MAINE MUNICIPAL ASSOCIATION
MMA Legal Services

The Affordable Housing Law; Guidance for Municipalities

MMA Legal Services

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On April 27, 2022, Governor Mills signed affordable housing legislation into law, P.L. 2021, c. 672, entitled, *An Act To Implement the Recommendations of the Commission To Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions* (hereinafter the Affordable Housing Law). The law was later amended by P.L. 2023, c. 192, which was entitled *An Act to Clarify Statewide Laws Regarding Affordable Housing and Accessory Dwelling Units*. Together, these bills made significant changes to several state statutes governing municipal land use regulation in Maine – all with an eye toward increasing the availability of housing. The changes can be broadly broken down into four sections:

(1) requiring the DECD to establish **statewide and regional housing production goals** and identifying the municipal role in increasing affordable housing;

(2) requiring municipalities to adopt additional density requirements and other requirements for **affordable housing developments** under local land use ordinances;

(3) requiring municipalities to allow **additional dwelling units** on lots where residential uses are allowed, with the number of allowable units depending on the location of the lot and whether it contains an existing dwelling unit; and

(4) requiring municipalities to allow an **accessory dwelling unit** (ADU) on the same lot as a single-family dwelling unit in any area where residential uses are permitted and to comply with certain requirements pertaining to ADUs.

The following summary outlines the general requirements of these laws and the Maine Department of Economic and Community Development (DECD) rule adopted to assist with the administration and enforcement of these laws (19-100 C.M.R. ch.5 (2023), herein referred to as the "DECD Rule") and includes the following sections:

This discussion is intended to be a general overview based on MMA Legal Services' interpretation of the Affordable Housing Law and the DECD Rule. MMA Legal Services strongly encourages each municipality to consult with local legal counsel on how to best implement these requirements in their municipality.

Implementation Date

The deadlines for municipalities to implement requirements in 30-A M.R.S. §§ 4364, 4364-A and 4364-B are:

~ **January 1, 2024,** for municipalities in which the municipal officers (select board or town/city council) have authority to adopt ordinances without further action or approval by the voters. According to the DECD Rule, this means municipalities that do not have a town meeting form of government (19-100 C.M.R. ch. 5 § 1(B)); and
~ **July 1, 2024,** for all other municipalities.

Housing Production Goals and Fair Housing

(5 M.R.S. § 13056(9); 30-A M.R.S. § 4364-C)

The Affordable Housing Law requires the DECD, in consultation with Maine State Housing, to establish statewide and regional "housing production goals" aimed at increasing the availability of affordable housing in the state. 5 M.R.S. § 13056(9). The "*State of Maine Housing Production Needs Study*," linked in the "**Quick Links**" section of this guidance, was released October 2023.

A different provision in the law establishes the municipal role in statewide housing production goals set by the DECD. Section § 4364-C provides that a municipality:

- Shall ensure local ordinances and regulations are designed to "affirmatively further" the purposes of the federal Fair Housing Act (FHA) and the Maine Human Rights Act (MHRA) to achieve the statewide or regional housing production goals.
- May establish and enforce short-term rental regulations to achieve housing production goals.

This is the only portion of the law that is currently in effect (as of August 8, 2022).

The purpose of the FHA is to provide for fair housing in the United States by prohibiting discriminatory practices that make housing unavailable to an individual because of their race, color, religion, sex, national origin, familial status or disability. 42 U.S.C. § 3601 *et seq*.
The purpose of the MHRA, in the context of housing, is to prevent discrimination due to an individual's "race, color, sex, sexual orientation or gender identity, physical or mental disability, religion, ancestry, national origin or familial status or because the individual has sought and received an order of protection under Title 19-A, section 4007." 5 M.R.S. § 4581.

1. What is the general purpose of this section of the law?

According to guidance issued by the DECD, the language in § 4364-C referencing the municipal obligation to advance state and federal fair housing laws is intended to draw a link between local land use regulation and federal and state prohibitions against discriminatory housing practices.

However, because neither the FHA nor the MHRA expressly address the *affordability* of housing, or impose clear standards around affordability, a full understanding of the purpose of § 4364-C is not yet apparent.

2. What should a municipality do to comply with this section of the law?

MMA Legal Services recommends that municipalities review local ordinances to identify and amend any clearly discriminatory provisions, such as provisions that limit housing to individuals based on their race, color, religion, national origin, ancestry, sex, sexual orientation or gender identity, disability, familial status or receipt of a permanent protection order. When reviewing local ordinances for this purpose, municipalities are also encouraged to keep in mind the spirit of the law and consider how provisions in local ordinances may affirmatively further (or act as a barrier to) affordable housing, such as how short-term rental properties are regulated in the municipality.

Municipalities should document any actions taken to review ordinances and regulations in the event that the law is later determined to require municipalities to demonstrate that they took specific steps to ensure that local ordinances and regulations have been designed to "affirmatively further" the purposes of the FHA and MHRA or state affordable housing goals. For example, a board or committee assigned to review local ordinances should take minutes of workshops dedicated to ordinance review or make express written finding for this purpose. Municipalities should also consider keeping track of the time and costs associated with meeting the goals of this section, particularly if a municipality might seek state funding to cover the cost of these expenses. See the discussion on "**Funding Opportunities**" later in this guidance document.

