DrummondWoodsum
ATTORNEYS AT LAW

MEMORANDUM

January 12, 2022

To: Protect Maine's Fishing Heritage Foundation

From: Agnieszka A. Dixon and David M. Kallin
Drummond Woodsum

Re: Model Aquaculture Development Moratorium

I. MODEL AQUACULTURE DEVELOPMENT MORATORIUM

At your request, we have prepared the enclosed Model Aquaculture Development Moratorium Ordinance (the "Moratorium"). Once adopted by a municipality, the ordinance will establish a 180-day moratorium on aquaculture development within the geographic boundaries of that municipality. Under the Moratorium, aquaculture development is defined as:

> . . . the construction or operation of a commercial facility on, in, or over Maine's coastal waters (including submerged lands and intertidal lands) for the culture of finfish in nets, pens, or other enclosures or for the suspended culture of any other marine organism, that (i) is located in whole or in part on, in, or over the territorial coastal waters of the Town and (ii) exclusively occupies an aggregate surface area of coastal waters greater than five (5) acres. "Industrial-Scale Aquaculture Development" includes any onshore development and water access ways associated therewith or related thereto.

Thus, once enacted by a municipality, the Moratorium would temporarily defer all large-scale offshore commercial finfish aquaculture development within a municipality's geographic boundaries.

II. MUNICIPALITIES HAVE LEGAL AUTHORITY TO ADOPT THE MORATORIUM

You have asked whether a municipality has the legal authority to adopt the Moratorium. For the reasons explained next, in our view, a municipality does have the legal authority to adopt the Moratorium pursuant to express statutory authority to adopt moratoria and its broad municipal home rule powers.

A. A Moratorium is a Type of Local Ordinance That Is Expressly Allowed Under Maine Law.

A moratorium is a type of ordinance or regulation approved by a municipal legislative body (the voters with a town meeting form of government, or the city/town council in a municipality with a council form of government) that "temporarily defers" development by withholding local permits, authorizations, or approvals that are necessary for that development.[1]

Under state law, a municipality is allowed to adopt a moratorium on the processing or issuance of local development permits and licenses so long as the municipality determines that (1) the moratorium is necessary to prevent a shortage or overburden of public facilities, and/or (2) the municipality's existing

[1] 30-A M.R.S. § 4301(11).

regulations are inadequate to prevent serious public harm from the development.[2] Accordingly, if a municipality presently has no ordinances or regulations affecting aquaculture development, it is likely that the municipality will be able to make one or both of these determinations. The enclosed Moratorium contains findings relevant to these two determinations, and any municipality contemplating adopting it should review and, as appropriate, modify these findings to reflect the specific circumstances affecting that municipality.

B. Municipalities Have Broad Power To Enact Local Ordinances (Including Moratoria), and Such Ordinances Are Presumed Valid.

Since the adoption of municipal "home rule" in 1969, Maine municipalities have had the power to enact ordinances—including moratoria—on most subjects without the necessity of state enabling laws. The Legislature intended home rule to be a broad grant of local authority: the home rule statute provides that the ordinance power granted to municipalities, being necessary for the welfare of the municipalities and their inhabitants, is to be liberally construed to effect its purpose, and there is a rebuttable presumption that an ordinance is a valid exercise of a municipality's home rule authority. Thus, both the Maine Constitution and state law provide a strong basis for the adoption of ordinances by municipalities. As a result, courts favor upholding local ordinances if they are subject to legal attack, and the burden rests on the person attacking an ordinance to prove that it violates home rule (and not on the municipality to prove that it does not).

This general grant of ordinance power is circumscribed in three situations: (1) when state law expressly prohibits local regulation; (2) when state law provides for the Legislature and municipalities to share authority over a subject matter; or (3) when state law is silent with respect to local regulation and a court determines that the Legislature intended to prohibit local regulation because such local action would frustrate the purpose of a state law. Together, these limitations are known as the doctrine of preemption.[3]

The first category (express preemption) and the second category (shared authority) are usually obvious because the prohibitions to locally regulate a subject area or the division of regulatory powers are expressly written into state law.[4] With respect to the third category (implicit preemption), the analysis is more complex. Although determining whether an ordinance is implicitly preempted by state law is nuanced, the lessons that can be drawn from the dozen or so Maine court cases on point can be summed up as follows: First, as noted above, the general rule is that a local ordinance is presumed valid. Second, it is not enough for a court to find that there is a conflict or an inconsistency between a state law and a local ordinance; rather, a court must find that the Legislature has enacted a comprehensive scheme for regulating the same subject matter and the local regulation is so inconsistent with the state law that it would frustrate the purpose or actual operation of the state law.[5]

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[2] 30-A M.R.S. § 4356(1).

