

**TOWN OF OLD ORCHARD BEACH  
TOWN COUNCIL WORKSHOP  
TUESDAY, JANUARY 13, 2009 - 7:00 P.M.  
TOWN HALL CHAMBERS**

**A Town Council Workshop of the Old Orchard Beach Town Council was held on Tuesday, January 13, 2009 in the Town Hall Chamber. The Chairman opened the meeting at 7:01p.m. The Workshop will discuss the 80K Rule – The Maine Rules of Civil Procedure and Pay-Per-Bag – Recycling**

**Present:** Chair Sharri MacDonald  
Vice Chair Robin Dayton  
Councilor Mike Tousignant  
Councilor Laura Bolduc  
Town Manager Steve Gunty  
Assistant Town Manager V. Louise Reid

**Absent:** Councilor Shawn O'Neill

**The following agenda item was tabled at the previous Council meeting so that it could be discussed at this Workshop.**

**# 5103 Discussion with Action: Approve Code Enforcement Officer as Representative to the Town in Initiating District Court Actions under Rule 80K for certain Code Violations without Assistance of Town Attorney.**

**As a result of the discussion the following motion was made to Table:**

**MOTION: Councilor Tousignant motioned and Councilor Bolduc seconded to Table Agenda Item 5103 to Approve Code Enforcement Officer as Representative to the Town in Initiating District Court Actions under Rule 80K for certain Code Violations without Assistance of Town Attorney.**

**VOTE: Yea: Councilors Tousignant, Bolduc and Chair MacDonald/  
Nea: Councilor Dayton**

**Background: The following information has been provided by the Code Enforcement Officer.**

**RE: Request to represent the Town in initiating District Court action for certain Code violations without the assistance of the Town's Attorney.**

**Court action is always the absolute last resort in settling code violations. Voluntary compliance is always the goal, but in some cases, even after exhaustive efforts, this is not possible. The following is an outline of a fast, inexpensive solution to these challenges.**

The Maine Rules of Civil Procedure were amended to include Rule 80K. Rule 80K provides a simpler, speedier and less costly procedure for the prosecution of land use violations. The system authorizes certified non-lawyer employees (as well as lawyers) to represent municipalities, the ("DEP") and the Maine Land Use Regulation Commission ("LURC") in the prosecution of land use violations.

The Following is a list of the violations that can be handled through Rule 80K:

- Subsurface wastewater disposal rules adopted by the Maine Department of Health and Human Services;
- Local land use and zoning ordinances and other local ordinances, e.g., junkyards, automobile graveyards, electrical installations, plumbing, subsurface waste water disposal;
- The subdivision law;
- Laws pertaining to public water supplies;
- Laws administered by health officials;
- Laws pertaining to fire prevention and protection;
- Laws pertaining to the construction of buildings for the physically disabled;
- Local building and housing codes;
- Shoreland zoning ordinances;
- Laws pertaining to harbors;
- Natural resources protection laws;
- The state junkyard and automobile graveyard statute.

I have had this certification for nearly two decades and have represented Maine communities including Old Orchard Beach in District Court. Rule 80K provides a "Summary Procedure," which means it moves faster than other court proceedings. The violator can answer the Complaint orally in court rather than in writing, and the court can decide the main issues of the case with a minimum amount of formality. That reduces the time and expense involved, without sacrificing the due process rights of the person accused of the violation.

As we learned with a recent Town case, the Attorneys costs quickly reached \$10,000.00 and the Court awarded about 25% of that to the Town. These costs continue to escalate as the case moves forward. This expense would not have occurred had we used this process. Attached is a copy of my Certification and the empowerment letter that the Town Council signs to authorize my representation in these matters.

**MIKE NUGENT:** He gave a very thorough reasoning for this agenda item and also the ability of the Town to save a great deal of money on the attorney fees that would be required if the attorney had to handle issues.

