

**When citizens and communities find that laws constructed to protect them and to foster their health, prosperity, and inalienable rights become ineffective, and that the very air, land, and water on which their lives and happiness depend are threatened, it becomes necessary for the people to reaffirm, reclaim, and exert their basic rights.**

**Therefore, we, the residents of Dover-Foxcroft, in the State of Maine, affirm**

**Article 1, Section 2 of the Maine State Constitution which states:**

**“All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.”**

**And since all power of governance is inherent in the people, we, the residents of Dover-Foxcroft, Maine, declare and enact the following local civil rights law:**

### **Community Bill of Rights Ordinance 2015**

#### **ESTABLISHING A COMMUNITY BILL OF RIGHTS FOR THE PEOPLE OF DOVER-FOXCROFT, WHICH SECURES THOSE RIGHTS BY PROHIBITING CORPORATIONS AND GOVERNMENTS FROM ENGAGING IN THE ACQUISITION OF LAND FOR, OR THE SITING OF, PRIVATE AND PUBLIC-PRIVATE TRANSPORTATION AND DISTRIBUTION CORRIDORS**

*Whereas*, the people of Dover-Foxcroft find that unsustainable infrastructure projects such as private and public-private transportation and distribution corridors damage property values and permanently alter the natural environment and cultural heritage, while failing to provide real benefits to the community;

*Whereas*, this community finds that our well-being and quality of life are dependent on clean air, water, and the healthy ecology of our environment;

*Whereas* this community depends on this healthy environment for support of our tourist economy which includes Peaks Kenny State Park, Sebec Lake, and extensive recreational lands;

*Whereas* this community finds that conserving working and natural lands is a key strategy for protecting the quality of life and economic viability of our farming, forestry, and other resource-based activities;

*Whereas*, current environmental laws allow state-chartered corporations to inflict damage on local ecosystems that cannot be reversed, violating the rights of residents to protect our community and the rights of ecosystems to exist;

*Whereas*, the people of Dover-Foxcroft possess the constitutional right to alter or abolish our current system of municipal governance if it either fails to recognize the authority of the people to self-govern or if it is rendered unable to secure the people's rights;

*Whereas*, the current system of municipal governance fails to recognize the self-governing authority of the people of Dover-Foxcroft because state and federal laws allow corporations to assert claimed “rights” to override the people's laws; because our municipal government can be preempted by state or federal legislators and agencies, and because our municipality is banned from adopting laws that have not been authorized by the state;

*Whereas*, the operation of those legal doctrines renders the municipal government unable to protect and secure the rights of the people, including the right to live sustainably; and

*Whereas*, the people of Dover-Foxcroft declare that because those current legal constructs render our current municipal system of governance powerless, we exercise our right to create a new system of municipal governance that recognizes our self-governing authority and secures and protects our rights;

*Therefore*, We the People of Dover-Foxcroft hereby adopt this Community Bill of Rights Ordinance, not as a land use or zoning law, but as an assertion of enforceable civil, human, and environmental rights.

## **Section 1 – Definitions**

- (a) “Corporations,” for purposes of this Ordinance, includes any corporation, limited partnership, limited liability partnership, business trust, public benefit corporation, limited liability company, or any other business entity, organized under the laws of any state of the United States or under the laws of any country.
- (b) “Corridor” means a strip of land that extends beyond multiple municipal boundaries and is used for a specified and restricted purpose.
- (c) “Cultural heritage” means the common culture of a community that is a result of historical and current interaction of people with their environment and depends on tangible culture such as farms, working forests and buildings, intangible culture such as shared tradition and interdependence of local communities, and all the assets of our natural heritage.
- (d) “Ecosystem” means a biological community, which consists of species that have evolved together to form a dynamic equilibrium of naturally fluctuating populations able to maintain that equilibrium, together with the physical environment of water, atmosphere, and soil, which the biological community interacts with and in which it sustains its self-organizing health and vitality. Ecosystems include, but are not limited to, wetlands, streams, rivers, aquifers, and other water systems, as well as systems that contain wildlife, people, flora and fauna, soil-dwelling, or aquatic organisms, and all naturally occurring habitats that sustain their health, longevity, and ability to flourish and contribute to the dynamic equilibrium of the biological community. The term does not refer to individual organisms. The term does not refer to subsets of biological communities that the health and equilibrium of the biological community does not depend upon, such as a limited stand of trees, or crops intended for harvesting and sustenance, but the term does refer to any subset of a biological community the damage, alteration, or elimination of which would harm, substantially alter, or eliminate other populations of organisms or biological communities.
- (e) “Engage in land acquisition” means the purchase, rent, lease, taking by eminent domain, or control of land by any means, and includes the application for any permit necessary to engage in land acquisition or the issuance of permits or licenses that would enable any of these activities.
- (f) “Private or Public-Private Transportation and Distribution Corridor” means any corridor – built, managed, owned, or maintained by a private developer using private investor capital, or by a public-private partnership using any private investor capital - that contains paved roadways for commercial traffic, toll highways, pipelines or railways intended for distribution of fossil fuels, water, or high tension transmission lines for communications or utility services outside of the Town.
- (g) "Sustainable infrastructure" means infrastructure that is integrated into the community as part of the community's planning processes, and that provides a benefit to the residents of the Town without inflicting

damage to the cultural habitat, aesthetics, economic, or natural systems that currently operate within the Town.

(h) "Unsustainable infrastructure," for the purposes of this Ordinance, means any infrastructure that is not integrated into the community as part of the Town's planning processes, does not benefit the residents of the Town, or inflicts damage to the aesthetic, cultural, economic, environmental, or natural systems that currently operate within the Town.

(i) "Utility services," shall mean the provision of basic utilities including natural gas, electricity, water, or sewer that does not serve residents of the Town of Dover-Foxcroft.

## **Section 2 - Statements of Law – A Community Bill of Rights**

***(a) Right to Sustainable Future.*** All residents of Dover-Foxcroft possess the right to create a sustainable future in which decisions to build infrastructure are made by, and for the benefit of, the community. This right shall include the right to be free from infrastructure projects that have not been approved by the Town's planning processes, that contribute to ecosystem degradation, and that provide no community benefit.

***(b) Right to Clean Air and Water.*** All residents and ecosystems of the Town of Dover-Foxcroft possess a right to sustainably access, use, consume, and preserve water drawn from natural water cycles that provide water necessary to sustain life within the Town and the right to be free from infrastructure projects that pose potential risks to clean air and water.

***(c) Rights of Ecosystems.*** Ecosystems within Dover- Foxcroft possess the right to exist, flourish, and naturally evolve.

***(d) Right to Scenic Preservation.*** All residents of the Town of Dover-Foxcroft possess a right to the scenic, historic, and aesthetic values of the Town, including clean air, pure water, healthy soil, and rural landscapes that preserve the community's cultural heritage, provide the foundation for tourism and economic sustainability for local businesses. This right shall include a community right to choose sustainable infrastructure projects that affect the community's scenic, historic, and aesthetic values.

***(e) Governmental Legitimacy.*** All governments in the United States owe their existence to the people of the community that those governments serve, and governments exist to secure and protect the rights of the people and those communities. Any system of government that becomes destructive of those ends is not legitimate, lawful, or constitutional.

***(f) Right to Local, Community Self-Government.*** The people of Dover-Foxcroft possess both a collective and individual right to self-government in their community, a right to a system of government that embodies that right, and the right to a system of government that protects and secures their human, civil, and collective rights.

***(g) Right to Assert the Right to Self-Government.*** The people of Dover-Foxcroft possess the right to use their local government to make law, and the making and enforcement of law by the people through a municipal corporation or any other institution shall not eliminate, limit, or reduce their sovereign right to local, community self-government.

***(h) Rights as Self-Executing.*** All rights delineated and secured by this Ordinance are inherent, fundamental, and unalienable, and shall be self-executing and enforceable against both private and public actors.