[3] There are other bases for challenging the validity of a municipal ordinance, such as its constitutionality, but there is likewise a presumption favoring the constitutional validity of ordinances and courts are therefore reluctant to invalidate them on constitutional grounds. *See Britton v. Town of York,* 673 A.2d 1322, 1323 (Me. 1996); *see generally* 5 McQuillin Mun. Corp. § 19:6 (3d ed.) (constitutionality of ordinances; constitutionality favored). Indeed, successful challenges to moratoria on constitutional grounds are rare. This is because it is well-established that any party challenging an ordinance must prove "the *complete absence* of any state of facts that would support the need for the enactment." *Tisei v. Town of Ogunquit,* 491 A.2d 564, 569 (Me. 1985) (citing *Gabriel v. Town of Old Orchard Beach,* 390 A.2d 1065, 1071 (Me. 1978) and *State v. Rush,* 324 A.2d 748, 753 (Me. 1974)) (emphasis added).

[4] *See, e.g.,* 12 M.R.S. § 13201 (establishing express limits on local regulation of matters within the jurisdiction of the Maine Department of Inland Fisheries and Wildlife by stating that a municipality may not enact any ordinance regulating, among other things, hunting, trapping, or fishing or the operation of ATVs, watercraft, or snowmobiles); 22 M.R.S. § 2429-D (stating that a municipality may regulate certain medical marijuana operations and listing with specificity the subject areas that municipalities may not regulate).

[5] *See Portland Pipe Line Corp. v. City of S. Portland,* 2020 ME 125, 240 A.3d 364; *Dubois Livestock, Inc. v. Town of Arundel,* 2014 ME 122, 103 A.3d 556; *State of Maine v. Brown,* 2014 ME 79, 95 A.3d 82; *Smith v. Town of Pittston,* 2003 ME 46, 820 A.2d 1200*; Sawyer Envtl. Recovery Facilities v. Town of Hampden,* 2000 ME 179, 760 A.2d 257*;*

C. The Maine Legislature Left Room for Municipalities to Regulate Aquaculture Development.

There is no state law that expressly prohibits municipalities from regulating aquaculture development; thus, local ordinances regulating aquaculture development are not expressly preempted. State law does, however, confer leasing authority over such projects to a state agency—namely, the Department of Marine Resources (DMR). As explained next, in reviewing the relevant statutes and case law, it appears that the Legislature has left room for municipalities to enact local ordinances to regulate aquaculture development.

The state law governing DMR's leasing authority (referred to here as Chapter 605)[6] grants the Commissioner of DMR the exclusive authority to issue aquaculture leases "in, on and under the coastal waters, including the public lands beneath those waters and portions of the intertidal zone."[7] Just because a state agency has leasing authority over state-owned lands or waters, however, does not mean that those lands and waters cannot be subject to local regulation. Next, we discuss two cases in point—one concerning "functionally water-dependent uses" in the shoreland zone, and the other concerning the transportation and loading of crude oil onto marine vessels in Maine's coastal waters.

1. Functionally Water-Dependent Uses

Functionally water-dependent uses are defined in state law to include uses that must be located on submerged lands or must have direct access to coastal waters, such as finfish and shellfish processing, fish-related storage and retail and wholesale marketing facilities, shipyards, boat building facilities, marinas, and industrial uses dependent on water-borne transportation or requiring large volumes of cooling or processing water that cannot be located or operated at an inland site.[8] Under Maine's mandatory shoreland zoning law, functionally water-dependent uses must be regulated by every Maine municipality having coastal waters within its territorial boundaries.[9] Typically, a municipality will establish a "Maritime Activities District" within the shoreland zone that identifies which functionally water-dependent uses are allowed within its territory and sets standards that such uses must meet as part of a local permitting process.

It is not unusual for a municipality to impose additional local controls over these uses pursuant to its home rule authority by, for example, also requiring a functionally water-dependent use to secure local planning board site plan approval. Likewise, municipalities have clear authority to adopt environmental standards applicable to these and other uses. Indeed, under several of Maine's environmental protection laws—including the Natural Resources Protection Act ("NRPA") and Maine's air quality law—the authority to

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Perkins v. Town of Ogunquit, 1998 ME 42, 709 A.2d 106*; International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995); *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993); *Central Maine Power v. Town of Lebanon*, 5711 A.2d 1189 (Me. 1990); *Midcoast Disposal, Inc. v. Town of Union*, 537 A.2d 1149 (Me. 1988); *Tisei v. Town of Ogunquit*, 491 A.2d 564 (Me. 1985); *Ullis v. Town of Boothbay Harbor*, 452 A.2d 153 (Me. 1983); *Schwanda v. Bonney*, 418 A.2d 163 (Me. 1980); *Begin v. Town of Sabattus*, 409 A.2d 1269 (Me. 1979).

[6] 12 M.R.S. ch. 605, sub-ch. 2 §§ 6071-6088 (hereafter, "Chapter 605").

