



# Land Use Law

## KENNEBUNKPORT COMPREHENSIVE PLAN 2030

### Volume 2 Appendix B

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# The Constitutional Basis for Land Use Regulation

## The Evolution of 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 rulemaking. And yet, a new issue was facing the community. Those "from away" were moving into town 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 10<sup>th</sup> 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 5<sup>th</sup> amendment 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 14<sup>th</sup> amendment was adopted in order to grant protection to recently emancipated slaves. The 14<sup>th</sup> states, in part, "nor shall any 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 14<sup>th</sup> amendment also includes a due process clause that prohibits the government from depriving people of property rights in the absence of a fair process.



Freed Slaves in 1865. Photo courtesy of the Library of Congress.

By the end of the 19<sup>th</sup> 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.

### 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. Douglass

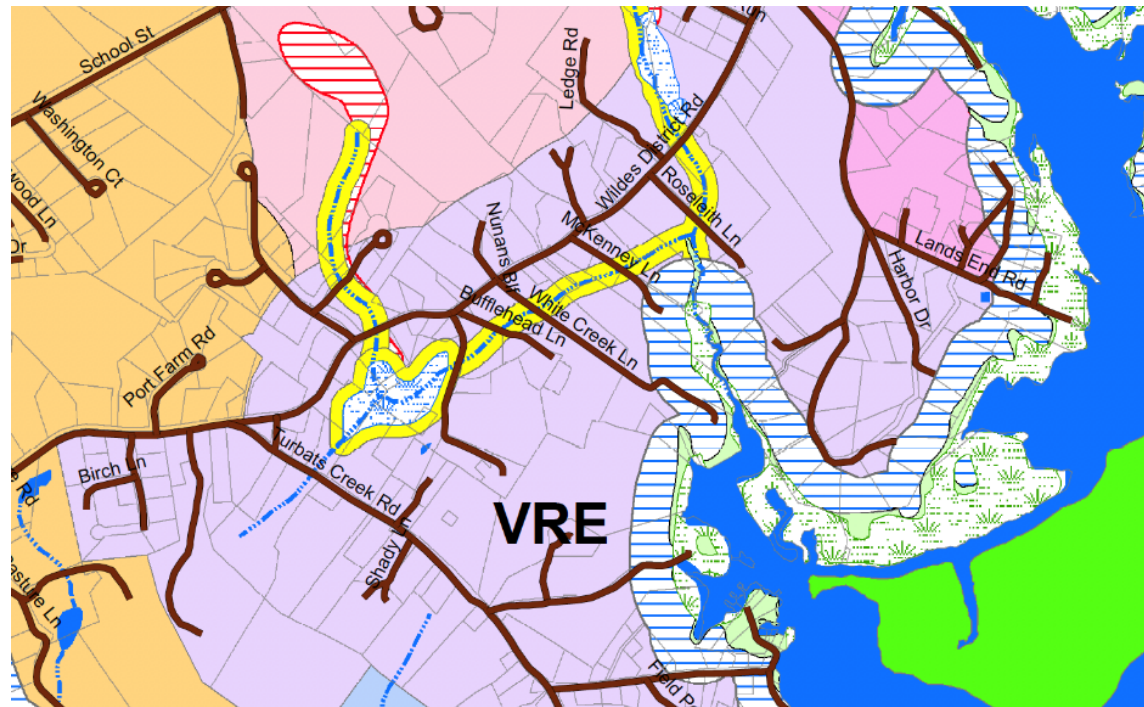
### The Public Welfare

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

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 Growth Management Ordinance was adopted in 2002.



A segment of the Kennebunkport Zoning Map