Affordable Housing Developments

(30-A M.R.S. § 4364)

Section 4364 governs affordable housing developments approved on or after the "implementation date" (discussed above). Under this section, a municipality that has adopted **"density requirements"** is required to authorize a **"density bonus"** for eligible **"affordable housing developments"** constructed in specified areas in the municipality.

3. Does this section apply to all municipalities?

No. Based on language in § 4364 and the DECD Rule, it appears this section of the law only applies to municipalities that have: (1) zoning districts or designated growth areas where multifamily dwellings are permitted; and (2) adopted "density requirements" that limit the number of

dwelling units that may be built on lots in those zones or growth areas. See the discussion of the term "designated growth areas" in the discussion of **"Issues Applicable to Multiple Sections of the Law"** below.

Based on language in the statute and the DECD rule, we understand "density requirements" to include: (a) ordinance provisions expressly limiting the number of dwelling units permitted on lots in a zone, (such as by only allowing X number of dwelling units per lot), and (b) dimensional requirements that have the effect of limiting the number of dwelling units on a lot (e.g., per-unit lot area or frontage requirements, or setback and building height requirements).

Therefore, this section of the law probably does not apply to your municipality if:

- Your municipality has no land use ordinance;
- Your municipality's land use ordinance contains only dimensional requirements that, when applied, do not limit the number of units that can be constructed on a lot (such as establishing only setback and building height requirements);
- Your municipality does not have a designated growth area or areas served by public water and sewer; or
- Your municipality does not allow for multifamily dwellings (structures containing three or more dwelling units) in any designated growth area or area served by public water and sewer.

MMA Legal Services advises that municipalities review the criteria in the statute and DECD Rule and consult with legal counsel to determine if the requirements in this section apply based on the ordinances and regulations adopted by the municipality.

4. Which housing developments are entitled to a density bonus?

To be entitled to a density bonus, a proposed housing development must:

- Meet the definition of "affordable housing development" in § 4364(1) and the DECD Rule (which includes specific income limits for rental or owner occupied developments).
- Be located in a "designated growth area," as defined by the law and DECD Rule (see the discussion of this term in **"Issues Applicable to Multiple Sections of the Law"** below) or be served by public water and sewer.
- Be located in any area in the municipality where multifamily dwellings are allowed. The DECD Rule defines "multifamily dwelling" as a structure containing three or more dwelling units.
- Meet the state subsurface wastewater disposal system minimum lot size requirements (12 M.R.S. Ch. 423-A).
- Comply with state and local shoreland zoning requirements (if the proposed development will be in the shoreland zone).

- The owner of the development must provide written verification that the affordable housing units will meet the water and wastewater system requirements outlined in § 4634(5).
- The owner of the development must execute and record a restrictive covenant in the registry of deeds, for the benefit of and enforceable by a party acceptable to the municipality, ensuring that the development will remain affordable, as defined by the law, for at least 30 years. See § 4364(3) for affordability criteria.

5. What does this section of the law require a municipality to do?

Under § 4364, municipalities that are subject to the affordable housing density bonus requirement must:

- Grant eligible affordable housing developments a dwelling unit **"density bonus"** of at least 2.5 times the base density otherwise allowed by municipal ordinance in that location.
- Not require more than 2 off-street parking spaces for every 3 units in an eligible affordable housing development. If fractional results occur when calculating off-street parking requirements, the number of necessary parking spaces may be rounded up or down to the nearest whole number under the DECD Rule. 19-100 C.M.R. ch. 5, § 2(C).

The DECD Rule provides that municipalities can adopt ordinances that are more permissive than these requirements, provided the ordinances are equally or more effective in achieving the goal of increasing housing opportunities. 19-100 C.M.R. ch. 5, § 1(A)(2). A municipality that wishes to adopt local regulations designed to increase affordable housing developments in the municipality which are different from the requirements in § 4364 are encouraged to contact local legal counsel to discuss whether the regulations will meet this standard.

6. If this section applies, does a municipality have to amend local land use ordinances to comply with the requirements in this section?

Although section 4364 provides that a municipality "shall apply" density requirements in accordance with this section, the statute does not address several key details as to its implementation and it allows local choice in several areas. For these reasons MMA Legal Services strongly recommends that municipalities subject to § 4364 amend applicable land use ordinances to make it clear how the required density bonus for affordable housing developments will be administered in their community and to flesh out the details of the approval process and criteria left open by the statute.

> **For example,** a municipality might grant a density bonus by expressly excluding this type of development from otherwise applicable dimensional requirements or by adopting different standards for approving this type of development than are applicable to market rate developments.

In addition to incorporating the statutory requirements outlined in § 4364, municipalities are encouraged to review and amend local ordinances to:

- Ensure local definitions of "multifamily housing," "affordable housing," and other terms used in this section are consistent with how these terms are defined in the Affordable Housing Law and DECD Rule.
- Identify the municipal official or board that is required to approve or review the restrictive covenant ensuring long-term affordability of the units and incorporate the review criteria applicable to the restrictive covenant in § 4364(3) into a local ordinance.
- Identify the municipal official or board that is required to approve or review the written verification that each dwelling unit is connected to adequate water and wastewater services and incorporate the review criteria for determining adequate water and wastewater services listed in § 4364(5) into a local ordinance.
- Address restrictive covenants (see the discussion in **Question 9** below).

7. How is the "density bonus" calculated under this section?

The density bonus is calculated on a case-by-case basis for each project because the base density and density bonus will depend on the particular lot where the affordable housing development will be located. The "**base density**" will depend on the size of the lot in question and the way in which the various applicable dimensional requirements (e.g., setback, frontage, per dwelling lot size, etc.) interact to determine the number of dwellings allowed. Then that number must be multiplied by 2.5 to determine the total number of dwelling units that must be allowed on the lot.