[7] 12 M.R.S. § 6072(1).

[8] *See* 38 M.R.S. § 436-A (defining functionally water-dependent uses for purposes of the mandatory shoreland zoning law). Although the mandatory shoreland zoning law applies only to shoreland areas (defined, *inter alia*, to include areas within 250 feet of the normal high-water lien of any great pond, river or saltwater body), municipalities may extend the geographic scope of their shoreland zoning framework beyond shoreland areas pursuant to their home rule powers.

[9] *See* 38 M.R.S. § 438-A (requiring municipalities to adopt zoning and land use control ordinances with respect to all shoreland areas, consistent with the Maine Department of Environmental Protection (MDEP) minimum shoreland zoning guidelines). In its guidelines, MDEP notes that municipalities may apply "many different techniques . . . to tailor an ordinance to reflect local goals and resources" with respect to regulating functionally water-dependent uses as part of its waterfront management strategy. *See* 06-096 C.M.R. ch. 1000 § 9 (note). The MDEP guidelines advise that municipalities may adopt ordinances that "may be much more specific [than the MDEP model guidelines] about what types of functionally water-dependent uses should be permitted," and expressly allow municipalities to "make use of more than one type of waterfront district, [ ] include standards for assessing the impact of proposed development on water dependent uses, and [ ] include specific provisions to encourage certain types of public benefits." *Id.*

regulate activities in order to protect natural resources and public health is expressly shared between the Maine Department of Environmental Protection (MDEP) and municipalities.[10]

Importantly, if a permanent structure associated with a functionally water-dependent use is located on submerged or intertidal lands, a lease from the Bureau of Parks and Land (BPL) must be secured. Much like the DMR leasing program, the state law governing the BPL submerged lands leasing program (referred to here as Chapter 220)[11] authorizes the Director of BPL to lease submerged and intertidal lands owned by the State for various functionally water-dependent uses, including offshore projects such as tanker ports, ship berthing platforms, and pipelines.[12] As with Chapter 605, Chapter 220 does not expressly prohibit municipalities from regulating any of the uses that are subject to the BPL leasing scheme. Indeed, any such interpretation would likely run afoul of the mandatory shoreland zoning law which, as discussed, requires municipalities to regulate functionally water-dependent uses in the shoreland zone.

Notably, Chapter 220 carves out an exception to BPL's leasing program for any aquaculture development project that secures a lease from the Commissioner of DMR under Chapter 605.[13] Thus, it appears that the Legislature intended to assign to DMR the responsibility of issuing a subset of leases—namely, aquaculture development leases—that would otherwise have been within BPL's jurisdiction under Chapter 220. This division of labor among sister agencies makes logical sense, and it is a strong indicator that the Legislature intended to create a statutory framework where the state remains exclusively responsible for *leasing* state-owned lands for various water-based enterprises. Nothing about this statutory leasing authority, however, facially prevents municipalities from regulating those same enterprises under their home rule powers. As discussed above, municipalities may likely do so as long the local regulations do not frustrate the purpose or actual operation of these licensing statutes.

2. Oil Transport

Under the Maine Coastal Conveyance Act ("CCA"), the MDEP is authorized to issue licenses for the operation of oil terminal facilities located in state waters, including the operation of marine tank vessels used to transport oil to such facilities.[14] In July 2014, the City of South Portland adopted a local ordinance under its home rule authority, known as the Clear Skies Ordinance, which effectively banned the bulk loading of crude oil onto any marine tank vessel in the City's harbor.[15] Soon thereafter, the Portland Pipe Line Corporation, which had been unloading crude oil from vessels in the City's harbor for years pursuant

[10] NRPA expressly provides that "[n]othing in [NRPA] may be understood or interpreted to limit the home rule authority of a municipality to protect the natural resources of the municipality through enactment of standards that are more stringent than those found in [NRPA]." 38 M.R.S. § 480-F(3). Similarly, the air quality law provides that "[n]othing in this chapter shall be construed as a preemption of the field of air pollution study and control on the part of the State" and further provides that municipalities may "adopt and enforce air pollution control and abatement ordinances, to the extent that these ordinances are not less stringent than this chapter or than any standard, order or other action promulgated pursuant to this chapter." 38 M.R.S. § 597; *see also International Paper Co. v Town of Jay*, 665 A.2d 998, 1002 (holding that the Town of Jay Environmental Control and Improvement Ordinance, which prohibits emission of air pollutants without a permit issued by the Town of Jay Planning Board, is not preempted by state law because the Legislature clearly expressed its intention not to occupy the field of air pollution control and because the ordinance compels a more stringent level of emissions compliance than state standards and therefore advances the same purposes expressed by the state law).

[11] *See* 12 M.R.S. §§ 1862(2) (submerged lands leasing program).