## **Section 3 -- Statements of Law – Prohibitions Necessary to Secure the Bill of Rights**

(a) It shall be unlawful within the Town of Dover-Foxcroft for any corporation or government to engage in land acquisition for, or engage in the construction of, any private or public-private transportation and distribution corridor.

(b) It shall be unlawful for any corporation or government to violate the rights recognized and secured by this Ordinance.

(c) No permit, license, privilege, charter, or other authority issued by any state or federal entity that would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Maine Constitution, the United States Constitution, or other laws, shall be deemed valid within the Town of Dover-Foxcroft.

#### **Section 4—Enforcement**

(a) Any corporation or government that violates any provision of this Ordinance shall be guilty of an offense and, upon conviction thereof, shall be sentenced to pay the maximum fine allowable under State law for that violation. Each day or portion thereof, and violation of each section of this Ordinance, shall count as a separate violation.

(b) The Town of Dover-Foxcroft, or any resident of the Town of Dover-Foxcroft, may enforce the rights and prohibitions of this Ordinance through an action brought in any court possessing jurisdiction over activities occurring within the Town of Dover-Foxcroft. In such an action, the Town of Dover-Foxcroft or the resident shall be entitled to recover all costs of litigation, including, without limitation, expert and attorney's fees.

(c) Any action brought by either a resident of the Town of Dover-Foxcroft or by the Town of Dover-Foxcroft to enforce or defend the rights of ecosystems or natural communities secured by this Ordinance shall bring that action in the name of the ecosystem or natural community in a court possessing jurisdiction over activities occurring within the Town of Dover-Foxcroft. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Town of Dover-Foxcroft to be used exclusively for the full and complete restoration of the ecosystem or natural community.

(d) If the local government fails to enforce or defend this Ordinance, or a court nullifies this Ordinance due to a conflict with corporate powers, any person may enforce this Ordinance through direct action. If enforcement through direct action is commenced, this Ordinance shall prohibit any private or public actor from filing a civil or criminal action against those participating in direct action. If filed in violation of this provision, the applicable court must dismiss the action promptly, without further filings being required of direct action participants. "Direct action" as used by this provision means any activities or actions carried out to directly enforce the rights and prohibitions contained within this Ordinance.

#### **Section 5 – Enforcement - Corporate Powers**

(a) Corporations that violate this Ordinance, or seek to violate this Ordinance, shall not be deemed to be "persons," nor possess any other legal rights, privileges, powers, or protections that would interfere with the rights or prohibitions enumerated by this Ordinance. "Rights, privileges, powers, or protections" shall include the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the authority to adopt this Ordinance.

(b) All laws adopted by the legislature of the State of Maine, and rules adopted by any State agency, shall be the law of the Town of Dover-Foxcroft only to the extent that they do not violate the rights or prohibitions of this Ordinance.

**Section 6—Effective Date and Existing Permit Holders**

This Ordinance shall be effective immediately on the date of its enactment, at which point the Ordinance shall apply to any and all actions that would violate this Ordinance regardless of the date of any applicable local, state, or federal permit.

**Section 7—People’s Right to Self-Government**

Use of the courts or the Maine legislature in attempts to overturn the provisions of this Ordinance shall require community meetings focused on changes to local governance that would secure the right of the people to local self-government.

**Section 8 – State and Federal Constitutional Changes**

Through the adoption of this Ordinance, the people of the Town of Dover-Foxcroft call for amendment of the Maine Constitution and the federal Constitution to recognize a right to local self-government free from governmental preemption and or nullification by corporate “rights.”

**Section 9—Severability**

The provisions of this Ordinance are severable. If any court decides that any section, clause, sentence, part, or provision of this Ordinance is illegal, invalid, or unconstitutional, such decision shall not affect, impair, or invalidate any of the remaining sections, clauses, sentences, parts, or provisions of the Ordinance.

**Section 10 – Repealer**

All inconsistent provisions of prior Ordinances adopted by the Town of Dover-Foxcroft are hereby repealed, but only to the extent necessary to remedy the inconsistency.

ENACTED AND ORDAINED this \_\_\_ day of \_\_\_\_\_, 2015, by the Town of Dover-Foxcroft, Maine.

By: \_\_\_\_\_

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September 3, 2015

To: Members, Dover-Foxcroft Select Board

At the request of Town Manager Clukey, I offer the following responses to his August 18, 2015 email to me, regarding the Community Bill of Rights (CBOR) Ordinance proposed for Dover-Foxcroft.

I am an attorney, licensed to practice in Maine State courts, Maine Federal District Court and the First Circuit Court of Appeals. A large component of my practice includes land use and municipal law. I have no conflict of interest with respect to the proposed Dover-Foxcroft CBOR ordinance. While I have worked with towns, as described below, in assessing the appropriateness of passing a CBOR ordinance, those ordinances have all been drafted by town residents with the assistance of the Community Environmental Legal Defense and Education Fund (CELDF). I have never worked for CELDF nor have I ever received any payment from them. All of my legal consulting has either been paid for by a town or by the residents of a town.

My experience with rights-based ordinances (RBO), which is the former name of this type of ordinance, includes working with the residents of the Towns of Shapleigh and Newfield in the development and passage of their RBO's, six or more years ago, as well as with the Town of Sangerville, in 2014. All three towns passed such an ordinance and none of these ordinances have been challenged in court. I also worked with the citizens of Wells and Cambridge but no RBO's were passed in those towns.

Should the Select Board place the CBOR on the ballot for a Town vote?

It is correct that a municipal body can refuse to place an item on the warrant if it is *ultra vires* or void on its face. That said, however, only a court can declare a proposed ordinance to be void or

unconstitutional, and no Maine Court has ruled on the validity of RBO's or CBOR's. The members of the Select Board are neither qualified nor authorized to make judgments about the legality of a proposed ordinance in the the absence of a prior court decision on the ordinance or a similar ordinance. For example, the U.S. Supreme Court has ruled on numerous cases involving housing discrimination. Therefore, if the residents of the Town asked the Select Board to put a measure on the warrant that would prevent property owners from leasing or selling to a member of a racial minority, a protected class, the Select Board would be well within its rights to decline to place such a measure on the warrant. Likewise, an ordinance cannot change a town charter, so a Select Board or town council could refuse to place such a proposed ordinance on the warrant. *La Fleur v. Frost*, 80 A.2d 407 (Me. 1951). The proposed CBOR does not fall into either of these categories.

As I noted above, none of the Maine RBO's have been challenged in court. There were two challenges to RBO's in Pennsylvania, at least 8 years ago, but I believe that both cases were resolved when the towns repealed the ordinances. There was also a challenge to a county-wide CBOR in New Mexico but that ordinance has since been repealed. There may be many reasons for the lack of challenges in Maine, not the least of which is that any potential challenger would need to have standing to bring such a suit. To demonstrate standing, the appellant would be required to show a "particularized injury."

"A particularized injury occurs when a judgment or order adversely and directly affects a party's property, pecuniary, or personal rights. *Anderson v. Swanson*, 534 A.2d 1286, 1288, (Me.1987). A person suffers a particularized injury only when that person suffers injury or harm that is "in fact distinct from the harm experienced by the public at large." *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me.1984)." *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735 (Me. 2009).

It would be very difficult for a business that has no pending application before a Town to demonstrate that a change in the parameters of what uses are permitted impacts them negatively. Ordinances change all of the time and there is no guarantee that a use that is currently permitted will be

permitted in the future. This requirement to show a particularized injury would apply whether a plaintiff filed a civil suit asking for monetary damages based on such harm, or a civil rights lawsuit based on the denial of a constitutional right.

