

Cumberland County Charter

PREAMBLE

We, the people of Cumberland County, Maine, in recognition of the dual role of the County as an agency of the State and a unit of local government, and in order to avail ourselves of self determination in County affairs to the full extent permissible under the Constitution and laws of the State of Maine and the United States of America, by this Charter confer upon the County the following powers, subject it to the following restrictions, and prescribe for it the following procedures and governmental structures except as otherwise proscribed by law:

I: AUTHORITY

- 1.1 **Name:** The name of the County as it operates under this Charter shall continue to be Cumberland County, Maine, (hereafter “County”).
- 1.2 **Nature and Legal Capacity:** From the time this Charter takes effect, the County shall continue to be an agency of the State and a body politic and corporate and shall be vested with all rights and powers of local self-government which are now, or hereafter may be, provided by the Constitution and laws of Maine and this Charter. In addition, it shall be vested with all the rights and programs from the Federal Government that are available either directly or through the State.
- 1.3 **Boundaries:** The external boundaries of the County are prescribed by state law
- 1.4 **Elected Positions:** Pursuant to the Constitution and laws of the State of Maine [Section 3, article 4 of Administration], the County shall have an elected Board of County Commissioners and the following elected official positions. If authorized by State law, any and/or all of following elected official positions may be permanently transferred to appointed, professional positions by a majority vote of the County electorate.
 - 1.4.1 Sheriff (listed in state constitution)
 - 1.4.2 Judge of Probate (listed in state constitution)
 - 1.4.3 Register of Probate (listed in state constitution)
 - 1.4.4 District Attorney (listed in state constitution)

2: POWERS AND DUTIES

- 2.1 **General Grant of Powers:** The County shall have those powers, duties and functions granted or allowed by the Constitution and laws of the United States of America or the State of Maine as fully as if each power were comprised in that general authority and were specifically granted by this Charter. The County shall have the necessary general police powers to assist its citizenry with their safety, health, education and general welfare and it shall avail itself of any and all powers invested by home rule to the advantage of its citizens. In addition, it may utilize all the laws, statutes and options available to private enterprise that are not in conflict with State Statues. All these powers are to be interpreted broadly.
- 2.2 **Transfer of Powers:** Whenever a governmental, public or non-profit entity requests a transfer of any or all privileges, powers, authority or functions to or from the County, the Board of County Commissioners (hereafter “Board”) may in its sole discretion arrange for a cooperative transfer based upon a contractual or governmental agreement. This Charter recognizes that various Governmental Entities and Special Districts of the County also have rights, powers and functions within the County.

2.3 Intergovernmental Cooperation: The Board may, in the best interest of the County citizens, contract for one or more functions of the County to be performed in cooperation with or transferred to one or more governmental, public or private entities.

2.4 Division of Powers: This Charter establishes the separation between legislative and administrative branches of the County government:

2.4.1 The Board by order shall create and adopt Bylaws, administrative codes and policies and any other governance and procedural documents necessary for the County.

2.4.2 The County Manager shall be responsible for the execution of those orders and the administration of all County entities, services and functions.

2.5 Construction of Services: The powers granted by this Charter shall be construed broadly in favor of the Charter form of government enabling the County to implement programs and services for other governmental entities, non profit organizations and its citizens directly while avoiding the creation of special districts or other legal entities to accomplish these programs.

2.6 Procurement: The Board shall have the authority to procure items and services from and contract with the most responsive, responsible vendor and may utilize a bias towards organizations located within the County per the bylaws, except as required by State law.

3: BOARD OF COUNTY COMMISSIONERS

3.1 Composition:

3.1.1 Number of County Districts: There shall be five (5) districts, with a single Commissioner representing each district.

3.1.2 Construction of Districts and Decennial Reapportionment: Within forty five (45) days of receipt of each decennial US Census data, the County Commissioners shall request that the State Apportionment Commission prepare a description of each of the geographical districts to ensure the division of the County into contiguous and nearly equally populated areas. Each apportionment shall start as a new construct within the County's boundaries and with each District following existing municipal boundaries insofar as is possible. The creation or elimination of Districts shall not disqualify a standing Commissioner from serving out a term.

3.2 Terms: Each County Commissioner elected shall serve four (4) years, beginning on the First day of January after his or her election, and continuing after such term until his successor is elected and qualified. The terms shall be reasonably staggered. No Commissioner may serve more than three (3) consecutive terms.

