment was adopted in order to grant protection to recently emancipated slaves. The 14th states, in part, "nor shall any



Freed Slaves in 1865 (Library of Congress)

State...deny to any person within its jurisdiction the equal protection of the laws". This clause was subsequently widely employed to protect property rights. The 14th amendment also includes a due process clause that prohibits the government from depriving people of property rights in the absence of a fair process.

By the end of the 19th century, industry was thriving in US cities, along with its attendant pollution, noise, vibrations, dust, odors, and hazards. Proposals were put forth to require setbacks from nearby residents, and to separate incompatible land uses.

In 1922, the village of Euclid, Ohio adopted a zoning ordinance that prevented industries in nearby Cleveland from expanding into Euclid. Four years later, the US Supreme Court ruled that Euclid's ordinance was consistent with the US Constitution.



The decision marked the first instance in which the Supreme Court upheld a zoning ordinance. Justice Sutherland, writing for the majority, famously noted that there is nothing wrong with industry per se, but that like "a pig in the parlor instead of the barnyard" the right use in the wrong place can create a nuisance.

In 1926, the York Harbor Village Corporation adopted a rudimentary zoning ordinance that divided the village into two districts, Zone A & Zone B.

In Zone B, a local resident by the name of Libby proceeded to establish a "camping ground conducted for private gain." The corporation brought suit, and in a 1928 ruling, Maine's Supreme Judicial Court declared for the first time that municipal zoning is consistent with the state's constitution.



Libby's Campground c.1945

Kenneth Roberts, a nationally renowned author and Kennebunkport summer resident, applauded York Harbor's "determination to be free of billboards, tourist camps, dance halls and other cheapening manifestations of the herd instinct" (*Trending into Maine*, 1938).

A key finding by the US Supreme Court was that Euclid's ordinance was neither arbitrary nor unreasonable. In 1943, Maine's legislature enacted a law that requires municipal zoning to have a basis in a comprehensive plan so as minimize the possibility of an ordinance that is arbitrary or unreasonable.

The Public Welfare

In the 1954 case of *Berman vs. Parker*, US Supreme Court Justice William O. Douglas took a broad and inclusive view of the public welfare.

BERMAN VS. PARKER

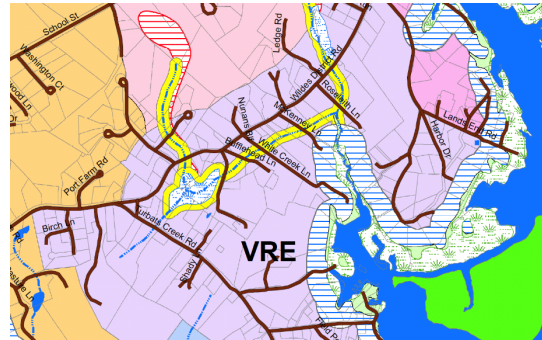
"The values it represents are spiritual as well as physical, aesthetic as well as monetary... It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as carefully patrolled."

- Justice William O. Douglas

This ruling effectively expanded a municipality's authority to protect natural and historic resources within its bounds.

Kennebunkport Enacts Zoning

Kennebunkport's current zoning ordinance was adopted in 1972, and subsequently amended on numerous occasions.



A segment of the Kennebunkport Zoning Map

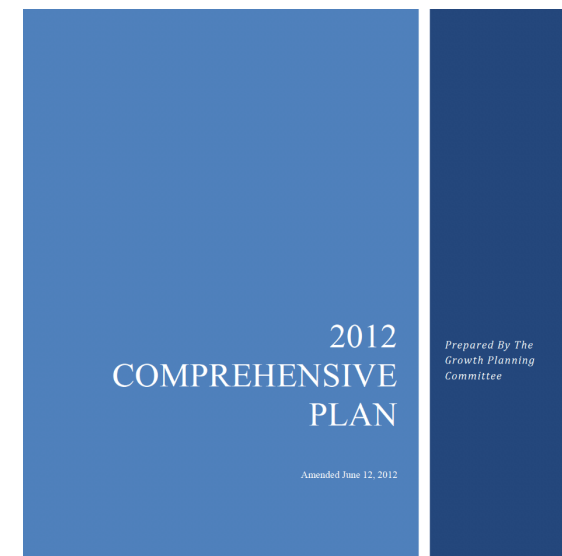
A Growth Management Ordinance was adopted in 2002.

Comprehensive Plans

Comprehensive plans were prepared in Kennebunkport in 1996, 2005, and 2012. These were primarily volunteer efforts, though some professional assistance was rendered by the Southern Maine Planning & Development Commission and Planning Decisions, Inc.

Why Prepare A Plan?

The State of Maine regulates the manner in which communities plan for and regulate growth and development through the Growth Management Program (Title 30-A §4312 et seq.), which was adopted in 1988 along with the Comprehensive Planning and Land Use Act. This law establishes the State's



policies, and establishes the rules by which communities may engage in land use planning and regulation. Through this law, the State overrides each community's home-rule authority and mandates compliance with an overall set of goals, procedures and standards for community comprehensive plans.

Aside from the requirement to have a plan, it just makes sense for towns to plan for the future. The process of preparing a comprehensive plan provides an opportunity for residents, community officials and other stakeholders to share ideas about what is important in the community, to identify issues and desirable responses, and to coordinate a town-wide approach to dealing with change. Ideally, the comprehensive plan will reflect consensus views about town policy.