Town elected officials frequently express the fear that they will be sued individually, and held legally responsible for the impacts of an ordinance that they voted to place on the ballot. However, elected officials have qualified immunity from being sued and they can't be sued for the actions they take as public officials. What this means is that the Maine Tort Claims Act (Act), 14 M.R.S.A. §§ 8001-8118 provides governmental employees, including elected officials, with immunity for performing either discretionary functions or intentional acts or omissions within the scope of employment, unless such actions were in bad faith. 14 M.R.S.A. § 8111(1)(C), (E). If a member of the Board votes to place the CBOR on the ballot, they are acting in good faith while performing a discretionary function of their role as an elected office and would therefore be shielded from a lawsuit under the doctrine of qualified immunity.

I believe that the Town attorney will argue that because there are so many aspects of the proposed CBOR that are clearly violative of settled State and Federal law, that it would be within the authority of the Select Board to refuse to place the measure on the ballot. I concur with some of the concerns of the Town attorney, particularly with respect to Section 4 – Enforcement. It is clearly settled law that only the state can set fines for State law violations and only the State can define those violations. Likewise, the municipality cannot void State law or regulations and only the judicial branch can determine costs and attorney's fees recovery.

However, the CBOR includes a “severability” clause, meaning that any sections of the ordinance that a court finds are either unconstitutional, or violative of State or Federal law, could be removed from the ordinance without resulting in the voiding of the entire ordinance. If the Select Board

determines that enough substance would remain even if certain sections of the CBOR were struck down by a Court, then it is my unbiased opinion that the Select Board has no choice but to allow the citizens to vote on the CBOR.

Respectfully submitted,

/s/Lynne Williams

Lynne Williams, Esq.

## Memorandum

**To:** Dover-Foxcroft Board of Selectmen  
**From:** Timothy C. Woodcock, Esq.  
**Date:** September 3, 2015  
**Re:** Legal Opinion; Proposed Citizen Petition re: Community Bill of Rights

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### INTRODUCTION

Dear Chair Edgerly and Members of the Board of Selectmen:

Upon request of the Town Manager, we have reviewed the citizen-initiated proposed ordinance entitled "Community Bill of Rights 2015, Establishing a Community Bill of Rights for the People of Dover-Foxcroft, which Secures those Rights by Prohibiting Corporations and Governments from Engaging in the Acquisition of Land For, or the Siting of, Private and Public-Private Transportation and Distribution Corridors" (the "Proposed Ordinance").

Below please find our legal analysis and recommendations to the Board regarding its duties and obligations under Maine law.

### BACKGROUND

We understand the Town recently received a citizen petition requesting that the Proposed Ordinance be considered for adoption by the voters of Dover-Foxcroft, and has conducted a verification process of this petition. This process should have included verification that:

1. The petition was circulated by a registered voter of the State of Maine;
2. The proposed article being circulated was printed on the top of each page;
3. Only signatures of voters registered in the Town of Dover-Foxcroft were counted as valid signatures;
4. The petition was signed by a number of registered voters equal to at least 10% of the number of votes cast in the Town at the last gubernatorial election, but in no case less than 10; and
5. The petition, at least for secret written ballots, was filed with the Town at least 45 days prior to the day it is scheduled for voting.

See 30-A M.R.S. § 2504 (citing 21-A M.R.S. § 903-A) and 30-A M.R.S. § 2528.

Please note that we have not conducted an independent analysis on whether petition was properly verified, but understand from communications with the Town that it has conducted the above verification process.

Among other things, the Ordinance focuses on prohibiting private corporations and any public-private relationship in the acquisition of property or undertaking of construction for the purposes of a private-public transportation corridor. In this respect, we understand the Town has enacted a moratorium on such activities that has been extended and remains in effect while the Town develops its own measures to address the concerns stated in the pending moratorium.

**BOARD OF SELECTMEN’S CONSIDERATION OF PETITION:  
REASONABLE REFUSAL STANDARD**

When considering a petition article, the Board of Selectmen are presented with two options: (1) present the petition article to the voters at a meeting called by the Selectmen; or (2) refuse to present the petition article to the voters based on justifiable reasons – the so-called “reasonable refusal” standard.

The Board of Selectmen may only refuse to put a petitioned article on a warrant for voter consideration if it would be reasonable to do so. See *Dunston v. Town of York*, 590 A.2d 526, 527 (Me. 1991) (“recognizing the authority of the selectmen to exercise their sound discretion in determining whether the written petition required compliance with the provisions of section 2522 [of Title 30-A]”). Please note that the Selectmen should not refuse to send the proposed article to the voters based on policy or subjective views. There must be an objective and legally justifiable basis (e.g., illegal or invalid article) for the Selectmen to refuse to place a proposed article on a warrant for voter consideration.

There is no expressly stated “definition” in Maine statutes that describes what constitutes a “reasonable refusal”, so it has been analyzed in the context of case law that has addressed these types of issues, such as in the *Dunston v. Town of York* case noted above. Another example is a case from Kennebec County Superior Court, *Town of Vassalboro v. Frederick & Camille Denico*, which involved a situation where a board of selectmen refused to place a petition article that sought a revote on an approved referendum regarding a construction bond. The court ultimately determined the statutory obligation of municipal officers to place petition articles before the voters related only to new petition articles, and not to situations where a petition article seeks a revote on an issue already decided.

Other reasonable refusal cases involve circumstances when (i) no request to call a Town meeting was actually made; and (ii) the requested article is invalid or illegal.  
*Citations.*

Here, the task before the Board of Selectmen requires an analysis of the proposed Ordinance to determine (1) whether a request to place an article as part of calling a Town Meeting has been made; (2) whether this request has been previously considered by the voters; and (3) whether the requested article presents an illegal or invalid law for adoption. If any of these circumstances exist, then the Board of Selectmen must decide whether to exercise its discretionary authority to refuse to place such measures before the Town Meeting.

A detailed analysis of the Ordinance within this framework is provided below for the Board consideration in this respect.

### **GENERAL COMMENT ON POWERS OF MAINE MUNICIPALITIES**

**Nature of Municipal Corporations.** The Town of Dover-Foxcroft is not a branch of the Maine State government. Me. Const. Art III, §§ 1 & 2 (setting forth express separation of powers between the State executive, legislative, and judicial branches); compare *In re Sealed Case*, 121 F.3d 729, 737 (C.A.D.C. 1997) (describing the deliberative process privilege as a type of privilege that may be asserted by the federal executive branch of government), with *Farris ex rel. Anderson v. Colley*, 145 Me. 95, 97, 73 A.2d 37, 38 (1950) (“Municipal corporations are but instruments of government, created for political purposes and subject to legislative control.”) (quoting *In re Opinion of the Justices*, 1935, 133 Me. 132, 178 A. 613, 615); see *Googins v. Gilpatrick*, 131 Me. 23, 158 A. 699, 700 (1932) (“They [Towns] are purely creatures of the Legislature and their powers and duties are within its control.”) (quoting *Sawyer v. Gilmore*, 109 Me. 169–186, 83 A. 673, 680).<sup>1</sup>

Moreover, the respective separation of power doctrines of the U.S. and Maine Constitutions do not extend to municipal governmental bodies. *Cf. State v. Hunter*, 447 A.2d 797, 800 (Me. 1982) (“Under the Maine Constitution, however, our inquiry is narrower: has the power in issue been explicitly granted to one branch of state government, and to no other branch?”); see also *Moreau v. Flanders*, 15 A.3d 565, 579 n.16 (R.I. 2011) (holding the separation of powers doctrine is not applicable to municipal

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<sup>1</sup> See also *Inhabitants of Bayville Vill. Corp. v. Inhabitants of Boothbay Harbor*, 110 Me. 46, 85 A. 300, 302 (1912) (“Municipal corporations are but instruments of government created for political purposes and subject to legislative control. Cooley says: ‘They are created for convenience, expediency, and economy in government, and in their public capacity are and must be at all times subject to the control of the state which has imported to them life, and may at any time deprive them of it.’”) (quoting Cooley, Const. Lim. (6th Ed.)).

governance and listing numerous states also declining to extend this doctrine to the municipal level).<sup>2</sup>

### SECTION-BY-SECTION ANALYSIS OF PROPOSED ORDINANCE

Submitted with this Memorandum is a section-by-section review of the proposed ordinance with commentary on each of the sections from Section 1 through Section 10. That analysis should be consulted for more detailed comment on particular sections in the proposed ordinance.