Example 1: A developer proposes to build a qualifying affordable housing development on a 40,000 sq. ft. lot with 300 feet of road frontage in a designated growth area that allows multifamily dwellings. The applicable minimum lot size per dwelling unit is 15,000 sq. ft., with a 20-foot setback required from all lot lines, and 150 feet of frontage required per dwelling unit. These requirements result in a base density of two (2) dwelling units for this lot. The board or official responsible for reviewing the affordable housing development would then multiply the base density by 2.5, which would allow the developer to build five (5) dwelling units (2 x 2.5) on the lot (assuming that the number of units also complies with the minimum lot size required per the state subsurface wastewater minimum lot size law). In addition, the board or official could require no more than 3 parking spaces (5 x 2/3, rounded down to nearest whole number) for the development.

> **"Base density"** is defined in the DECD Rule as the maximum number of units allowed on a lot not used for affordable housing based on dimensional requirements in a local land use or zoning ordinance (excluding local density bonuses, transferable development rights or other similar means to increase density on a lot). Under the DECD Rule, if a fractional result occurs when calculating a density bonus, the number of units is rounded down to the nearest whole number. A municipality may also choose to round up, thereby increasing the allowable density by more than the statute requires. 19-100 C.M.R. ch. 5, § 2(C).

Example 2: If the developer proposes a qualifying affordable housing development on an 50,000 sq. ft. lot with 500 feet of road frontage in the same zone, and the applicable dimensional requirements increased the base density to three (3) dwellings, the density bonus calculation would increase to allow seven (7) dwelling units (3 x 2.5, rounded down to the nearest whole number) and the municipality could not require more than five (5) parking spaces (7 x 2/3, rounded up to nearest whole number) for the development.

8. Can municipalities apply dimensional requirements to eligible affordable housing developments granted a density bonus under this section?

A municipality probably cannot adopt or enforce dimensional requirements in a local ordinance that would prevent a developer from building the *number* of affordable housing units allowed under this section. Therefore, a municipality probably could not enforce a per-unit lot size requirement or other dimensional requirements, if it would mean that the density bonus discussed above could not be achieved. However, a municipality probably can adopt and enforce dimensional requirements that govern *the size or location* of dwelling units on a lot (such as a reduced or relaxed minimum road or side lot setback requirement).

However, note that the Affordable Housing Law requires affordable housing developments allowed under this section to comply with applicable minimum lot area requirements in the state minimum lot size law and regulations. 12 M.R.S. ch. 423-A. Also, for affordable housing developments in the shoreland zone, the municipality must enforce the minimum lot size and other dimensional requirements mandated by state shoreland zoning law and regulations. 38 M.R.S. §§ 435 to 448. As a result, a developer may be prohibited from building the total number of affordable housing development units allowed under this section when these statutory dimensional requirements are applied.

9. How do we meet the affordable housing restrictive covenant requirement?

MMA Legal Services recommends that municipalities subject to this section adopt an ordinance establishing criteria for determining the type of entity that is acceptable as the holder of the restrictive covenant required by this section. As noted above, the ordinance should also identify the municipal official or board responsible for reviewing and approving restrictive covenants for this purpose. A municipality might also consider requiring the developer to cover the cost of any legal review necessary to confirm the covenant complies with this law and any local ordinance requirements.

Note: Maine State Housing Authority is generally familiar with affordable housing development and is commonly named as a party responsible for administering and enforcing restrictive covenants related to state and federal housing laws.

Additional Dwelling Units Density Requirements

(30-A M.R.S. § 4364-A)

Section 4364-A requires municipalities to allow **additional dwelling units** on lots that are located in any area where residential uses are allowed, including where residential uses are allowed as a conditional use. The number of dwelling units that must be allowed on a lot depends on: (1) whether the lot already contains a dwelling unit; and (2) where the lot is located within the municipality.

Lots without an existing dwelling unit

- If the lot is located in a "**designated growth area**" as defined by the law and DECD Rule (see the discussion of this term in **"Issues Applicable to Multiple Sections of the Law"** below) and does not have an existing dwelling unit on it, a municipality must allow up to 4 dwelling units to be constructed on the lot.
- If a lot is located in an area that is *not* a designated growth area, but is located in an area where residential uses are allowed (including as a conditional use), and the lot does not have an existing dwelling unit on it, a municipality must allow up to two (2) dwelling units to be constructed on the lot. The DECD Rule clarifies that the two dwelling units may be within one structure or as two separate structures. 19-100 C.M.R. ch. 5, § 3(B)(1)(b).

Lots with an existing dwelling unit

- On lots having one existing dwelling unit, a municipality must allow up to two (2) additional dwelling units per lot. The DECD Rule defines "existing dwelling unit" as a residential unit in existence on a lot at the time of submission of an application to build additional units on that lot.
    - The additional dwelling units may consist of one additional dwelling unit within or attached to an existing structure, or one additional detached dwelling unit, or one of each.
- If a lot contains two existing dwelling units, the DECD Rule clarifies that no additional dwelling units must be allowed on the lot, unless otherwise allowed under a local ordinance. 19-100 C.M.R. ch. 5, § 3(B)(1)(d).