[12] *Id.*

[13] *See* 12 M.R.S. § 1862(10).

[14] 38 M.R.S. §§ 545. The MDEP's jurisdiction under the CCA extends to 12 miles from the coastline. *Id.* § 544(1).

[15] Specifically, the Clear Skies Ordinance is a compilation of amendments to the City's Zoning Ordinance, which prohibit the bulk loading of crude oil onto any marine tank vessel. *See* Zoning Ordinance of the City of South Portland, Maine, §§ 27-786, 27-922, 27-930.

to an MDEP oil terminal facility license, filed suit against the City asserting that the Clear Skies Ordinance is preempted by the CCA.[16] The Maine Law Court, however, concluded that it is not.[17]

Not unlike NRPA and the air quality law, under the CCA, the authority to deal with the hazards and threats posed by oil transfers in Maine's coastal waters is expressly shared between the MDEP and municipalities. Specifically, the CCA provides that "[n]othing in [the CCA] may be construed to deny any municipality . . . from exercising police powers" so long as the municipal regulation is not in "direct conflict" with the CCA or any MDEP rule or order adopted under authority of the CCA.[18] Accordingly, the Court determined that the Legislature expressly recognized municipal authority to exercise local police power and in so doing made clear that it did not intend to "occupy the field" of oil pollution control for the purposes set out in the CCA, which include preserving the "seacoast of the State as a source of public and private recreation . . . and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities."[19]

The Court also determined that nothing in the Clear Skies Ordinance is in "direct conflict" with the MDEP's exercise of its licensing powers under to the CCA because the Clear Skies Ordinance "does not purport to require the MDEP to do anything that the CCA says it may not do, nor does it bar the MDEP from doing what the CCA says that it may do."[20] In short, the Court reasoned that it is possible to comply with both the Clear Skies Ordinance and the MDEP oil terminal facility license because the Ordinance simply bars an activity that the MDEP license *allows*, but does not *require*—namely, loading crude oil from storage tanks onto marine tank vessels in the City's harbor.[21]

The Portland Pipe Line case illustrates that a municipal ordinance may regulate the same subject matter as a state law without being preempted by implication.[22] It also illustrates that, even when a municipal ordinance bans an activity that is authorized by a state license issued pursuant to a statutory licensing framework, the ordinance is not likely to be implicitly preempted because, as the Law Court stated, a "license" is a "permission to act"— and, consequently, the activities permitted thereunder do not have to occur.[23] Thus, a municipal ordinance that bars an activity for which a state license may be granted does not invariably "frustrate the purposes of a state law or prevent the efficient accomplishment of a defined state purpose."[24]

Much like the MDEP licensing framework for oil terminal facilities located in state waters, the licensing framework for aquaculture development is permissive: nothing about a DMR aquaculture license *requires* an operator to act on that license. Accordingly, a municipal ordinance that regulates or bans aquaculture development is not likely to frustrate the purpose or actual operation of Chapter 605, the DMR aquaculture licensing law.

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[16] *Portland Pipe Line Corp. v. City of South Portland*, 947 F.3d 11, 14 (1st Cir. 2020). Specifically, the company had been unloading crude oil from vessels in South Portland's harbor, stored the oil in above-ground tanks, and then sent the oil via a pipeline to Canada—all pursuant to an MDEP oil terminal facility license originally issued in 1979. *Id.* at 13. In 2010, the company sought and secured a renewal license from the MDEP, which authorized it to reverse the flow of the crude oil and thereby transport the oil from Canada to the United States via the South Portland terminal. *Id.* at 13-14. On appeal, the First Circuit Court of Appeals certified three questions to the Law Court concerning state law preemption.

[17] *Portland Pipe Line Corp. v. City of South Portland,* 2020 ME 125, ¶ 2; 240 A.3d 364.

[18] *Id.* at 11 (quoting 38 M.R.S. § 556).

[19] *Id.* ¶ 26; 38 M.R.S. § 541 (enumerating the purposes of the CCA).

[20] *Id.* ¶ 14.

[21] *Id.* ¶ 17.

[22] *Id.* ¶¶ 24-26.

[23] *Id.* ¶¶ 17-19.

[24] *Id.* ¶¶ 23, 25 (quoting *Dubois Livestock, Inc.* 2014 ME 122, ¶ 13, 103 A.3d 556).

III. CONCLUSION

In sum, the Legislature has enacted a comprehensive scheme for leasing state-owned submerged lands, but it appears to have left room within that scheme for municipalities to regulate aquaculture development located on or above those lands. For all of the reasons discussed above, in our view, Maine municipalities with coastal territory have the legal authority to adopt the enclosed Moratorium for the purpose of evaluating and, as appropriate, enacting permanent ordinances to regulate industrial-scale aquaculture development.

We trust this memorandum is responsive to your request. If you have any further questions, please do not hesitate to contact us.