### CONCLUSIONS REGARDING LEGAL VALIDITY OF CERTAIN PROVISIONS OF PROPOSED ORDINANCE

The proposed ordinance includes several definitions that are unique to the ordinance. Among those, the definitions of “Ecosystem”, “Engage in Land Acquisition”, “Private and Public-Private Transportation and Distribution Corridor”, and “Utility Services” are particularly important. Each of these definitions is tied to or guides substantive, prohibitory provisions set forth in Sections 3 through 6. As each of these sections are intended to limit the rights of corporations (as defined in Section 1(a), vagueness in their terms renders them vulnerable to a Due Process Clause challenge. See, *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2551, 2561 (2015).

Sections 3(a)-(c) and Section 4(a) are invalid to the extent that each purports to limit the authority of the State of Maine or the United States.

Sections 3 (a)-(c) are invalid in that they purport to limit the authority of a corporation to acquire land as opposed to regulating the use of the land acquired. They are invalid to the extent that it prohibits an activity—the construction of private or public-private transportation infrastructure projects—that are permitted by the Intermodal Surface and Transportation Efficiency Act or any other federal law. Further review of this issue is warranted before a more definite opinion can be expressed.

Sections 4(b) is invalid in that they exceed the authority of the Town of Dover-Foxcroft to criminalize conduct and to set fines. Section 4(b) is invalid in that the Town of Dover-Foxcroft lacks the authority set damages or provide for the recovery of costs and expenses in civil litigation.

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<sup>2</sup> Although Plaintiff’s counsel did not locate primary authority on the extension of the separation of powers doctrine to municipalities, it bears emphasis that the Maine Constitution contains no such language and any extension of this doctrine would fundamentally alter functions performed by municipal boards throughout the State, such as the Eddington Planning Board that currently acts in both quasi-judicial and legislative capacities (which would plainly violate the separation of powers doctrine).

Section 4(c) is invalid in that the Town of Dover-Foxcroft lacks the authority to invest “ecosystems”, as defined in the proposed ordinance, or “natural communities” (not defined) with legal standing. Section 4(c) is invalid in that the Town of Dover-Foxcroft lacks the authority set damages or to direct the party to whom such damages must be awarded.

Section 4(d) is invalid in that the Town of Dover-Foxcroft lacks the authority to authorize “direct action” by any person to “enforce or defend” the ordinance to the extent such authorization extends to any conduct that is either criminal in nature or otherwise unlawful or to the extent that such “direct action” involves civil wrongs or otherwise occurs outside of legally established processes.

Section 4(d) is invalid in that the Town of Dover-Foxcroft lacks the authority to limit private persons from filing legal actions and it lacks the authority to prohibit or limit the power of District Attorneys, the Office of the Attorney General or the United States Attorney to prosecute individuals for suspected criminal wrongdoing.

Section 4(d) and Section 5(a) are invalid in that the Town of Dover-Foxcroft lacks the authority to limit the jurisdiction of any court or to require any court to do or refrain from doing any particular act.

Section 5(a) is invalid in that the Town of Dover-Foxcroft lacks the authority to alter the meaning of “person” within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment or within the meaning of Article I, Sections 6 and 6-A of the Maine Constitution.

Section 5(b) is invalid because the Town of Dover-Foxcroft lacks the authority to subordinate the Maine Constitution and the laws of the State of Maine and the United States Constitution and the laws of the United States to any ordinance, including the proposed ordinance, that may be enacted by the Town of Dover-Foxcroft.

Section 6 is invalid to the extent that it may be inconsistent with standards articulated by the Law Court for determining when a party has developed a property interest in an application for permit or other approval process relating to property.

Section 7 is invalid in that the Town of Dover-Foxcroft lacks the authority to place preconditions on the right of a person, including a corporation, to invoke the jurisdiction of a State or Federal Court.

### **RISK OF LITIGATION**

Each of the sections of the proposed ordinance referred to in the immediately preceding implicate federal constitutional and possibly statutory rights of corporations.

They also implicate the federal constitutional rights of individuals who own land and who, by operation of the ordinance on a corporation, may be prevented from selling, renting or otherwise conveying a property interest in that person's land to a corporation. Each of the sections identified immediately above, generate claims by corporations or individuals against the Town of Dover-Foxcroft pursuant to 42 U.S.C. § 1983 which permits federal claims against persons who constitutional and federal statutory rights are infringed by persons or governmental entities acting under "color of law." If a litigant is successful in such a proceeding, the Town of Dover-Foxcroft could become liable for the prevailing party's attorney fees and costs. This could be the case even if the litigation did not result in an award of damages against the Town of Dover-Foxcroft but only in Declaratory or Injunctive relief.

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## Memorandum

**To:** Dover-Foxcroft Board of Selectmen  
**From:** Timothy C. Woodcock, Esq.  
**Date:** September 3, 2015  
**Re:** Supplement to Legal Opinion, Proposed Community Bill of Rights  
Section by Section Analysis

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### Review of Proposed Ordinance

**Structure of the Proposed Ordinance:** The proposed ordinance begins with a preamble, bill title, and a summary statement of purpose. It is followed by a series of “whereas” clauses, a set of definitions, and, a section entitled “statements of law”. The substantive provisions of the proposed ordinance appear at Sections three through seven. The proposed ordinance concludes with an declaration that the Constitutions of the United States and Maine should be amended (Section 80), a severability clause (Section 9), and, a repealer clause (Section 10).

**Preamble, Title, and, Summary.** The proposed ordinance is titled the “Community Bill of Rights Ordinance 2015.” The Community Bill of Rights Ordinance has a preamble which is followed by the ordinance title, which, itself, is followed by a summary of the rationale for the ordinance; that is, “Establishing a community bill of rights for the people of Dover-Foxcroft which secures those rights by prohibiting corporations and governments from engaging in the acquisition of land for, or the siting of, private and public-private transportation and distribution corridors.”

**Whereas Clauses:** The proposed ordinance has nine “whereas” clauses which conclude with a “therefore” clause. The “whereas” and “therefore” clauses are the equivalent of legislative findings that often precede statutory enactments. It would appear that these clauses are intended to state the reasons supporting the proposed ordinance and to provide guidance to anyone who seeks to interpret the meaning and extent of the ordinance’s substantive provisions.

Among the salient “whereas” clauses is the statement, “[w]e, the people of Dover-Foxcroft find that unsustainable infrastructure projects such as private and public-private transportation and distribution corridors damage property values and permanently alter the natural environment and cultural heritage, while failing to provide real benefits to the community.” At various points, the whereas clauses assert that existing laws and the existing governmental system are inadequate to prevent the damaging effect of private or public-private transportation corridors. See, whereas clauses five, seven, eight, and, nine.

The closing clause—the “therefore” clause—states that the Community Bill of Rights is “an assertion of civil, human, and environmental rights” and that it is not “a land use or zoning law.”

**Section 1—Definitions.** Section 1 of the proposed ordinance provides definitions for certain terms.

**Section 1(b)—“Corridor”.** Section 1(b) defines “corridor” as a “strip of land that extends beyond the municipal boundaries and is used for a particular purpose.” It would appear that several land uses, other than Private or Public-Private Transportation and Distribution Corridors, could fall within this definition, including land uses ranging farms and car dealerships.

**Section 1(c)—“Cultural Heritage.”** Section 1(c) defines the term “cultural heritage” as “the common culture of the community” and provides further that the “common culture” must have resulted from “historical and current interaction of people with their environment”. It includes “tangible culture” which includes farms, working forests and buildings as well as “intangible culture” which includes “shared tradition and interdependence of local communities, and all assets of our natural heritage.”

