# More Information about Informed Growth Act

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One of the more hotly contested bills of the past legislative session was the Informed Growth Act (IGA). In bill form it was known as LD 1810, as enacted it is known as PL 2007 Chapter 347. This legislation was enacted despite the opposition of Maine Municipal Association and many municipal officials.

This law prohibits municipalities from issuing land use permits for large (75,000 square feet or more) retail development projects if the projects cause an "undue adverse economic or community impact" in the "comprehensive economic impact area." The IGA requires the applicant to pay for a study of the impacts of the project. The study must be completed by a "qualified preparer" as determined by the State Planning Office.

The study will look at traditional land use issues such as such as traffic, public safety, and sewer infrastructure. The study will also analyze economic issues such as the impact of the project on the number of jobs created and lost, salaries and benefits in the area, the demand for retail space and competitors.

The primary municipal objection to the bill was that municipalities have the ability to adopt these standards locally and that the state should not impose this specific process for every affected Maine community. Municipalities generally appreciate state-developed model legislation that each community may adopt (or not) at its discretion. Municipalities generally oppose the mandatory adoption of state-developed legislation.

A secondary municipal objection to the bill was that the actual administration of this new mandate would be difficult.

**Questions and Answers**

MMA was pleased to see that the State Planning Office has recently issued a "Questions and Answers" document dealing with the Informed Growth Act. Below are the "questions and answers" prepared by the State Planning Office and posted on its website. As you will see, a typical "answer" offered by the State Planning Office is simply to refer the reader to the municipality to provide the information.

The answers to many real-life questions will depend upon the particular facts and ordinances in a local community. All parties involved, including municipalities, should consult their attorneys when answering questions about actual projects.

However, it is unfortunate that the state government, which felt it so important to insert itself into these local land use issues, does not feel it is necessary to provide even general answers in response to many of the outstanding questions.

The 11 SPO questions are shown below with SPO's answer in "italics" following each question. Following each question and answer is supplemental information provided by MMA. In addition, the 11 SPO questions spawned additional questions that MMA has posed and answered.

**SPO Question 1. When does the State Planning Office think it will have compiled a list of 'qualified preparers' to prepare the impact statements?**

The State Planning Office will prepare the list of qualified preparers as soon as it can under the state rule-making and purchasing requirements. Given the statutory and regulatory public notice time lines, the Office expects the list to be available on or about December 1, 2007.

MMA Supplement: This answer raises a problem. The effective date of the law is in September 2007. The IGA requires the study to be completed within 4 months of the filing of the application. The statute does not

include any special provisions for applications filed during this gap period after the effective date of the law in September and before the December date that SPO releases its list of 'qualified preparers'.

**MMA Question 1A – Where can I find the standards that SPO is using to determine who is a qualified preparer? How does one apply to be a qualified preparer? May a municipal employee be a qualified preparer?**

MMA Answer to Q 1A – The statute directs the State Planning Office to adopt routine technical rules to implement the "qualified preparer" component of the IGA. SPO's website indicates the rulemaking process will begin in August and conclude in December.

**SPO Question 2. How many firms do you believe may be qualified to do the work identified in LD 1810?**

We do not have a precise estimate, but expect there will be a significant number who qualify from private firms, regional planning councils, and academic institutions from Maine, New England, and the Maritimes.

**SPO Question 3. Do you envision the State Planning Office playing any role in who is selected to conduct an impact assessment other than compiling a list of qualified preparers?**

No, the decision of selecting a consultant will be at the sole discretion of the municipality.

MMA Supplement: This answer is incomplete. The statute has a specific section (§4367(2)) on the selection of a preparer. It reads:

"2. Selection of preparer. The selection of the preparer must be mutually agreed upon by the municipal reviewing authority and the applicant. If no mutual agreement is reached within 15 days, the municipal reviewing authority shall select the preparer."

Accordingly, the municipality must first consult with the applicant and seek mutual agreement on the preparer. Only after this process fails may a municipality select the preparer at its "sole discretion."

Municipalities should note that the contract for the study is between the municipality (not SPO) and the qualified preparer.