3.3 Qualifications:

3.3.1 Residence: An individual is eligible to be nominated and elected to the Office of County Commissioner only when they are a resident of the District from which nominated and a registered voter of the County.

3.3.2 Non-residence: The office of any member of the Board shall become immediately vacant when the commissioner ceases to be any of the following: a resident of the district from which elected except as provided in Section 3.1.2; a registered voter of the County; any other cause as provided by this Charter or by the Constitution and laws of the State.

3.3.3 Ineligible: Upon election, a County Commissioner is immediately ineligible to serve in any other elected or appointed office as provided by this Charter or by the Constitution and laws of the State, except as follows:

3.3.3.1 Dual Offices: No one shall hold elective or appointive office in two governmental entities if money and/or resources are exchanged between them except where clearly authorized by the Bylaws or pursuant to an agreement under the Inter-local Cooperation Act.

3.3.3.2 Time Restriction: For a trailing period of 18 months, no former Commissioner shall hold any compensatory or appointed County position and must obtain written authorization from the County Manager approved by the Board to be employed by an organization having any business relationship with the County.

3.4 Vacancies: If a seat on the Board becomes vacant more than eight (8) months prior to the next November general election, the Board shall appoint a qualified person (as defined in Section 3 above) to fill the vacancy until the next November general election, at which time a qualified person will be elected to fill the remainder of the term.

3.5 Exclusion: After due process of formal charges and a hearing, and upon finding that a Commissioner-elect is not entitled to a seat because of a failure to meet the requirements in section 3.3.1 or 3.3.2., or if a Commissioner-elect was not “duly elected,” the full Board, by a simple majority vote, may deny the Commissioner-elect a seat on the Board.

3.6 Censure and Expulsion: After due process of formal charges, a hearing and upon a formal vote on a resolution agreed to by a majority plus one of the full Board, Commissioners may be involuntarily removed from office before the normal expiration of their Charter terms by an “expulsion” from the Board of Cumberland County Commissioners. The Board may determine the Rules of its Proceedings and punish by immediate expulsion Commissioners for non-attendance, disorderly behavior and moral turpitude with the concurrence of a majority plus one of the full Board.

3.7 Compensation: Changes in salaries and available benefits of all commissioners shall be set by the Board and approved by a majority plus one vote of a full Finance Committee; said salary shall constitute full compensation for all services. Reimbursement for reasonable expenses incurred in performance of their duties may be allowed upon formal review and approval by the Board.

3.8 Powers of the Board: The Board shall be the policy determining body of the County. The Board may exercise all the powers singularly and/or jointly granted to the County and by this Charter, by local governmental entities, public and nonprofit entities or by its voters.

3.8.1 Specific Powers: The Board shall appoint by a majority of a full Board and remove by a majority plus one vote of a full Board:

3.8.1.1 The County Manager, Treasurer, Register of Deeds, Auditor and Commissioner’s Attorney, as well as such of those offices set forth in Section 1.4 that may become appointive.

3.8.1.2 Other Appointments: The County Manager shall follow the process as prescribed in the Bylaws and may present his appointments to the Board for their confirmation.

3.8.1.3 Finance: In order to ensure transparency, the Board shall require the highest professional standards for its accounting and for the comprehensive annual financial report as prescribed in the Bylaws.

3.8.1.3.1 Budgets: The County Manager shall present to the Board the full annual County budget for their review, oversight, and endorsement prior to a public presentation. This shall include the review of all the budgetary requests including salaries and the final budgetary determinations and appropriations for all County governmental operations and functions. Ratification of the budget shall require a majority vote of a full Board.

3.8.1.3.2 Revenues: The Board shall apply for available public and private grants to assist the needs of citizens, to provide required services and to fund capital improvements; they shall establish and charge reasonable fees and assessments to

offset all expenditures; in addition and pursuant to State law, they shall appropriate funds as necessary to support their budget and pay debt service.

3.8.1.3.3 Financial Instruments: The Board is authorized to utilize any and all financial instruments that create an advantage for serving its citizens.

3.8.1.3.4 Audit: The Board shall cause independent audits by a certified public accountant of all government operations and functions of the County annually and as the Board deems necessary.