**Section 1(d)—“Ecosystem”:** In Section 1(d), the term “Ecosystem” is defined at length. It appears to apply without limitation to “organisms” but not to individual organisms; only to organisms constituting “populations of organisms” or “biological communities”. It applies to “people” as well as “flora and fauna” and “soil-dwelling, or aquatic organisms”. This definition could be read to include the community of human beings within the Town of Dover-Foxcroft, though it is not entirely clear that that is intended. It appears that it also could include “communities” of microscopic organisms.

**Section 1(e)—“Engage in land acquisition.”** The term “Engage in land acquisition” is defined to apply to purchases of land or other means of obtaining “control of land”, including by “rent” or “lease” or “by any means”. It also includes, “the application for any permit necessary to engage in land acquisition” as well as “the issuance of permits or licenses that would enable” the purpose of “engag[ing] in land acquisition.” As this definition applies to the acquisition of land by purchase and other means, it follows that it equally applies to property owners who would sell, rent, lease or otherwise allow another to control their land. The definition also applies to “taking by eminent domain.” The only entities capable of exercising eminent domain with the State of Maine are the State of Maine, itself, and the United States.

**Section 1(f)—“Private or Public-Private Transportation and Distribution Corridor.”** The term “Private or Public-Private Transportation and Distribution Corridor” is defined to apply to “any corridor”, if that corridor is “built, managed, owned or maintained by a private developer using investor capital”; it applies as well to “a public-private partnership using any private investor capital.” These criteria apply to “paved roadways for commercial traffic, tol (sic) highways, pipelines or railways intended for the distribution of fossil fuels, water or high tension transmission lines for communications or utility services outside of the Town [of Dover-Foxcroft].” It appears that this definition may apply to public-private transportation infrastructure projects authorized by Congress, including, in particular, those authorized by the

Inter-Modal Surface Transportation and Efficiency Act (ISTEA) of 1991. (Public Law 102-240) Further research into this point would be warranted to answer that question. The term “utility services” is, itself, defined in Section 1(i).

**Section 1(g)—“Sustainable infrastructure.”** Section 1(g) defines “sustainable infrastructure” to include infrastructure that is “integrated into the community as part of the community’s planning processes”. The reference to “the community’s planning processes” would appear to include land use processes. The inclusion of this term in Section 1(g) appears inconsistent with the assertion in the “Therefore Clause” that the proposed ordinance is not a “land use or zoning law...”

Section 1(g) also states that “sustainable infrastructure” means infrastructure “that provides a benefit to the residents of the Town without inflicting damage to the cultural habitat, aesthetics, economic or natural systems that currently operate within the Town.” Section 1(g) does not explain what constitutes “damage” to each of the listed factors. Neither are the factors, themselves, explained in any greater detail. This lack of detail raises the question whether this provision, if tied to a substantive provision (see, Sections Three through Seven) or if significant to the interpretation of a substantive provision could be ruled void for vagueness. See, *e.g.*, *Johnson v. United States*, \_\_\_\_ U.S. \_\_\_\_, 135 S. Ct. 2551, 2561 (2015).

**Section 1(h)—“Unsustainable Infrastructure.”** Section 1(h) defines “unsustainable infrastructure” as infrastructure that is not “integrated into the community as part of the Town’s planning processes” and that “does not benefit the residents of the Town or inflicts damage to the aesthetic, cultural, economic, environmental, or natural systems that currently operate within the Town.” See comments on Section 1(g), “Sustainable infrastructure.”

**Section 1(i)—“Utility Services.”** The term “Utility Services” is defined to include “basic utilities including natural gas, electricity, water, or sewer that does not service the residents of the Town of Dover-Foxcroft.” The term “Utility Services” appears in the definition of “Private or Public-Private Transportation and Distribution Corridor” as set forth in Section 1(f) and significantly expands the meaning of that definition.

**Section 2—Statements of Law—A Community Bill of Rights.** Section 2 is styled as “Statements of Law” but several more closely resemble policy positions.

**Section 2(a) Right to a Sustainable Future.** This statement states the position that “[a]ll residents of Dover-Foxcroft possess the right to a sustainable future” and that that concept includes processes by which “decisions are made by, and for the benefit of, the community.” Section 2(a) goes on to state that the “right to a sustainable future” includes “the right to be free from infrastructure projects that have not been approved by the Town’s planning processes...” This latter statement suggests that the proposed ordinance was intended to preserve the application of Dover-Foxcroft’s land use standards and processes to Public and Public-Private Transportation and Distribution Corridors. To the extent that the proposed ordinance affects whether or how those processes would apply to such a project, the proposed ordinance, in effect, may be a land use ordinance notwithstanding “whereas” clause 10.

At this juncture, it should be noted that the proposed ordinance uses the term “residents of Dover-Foxcroft at various points including, Sections 1(g), 1(i), 2(a), 2(b), 2(d), 4(b), 4(c); at other points, the proposed ordinance refers to “the people of Dover-Foxcroft, including “Whereas” clauses (1), (6), (9), and (10), and Sections 2(f), 2(g), 8. At no point does the proposed ordinance refer to “taxpayers” of Dover-Foxcroft. It is not known whether this omission was deliberate.

**Section 2(a). Right to a Sustainable Future.** Section 2(a) states that “[a]ll residents of Dover-Foxcroft possess the right to create a sustainable future in which decisions to build infrastructure are made by, and for the benefit of, the community.” Section 2(a) goes on to state that the “right to a sustainable future” includes “the right to be free from infrastructure projects that have not been approved by the Town’s planning processes”. It also includes “the right to be free from such projects that “contribute to ecosystem degradation and that provide no community benefit.”

The reference to the “Town’s planning processes” suggests that the proposed ordinance is intended to enhance or preserve the Town of Dover-Foxcroft’s planning processes. As such, it would appear that Section 2(a) may not be consistent with the “Therefore Clause” asserting that the proposed ordinance is not a “land use” or “zoning” ordinance.

**Section 2(b)—Right to Clean Air and Water.** Section 2(b) states that “[a]ll residents and ecosystems of the Town of Dover-Foxcroft possess a right to sustainably access, use, consume, and preserve water drawn from natural water cycles”. It provides further that all residents also have the right to be “free from infrastructure projects that pose potential risks to clean air and water.”

The statement in Section 2(b) regarding the rights of ecosystems should be compared to Section 1(d), defining “Ecosystem” and Section 4(c) purporting to authorize any “resident” of the Town of Dover-Foxcroft to “enforce or defend” the rights of “ecosystems” and “natural communities” under the proposed ordinance.

**Section 2(c). Rights of Ecosystems.** This statement states the position that “[e]cosystems within Dover-Foxcroft possess the right to exist, flourish, and naturally evolve.” See, Section 1(d) (definition of “Ecosystem”); see also, Section 4(c), *infra*.

**Section 2(d)—Right to Scenic Preservation.** Section 2(d) states that “[a]ll residents of the Town of Dover-Foxcroft have a right to the scenic, historic, and aesthetic values of the Town”. Section 2(d) states that those values include “clean air, pure water, healthy soil, and rural landscapes that preserve the community’s cultural heritage.” Note, “cultural heritage” is defined at Section 1(c). Section 2(d) also states that these attributes “provide the foundation for tourism and economic sustainability for local businesses.”

Section 2(d) concludes by stating that the “Right to Scenic Preservation: includes “a community right to choose sustainable infrastructure projects that affect the community’s scenic, historic, and aesthetic values.” The concluding point in Section 2(d) appears to relate to land use planning and deliberation.