**SPO Question 4. Who determines whether the municipality is exempt under section 4371?**

The municipality would make this determination, perhaps in consultation with its legal counsel.

MMA Supplement: The statute contains an "exemption" provision. It reads:

"§ 4371. Exemption. The provisions of this subchapter do not apply to a municipality that has adopted economic and community impact review criteria that apply to large-scale retail development land use permit applications and that require a study of the comprehensive economic and community impacts of the proposed large-scale retail development for consideration, among other evidence, in applying the review criteria to the application."

As you can see, the statute does not specify who makes the determination whether a municipality qualifies for the exemption. Accordingly, standard statutory construction dictates that a court would ultimately be responsible for determining if the exemption applies. As a practical matter, the municipality will need to decide if its ordinance conforms to the exemption standards in the statute and proceed accordingly. But this decision is subject to challenge in court.

**SPO Question 5. Section 4367.4.A. identifies a wide range of issues that must be considered in analyzing the local retail market. What existing background information do you believe is available to assist a firm in preparing this analysis?**

There is considerable existing data available through the federal and state government and regional planning councils. A qualified consultant should be able to identify what information he or she needs to conduct the study and know where to find it.

MMA Supplement: This answer is unhelpful.

The statute directs local permitting authorities to base their decisions on more information than the findings of the study conducted by the qualified preparer. It requires the local permitting authority to consider the study, information received at the public hearing on the study, and any information it gathers on its own.

Accordingly, the IGA envisions that the permitting authority will rely on more than just the study. Given this statutory framework, if the state believes this data is readily available, it should assist the public and local permitting authorities in fulfilling the roles assigned to them by identifying the data and if possible making this data generally available. It should not put all of its faith in just one element of the review scheme mandated by the new law. (See Questions 12-14 for more on this topic.)

**SPO Question 6. I am developer and I want to send my fee to the State Planning Office right now. What should I do?**

Because the Informed Growth Act does not go into affect until September 20, 2007, the State Planning Office cannot accept any funds until after that date. After September 20, a developer with a pending application can direct the requisite $40,000 to: Director of Operations, Maine State Planning Office, 38 State House Station, Augusta ME 04333.

The check should indicate the municipality where the project is located and the project name.

**SPO Question 7. I am a developer, I am concerned that this requirement will slow down my project.**

The Informed Growth Act attempts to minimize the extra time the economic impact study will add to a project. The comprehensive economic impact study must be completed within four months of the filing of the application.

MMA Supplement: Section 4367(4) of the statute states: “The comprehensive economic impact study must be completed within 4 months of the filing of the application.” However, in addition to the required 4 months, section 4368 of the statute also requires the municipality to conduct a public presentation of the study and to allow public comment on the study. Notice of this public presentation is required by statute.

Realistically, a municipality will not post notice of the public hearing on the study until the study has actually been completed. Furthermore, while not mandated, one would assume that municipalities would give the applicant some reasonable amount of time to review the study and prepare a response. If the full 4 months are taken to prepare the study, and then another 30 days are provided for the project applicant’s review/public notice period, a 5-month time-frame appears to be the minimum that will be needed.

**MMA Question 7A – Must the study be completed within four months from the date the application is submitted or four months from the date that the reviewing authority formally determines that the application is complete?**

MMA Answer 7A – The reasonable answer is that the study must be completed within 4 months from the date that an application is determined to be complete. However, a literal reading of the statute would indicate that the answer is four months from the date of submission. The phrase used in the statute is: “within 4 months of the filing of the application”.

Many land use ordinances have a procedural “completeness” review for permit applications. In the case of an incomplete application, it may take a few weeks or even months for an applicant to submit any missing materials.

Additionally, section 4367(3) of the statute indicates that an application is not complete until the State Planning Office has provided confirmation to the municipality that the $40,000 study fee has been paid by the applicant.

The efficient and common-sense approach to this process would entail a local permitting authority waiting to execute the contract for the study until after the authority determines that an application is complete. However, the wording of the legislation invites confusion.