3.8.2 Other: The Board may investigate the affairs of County Government, and shall be the judge of the election and qualifications of its members.

3.8.3 Committees: The Board may create and abolish such committees as it deems necessary to assist in the performance of its duties, may appoint the membership necessary and may serve as ex officio committee members. A committee shall be a Standing Committee or an Ad Hoc Committee. All committees shall have a clearly written charge and have their budgets approved by the Board. At the Annual Meeting, the Board shall review and vote to authorize each Ad Hoc Committee or by default they shall be abolished.

3.8.3.1. Standing Committees: Standing Committees are named County committees that may have an ongoing operating and capital budgets; their governance is described and referenced in the Bylaws.

3.8.3.2 Ad Hoc Committees: Ad Hoc Committees are temporary committees developed for the County by its Board or Administration that perform limited, singular assignments generally of limited duration, less than 18 months. They have neither an ongoing operational nor a capital budget and are not part of the Bylaws.

3.9 Board Organization: At the annual Board meeting, determined by the Bylaws, the Board shall elect from among its members a chairman and a vice-chairman to serve as such at its pleasure and present its complete table of organization. The chairman shall preside over the meetings of the Board, have a vote on all questions before it, and have authority to preserve order at all Board meetings. The Rules of the Board shall be determined in the Bylaws.

3.9.1 Bylaws: The Board shall prepare Bylaws that sets forth the County's rules of governance, their procedures and rules for change. At least decennially, Bylaws shall be formally reviewed by an independent group of the electorate selected by the Commissioners, one per District.

3.9.1.1 Bylaw Changes: The adoption, amendment or repeal of a Bylaw shall require a reading at two (2) formal Commission meetings and the concurrence of the majority plus one vote of the full Board.

3.9.2 Rules: The Board shall adopt rules of parliamentary procedure and create Board sub-committees as is necessary for the orderly transaction of its business.

3.10 Meetings:

3.10.1 Regular Meetings. The Board shall meet regularly and publicly in the County at least once each month and for eleven (11) of the twelve (12) months in the year. The Board shall provide for the manner, time and place for holding all regular Board meetings, except a regular meeting shall be scheduled and held in each Commissioner's district at least biennially.

3.10.1.1 Quorum: A majority of a full Board constitutes a quorum and the required number of votes to act upon a motion, except as set forth herein. A lesser number or the County Manager may only adjourn the meeting to another place and time.

3.10.1.2 Special Meetings. Special meetings may be held at the call of the chairman or three

shall be given of the time, place and purpose of the meeting in accordance with the procedures established by the Board's Bylaws.

Actions of the Board at special meetings on matters not included in the notice of the meetings shall not be effective until approved at a regular meeting or at a special meeting for which the action was included in the notice.

3.10.1.3 Emergency Meetings: An emergency meeting of the Board may be called at the Chair's discretion; if Commissioners are not able to physically attend, the communications and votes of such may be transmitted by any electronic device. A complete record of the meeting, the Chair's justification for such action, and a recorded roll call vote shall be expressed, vetted and read into the record of the next formal Board meeting.

3.10.1.4 Non-meetings: Chance meetings or planned social gatherings of the Board members, at which no discussion, action, vote, or poll of County business is taken, do not constitute public meetings; however a reasonable public calendar of such events must be presented at the following Board meeting.

3.11 Bonding: The Board shall designate which officers and employees shall be bonded and fix the amount and approve the form of the bond.

3.12 Records. The Board of County Commissioners shall cause a public record of its proceedings to be kept in accordance with the Bylaws; a written copy of such records shall be available to the public prior to the next formal meeting and maintained by the County Clerk. The individual votes on questions before the Board shall be recorded.

4: ADMINISTRATION

4.1 General Provisions: All functions and duties required of the County or County officials (see 2.1) by this Charter shall be the responsibility of the Board of County Commissioners. Duties and functions shall be distributed among such committees, departments, offices and agencies as the law, the Board or this Charter may establish. All entities, services and functions are under the direction and the supervision of the County manager, subject to the approval and control of the Board of County Commissioners or through its committee structure except as provided by law. The Board has the obligation to use its powers to operate the County in an optimal businesslike manner and to provide services that are in the best interest of its citizenry.

4.2 County Manager: The County manager shall be appointed solely on the basis of his executive and administrative qualifications.

