Memorandum

Date:	January 21, 2021
To:	Town Council
From:	Ethan Croce, Community Development Director
Re:	Background to Proposed Subdivision Ordinance Amendments

Staff recently became aware of a change the Maine Legislature made to the state statutes that govern municipal review of subdivisions. This statutory change requires municipalities to update their subdivision ordinances to make them consistent with state law as described in greater detail below. 30-A MRSA §4401, sub-§4, ¶H-2 is the relevant statutory provision that was recently amended by the Maine Legislature and which is the impetus for these proposed ordinance amendments. The statutory language in question is excerpted below in italics and with bold added for emphasis.

> *H-2. A municipality may not enact an ordinance that expands the definition of "subdivision" except as provided in this subchapter.* ***A municipality that has a definition of "subdivision" that conflicts with the requirements of this subsection at the time this paragraph takes effect shall comply with this subsection no later than January 1, 2021.*** *Such a municipality must file its conflicting definition at the county registry of deeds by June 30, 2020 for the definition to remain valid for the grace period ending January 1, 2021. A filing required under this paragraph must be collected and indexed in a separate book in the registry of deeds for the county in which the municipality is located.*

The effect of this change to the statute is to require municipalities to adopt and apply definitions of "subdivision" that comply in all respects with the statutory definition so that there will be less inconsistency in how subdivisions are reviewed and regulated by different municipalities across the State. Municipalities will no longer be able to either expand or contract the definition of "subdivision" in their local ordinances except as otherwise expressly provided for in the statute.

Previously, it had been legal for municipalities to exercise home rule authority to adopt definitions of "subdivision" that differed from the statute in certain ways. Over time, the Legislature has gradually reduced the amount of flexibility municipalities have to adopt different definitions of "subdivision" in their local ordinances. With this most recent statutory change, the only provision of the subdivision statute that gives municipalities flexibility in defining a "subdivision" is MRSA §4401(4)(C) which allows lots of ≥40 acres in size to not be counted as lots for purposes of subdivision review if the municipality has elected to not count those ≥40 acre lots as lots subject to review. The relevant statutory language from MRSA §4401(4)(C) is excerpted below in italics:

C. A lot of 40 or more acres must be counted as a lot, except:

(2) When a municipality has, by ordinance, or the municipal reviewing authority has, by regulation, elected not to count lots of 40 or more acres as lots for the purposes of this subchapter when the parcel of land being divided is located entirely outside any shoreland area as defined in Title 38, section 435 or a municipality's shoreland zoning ordinance.

Statutory History of ≥40 acre lot exemption

Falmouth's definition of "subdivision" has remained unchanged for at least 35 years. Falmouth's current definition mimics the statutory definition of "subdivision" that was in effect in the mid-1980s. The statutory default at that time was for all lots ≥40 acres in size to be exempt from subdivision review unless a municipality adopted a definition to specifically include those lots as lots subject to subdivision review. In 1988 the Legislature amended the statute to eliminate the ability for municipalities to exempt lots ≥40 acres in size from subdivision review if those lots were either wholly or partially located within the Shoreland Zone. The statute was amended again in 2002 to change the statutory default such that all lots ≥40 acres in size were subject to subdivision review, regardless of whether or not the lots were in the Shoreland Zone, unless a municipality adopted an ordinance definition of "subdivision" that did both of the following:

1. Included an exemption for lots ≥40 acres in size for only those lots that were not in the Shoreland Zone; and
2. Was otherwise consistent with the statutory definition of subdivision in effect at the time.

Because Falmouth did neither of these two things, Falmouth's current ordinance definition of "subdivision", which is written to exempt all lots ≥40 acres in size from subdivision review regardless of whether or not they are located in the Shoreland Zone, is no longer technically in effect and Falmouth must review lots ≥40 acres in size notwithstanding the conflicting definition in the Subdivision Ordinance.

Draft Subdivision Ordinance Amendments - Policy Decision on Lots ≥40 acres in size

Falmouth's Subdivision Ordinance should be amended to be consistent with current state law. As mentioned above, the only section of the statute that gives municipalities flexibility in defining a "subdivision" is §4401(4)(C) which allows lots of ≥40 acres in size to not be counted as lots for purposes of subdivision review if the lots lie entirely outside the Shoreland Zone. The current statutory default requires municipalities to count lots ≥40 acres in size as lots for the purpose of subdivision review.

At its November 16, 2020 meeting, the CDC reviewed the aforementioned changes to the statutes and reviewed and discussed the policy question of whether Falmouth's ordinance definition should exempt lots ≥40 acres in size from subdivision review moving forward. The CDC is recommending that the Town use the statutory default of not exempting lots ≥40 acres in size from subdivision review. It was noted that one of the main purposes of subdivision review is to allow the Town and the Planning Board the ability to review and mitigate a development's impacts on the community. It was not clear that there was any obvious rationale to support precluding the ability of the Planning Board to review development impacts that are generated from lots ≥40 acres in size.

At its December 7, 2020 meeting, the CDC reviewed, and ultimately decided to recommend adoption of, draft amendments to the Subdivision Ordinance that:

1. Update the definition of "subdivision" to comply with the recent changes to state law;
2. Update outdated statutory references;
3. Delete outdated definitions (e.g. "exempted lots");
4. Incorporate the updated subdivision review criteria mandated by §4404 of the statute;
5. Incorporate new statutory requirements related to the physical form of plans recorded at the Registry of Deeds; and
6. Amend certain of the ordinance's thresholds to reflect the number of dwelling units created within a subdivision instead of only referencing the number of lots created within a subdivision. (This serves to help clarify how condominium projects that create multiple dwelling units but create no new lots should be reviewed.)