10. Does this section of the law apply to all municipalities?

Yes. This section applies to all municipalities, regardless of whether the municipality has adopted a zoning ordinance or density requirements.

11. What criteria must be met for additional dwelling units allowed under this section to be built on a lot?

- Each additional dwelling unit must meet the state subsurface wastewater disposal system minimum lot size requirements in 12 M.R.S. ch. 423-A.
- The owner of the housing structure must certify compliance with the water and wastewater system requirements in § 4634-A(4).

- Additional dwelling units in the shoreland zone must meet state and local shoreland zoning requirements.

12. What does this section require municipalities to do?

To comply with the requirements in § 4364-A, municipalities must ensure local land use ordinances:

- Do not restrict residential development to only single-family housing.
- Do not establish dimensional requirements (including but not limited to setback requirements) for the additional dwelling units allowed under § 4364-A that are greater than the dimensional requirements for single-family housing units, except that an ordinance may establish per-dwelling unit lot area requirements provided the required lot area for subsequent units is "not greater than" the required lot area for the first unit. The DECD Rule clarifies that "not greater than" means proportional to the lot area per dwelling unit for the first unit. 19-100 C.M.R. ch. 5, § 3(B)(4).

Municipalities may adopt local regulations that are more permissive than the requirements in the law, provided that the regulations are equally or more effective in increasing housing opportunities within the municipality. 19-100 C.M.R. ch. 5, § 1(A)(2).

13. Does a municipality have to amend local land use ordinances to comply with the requirements in this section?

Although section 4364-A provides that municipalities must allow additional dwelling units according to this section "notwithstanding any provision of law to the contrary," MMA Legal Services advises municipalities to review and amend local ordinances to ensure they allow the number of required dwelling units in the applicable areas in the municipality and to facilitate implementation of the requirements in § 4364-A.

Municipalities are also encouraged to review and amend local ordinances to:

- Clarify or establish an application and permitting process for additional dwelling units allowed under this section, including a tracking process for when and how individual lots have exhausted the additional dwelling unit "bonus." For example, an ordinance should address whether a dwelling unit bonus will be allowed or prohibited on lots where a dwelling unit in existence after the implementation date is torn down and an empty lot results.
- Incorporate the review criteria outlined in § 4364-A(4) for determining adequate water and wastewater services and identify the municipal board or official responsible for reviewing and approving the written verification that the additional dwelling units meet this requirement for adequate water and wastewater services.
- Ensure local definitions of "dwelling unit" are consistent with the definition provided in Title 30-A M.R.S. §§ 4301, 4364-A and the DECD Rule.

14. Must municipalities allow additional dwelling units on a lot that already contains additional dwelling units or an ADU built under the Affordable Housing Law?

If more than one dwelling unit has been constructed on a lot pursuant to the allowance under this section or § 4364-B, the lot is generally not eligible for any additional increases in density except as allowed by the municipality. The DECD Rule states that a municipality has the discretion to determine if a dwelling unit or ADU has been constructed on the lot for purposes of this provision. 19-100 C.M.R. ch. 5, § 3(B)(2)(a).

Note that § 4364 only allows municipalities with zoning to prohibit the "doubling up" of density bonuses allowed under §§ 4364-A and 4364-B, but the DECD Rule provides that municipalities with and without zoning may prohibit the doubling up of density bonuses under § 4364-A. See 30-A M.R.S. § 4364-A(2)(A) and 19-100 C.M.R. § 3(B)(2). Municipalities without zoning ordinances should consult with local legal counsel to discuss how density bonuses under §§ 4364-A and 4364-B will be implemented and how to count additional dwelling units allowed on a lot under the municipality's ordinance.

15. Can municipalities apply dimensional requirements to additional dwelling units allowed under this section?

Yes. A municipality may establish and apply dimensional requirements, including but not limited to setback requirements, for additional dwelling units allowed under § 4364-A, but only if they are not greater (or are less restrictive) than the dimensional requirements applied to the single-family dwelling units already on the lot. See 30-A M.R.S. § 4364-A(3) and 19-100 C.M.R. ch. 5, § 3(B).

> **For example,** if a municipality has a 20 ft. road setback for single-family dwellings, the road setback required for additional dwellings must be the same 20 ft. (or less).

The law also allows municipalities to establish lot area requirements for each additional dwelling unit on a lot as long as the lot area requirement for additional units is not greater than (is proportional to) the lot area required for the first unit. Note, the law requires the lot area for additional units be proportional to the lot area for the "first unit," not necessarily for a *single-family dwelling unit*. Therefore, it is possible that a different lot area could be applied if the "first unit" on a lot is in a duplex or multi-family housing development.

> **For example,** if a municipality has adopted a 30,000 sq. ft. lot size requirement, it may enact an additional 30,000 sq. ft. (or less) lot size requirement for each additional dwelling unit allowed under this section. Conversely, a municipality may not enact per-unit lot size requirements that increase for each additional unit (e.g., 30,000 sq. ft. for one unit, 65,000 sq. ft. for two units, and 100,000 sq. ft. for three units).

16. Can a municipality apply dimensional requirements to additional dwelling units if doing so would prohibit the total number of additional dwelling units allowed under this section from being built on a lot?

A municipality may adopt and enforce lot size requirements that would have the effect of limiting the number of additional dwelling units allowed under this section.

> **For example,** if a municipality has adopted a 20,000 sq. ft. lot size requirement for each dwelling unit on a lot, a municipality could deny an application for an additional dwelling unit on a 30,000 sq. ft. lot that already contains a dwelling unit.