**COUNCILOR TOUSIGNANT:** He suggested that this be tabled so it could be brought up at a Workshop.

Our legal counsel, Chris Vaniotis, also provided this additional information to update the Council on this issue:

I am responding to your January 8<sup>th</sup> e-mail request that I provide some analysis of the pros and cons of authorizing the Code Enforcement Officer to prosecute land use violations in

the District Court under Rule 80K of the Maine Rules of Civil Procedure. I am going to respond in a narrative fashion rather than setting up some sort of pros and cons comparison table because, in my view, there are very few disadvantages.

First, let me provide a little bit of background on why Rule 80K exists. Under Maine law, the general rule is that a municipality cannot represent itself in court. For a municipal official, such as a code enforcement officer, to represent the Town would constitute unauthorized practice of law and be illegal. However, the Legislature has made a few exceptions to that general rule, and Rule 80K is one of those exceptions. It allows the Town to prosecute a land use violation through its code enforcement officer, without the need for having legal counsel involved. The Legislature enacted the statutes which resulted in Rule 80K in the early 1980s in order to give municipalities an expedited and inexpensive way to prosecute land use violations.

Rule 80K is most useful in cases where the violations are fairly straightforward and the property owner/violator is simply ignoring the Town's efforts to achieve compliance. I think the key to successful use of Rule 80K by a code enforcement officer is the code officer's ability to exercise some judgment about which cases fall within his or her comfort level, and which might be too complicated legally or procedurally for the CEO to go it alone. Note that the code enforcement officer can always consult with the Town's attorney and can always bring the Town's attorney into the case if the circumstances warrant. Note also that under the Freedom of Access Act, the code enforcement officer involved in a Rule 80K case can discuss it in executive session with the Town Council, in the same fashion as could an attorney prosecuting the case.

Saving on legal fees in the prosecution of land use enforcement cases is something which I strongly encourage. I would much rather see the Town's resources spent on matters where legal expertise is really needed and we can provide unique value. Prosecuting non-complex land use cases when the Town has a code enforcement officer qualified to appear in court is not the best use of the Town's legal resources.

There are some potential problems. Sometimes a code enforcement officer will be too close to a situation or to the parties involved and may therefore lack objective perspective. And sometimes a code enforcement officer could misjudge the complexity of a case or the aggressiveness of the property owner in defending the case. Those potential problems could be avoided by instituting a practice of having the code enforcement officer consult with legal counsel before bringing a case.

The Town Council also should keep in mind that authorizing the Code Enforcement Officer to prosecute Rule 80K actions is not a permanent decision. The Council can always evaluate the effectiveness of the mechanism and make changes as needed.

Also in attendance were members of the former Recycling Committee including Bill Farley who gave a historical account of the former Recycling Committee and the obstacles they felt were placed in front of them to get their ideas accepted. Also attending were Archie St. Helaire and Ken Blow of Blow Brothers, our present waste disposal vendor.

Discussion continued on “pay per bag,” although known as “pay s you throw.” One of the reasons for the failure of recycling is that no incentive is given beyond an environmental concern which for a few is vital. Because individuals in most communities pay for collection and disposal services through property taxes (or in some cases, through a flat fee), they pay the same amount no matter how much they throw away. The program “pay-as-you-throw” or “pay per bag” is another program that is gaining interest throughout the country. This is a unit based or variable-rate pricing program which provides economic incentives for people to reduce the amount of waste they generate. Households are charged for waste collection based on the amount of waste they throw away in the same way they are charged for electricity, gas and other utilities. In some communities, “pay-as-you-throw” is based on volume: residents are charged for each bag or can of waste they generate. Some base it on the weight of the trash. Either way this gives everyone an extra push to prevent waste and addresses environmental concerns with our wallet. “Pay-as-you-throw” programs have environmental and economic advantages and are often more equitable for residents. Some communities have reported reductions in waste amounts ranging from 25 to 35 percent on average. Less waste and greater recycling mean that fewer natural resources are used; less energy is consumed; and less pollution is created. Landfill space is used at a slower rate reducing the need to site additional facilities. Adjustment of purchasing habits to favor products that will result in less waste also is a plus. In addition disposal costs go down because they often have more recovered materials and less waste to dispose of and these programs can yield savings in waste transportation expenses and potentially greater revenues from the sale of collected recyclables. The bold truth is that although they may not realize it, residents pay to throw away trash. Whether they pay through their taxes or with a flat fee, those who generate less and recycle more are paying for neighbors who generate two or three times as much waste. Pay-as-you-throw is more equitable; residents who reduce and recycle are rewarded with a lower trash bill. There are, however, disadvantages to pay-as-you-throw. Some feel that illegal dumping will increase however this is a misnomer. Offering citizens this program as well as composting for yard trimmings and other programs are, however, positive approaches. The Councilors and those attending discussed a wide variety of issues. Traditionally residents pay for waste collection through property taxes or a fixed fee regardless of how much or how little trash they generate. The pay-as-you-throw breaks with tradition by treating trash services just like electricity, gas and other utilities. Households pay a variable rate depending on the amount of service they use.