**Section 2(e). Governmental Legitimacy.** This statement states the position that “[a]ll governments in the United States owe their existence to the people of the community that those governments serve.” The statement goes on to state that “those governments [i.e., “all governments in the United States”] “exist to secure and protect the rights of the people and those communities.” The statement concludes with the statement that “[a]ny system of government that becomes destructive of those ends is not legitimate, lawful, or constitutional.”

Section 2(e) should be compared to the Preamble to the Maine Constitution. The Preamble provides that the Maine Constitution was “ordain[ed] and establish[ed]” by “[w]e the people of Maine...” Article I, Section 2 states that “[a]ll power is inherent in the people” and that “all free governments are founded in their authority and instituted for their benefit”. Article I, Section 2 provides further that “the people” have “an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.”

The Preamble and Article I, Section 2 refer to the people of Maine collectively. Neither the Preamble nor Article I, Section 2 refers to rights in “communities”, including political subdivisions of Maine.

**Section 2(f). Right to Local, Community Self-Government.** Section 2(f) states that “[t]he people of Dover-Foxcroft possess both a collective and an individual right to self-government in their community, a right to a system of government that embodies that right (sic) and the right to a system of government that protects and secures their human, civil, and collective rights.” Section 2(f) does not make it clear whether this description of rights guaranteed to “the people of Dover-Foxcroft” is intended to refer only to the government of the Town of Dover-Foxcroft or the governments of the State of Maine and the United States, as well.

**Section 2(g). Right to Assert the Right to Self-Government.** Section 2(g) states that “[t]he people of Dover-Foxcroft possess the right to use their local government to make law, and the making and enforcement of law by the people through a municipal corporation or any other institution shall not eliminate, limit or reduce their sovereign right to local, community self-government.” The reference in Section 2(g) to authority of the people make law “through a municipal corporation” appears intended to refer to a municipal corporation other than the Town of Dover-Foxcroft, but that is not certain. In addition, the reference in Section 2(g) to the authority of the people to make law “through...any other institution” is not clear.

**Section 2(h). Rights as Self-Executing.** Section 2(h) states that all the rights set forth in the proposed ordinance are “inherent, fundamental, and unalienable...” Section 2(h) states that all those rights are “self-executing and enforceable against both private and public actors.” The Law Court has referred to “self-executing rights” in describing those rights that are set forth in Article I of the Maine Constitution, denominated, “Declaration of Rights”, explaining that they are rights that do not require legislation to be effective. *State v. Bachelder*, 403 Me. 754 (Me. 1979). The Law Court has also observed that, even though these rights are self-executing, the Legislature may enact laws that “facilitate the exercise of these constitutional privileges and the enforcement of these protective rights.” *Id.* at 758-759. No authority was found that recognized rights provided in municipal ordinances as “self-executing.” It appears, however, that

succeeding sections of the proposed ordinance are intended to effectuate at least some of the rights broadly referred to in Section 2(h).

**Section 3—Statements of Law—Prohibitions Necessary to Secure the Bill of Rights.** Section 3 sets forth certain prohibitions which appear intended to have substantive effect.

**Section 3(a).** Section 3(a) states that “[i]t shall be unlawful within the Town of Dover-Foxcroft for any corporation or **government** to engage in land acquisition for, or engage in the construction of, any private or public-private transportation and distribution corridor.” The ambit of Section 3(a) is determined with reference to the definitions of “engage in land acquisition” and “private and public-private transportation corridor” set forth in Section 1, the Definition Section, at Sections 1(e) and (f).

Section 3(a) by its terms would, as a matter of local law only, make it unlawful for a corporation to acquire or even attempt to acquire land in order to construct the particular transportation corridor. It is not clear what is meant by the term “unlawful” as used in Section 3(a). Section 3(a) should be compared to the sanctions set forth in Section 4(a). See discussion of Section 4, below.

Although Section 3(a) does not make it unlawful for a person to sell or rent land under circumstances that would constitute “engag[ing] in land acquisition”, it would appear that Section 3(a) is intended to make such sales or rentals impossible.

Section 3(a) extends to “governments” as well as corporations. Section 3(a), therefore, purports to prohibit the United States, the State of Maine, and, the County of Piscataquis from “engaging in land acquisition” as defined at Sections 1(f) and 1(i).

Nothing in the powers allocated to the Town of Dover-Foxcroft or any other Maine municipality suggests that the Town can limit the powers of either the United States or the State of Maine. See, United States Constitution, Article VI, § 2., Maine Const. Article VIII, Pt. 2, §§ 1-2. See, also, *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, ¶ 13, 103 A.3d 556, 561. This portion of Section 3(a) is beyond the authority of the Town of Dover-Foxcroft.

**Section 3(b).** Section 3(b) states that “[i]t shall be unlawful for any corporation or government to violate the rights recognized and secured by this ordinance.”

The nature of the violation provided for in Section 3 must be determined with reference to Section 4. See discussion of Section 4, below.

Like Section 3(a), Section 3(b) applies to “governments” without limitation and, therefore, purports to prohibit the United States, the State of Maine, and the County of Piscataquis from violating any of the rights included in the proposed ordinance.

Nothing in the powers allocated to the Town of Dover-Foxcroft or any other Maine municipality suggests that the Town can limit the powers of either the United States or the State of Maine. See, United States Constitution, Article VI, § 2., Maine Const. Article VIII, Pt. 2, §§

1-2. See, also, *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, ¶ 13, 103 A.3d 556, 561. This portion of Section 3(b) is beyond the authority of the Town of Dover-Foxcroft.

**Section 3(c).** Section 3(c) states that “[n]o permit, license, privilege, charter, or other authority issued by any state or federal entity that would violate the prohibitions of this Ordinance or any rights secured by this Ordinance, the Maine Constitution, the United States Constitution, or other laws, shall be deemed valid within the Town of Dover-Foxcroft. “The Town of Dover-Foxcroft comes within the Home Rule provisions of the Maine Constitution. See, Article VIII, Pt. 2d, §§ 1-2. Nothing in that provision, however, authorizes a municipality to limit the authority of the State of Maine with respect to the issuance of permits See, also, *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, ¶ 13, 103 A.3d 556, 561.

By its terms, Section 3(c) overrides and invalidates permits issued by federal authorities. Section 3(c) is inconsistent with the Supremacy Clause of the United States Constitution. U.S. Const., Article VI. The Supremacy Clause reads in pertinent part as follows: “The Constitution and Laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land...”

By its terms, Section 3(c) is also inconsistent with the Maine Constitution by which the laws of the State are superior to those of any political subdivisions of the State, of which Dover-Foxcroft is one. Maine Const., Art. IV, Part 3d, § 14 (subjecting all corporations, including municipal corporations, to “the general laws of the State”).

**Section 4—Enforcement.** Section 4 of the proposed ordinance sets forth enforcement provisions for the terms set forth in Section 3, as defined by Section 1.

**Section 4(a).** Section 4(a) provides that, “[a]ny corporation or government that violates any provision of this Ordinance shall be guilty of an offense...” This portion of Section 4(a) applies to corporations and governments. As to the latter, it applies to the United States, the State of Maine, and the County of Piscataquis.

Section 4(a) also purports to set penalties for any violations falling within its term, stating that, “upon conviction” of violating any provision of the proposed ordinance, the “corporation or government” must be “sentenced to pay the maximum fine allowable under State law for that violation.” The terms used in Section 4(a), particularly the word “conviction” imply that Section 4(a) is intended to criminalize any violations of any of the provisions of the proposed ordinance. *Rich v. Department of Marine Resources*, 2010 ME 41, ¶ 10, 994 A.2d 815, 818-819 (word “conviction” limited to criminal offenses). The Town of Dover-Foxcroft lacks the authority to criminalize conduct. Maine Const. Article VIII, Part 2d, §§ 1-2. In these respects, Section 4(a) is beyond the authority of the Town of Dover-Foxcroft.