However, in practice, it is not clear to what extent a municipality may apply other types of dimensional requirements (e.g., setbacks or height restrictions) that have the effect of prohibiting additional dwelling units on a lot.

17. What is the difference between an "additional dwelling unit" and "accessory dwelling unit?"

The Affordable Housing Law establishes clearly distinct requirements for "additional" dwelling units under § 4364-A and "accessory" dwelling units under § 4364-B. Although the law and DECD Rule do not establish clear definitions of either of these terms, MMA Legal Services believes that a court would give these terms their traditionally understood meaning when applying the law.

> **For example,** "accessory dwelling unit" is defined in 30-A M.R.S. § 4301(1-C) and the DECD Rule as a self-contained dwelling unit located within, attached to or detached from a single-family dwelling unit located on the same parcel of land and an "accessory" structure is usually understood to be a structure that is dependent on or pertaining to a principal use or main structure. See *Town of Shapleigh v. Shikles*, 427 A.2d 460 (Me. 1981).

However, in practice, it may not always be clear if a proposed dwelling unit is an ADU or additional dwelling unit under these sections, particularly when a dwelling unit will be constructed on a property with a single-family dwelling unit. For this reason, MMA Legal Services advises that municipalities review local definitions of "dwelling unit" and "accessory dwelling unit" to make clear any local differences in these definitions and the regulation of these types of development. For example, it may be helpful to enact a maximum size for ADUs or to otherwise clarify which characteristics render a unit "accessory" (e.g., subordinate) as distinct from "additional." For more on ADUs, see the discussion below (**Question 21**).

Accessory Dwelling Units Density Requirements

(30-A M.R.S. § 4364-B)

Section 4364-B requires municipalities to allow at least one **"accessory dwelling unit"** (ADU) to be constructed on the same lot as a single-family dwelling unit in any area of the municipality where residential uses are allowed. Compliance with this section of the law is required by the implementation date, which is discussed above.

18. Does this section of the law apply to all municipalities?

Yes. This section applies to all municipalities, regardless of whether the municipality has adopted a zoning ordinance or density requirements.

19. What criteria must be met for an ADU allowed under this section to be built on a lot?

The ADU must be located on a lot that already contains a single-family dwelling unit and in an area where residential uses are allowed (including as a conditional use). Additionally, the ADU must:

- Be constructed either:
  - Within an existing dwelling unit on the lot;
  - Attached to or sharing a wall with a single-family dwelling unit; or
  - As a new structure on a lot for the primary purpose of creating an ADU.
- Be a minimum size of 190 square feet.
- Be consistent with state subsurface wastewater disposal system minimum lot size requirements in 12 M.R.S. ch. 423-A.
- Comply with the several water and wastewater system requirements in § 4634-B(7) – as verified in writing by the owner of the unit.
- Comply with state and local shoreland zoning requirements, if located in the shoreland zone.

20. What does this section require municipalities to do?

Under § 4364-B municipalities must:

- Exempt an ADU allowed under this section from any density requirements or calculations related to the area in which the ADU is constructed.
- For an ADU located within the same structure as, attached to, or sharing a wall with a single-family dwelling unit, apply the same or more permissive setback and dimensional requirements to the ADU as are applicable to the single-family dwelling unit.
  - If an ADU is located in an existing accessory building or secondary building or garage as of the implementation date, the setbacks for that structure can apply.
- Allow ADUs on a nonconforming lot if the ADU does not further increase the nonconformity per § 4364-B(3)(C).

Under § 4364-B municipalities may not:

- Categorically prohibit ADUs in the shoreland zone that would otherwise meet the requirements established by the DEP under Title 38, chapter 3 and municipal shoreland zoning ordinances.
- Count any permit issued for an ADU as a permit issued under a rate of growth ordinance.
- Subject ADUs to additional parking requirements beyond the parking requirements of the single-family dwelling unit on the lot where the ADU is located.
- Require planning board approval for an ADU allowed under this section.

21. Are municipalities required to amend local ordinances to comply with this section of the law?

Although § 4364-B provides that a municipality "shall allow" an ADU to be located on the same lot as a single-family dwelling, MMA Legal Services recommends municipalities review and amend local ordinances to ensure local ordinances do not prohibit an ADU allowed under this section and to facilitate the administration of the requirements in this section.

In addition to implementing the statutory requirements in § 4364-B, MMA Legal Services suggests municipalities also consider:

- Adopting a maximum size for ADUs, as expressly authorized by § 4364-B. The law establishes a minimum size for ADUs, but not a maximum size. By adopting a maximum size for ADUs, it may help municipalities distinguish an ADU from additional dwelling units allowed under § 4364-A.
- Determining whether to regulate ADUs in existing structures that are not dwelling units (e.g., commercial, industrial, or existing garages) independently from the requirements in § 4364-B.
- Adopting provisions that allow for an ADU that has not been built with municipal approval to be allowed if the ADU otherwise meets the requirements for ADUs under the law and municipal ordinance per § 4364-B(4)(D).
- Identifying who is responsible for reviewing and approving the required written verification that an ADU is connected to adequate water and wastewater services under § 4364-B(7) and incorporate the review requirements into the applicable local ordinance.