4.2.1 Administration. The County Manager shall carry out the Board's policies and be delegated with and responsible for the County's entire management functions, including planning, organizing, staffing, direction and control; in addition, the County Manager is responsible for the preparation of and enforcement of personnel policies, administrative codes and Bylaws as created by the County Commissioners. The County manager shall assume responsibility for all County elected, appointed and professional positions and their entities, services and functions and may delegate such by the agreement of the Board except as provided by law.

4.2.2 Appointments: All administrative officers and employees of the County other than elective administrative officers and those designated in Section 3.8.1.1 shall be appointed by the County Manager. The qualifications for such an appointment or position shall be on a professional basis and may be prescribed by the County Commissioners.

4.2.3 Administrative Code. The County Manager shall prepare an administrative code that shall set forth the committee and departmental organization of the government and the nature and scope of each together with all required rules and procedures for their operation and in addition the required personnel procedures and regulations. The administrative code shall be submitted to the Board for adoption, review, amendment and repeal. It may be formally amended or repealed by a vote of the

reviewed by an independent group of the electorate selected by the Commissioners, one per District.

4.3 Organizational Structure: The Board and/or the County Manager may from time to time establish additional administrative departments, combine any two or more administrative departments into a single such department, separate departments thus combined, abolish any administrative department and prescribe the duties and functions of any administrative department. A function of the County prescribed by State law but not allocated to any County officer or agency shall be allocated to such department or committee of the County as the Board shall determine.

5: FINANCE

General Provisions:

5.1 Budget: The Board of County Commissioners is responsible for the review of the County Manager's preliminary budget, its submittal to the County's Finance Committee (FC) and for the preparation and presentation of the final annual operating budget and capital program to their citizens prior to its adoption. The annual County budget process shall be transparent and as detailed as necessary to ensure a knowledgeable understanding by the electorate of the entire County's expenditures and revenues; it shall be described in the Bylaws and shall receive the oversight of the County's FC. A copy of the accepted final budget document shall be filed with the State in accordance with State law.

5.2 Fiscal Year: The fiscal year of the County shall be determined in the Bylaws.

5.3 Appropriation Authority: The County Commissioners shall have the authority to appropriate money according to their budgetary requirements; in addition, the County shall have all taxing authority prescribed by the State Constitution and the authority to present any and all tax information to its electorate.

5.4 Finance Committee (FC)

5.4.1 Committee Membership: Representatives to the FC shall be municipally elected officials from the Commissioner District in which their municipality resides.

Municipally elected officials of each Commissioner District may appoint two (2) representatives to serve on the FC for a three (3) year term; a representative shall not serve more than two consecutive terms. No municipality shall have more than one representative unless it serves more than one half (½) of a District's population. A District Commissioner may appoint representatives to fill FC vacancies occurring 120 calendar days prior to the commencement of the Board's fiscal year. A FC vacancy shall immediately occur when representatives no longer qualify for membership.

5.4.2 Finance Committee Meetings: On the call of the County Commissioners or at least 90 calendar days prior to the commencement of the fiscal year, the FC shall meet. The FC shall select a chairman from its full membership. It shall also appoint such other officers as it may deem necessary and create such sub-committees as may be necessary to perform its duties.

5.5 General Budget Procedures: The County Commissioners shall present their preliminary budget to the FC with dispatch and at least fifty five (55) business days prior to the end of their fiscal year. The budget shall also present a 3 year estimated revenue projection. The County, through the Board, shall provide the Committee with all the reasonable resources necessary to scrutinize the budget, transparency being the imperative. The FC shall act on the budget with dispatch and take action no later than thirty (30) business days prior to the end of the County's fiscal year or the Board's preliminary budget shall be considered FC endorsed. Upon receipt of the FC's provisional Budget and at least ten (10) business days prior to the end of the County's fiscal year, the Commission shall adopt their final budget. The Board may modify and reinstate any and all of the proposed FC's changes by a recorded majority vote of a full Board; the Board shall provide written definitive reasons to the public for their revisions.

5.6 Operating and Capital Budget Process: Annually each County entity shall submit a detailed budget including revenues as may be required by the County Manager.

5.6.1 Preparation: The County Manager shall compile all operational and capital budget requests, prepare a preliminary budget, including revenue estimates therein and submit the same to the Board of Commissioners for their review and approval. The operating budget shall include a three (3) projection of total revenues based upon expressed assumptions; the capital program shall include a five (5) year projection of capital programs and bonding.