**SPO Question 8. Do I need an economic impact analysis done to obtain a building permit?**

The developer should consult with the municipality to determine what is required.

MMA Supplement: If you are a building a "large-scale retail development" project, the answer is likely yes; if not, the answer is no. The statute states:

"§ 4367. Preparation of comprehensive economic impact study. As part of its review of a land use permit application for a large-scale retail development, a municipal reviewing authority shall require the preparation of a comprehensive economic impact study."

The statute defines "large-scale retail development" as any "retail business establishment" with 75,000 square feet of floor area (or more) in one or more buildings at a single location. It also includes any expansion of 20,000 square feet or more that results in a final retail establishment of 75,000 square feet or more.

A retail developer of a significant project should consult with its attorney as to whether it believes the development will qualify as a "large-scale retail development" pursuant to the IGA and then so-notify the municipality in its application materials. The municipality would then decide if it agrees with the applicant. Obviously, the municipal determination may ultimately be challenged in court.

**SPO Question 9. Does our town have to amend our land use permit review ordinance to incorporate the procedures under the Informed Growth Act?**

The municipality should consult with its legal counsel to determine what steps it needs to take to implement the Informed Growth Act.

MMA Supplement: The statute does not explicitly direct municipalities to amend their ordinances. However, the substance of the law is such that there may be practical reasons for some towns to amend their ordinances.

Section 4367 states: "As part of its review of a land use permit application for a large-scale retail development, a municipal reviewing authority shall require the preparation of a comprehensive economic impact study."

Second, section 4367(4) states: "the comprehensive economic impact study must be completed within 4 months of the filing of the application." Section 4368 then states that a public hearing, with due notice, must be held for the public presentation of this study and to allow public comment.

In order for a permitting authority to (1) require that an impact study be conducted, (2) review the impact study, (3) hold a public hearing on the impact study, and (4) make a specific "undue adverse impact" determination on a permit application relying, in part, on that impact study, it would appear that many municipalities will want to weave these requirements and deadlines into their existing local land use ordinances.

**MMA Question 9A - Will the State reimburse the municipality for its costs associated with the Informed Growth Act.?**

MMA Answer 9A – Yes and No.

Section 4367(3) of the statute requires developers whose projects are covered by the IGA to pay a $40,000 fee to the State Planning Office. SPO is directed to use the fee to reimburse municipalities for: (1) the cost of the study itself, (2) municipal costs to provide notice for the public hearing on the study, and, (3) related municipal staff support. Since the statute places a cap of $40,000 on the entire reimbursement, the statute directs the municipality to "ensure that the $40,000 fee will be sufficient to cover both the costs of the study and the costs" incurred by the municipality.

In the course of the legislative process of enacting the IGA, the issue of municipal costs was discussed extensively. The clear legislative intent was to ensure that municipalities incur no additional costs as a result of this legislation. Thus, "staff support" costs should be estimated and deducted from the overall $40,000 budget before the contract for the study is executed.

As the discussion in Question 9 above indicated, municipalities may end up amending their local ordinances to incorporate the provisions of the IGA. It is not clear if these "implementation" costs are reimbursable by the State.

**SPO Question 10. My town does not require any kind of land use permit. What are our obligations under the law?**

The municipality should consult with its legal counsel to determine what steps it needs to take to implement the Informed Growth Act.

MMA Supplement: By its terms, the IGA is relevant only in the context of a "land use permit application." The IGA definition of land use permit includes: "a municipal permit or approval required by a municipal land ordinance, site plan ordinance, subdivision ordinance, zoning ordinance or building permit ordinance or by the state subdivision law." If there is no local land use permit or approval requirement, there is no obligation to conduct a study.

**SPO Question 11. My application was filed with the town prior to the effective date of the Informed Growth Act. Is an economic impact study required on my project?**

The developer should consult with the municipality to determine what is required.

MMA Supplement: As a general rule, if the application is considered "pending", the IGA does not apply, if the application is not "pending", the IGA does apply.

Legislation applies prospectively unless it specifically contains a retroactive effective date. The IGA was not "emergency" legislation and did not contain a specific effective date, therefore the effective date will be September 20, 2007. Accordingly, the provisions of the IGA clearly apply to permit applications filed after September 20, 2007.