As noted above, the DECD Rule encourages municipalities to adopt local definitions and requirements that meet the needs of their communities and the minimum requirements in the law. Ordinances may be more permissive than the requirements in this section, provided that they are equally or more effective in achieving the goal of increasing housing opportunities in the municipality. 19-100 C.M.R. ch. 5, § 1(A)(2). Municipalities implementing different requirements for ADUs than what is required by law are encouraged to consult with legal counsel to ensure the requirements meet this standard.

22. Can planning boards review applications for ADUs allowed under this section?

No. A municipality may not establish a local application or permitting process for an ADU allowed under this section that requires review or approval by a planning board. Therefore, municipalities should ensure that local ordinances give the CEO or another municipal official or board jurisdiction to review and approve an ADU allowed under this section if a local permit or approval for the ADU is required by the municipality.

> **For example,** municipalities should carefully review local ordinances requiring conditional use approval and approval of development in the shoreland zone to ensure they comply with this requirement.

If the CEO is authorized to review and approve an ADU allowed under this section, municipalities should allow for an appeal of the CEO's decision to be made to a local board of appeals and require the board of appeals to conduct a de novo review of the CEO's decision. This is because a Maine Law Court decision has identified due process issues when a court directly reviews a CEO's decision. (Note: a court will generally review a CEO's decision directly when there is no local appeal process to a local board of appeals or when a local board of appeals is required to conduct an appellate review of the CEO's decision). *Lamarre v. Town of China,* 2021 ME 45. See also, "Courts Urge De Novo Review of CEO Decisions," MMA Legal Services Legal Note, *Maine Town & City*, December, 2022.

23. What does it mean to exempt an ADU from density requirements in a local ordinance?

Section 4364-B requires municipalities to exempt the ADU allowed under this section from any "density requirements" or "calculations related to the area in which the ADU is constructed." The DECD Rule further provides that a municipality must exempt the ADU allowed under this section from "lot area requirements related to the area in which the ADU is constructed." 19-100 C.M.R. ch. 5, § 4(B)(3)(a).

MMA Legal Services understands this to mean that a municipality must exempt an ADU allowed under this section from any local ordinance requirement that expressly limits the number of units allowed on a lot, as well as any dimensional requirements that, when applied, would have the effect of limiting the number of units on a lot (e.g., per-unit lot size, per-unit frontage, setback, building height requirements, etc.).

24. Can municipalities enact dimensional requirements for the ADU allowed under this section of the law?

Section § 4364-B, establishes different restrictions on a municipality's authority to enact dimensional requirements pertaining to an ADU allowed under this section depending on where the ADU will be constructed in relation to the single-family dwelling.

ADUs located within, attached to, or sharing a wall with a single-family dwelling unit must be subject to "the same" dimensional requirements that govern the size and placement of a structure on a lot as the single-family dwelling unit. See § 4364-B(4)(B). Except, as noted above, the ADU must be exempt from any lot size requirement or other dimensional requirement that has the effect of prohibiting the ADU from being constructed.

> **For example,** a municipality that has established a 20 ft. road setback requirement for single-family dwelling units would apply that same setback requirement to an ADU constructed on the lot that is within, attached to, or sharing a wall with the single-family dwelling unit. However, if a municipality has adopted a 40,000 sq. ft. lot size requirement per dwelling unit, the municipality may not apply this per-unit lot area requirements to the ADU allowed under this section. (Note: the addition of the ADU would still need to comply with the requirements in the state minimum lot size law and regulations).

A municipality is not required to allow an ADU to be constructed in an accessory building or secondary building (like a garage) built prior to the implementation date of the law. If a municipality allows for the ADU allowed under this section to be built in this type of existing structure, then the municipality may apply the dimensional requirements that are applicable to that structure to the ADU.

> **For example,** if a municipality has established a 20 ft. road setback for single-family dwellings and a 40 ft. road setback for secondary buildings built on the lot prior to the implementation date of the law, the municipality may apply the 40 ft. road setback requirement to the ADU constructed in the secondary structure.

This section does not directly address a municipality's authority to adopt dimensional requirements for ADUs constructed as a new, separate structure on a lot for the primary purpose of creating an ADU. MMA Legal Services interprets the law and DECD Rule as also prohibiting a municipality from applying density requirements or per-unit lot area requirements to an ADU built as a new, separate structure on a lot under this section. However, a municipality could probably enact and apply other types of dimensional requirement (e.g., setback or building height) governing where an ADU may be built on the lot provided it does not completely prohibit an ADU allowed under this section from being built on a lot. For this reason, MMA Legal Services advises municipalities to enact dimensional requirements for detached ADUs that are the same as or less restrictive than those applicable to the single-family dwelling on the lot.

25. Must a municipality allow a new ADU to be constructed on a lot that already contains an ADU?

No. Section 4364-B only requires that municipalities allow "an" or "one" ADU to be located on the same lot as a single-family dwelling unit. See also 19-100 C.M.R. ch. 5 § 4(A)(1).

26. What requirements apply to an ADU that was built prior to the implementation date with or without required approvals?

The law does not restrict the construction or permitting of ADUs constructed and certified for occupancy prior to the implementation date of the law. Therefore, any ADU constructed and reviewed by the municipality prior to the implementation date is not required to comply with the requirements in the Affordable Housing Law and may be subject to the land use regulations adopted by the municipality in effect at the time.

An ADU that was built prior to the implementation date, but without municipal approval, must be allowed if the ADU otherwise meets the requirements for ADUs of the municipality and under § 4364-B, even the ADU did not comply with the ordinance requirements in effect at the time it was built. 30-A M.R.S. § 4364-B(4)(D).