**Section 4(b).** Section 4(b) provides that the Town of Dover-Foxcroft as well as “any resident” thereof “may enforce the prohibitions of this Ordinance through any action brought in any court possessing jurisdiction over the activities occurring within the Town of Dover-Foxcroft.” Section 4(b) appears intended as a “citizen suit” provision in that it would allow “residents”, but apparently not taxpayers, of Dover-Foxcroft to bring suits based on the proposed

ordinance. The Town of Dover-Foxcroft does not have the authority to authorize citizen suits. See, Maine Const. Article IV, Pt. 3d, § 1, Article VIII, Part 2d, §§ 1-2.

Section 4(b) also purports to authorize litigants bringing such suits to recover, presumably pursuant to court order, “all costs of litigation”, including attorney fees and expert fees. The Town of Dover –Foxcroft does not have the authority to authorize a party to recover any litigation costs, including but not limited to attorney and expert fees. Maine Const. Article VIII, Part 2d, §§ 1-2. The authority to provide for the recovery of attorney fees lies solely with the Legislature. Maine Const., Article IV, Pt. 1<sup>st</sup>, § 1. The Maine Legislature has set what fees and costs may be recovered in general. 14 MRS §§ 1502-B, 1502-C, 16 MRS § 251. The Maine Rules of Civil Procedure have provided for recover of certain litigation costs. See, Rule 16(d), Rule 54(g), Maine Rules of Civil Procedure.

**Section 4(c).** Section 4(c) states that a “resident” of the Town of Dover-Foxcroft or the Town, itself, “may enforce or defend the rights of ecosystems or natural communities secured by this Ordinance” and that action may be “brought in the name of the ecosystem or natural community...” As noted above, the term “ecosystem” is defined at Section 1(d). The term “natural community” is not defined.

The Town of Dover-Foxcroft lacks the authority to invest anyone with the right to bring a particular kind of legal claim either in that individual’s name or in the name of an environmental or natural entity. Maine Const. VIII, Pt. 2d, §§ 1-2. The authorization of legal claims in the name of an environmental or natural entity is not consistent with decisions of the Law Court setting minimum standards for “standing” to bring legal claims. Under Maine law, standing to bring law suit is vested in “persons.” Not all persons have standing to bring lawsuits; only those persons who can demonstrate a “particularized injury” can meet standing requirements. See, *e.g.*, *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶¶ 16-22, 973 A.2d 735, 740-741, see also, *Sierra Club v. Morton*, 405 U.S. 727, 749 (Douglas, J., dissenting) (proposing standing be extended to “inanimate objects”).

Section 4(c) states that damages claimed in such actions “shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury...” It provides further that those damages “shall be paid to the Town of Dover-Foxcroft to be used exclusively for the full and complete restoration of the ecosystem or natural community.” The Town of Dover-Foxcroft lacks the authority to set damages in legal actions or to direct where damages should be paid. Maine Const. VIII, Pt. 2d, §§ 1-2.

**Section 4(d).** Section 4(d) provides that if the “local government fails to enforce or defend this Ordinance, or a court nullifies this Ordinance due to a conflict with corporate powers, any person may enforce this Ordinance through direct action.” This portion of Section 4(d) is contingent on the Town of Dover-Foxcroft not enforcing or defending the ordinance. It also anticipates that a court may rule that some or all of the provisions of the ordinance “conflict with corporate powers,” though it does not specify what it means by “corporate powers.”

Section 4(d) authorizes “any person” to take “direct action” to enforce the ordinance. The reference to “any person” extends beyond the references to “residents” of Dover-Foxcroft or

the “people of Dover-Foxcroft”. See discussion above. The term “direct action” is in Section 4(d) as “...any activities or actions carried out to directly enforce the rights and prohibitions contained in this Ordinance.”

The authorization provided in Section 4(d) extends to “any person” and, therefore, Section 4(d) constitutes a broader authorization than those provisions that are limited either to “residents” of Dover-Foxcroft or “the people of Dover-Foxcroft.” By its terms, Section 4(d) places no limit on persons who may take “direct action”.

The “direct action” authorization in Section 4(d) is contingent on one of two events: a) the Town of Dover-Foxcroft, having adopted the ordinance, does not “enforce or defend” it and b) the ordinance is nullified by a court “due to a conflict with corporate powers”. With respect to the first precondition, it is not clear how it is determined that the Town of Dover-Foxcroft has failed to “enforce or defend” the ordinance. It would appear that it is left to the judgment of the person who would take the “direct action.”

It would appear that the second precondition is contingent on a court ruling that a corporate entity possesses powers that conflict with and are superior to one or more provisions of the ordinance. It is evident that the proposed ordinance is intended to eliminate the use of property within the limits of the Town of Dover-Foxcroft for Public or Public-Private Transportation and Distribution Corridors and for “Utility Services. Section 1(f), (i), Section 3(a)-(c), Section 4(a).

The United States Supreme Court has held that corporations are persons for purposes of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896). As part of the United States Constitution, the interpretation and application of the Fourteenth Amendment is a matter of federal law. The United States Supreme Court’s interpretation of the Constitution are binding on the Legislative and Executive Branches of the federal government and on the States. *Perez v. Mortgage Bankers Association*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1199, 1224 (2015) (Scalia, J., concurring in the judgment), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

If, as it appears, Section 4(d)’s reference to judicial nullification of the ordinance “due to a conflict with corporate powers” is intended to encompass judicial recognition that the United States Supreme Court has recognized that corporations are persons for purposes of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, then this portion of Section 4(d) conflicts with federal law.

This raises the question of the breadth of “direct action” as used and defined in Section 4(d). The remainder of Section 4(d) provides guidance on this point. Section 4(d) provides that, if any person “commence[s]” direct action, “this Ordinance shall prohibit any public or private actor from filing a civil or criminal action against those participating in the direct action.” The breadth of this purported prohibition implies that “direct action” as used in the proposed ordinance includes both civil offenses or civil torts or criminal actions.

If conduct has been criminalized by act of the Legislature, it is beyond the authority of the Town of Dover-Foxcroft to immunize a person or persons from prosecution for criminal acts because they were engaged in “direct action” to enforce the ordinance. Maine Const. Article VIII, Pt. 2d, §§ 1-2, *cf.*, Maine Const. Article IV, Pt. 3, § 1. Neither can the Town of Dover-Foxcroft immunize a person or persons from civil liability because they were engaged in such action. *Id.*

As has been noted, Section 4(d) specifically authorizes “direct action” where a court has issued a decision recognizing or enforcing one or more “corporate powers.” To the extent that a person, acting under authority of the ordinance, takes “direct action” in contravention of a court order, that person may be exposed to civil or criminal judicial contempt. See, Rule 66, Maine Rules of Civil Procedure; See, Rule 66, Federal Rules of Civil Procedure.

Section 4(d) purports to prohibit private persons from filing civil action against persons engaging in “direct action” under the authority of the proposed ordinance. Section 4(d) also purports to deprive courts from acting on such filings. The Town of Dover-Foxcroft lacks the authority to limit private litigants in this regard. Maine Const. Article VIII, Pt. 2d, §§ 1-2, see also, *Id.*, Article IV, Pt. 3d, § 14, Article VI, § 1.

Section 4(d), by its terms, would also purport to prevent private persons from filing civil actions in federal court in response to “direct action.” Thus, for example, Section 4(d) would purport to prohibit claims brought pursuant to 42 USC § 1983 (authorizing suits against persons acting “under color of State law” for violations of federal constitutional and statutory rights). The Town of Dover-Foxcroft lacks the authority to determine when a person may bring a federal action, including a Section 1983 action, in federal court.

Section 4(d) purports to prohibit “public actors” from “filing a...criminal action against those participating in the direct action.” This portion of Section 4(d), by its terms, attempts to limit the ability of State and Federal prosecutors to bring criminal actions against persons who engage “direct action” that is or may be criminal in nature. The Town of Dover-Foxcroft lacks the authority to limit the authority of the Attorney General of the State of Maine, the District Attorneys acting under the laws of the State of Maine or the United States Attorney.