As for applications filed before that date, whether the IGA applies hinges on whether the permit application is "pending" as of September 20, 2007. Title 1 Section 302 of Maine's Statutes states that legislation does not affect actions "pending" as of the effective date of the legislation. There is case law on the topic of how newly enacted legislation affects "pending" permit applications. A developer should consult his or her attorney to see if the project is "pending" for purposes of the applicability of the IGA.

For very generalized purposes, an application is pending if it has been submitted and some substantive review has taken place. (See Table below.)

Keep in mind that the law specifically preserves home rule for municipalities. A municipality may adopt IGA-type ordinances and include in those ordinances retroactive effective dates. A retroactive ordinance could be enacted and applied to some pending projects, including projects for which a permit has been issued.

Below are additional questions on topics not discussed by the State Planning Office document.

**MMA Question 12 - The permitting authority must determine if a project will have an "undue adverse impact", what does "undue adverse impact mean"?**

MMA Answer to Q 12 – "Undue adverse impact" is defined in the IGA but the answer to this question is still unclear. The definition states that a project will have an "undue adverse impact" if the "estimated overall negative effects" of the project "outweigh the estimated overall positive effects" of the project with respect to a series of 12 specific factors. Those factors are:

The comprehensive economic impact study, must identify the economic effects of the large-scale retail development on:

1. existing retail operations;

2. supply and demand for retail space;

3. number and location of existing retail establishments where there is overlap of goods and services offered;

4. employment, including projected net job creation and loss;

5. retail wages and benefits;

6. captured share of existing retail sales;

7. sales revenue retained and reinvested in the comprehensive economic impact area;

8. municipal revenues generated;

9. municipal capital, service and maintenance costs caused by the development's construction and operation, including costs of roads and police, fire, rescue and sewer services;

10. the amount of public subsidies, including tax increment financing;

11. and public water utility, sewage disposal and solid waste disposal capacity.

The 12th factor is an environmental factor. It incorporates the existing "subdivision law" (30-A MRSA §4404), natural resource protection act law (Title 38 MRSA §480-D) and "site law" (38 MRSA 484) review factors into the IGA process. The IGA requires these factors to be considered, even if the provisions of these laws would not otherwise apply to the project.

To be clear, the statute only directs the permitting authority to make a determination of "undue adverse impact" it does not require the study to confront this issue. As the statute quoted above indicates, the study must only provide the "economic" impacts, not the "positive" or "negative" impacts.

No guidance has been provided to permitting authorities on how to determine whether a particular impact is "negative" or "positive".

Consider impact factor number 5 (impact on retail "wages"). The statute does not clarify if this analysis is on the wage rate or on total wages paid in the area. For example, say a large-scale developer proposes to pay wage rates that are below the existing average retail wage rate in the area and the study concludes this will bring down the average wage rate in the area. Further assume that the proposed establishment will have an impact on its competitors and cause them to lay-off some employees, but that total retail employment in the area will see a net increase.

In this very reasonable fact pattern, average wage rates are down but total wages are up due to overall higher employment levels. Whether the new development has a positive or negative impact on the "wage" factor depends on how wages are defined (rate versus total).

Furthermore, the statute doesn't identify the perspective the reviewing authority is supposed to take when making the determination of "positive" or "negative" impact. Again referencing a situation where the average wage rate goes down in an area. Is a declining wage rate a "negative" impact?

A declining wage rate could clearly be a negative from the perspective of area retail workers and potentially other workers in similar occupations. But, from the perspective of small local business owners who pay area wages this would arguably be a positive impact. From the perspective of retail consumers (who ultimately cover the cost of those wages when they buy products) this downward impact on wages is also arguably positive. From the perspective of the income-tax-collecting government, the issue is not wage rate, but total wages. So, is a "negative" impact a value-judgment, a balancing of perspectives or a simple math calculation (e.g., all declines are negative)?