Short-term Rental Regulations

The Affordable Housing Law expressly confirms municipal home rule authority to regulate short-term rentals. 30-A M.R.S. § 4364-C(2). The law identifies the regulation of short-term rentals as one way for a municipality to achieve statewide or regional housing production goals. Also, regulations that restrict short-term rentals in the municipality will likely be consistent with the purpose of the law, which is to support and encourage the creation of affordable housing.

Municipalities may regulate short-term rentals in a number of ways. For example, a municipality may define and regulate short-term rentals as commercial uses or transient housing in local land use ordinances, rather than as residential housing, and restrict where these uses may be located or impose more stringent dimensional requirements on these uses. A municipality could also impose regulations limiting the number of short-term rentals in the municipality, such as through a licensing ordinance.

A municipality considering short-term rental regulations should work closely with local legal counsel to ensure that such regulations have a sound legal basis and will be administered in compliance with § 4364-A (the section of the law governing additional dwelling units) and § 4364-B (the section of the law governing ADUs).

Issues Applicable to Multiple Sections of the Law

The several provisions of the Affordable Housing Law include common terms and requirements. These are addressed below:

Definitions. Municipalities are not required to adopt the terms and definitions in the DECD Rule word for word. A municipality can adopt terms and definitions that meet the needs of their community, provided that the locally adopted terms and definitions are more permissive than the definitions in Section 1(B) of the DECD Rule and are equally or more effective in achieving the goal of increasing housing opportunities. 19-100 C.M.R. ch. 5, § 1(B).

Designated Growth Area. The Affordable Housing Law establishes distinct requirements for development that occurs in a municipality's "designated growth area." See §§ 4364(2) and 4364-A(1). The law and DECD Rule define this term as:

- The locally designated growth area, as identified in a comprehensive plan adopted pursuant to and consistent with the Growth Management Act, or as identified in a comprehensive plan that has been certified by the state under 30-A M.R.S. § 4347-A. The DECD Rule clarifies that this is "an area that is designated in a municipality's or multi-municipal region's comprehensive plan as suitable for orderly residential, commercial, or industrial development, or any combination of those types of development, and into which most development projected over ten (10) years is directed. Designated growth areas may also be referred to as priority development zones or other terms with a similar intent." 19-100 C.M.R. ch. 5, § 1(B).

- In the absence of a comprehensive plan, a designated growth area is "an area served by a public sewer system that has the capacity for the growth-related project, an area identified in the Federal Decennial Census as a census-designated place, or a compact area of an urban compact municipality as defined by 23 M.R.S. § 754."

If a municipality does not have a comprehensive plan, it may need to determine whether it has a "designated growth area" for purpose of this law and where it is located, such as by identifying which areas have access to public water and sewer or which areas have been designated as urban compact areas by the MDOT.

Nonconforming Lots and Structures. The Affordable Housing Law does not address how most requirements in the law apply to legally nonconforming lots or structures and the limits that generally apply to expansion or development involving nonconformance issues. Usually, ordinances provide that a legally nonconforming lot or structure of record may not become more non-conforming, and expansion of the nonconforming structure or use is limited.

The DECD has, informally, indicated that with respect to affordable housing developments and additional dwelling units (§§ 4364 and 4364-A), a municipality retains its home rule authority to enact ordinances regulating the development of nonconforming lots and structures, even if those provisions would restrict or prohibit development otherwise allowed under these sections.

However, under § 4364-B, an ADU must be "allowed on a lot that does not conform to the municipal zoning ordinance if the ADU does not further increase the nonconformity." 30-A M.R.S. § 4364-B(3)(C). The DECD Rule clarifies that this means that an ADU must be allowed on a nonconforming lot provided it "does not cause further deviation from the dimensional standard(s) creating the nonconformity, excluding lot area." 19-100 C.M.R. ch. 5, § 4(B)(2(c).

Plantations; Municipalities under the LUPC. The requirements in the Affordable Housing Law apply to "municipalities." However, under the DECD Rule, municipality is defined to exclude "all unorganized and deorganized townships, plantations, and towns that have delegated administration of land use controls to the Maine Land Use Planning Commission pursuant to 12 M.R.S. § 682(1)." Therefore, the law's requirements only apply to towns and cities not subject to LUPC land use regulations.

Residential Use. Sections 4364-A and 4364-B apply to lots in areas where "residential uses" are allowed, including as a conditional use. The DECD Rule defines residential use as "a use permitted in an area by a municipal legislative body to be used for human habitation." 19-100 C.M.R. ch. 5, § 1(B). Residential use may include single-family, duplex, triplex, quadplex, and other multifamily housing, condominiums, time-share units, and apartments, but does not include dormitories, congregate living facilities, campgrounds, hotels, motels, bed and breakfasts, or other types of lodging facilities, and transient housing or short-term rentals.

MMA Legal Services advises municipalities to review local definitions of "residential use" and "commercial use" to ensure consistency with this provision. Particularly, municipalities should consider whether to allow short-term rentals in residential areas or to expressly prohibit

additional dwellings and ADUs allowed under the Affordable Housing Law to be used as short-term rentals.

Shoreland Zoning. The Affordable Housing Law expressly provides that any affordable housing development, additional dwelling unit, or ADU allowed under this law must comply with shoreland zoning requirements established by the Department of Environmental Protection under Title 38, chapter 3 and municipal shoreland zoning ordinances. The application of shoreland zoning requirements may have the practical effect of prohibiting some affordable housing developments, additional dwelling units and ADU's in shoreland zones. However, a municipality may not categorically prohibit ADUs in the shoreland zone that would otherwise meet requirements established by the DEP for shoreland zoning and municipal shoreland zoning ordinances. 30-A M.R.S. § 4364-B(5).