Section 4(d) purports to direct courts to “dismiss” civil or criminal actions against persons who have allegedly engaged in “direct action” authorized under Section 4(d). The Town of Dover-Foxcroft has no authority to limit the jurisdiction of the State or Federal Courts or issue binding orders to them.

**Section 5—Enforcement—Corporate Powers.** Section 5 is divided into two sections. One addressing the legal status of corporations and the other purporting to create a hierarchy of laws relative to the proposed ordinance.

**Section 5(a)** Section 5(a) purports to establish a penalty on corporations that “violate this Ordinance or seek to violate this Ordinance”. The penalty is that such corporations “shall not be deemed to be ‘persons’ nor possess any legal rights, privileges, powers or protections that would interfere with the rights or prohibitions enumerated by this Ordinance.” Section 5(a) provides

specific meaning to the term “rights, privileges, powers or protections” as used in Section 5(a), stating that it “include[s] the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance, and the power to assert that the people of this municipality lack the authority to adopt this Ordinance.”

Under Sections 1(e), (f), and (i), Sections 3(a)-(c), Sections 4(a)-(d), corporations may not “engage in land acquisition” for “Private or Public-Private Transportation and Distribution Corridor[s]”, including “Utility Services.” These provisions are intended to limit the legal right of corporations to obtain land for specified purposes or who “seek” to do so. The proposed ordinance is, therefore, directed at a specific category of entities and at a particular kind of land use.

The reach of Section 5(a) is broad, apparently applying to any steps taken by a corporate entity towards any purpose prohibited by the proposed ordinance. The Town of Dover-Foxcroft’s lack of authority in these areas has been discussed above.

The penalty that would be imposed under Section 5(a) would divest “corporations” of their status as persons within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as under Article I, Sections 6 and 6-A of the Maine Constitution. As has been noted above, the United States Supreme Court has the final authority to interpret the meaning of the United States Constitution and its decisions in that regard are the supreme law of the land. The Town of Dover-Foxcroft lacks the authority to enact laws governing the meaning of the Fourteenth Amendment to the United States Constitution or Article I, Sections 6 and 6-A of the Maine Constitution or establishing adverse constitutional consequences for corporations seeking to engage in certain types of land uses.

The penalty also purports to limit the legal capacity of corporations to raise certain legal issues in state or federal court; in particular, the proposed ordinance purports to deny to corporations “the power to assert state or federal preemptive laws in an attempt to overturn this Ordinance” and it purports to deny corporations “the power to assert that the people of the Town of Dover-Foxcroft lack the authority to adopt this Ordinance.” It appears that the proposed ordinance would extend this disability to legal positions advanced by corporations in State or Federal Court. As noted above, the Town of Dover-Foxcroft lacks the authority to issue any directives limiting the rights of litigants in State or Federal Court and equally lacks the authority to issue directives which State or Federal Courts are obligated to obey.

**Section 5(b).** Section 5(b) states that “all laws adopted by the legislature of the State of Maine, and rules adopted by any State agency, shall be the law of the Town of Dover-Foxcroft only to the extent that they do not violate the rights or prohibitions of this Ordinance.” Section 5(b) purports to place the proposed ordinance in a superior position to Maine statutes and rules issued by any State agency. Among the three branches of Maine State government, the powers of the Legislature are unique. As the Justices of the Maine Supreme Judicial Court recently opined, “[t]he authority of the executive and judicial departments is a grant.” *Opinion of the Justices*, 2015 ME 107, ¶ 43, \_\_\_ A.3d \_\_\_. By contrast, the Justices observed, “[t]he powers of the Legislature in matters of legislation, broadly speaking are absolute, except as restricted and limited by the Constitution. As to the executive, and judiciary, the Constitution measures the

*extent of their authority, as to the Legislature it measures the limitations on its authority.” Ibid.* See, also, Maine Const., Article IV, Pt. 3d, § 1.

Maine’s Home Rule authority does not make municipal ordinances superior to state legislative law or State agency rules adopted pursuant to State Legislative directive. *Dubois Livestock, Inc. v. Town of Arundel*, 2014 ME 122, ¶ 13, 103 A.2d 556, 561.

**Section 6—Effective Date Permit and Existing Permit Holders.** Section 6 consists of a single section without subsections. It states that the proposed ordinance shall take effect “immediately” upon enactment and provides further that it shall apply to “any and all actions that would violate this ordinance regardless of the date of any applicable local, state or federal permit.”

Section 6 recognizes that corporations may have obtained permits from State or Federal governmental entities at the time the proposed ordinance becomes effective. Section 6 then provides that the ordinance shall apply to “any and all actions” that a corporate entity might under the authority of such a permit and that the date on which Federal or State entity issued the permit shall be irrelevant.

Section 6 as drafted purports to override any interests, including property interests, that the Federal or State governments may recognize a permit holder has acquired, depending on the date on which the Federal or State governmental entity issued the permit. Section 6 is intended to override whatever interests the Federal or State governments may recognize in permits that either had issued based on the date on which the permit was issued. The Town of Dover-Foxcroft does not have the authority to diminish or enhance the legal status of a permit depending on the date of that permit.

**Section 7—People’s Right to Self-Government.** Section 7 is entitled “people’s right to self-government” and states that the “[u]se of the courts or the Maine legislature to overturn the provisions of this Ordinance shall require community meetings”. Section 7 provides further that those “community meetings” must be “focused on changes to local governance that would secure the right of the people to local self-government.”

Section 7 purports to place preconditions on when persons can invoke the jurisdiction of Federal or State Courts regarding the ordinance. As noted above, the Town of Dover-Foxcroft has no authority to place any conditions on when persons may seek judicial relief in either Federal or State court.

Section 7 also purports to place preconditions on when persons can petition the legislature regarding the ordinance. The right to petition the State government is guaranteed by the Maine Constitution at Article I, Section 15. The rights listed in Article I of the Maine Constitution are paramount and may not be diminished even by the Legislature. *State v. Bachelder*, 403 A.2d at 758-759. The Town of Dover-Foxcroft lacks the authority to impose any conditions on when a person may petition the Legislature. Maine Const., Article VIII, Pt. 2d §§ 1-2.

**Section 8—State and Federal Constitutional Changes.** Section 8 of the proposed ordinance provides that “through the adoption of the [the proposed ordinance], the people of the Town of Dover-Foxcroft call for amendments to the Constitutions of Maine and of the United States which would “recognize a right to self-government free from governmental preemption and or nullification by corporate ‘rights.’” Section 8 appears to tacitly acknowledge that some provisions of the proposed ordinance may exceed the authority of the Town of Dover-Foxcroft as a Maine municipality vis a vis the State of Maine and the United States. It also appears to tacitly acknowledge that corporations may possess right which the Town of Dover-Foxcroft lacks the authority to diminish or regulate.

Section 8 provides that, by the adoption of the proposed ordinance, the “people of the Town of Dover-Foxcroft would be endorsing the changes to the Constitutions of Maine and the United States as stated. Section 8 would appear to eliminate the need for the people of Dover-Foxcroft to specifically and separately state their support for these constitutional amendments set forth in Section 8.

The right to seek changes in the Constitution of the State of Maine and the United States Constitution is protected in the Maine Constitution at Article I, Section 15 and in First Amendment to the United States Constitution.

**Section 9—Severability.** Section 9 provides that the sections of the proposed ordinance are severable from one another; that is, that if a court decides that a part or section of the ordinance is “illegal, invalid or unconstitutional”, the remaining portions of the ordinance shall not be “affect[ed], impair[ed], or invalidate[d].”

**Section 10—Repealer.** Section 10 provides generally that “[a]ll inconsistent provisions of prior Ordinances adopted by the Town of Dover-Foxcroft are hereby repealed, but only to the extent necessary to remedy the inconsistency.”