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PRESERVING MUNICIPAL WATERFRONTS IN MAINE FOR WATER-DEPENDENT USES: TAX INCENTIVES, ZONING, AND THE BALANCE OF GROWTH AND PRESERVATION

*Elizabeth C. Davis**

I. INTRODUCTION

The latter half of the 1990's saw the nation's wealth expand as in no other time. The stock market hit record highs as investing itself changed shape; no longer was the market a mysterious puzzle known only to those in the business. Until the latter 1990's the stock market was traditionally thought of as the realm of brokers, analysts, investment bankers and the very wealthy. But as the stock market began to rise, and the potential for wealth became more obvious, everyone from the grandmother down the street to middle school students were learning about the market and diving in to try and make money. The internet helped widen the investment circle as well, as more information became available more easily to the public, investing was made child's play by online brokerage houses. The "dot-com" frenzy hit the nation and stocks and the stock market became sexy; everyone was investing, and money was being made. As this unprecedented wealth hit the nation, Americans were eager to spend.

Throughout 1999 and into the new millennium, Americans were outspending their earnings as they had in no other time in history and the savings rate in America dropped dramatically. The low-point of this trend came in May of 1999, when the savings rate hit a historical low of -1.2%; it was the sixth consecutive month of 1999 that the savings index had been negative.¹ Although the rate had risen slightly by the end of the twentieth

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1. June of 1999 was the first time during the year that consumer earnings actually outpaced consumer spending, and the savings rate rose slightly, but remained in the negative at -1%. This trend continued throughout the end of 1999. Analysts do not predict that the trend will reverse any time soon as long as the stock market stays strong, and do not see reason for alarm. Instead analysts attribute it to a "wealth effect" brought on by the booming stock market: "As stock gains boost their incomes, consumers boost their spending. The

century, December's 1.5% rate was still the lowest ever recorded for that month. American earnings for the month rose 3%, but spending had jumped to 8%, a ratio that was indicative of the entire year. As the stock market continues to stay strong in the first half of the new year, there is no expectation that the trend will reverse. Americans continue to feel confident about their present and future financial security as they watch the stock market and see their portfolios grow.

New wealth was reinvested in the market, or spent on luxuries and larger homes. One popular investment was the second home (or third, or fourth), a place simply to retreat or spend summers. Popular among locations to invest in that second home was Maine, with miles of shoreline, amazing views, and a reputation for being a state that is relaxed and peaceful. Prices for Maine's shoreline real estate rose along with prices across the nation, but by comparison, many Maine properties were still a bargain. Encouraging investment in second homes were interest rates that were at a twenty year low at the end of the twentieth century; not only was there money available to buy homes, but financing them cost less than ever.²

wealth effect also means that many Americans may feel more comfortable saving little or no money, relying on future stock-market gains to help them meet their long-term financial goals . . . The decline in the savings rate is a rational response to the strength of the stock market." Yochi J. Dreazen, *Rate at Which Consumers Save Sinks to a Record*, WALL ST. J., Feb. 1, 2000, at A2; see also Christine B. Whelan, *June Personal-Income Growth Topped Spending* WALL ST. J., Aug. 2, 1999, at A2; Alejandro Bodipo-Memba, *Big Increase May Give Fed More Fuel to Lift Rates; Personal Income Up 0.4%*, WALL ST. J., June 29, 1999, at A2.

In September of 1999, however, the Wall Street Journal also reported that the Commerce Department was unveiling new methods for calculating the savings rate, a change that could mean that the "official personal savings rate is actually positive, not negative as the Commerce Department has been reporting in recent months. A negative savings rate means Americans are spending more than they are earning, and the figure has been widely cited as a sign of rare weakness in the current economic expansion." Jacob M. Schlesinger, *U.S. to Alter Calculations, Increasing Economic Growth, Productivity Levels*, WALL ST. J., Sept. 8, 1999, at A2. Although the new method of calculation was expected to perhaps revise the negative savings rates in 1999 to positive figures, the percentages were still expected to be at all time lows. See *id.*