Subdivision Law. The Affordable Housing Law expressly provides that it does not exempt a subdivider from the requirements in the state subdivision law (30-A M.R.S. §§ 4401 to 4408). An affordable housing development or the addition of single-family dwelling units to a lot may trigger subdivision review, in which case the development must meet all applicable approval criteria in the state subdivision law.

Water and Wastewater. The Affordable Housing Law requires that the owner of affordable housing developments, additional dwelling units, and the ADU allowed under the law provide written verification to the municipality that each unit or housing structure is connected to adequate water and wastewater services before a municipality may certify the development for occupancy. The law specifies the information that must be included in the written verification. As stated above, municipalities are encouraged to specify in local ordinances which municipal official or board is responsible for reviewing this information.

Funding Opportunities

The Maine Legislature created the Housing Opportunity Program and Housing Opportunity Fund in separate legislation (P.L. 2021, c. 635). The DECD is required to provide technical and financial assistance to support communities implementing zoning and land use related policies necessary to support increased housing development, including model ordinance development. Funding opportunities for municipalities include:

~ **Municipal Payments:** State funding is available through the Housing Opportunity Program to reimburse municipalities for the mandated costs of complying with Chapter 672 requirements. The process to apply for this one-time payment will depend on whether a municipality has adopted zoning.

- Municipalities that have adopted zoning ordinances are automatically eligible for a one-time payment.
- Municipalities without zoning (including municipalities with only shoreland zoning) must request funding from the DECD by sending the Housing Opportunity Program a letter

explaining why the municipality must amend their ordinances to comply with Chapter 672 requirements and send copies of impacted ordinances. This request will then be reviewed by a Municipal Payment Review Committee, which will issue a written approval or denial to the municipality.

- If eligible, a municipality (with or without zoning) will receive up to $10,000 for qualifying expenses if it has one or more designated growth areas or public, special district, or centrally managed water system or sewer system. Municipalities without a designated growth area or public water or sewer will receive up to $5,000 for qualifying expenses.
- Qualifying expenses include: (1) attorney fees to research, draft, and revise zoning ordinances, (2) staff, volunteer, or contractor time for research and drafting zoning ordinances, including staff time, (3) fees related with providing notice and conducting board meetings and town meetings.
- For more information see the "Municipal Payment Distribution Schedule for P.L. 2021, c. 672" on the DECDs Housing Opportunity Program website.

~ **Service Provider Grants:** The DECD has established a service provider grant program to provide funding to eligible entities to support municipal ordinance development and provide technical assistance to increase housing opportunities. Eligible service providers include regional organizations (such as councils of governments, regional planning commissions), regional economic development organizations, county governments, non-profit organizations, academic institutions, and cooperative extension programs and for-profit enterprises. A municipality may also be eligible to apply as a service provider.

The purpose of these grants is to provide funding to entities that will provide municipalities with assistance to plan for and increase housing opportunities to comply with Affordable Housing Law requirements and beyond. For example, eligible entities may assist with municipal ordinance development designed to further the purposes of the FHA and MHRA or to assist a municipality identify its specific housing needs.

The deadline to apply for service provider grants has passed. A municipality that has received funding to be a service provider may not also apply for a municipal grant. Moreover, a municipality that is eligible to receive or has received a municipal grant is generally ineligible to receive ordinance development services from a service provider.

For more information see the Request for Application (RFA #202306123) on the State's Division of Procurement Services website here.

For more information on funding opportunities see the DECD's Housing Opportunity Program website for more information on funding opportunities.

Quick Links; Municipal Planning Resources

Statutes:

P.L. 2021, c. 672 , An Act To Implement the Recommendations of the Commission To Increase Housing Opportunities in Maine by Studying Zoning and Land Use Restrictions (LD 2003)

P.L. 2023, c. 192, An Act to Clarify Statewide Laws Regarding Affordable Housing and Accessory Dwelling Units (LD 1706)

Title 30-A, Chapter 187; see 30-A- M.R.S. §§ 4364 to 4364-C

Rules:

19-100 C.M.R. ch. 5, Housing Opportunity Program: Municipal Land Use and Zoning Ordinance Rule

19-100 C.M.R. ch. 4, Rule Regarding Housing Opportunity Program Grants

State Agencies:

DECD Housing Opportunity Program:
https://www.maine.gov/decd/housingopportunityprogram

Municipal Planning Assistance program, DACF:
https://www.maine.gov/dacf/municipalplanning/index.shtml

MMA Legal Services Resources:

MMA Legal Services Ordinance Enactment information packet:
https://www.memun.org/Members/Information-Packets/Browse/ordinance-enactment

Regional Planning Resources:

List of Regional Planning Organizations (MPAP):
https://www.maine.gov/dacf/municipalplanning/technical/regional_council.shtml

Southern Maine Planning Guidance on LD 2003: https://smpdc.org/ld2003

Housing Goals Study:

State of Maine Housing Production Needs Study, October 2023:
https://mainehousing.org/docs/default-source/default-document-library/state-of-maine-housing-production-needs-study_full_final-v2.pdf

Maine Municipal Association Legal Services
1-800-452-8786
legal@memun.org
www.memun.org