5.6.2 Notification: Prior to the Commissioners adopting their preliminary budget, they shall notify the Finance Committee (FC) and hold one or more public hearings throughout the County and present the Manager's preliminary budget.

5.6.3 Budget Modifications: After said hearing(s), the Commissioners shall review the preliminary budget as submitted by the County Manager, together with the Manager's recommendations, and make such additions, deletions or modifications as they deem necessary to insure the proper fiscal performance of County government and submit the preliminary budget to the FC.

5.6.4 Provisional Budget: After deliberation of the Board's preliminary budget, the FC may accept or amend it by a majority vote of a full Committee; the changes shall be limited to gross department amounts and shall relate solely to the proposed appropriations paid by County taxes. Once the review is completed it shall be presented to the Board of Commissioners at a public meeting.

5.6.5 Annual Budget Acceptance: The Board shall meet to accept and/or modify the provisional budget. They may reinstate any or all of the proposed FC's changes to the preliminary budget by a recorded majority vote of a full Board; the Board shall provide written definitive reasons to the public for each of their revisions and decisions.

5.6.6 Unauthorized Budget: In the event the budget is not authorized before the start of a fiscal year, the County shall, until a final budget is adopted, operate on an interim budget which shall be no more than 80% of the previous year's budget.

5.7 Emergency Appropriations: Emergency appropriations may be made by the Board of County Commissioners; it requires ratification by a majority of the full FC. The chairman of the FC shall call a special meeting within seven (7) business days of the Board's action to formally ratify the emergency appropriation; non-action by the FC is ratification. If FC ratification is not obtained, then the Commission must go through the formal process per Section 5.6.5.

5.8 Borrowing

5.8.1 Revenue Securities: The Board shall have the authority to issue revenue bonds, notes or other securities and financial instruments that are totally project remunerated and shall not negatively affect the County's tax rate; each project shall be run as a profit center. The Board of County Commissioners may issue any form of tax, grant or bond anticipation certificate or note as authorized by 30 M.R.S.A. §401-A, or by the Constitution or general laws of the State.

5.8.2 Tax Securities: The Board of County Commissioners may issue any form of tax, grant or bond anticipation certificate or note as authorized by 30 M.R.S.A. §401-A, or by the Constitution or general laws of the State. Annually, the Board of County Commissioners shall have the authority to issue tax supported bonds, notes or other securities and financial instruments of the County up to 1/10 of one mil based upon the County's property valuation, or greater upon approval of the electorate in a County-wide referendum.

5.9 Transfer of Appropriations: To the extent permitted by its appropriation and within the last three months of each fiscal year, on request of the manager, the Board of Commissioners may transfer any unencumbered balance of an appropriation or portion thereof to another account, department, office, or agency of the County unless such funds were derived from income restricted to the specific purpose for which they were originally appropriated. Year end balances may be used to pay down debt if authorized by the Board of County Commissioners.

6: ELECTIONS

6.1 Nominations and Elections of County Officers: Except as this Charter provides to the contrary, the manner of nominating and electing County officers and the filling of vacancies shall be the manner now or hereafter prescribed by the laws of the State for nomination and election of County officers in general.

6.2 Partisan Elections: No provision of this Charter or orders adopted under its authority shall alter the partisan nature of the nomination and election of the elected Officers except as they may be amended by the laws of the State.

6.3 Nomination and Election of County Commissioners: The manner of nominating and electing candidates for County Commissioner shall be the manner now or hereafter prescribed by the laws of the State for the conduct of partisan nominations and elections.

6.4 Elections on County Referenda: Except as this Charter or State law provides to the contrary, the manner of conducting an election on referendum questions concerning the County shall be as prescribed by the laws of the State for an election in the County on any proposition.

7: GENERAL PROVISIONS

7.1 Effective Date: This Charter will become law thirty (30) days after the Governor has proclaimed that the charter adoption was approved by a majority of the legal voters in the County.

7.2 Amendments: This Charter may be amended by a majority of the County voters during the November General Election pursuant to the laws of the State of Maine.

7.3 Codification: Every 10 years the governing documents shall be codified (i.e. Charter, Bylaws, administrative codes and policy documents).