The bottom line of the discussion was that communities with programs in place have reported significant increases in recycling and reductions in waste, due primarily to the waste reduction incentive created by the pay per bag program. It is, everyone agreed, the most effective and efficient way to assure that people recycle. It is an effective tool for

communities struggling to cope with soaring municipal solid cost waste management expenses. Well-designed programs generate the revenues communities need to cover their solid waste costs including the costs of such complementary programs as recycling and composting. Residents benefit too, because they have the opportunity to take control of their trash bills.

One of the most important advantages that was discussed is the inherent fairness to this program. When the cost of managing trash is hidden in taxes or charged at a flat rate, resident who recycle and prevent waste subsidize their neighbors' wastefulness. Under the pay per bag program resident pay only for what they throw away.

Other information provided that evening was material provided by our present vendor and also Ecomaine, a recycling vendor. They are presently working on a spot market single sort rate at the beginning of the month. Spot Market Single Sort is for hauler and/or commercial material not subject to revenue sharing under a Recycling Associate member agreement. This rate is announced in advance of revenue sharing calculations which are calculated after the close of the current month. Right now their fees include OCC -\$30 charge per ton; Newspaper - \$50 charge per ton; Mixed Paper - \$50 charge per ton; Co-mingled Containers - \$50 charge per ton; and Spot Market Single Sort - \$50 charge per ton.

A report was provided by Jetta Antonakos in which she indicated that around 143 towns use the pay-per-bag-as-you-throw system. Some of those communities are North Berwick, Portland, Kennebunk, Wells and Ogunquit. Bath also has recently instituted this program. She also provided information on surveying residents. A great deal of time was also spent on discussing the need for educating the citizens on recycling whether it be through post card, newspaper ads, through the schools, word of mouth, etc.

The BBI contract ends this April with the option to extend if necessary or desired. The change over to single stream came about approximately six months ago. As of January 2009 the per ton tipping fee is \$66.23 per ton. The only fees Old Orchard pays for recycling is for curbside pickup and if BBI picks up recycling from the transfer station they charge us for the hauling fee.

Reemphasized was that at the present citizens in Old Orchard can fill two trash barrels for their weekly trash without paying. If they want more they must purchase the blue town bag for \$1.50 per bag and these are available at the Transfer Station and the Town Clerk's office. Residential recycling in Old Orchard Beach average slightly less than 15 percent. About 460 tons of material is recycled each year in the Town. It was estimated that with the pay per bag system we might recycle close to 40%. The system encourages people to recycle because if the fewer trash bags they use the less they have to spend on the bags. Although in recent years disposing of recycling was much cheaper than disposal of waste and was at times a money maker but co-mingled recycling now costs \$50 a ton to dispose of and other waste costs \$48 a ton to dispose. Also discussed was the time frame for implementing this program.

**Respectfully Submitted,**

**V. Louise Reid  
Town Council Secretary**

**I, V. Louise Reid, Secretary to the Town Council of Old Orchard Beach, Maine, do hereby certify that the foregoing document consisting of six (6) pages is a true copy of the original Minutes of the Town Council Workshop of January 13, 2009.**

**V. Louise Reid**