The first impact factor is to review the impact of the project on existing retail operations. Suppose a proposed retail project will put an existing retailer out of business. Is this a negative impact? At first blush it would appear to be negative, and in many ways would be. But from an "economics" perspective this outcome is a natural result of free-market capitalism. Is the impact of competition in a free-market a "negative"? Is it a "positive"?

It appears that one of the biggest challenges for permitting authorities is coming to some agreement about which economic impacts are positive and which are negative.

The statute does not appear to prohibit the municipality from contracting with the qualified preparer of the study to offer an opinion about whether a project will have an "undue adverse impact". Or the municipality could simply ask the preparer to indicate whether he/she believes a particular economic impact is positive or negative. Obviously, if a municipality chooses to do this, it should make sure that the qualified preparer discloses all assumptions in the study.

**MMA Question 13 – Many of the impact factors, particularly factors 1-6, do not seem to deal with traditional land use issues such as traffic, building height and environmental impact; instead, they deal with economic issues of wages, competitors and employment. May a town deny a land use permit because a proposed business is going to have an "adverse" impact on a competitor?**

MMA Answer to Q 13 – The constitutionality of statutes that incorporate private-sector economic factors into land use permitting decisions has been questioned. The state has not offered a legal opinion on the constitutionality of the IGA to the municipalities that they can then use to defend the law the state is now requiring municipalities to enforce. The state Attorney General is not required to join a lawsuit which questions the constitutionality of this statute.

**MMA Question 14 - If the qualified preparer of the study offers an opinion that a proposed development will have an "undue adverse impact" must the local permitting authority deny the permit?**

MMA Answer to Q 14 – Not on the basis of that opinion alone.

The statute is clear that the permitting authority must "issue a finding" of its own as to whether the proposed development project will cause an undue adverse impact. If the permitting authority determines that the project will cause an undue adverse impact, it may not issue the permit.

The statute directs the permitting authority to consider three sources of information before making its determination: (i) the study performed by the qualified preparer, (ii) other materials submitted to the authority, and, (iii) information provided during the public comment.

If a study author believes that a project will have an “undue adverse impact” it can be anticipated that the applicant will offer critiques of that study. It should also be anticipated that whatever conclusion the qualified preparer reaches, if any, members of the public will offer critiques and possibly alternative studies.

**MMA Question 15 - If a municipality determines that a project will not cause an “undue adverse impact” who may challenge that decision in court?**

MMA Answer Q 15 – The issue of who has “standing” to appeal a decision of a permitting authority is governed by local ordinance, state statutes and case law. A determination of standing is very fact specific. That said, the general rule of thumb is that a citizen who will suffer a “direct and personal injury” or “particularized injury” as a result of the decision and who has participated in the proceedings of the permitting authority has standing to appeal.

The cases discussing “particularized injury” often focus on the fact that the person appealing will suffer because of the proximity of the appellant’s property to the proposed project. Thus, abutters are almost automatically granted standing in land use disputes, provided they participated in the permit review process.

Given that the apparent focus of the IGA is to protect the economic interests of individuals and businesses engaged in retail activities, even if they are located in abutting municipalities, the IGA would appear to confer standing on many individuals who would not qualify under existing standing analysis.

However, the legislature seems to have anticipated the possibility of expanded standing and specifically addressed the issue in section 4370 of the statute. This provision states that standing is not conferred simply because the IGA offers individuals an opportunity to comment on the impact study. Thus, it appears that the legislative intent is for a “standing” analysis to follow existing case law relative to land use permits. Yet, this too is not entirely clear.

**Conclusion**

The Informed Growth Act does not apply to most development projects and so the agendas of planning boards and boards of appeal should not be greatly disrupted.

When it does apply, however, the obligation to make a determination about “undue adverse economic impact” on wages, employment, benefit levels, demand for retails space, etc. is going to be difficult. The permitting authority is also open to being sued to defend that determination and even to defend the constitutionality of the underlying state statute. Permitting authorities should proceed with caution into the state of being “Informed.”

This material is for general informational purposes only. It is not legal advice. Municipal officials should consult with their attorneys on the impact of this and other legislation in their communities.