7.4 Charter Review: The Charter shall be formally reviewed by a Charter Commission at least every twenty five years.

7.5 Severability: If any part of this Charter is finally determined by a court of competent jurisdiction to be unconstitutional or invalid the remainder thereof shall remain in full force and effect.

8: TRANSITION PROVISIONS

8.1 Validity: Article 8, Transition Provisions shall be omitted in the final printed copies of this Charter after adoption, but this shall not impair the validity of acts under these sections.

8.2 Board: The County Commissioners in office at the time this Charter becomes effective shall remain in office for the remainder of their terms as members of the Board prescribed by the Charter; provided, however, that the powers, duties and compensation of said members shall be as set forth in this Charter.

8.3 Other Elected County Officers: Except for the Offices of District Attorney, Sheriff, Judge of Probate, and Register of Probate on the expiration of any other elected County Officer's term or the vacancy of said office, those offices shall become appointed.

8.4 First Election: At the November general election November 8, 2011, additional commissioners from those districts created by this Charter and unrepresented by the current membership of the Board shall be elected. The nomination and election of said new commissioners shall be in accordance with the provisions of State law relating to the election of County Commissioners except that candidates shall be nominated only by petition and all those so nominated shall appear on the ballot without party designation.

8.5 First Meeting: On January 9, 2012 at 7:30 p.m., the Board of County Commissioners shall meet at the County Courthouse. The newly elected Commissioners from Districts shall draw lots to determine the length of their initial terms, one of whom shall serve for only three (3) years and one of whom shall serve only one (1) year. Thereafter the Board shall elect a Chairman and Vice-Chairman, appoint a Temporary County Manager pending a permanent appointment, adopt such orders or resolution necessary to effect the transition of Government under this Charter and take such other action as may be deemed necessary by the Board or required by this Charter.

8.6 First Budget: The budget process detailed herein shall be followed for the fiscal year

8.7 Transition to New Charter Governance.

8.7.1 Effect on County Regulations: All existing orders, regulations, rules and resolutions of the County shall remain operative except where inconsistent or in direct conflict with this Charter or repealed or amended by the newly expanded Board of County Commissioners.

8.7.2 Existing Contracts and Bonds: All rights, actions, proceedings, prosecutions and contracts of the County or any of its departments, pending or unexecuted when this Charter goes into effect and not inconsistent herewith, shall be enforced, continued or completed in all respects as though begun or executed hereunder. All outstanding bonds issued by former governments including the Board of County Commissioners of Cumberland County and all special districts or authorities abolished or altered under this Charter are obligations of the County government; however, payment of such obligations and the interest thereon shall be made solely from and charged solely against funds derived from the same sources from which such payment would have been made had this Charter not become effective.

8.7.3 Existing Legislation: All legislation affecting the County consistent with this Charter and in force when it takes effect shall continue to be effective within the County until amended or repealed.

8.7.4 Bylaw Requirements:

8.7.4.1 Fiscal Year: The annual fiscal year is established as January 1st through December 31st, (See Section 5.2).

8.7.4.2 Revenue Security Requirements: The County shall maintain organizational control and shall not be in a subordinated financial position as long as they have majority owner interest, (See Section 5.8.1).

8.7.4.3 Procurement Requirements: The procurement of long term items shall be based upon a total life cycle analysis; the bias shall be based upon a reasonable and diminishing sliding scale of 2% to ¼ % of the total price, \$1,000 to greater than \$20,000,000 respectively. At least 50% of all contractor employees shall reside within the County (See Section 2.6).

8.8 Continuance of Officers, Employees

8.8.1 Rights and Privileges Preserved. Nothing in this Charter except as otherwise specifically provided shall affect or impair the rights or privileges of persons who are County officers or employees at the time of its adoption.

8.8.2 Continuance of Office or Employment. Except as specifically provided by this Charter, if at the time this Charter takes full effect a County administrative officer or employee holds any office or position which is or can be abolished by or under this Charter, he or she shall continue in such office or position until the taking effect of some specific provision under this Charter directing that he or she vacate the office or position.

8.9 Construction of Districts: Within 15 business days of the passage of the charter, the Board shall re-convene the charter commission to determine the geographical boundaries of the five (5) Commissioner Districts. The new districts shall be constructed within 45 business days or the County Commissioners shall determine such.