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Municipalities May Give Ordinances A Retroactive Effect

By Gary Wood, Esq., 1988

Please Note: Despite this article's original publication date, it remains a valid resource on the relevant subject matter. Recent cases and statutory changes are footnoted to reflect current law. (8/98)

In the case of *City of Portland et al v. Fishermen's Wharf Associates II*, Maine Supreme Judicial Court Decision #4746 (decided April 27, 1988) [This case is found in the *Atlantic Reporter* at 541 A.2d 160 (Me. 1988)], the Maine Supreme Court held that a municipal ordinance may contain a legally binding provision making the ordinance effective on the date that it is proposed rather than on the date that it is enacted. In reaching this ruling, the Court also held that such a provision in an ordinance overrides the statutory rule of prospective application of ordinances and statutes found in 1 MRSA § 302.

The facts of this case were that citizens initiated a proposed ordinance, pursuant to Portland's municipal charter, by filing that proposed ordinance with the municipal clerk on December 22, 1986. The ordinance specifically stated that it would apply to any applications commenced after that date if the ordinance was ultimately enacted by a vote of the city's legislative body. After that date, but before the enactment of the ordinance, the owners of Fisherman's Wharf filed an application for a permit to develop property within the zone that was the focus of the proposed ordinance: The owners of the property knew of the contents of the proposed initiated ordinance and its retroactive provision prior to the time that they acquired title to the property. In late April of 1987, the local planning board determined that the applicants were entitled to the permits that they sought under the then existing ordinances. One week later the municipality voted to pass the proposed ordinance under whose terms the proposed project would not be permitted.

The Court also ruled that the time and money spent by the applicants to obtain the permits required under the old ordinance were not expenditures that created any vested rights in the applicants. Finally, the Court concluded that, given the applicants' knowledge of the contents of the proposed ordinance, including its retroactive provision prior to acquiring title to the property in question and the lack of any evidence of bad faith or discriminatory treatment by the city or ordinance proponents, that the applicants had failed to demonstrate any vested rights based on equitable grounds.

The primary advantage of this ruling to municipalities is that it will allow them to propose ordinances and at the same time bar a last minute rush to the door by applicants who are trying to beat the restrictions contained in the proposed ordinance. If the municipal officers or planning board or citizens initiate a proposed ordinance that will ultimately have to be enacted by the municipality's legislative body, the ordinance should contain a provision making it effective on the date that it is proposed which should also be specifically identified in the ordinance. The proposed ordinance should be filed with the town clerk at the town office as well as posted in town. Its existence should also be noted in one or more newspapers with general circulation in the municipality in order to notify as many individuals as possible of the potential change in town law. To minimize any potential claims of vested rights based on equitable grounds, the municipality should send personal notice by mail to individuals or entities that purchase property in the

municipality. The municipal officers should then take whatever steps are necessary to bring the ordinance promptly before the voters, which in many municipalities will mean calling a special town meeting.

Municipalities should not use the fact that a time gap can legally exist between the effective date and the date of enactment as a disguised mechanism for slowing growth. Nor, as a general rule, should municipalities react to specific proposals by enacting ordinances aimed precisely at those proposals. Municipalities should continue to plan for future growth and development rather than simply react to growth and development on an ad hoc basis.

NOTE: The provision at issue in this case read as follows:
"(If enacted, the provisions of this ordinance) shall be applicable to all pending proceedings, applications and petitions commenced after December 22, 1986, which is the date of filing this initiative in the City Clerk's office of the City of Portland."