As circumstances change and the community considers changes in its local policies, it is important to frame these considerations in terms of the comprehensive plan. New policies must strive to fit within current and future State requirements plus mesh with other local policies.

A comprehensive plan is not a law that is directly enforceable, but it is still a very powerful public document. A plan, which must be adopted by the voters, establishes the policy directives of the town.



State law requires zoning, growth control and impact fee ordinances to be consistent with a comprehensive plan (MRSA Title 30-A §4314.3). As

comprehensive plans are revised and updated, there is always a lag in consistency. The town is legally obligated to work towards consistency, and by statute such consistency must be achieved within 2 years (Title 30-A §4314.3.E).

Other regulations, most notably the Site Plan and Subdivision Regulations, limit approval of development applications to those that are consistent with the comprehensive plan. Although the plan is not a law per se, it is very close and can have that same effect in certain circumstances.

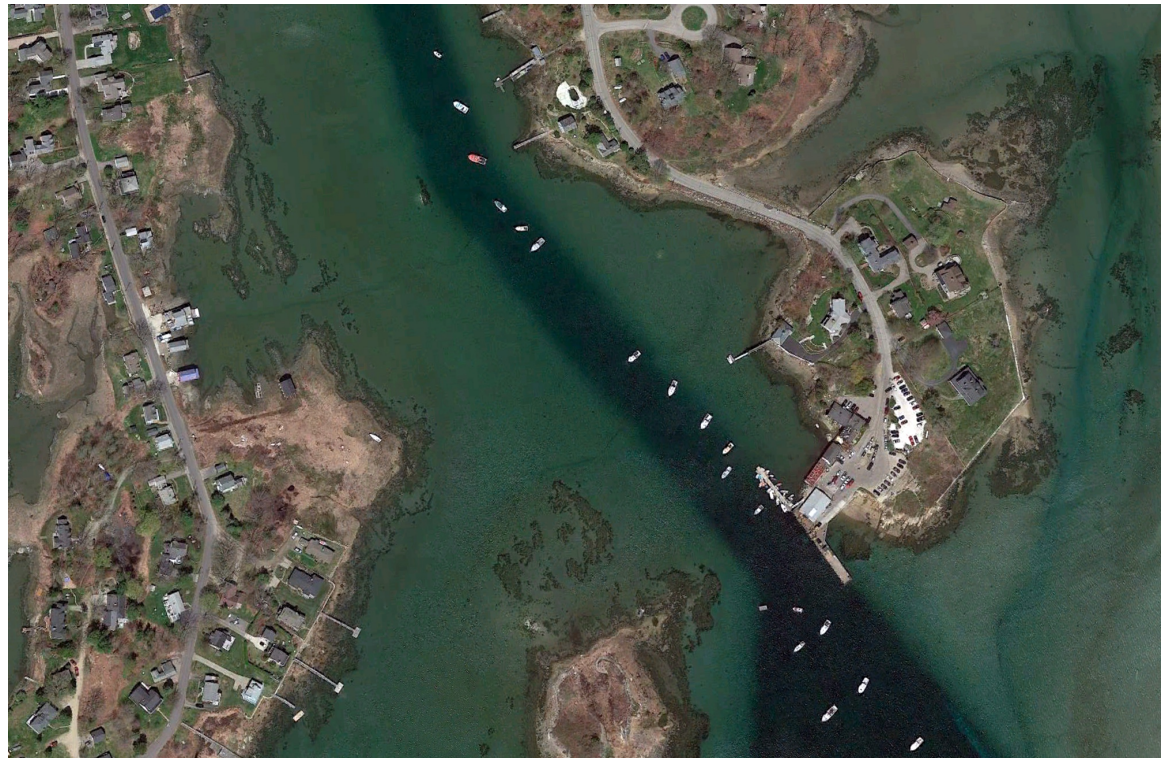
A comprehensive plan is required to include recommendations about major capital purchases with a goal of gaining cost efficiency for capital spending in the long-term. At the budget referendum the voters may subsequently decide not to follow the plan, but it is the obligation of the Town officials to pursue capital expenditures that are consistent with the Town's comprehensive plan.

A Changing Climate

This update is the first time the Town is directly addressing the challenges posed by climate change in the Comprehensive Plan.

The rate of sea level rise (SLR) in the Gulf of Maine is among the highest on the planet. Some low-lying areas in the vicinity of Dock Square and elsewhere will soon be susceptible to flooding due to SLR. As flooding becomes more frequent and more severe, businesses and residents in the floodplain will have to plan in advance to ensure a timely recovery from such events.

The rising sea will force the groundwater table to rise in locations that will be largely unanticipated. Septic systems will fail, and pollutants from those failures will find their way into nearby wells. The Town will have to revisit its plan for designated growth areas. Even in areas served by public sewer, the groundwater rise will undermine coastal defenses against a rising sea.



Source: Google Earth. Imagery date: May 4, 2018.

One of the best long term climate adaptation strategies is to reduce greenhouse emissions so that the climate challenge faced by future generations is less formidable. This update to the Comprehensive Plan thoroughly addresses this challenge, along with the many other ways the town can reduce CO₂ emissions.

Although Maine law requires the plan to look ten years into the future, an epochal event such as the current rate of climate change compels a longer view. It is never too soon to start that conversation.