2. Although mortgage rates hit their historical low in October of 1998, at 6.71%, current rates are still considered to be low by industry analysts, and are still low enough to encourage investors. See The Federal Reserve, *Mortgage Interest Rate* (visited November 27, 2000) <<http://www.federalreserve.gov/releases/H15/data/m/cm.txt>>. This is true even though the Federal Reserve, under the Chairmanship of Alan Greenspan, has raised the prime rate ten times since June, 1999, in order to slow the economy's pace. See The Federal Reserve, *Prime Rates* (visited November 27, 2000) <<http://www.federalreserve.gov/releases/H15/data/m/txt>>. The interest rate for a thirty year, fixed rate mortgage was 8.15% in April 2000, and the rate actually lowered throughout the year to 7.80% in October 2000. See The Federal Reserve, *Mortgage Interest Rate* (visited November 27, 2000) <<http://www.federalreserve.gov/releases/H15/data/m/cm.txt>>.

As more and more people came to Maine to look for a home by the water, with money available to pay dearly, or outbid other buyers for waterfront homes, prices rose to and beyond the million dollar mark for properties that had previously been valued at less than half that cost.³ Some older shoreline properties were being bought at a premium, then torn down to make way for new, larger homes, which would keep the assessed value and property taxes high.⁴

The effect of these rising shoreline prices on property taxes began to be seen in 1999, and had an outreaching effect not only on neighboring residential property, but also on working waterfront property that shared the

federalreserve.gov/releases/H15/data/m/cm.txt>.

3. For example, six waterfront properties in Southwest Harbor sold in 1999 for forty-seven to eighty-one percent more than their assessed value, triggering a reassessment of all properties in the town. See Samantha Coit, *Shore Property Owners Fight Tax Assessments*, BANGOR DAILY NEWS, Jan. 18, 2000, available in 2000 WL 4255761. Other examples include Freeport, where properties had sold for over fifty-percent of their assessed price, and Phippsburg, in which town property taxes on one waterfront home rose from \$6,700 to \$63,000 after nearby home sales had caused a reevaluation of shoreline property taxes in the area, and the assessed value of some properties rose three hundred percent. See Susan Rayfield, *Fisherman Seek Property-Tax Relief; Rising Taxes Threatens Waterfront Commercial Property, They Contend*, PORTLAND PRESS HERALD, Feb. 4, 2000, at 5B, available in 2000 WL 5074813; see also *Local and State Dispatches*, PORTLAND PRESS HERALD, Sept. 4, 1999, at 2B, available in 1999 WL 26281590; *Lawmaker Proposes Tax Relief for Waterfront Property Owners*, ASSOCIATED PRESS NEWSWIREs, Jan. 17, 2000, 1/17/00 APWIREs 02:19:00.

4. One recent example of this phenomenon is the case of the Shawmut Inn in Kennebunkport. Built in 1913, the Shawmut Inn gained notoriety as the home of the National Press Corps during President Bush's White House term, as the President frequently visited his summer home in Kennebunkport. The Inn had been bought in 1989 by a real estate developer, when the real estate market was strong, with plans to renovate and revitalize the Inn. However, the developer soon fell on hard times and filed for Chapter 11 Bankruptcy in 1991. The Inn itself never quite recovered as a fashionable resort, as many regular customers had been turned away during the summers of Bush's presidency in order to make room for the Press Corps. Although the developer was able to raise enough money to avoid having the property sold at auction in 1999 by making good on his 3.6 million dollar loan, he was looking for a buyer. Enter onto the scene Tim O'Neill of Rye, New York, an executive from the Wall Street firm of Goldman Sachs. Mr. O'Neill bought the property on March 15, 2000 for 6.5 million dollars, and will raze the former resort in order to build a summer home. O'Neill said that there is a possibility that he may sell off some of the land as residential property. O'Neill has made plans to begin burning the remains of the former hotel in April of 2000, an act upsetting many local residents more than the sale of the Inn itself. See *Oceanfront Inn that Housed Bush Press Corps is Sold to New York Investor*, ASSOCIATED PRESS NEWSWIREs, Mar. 16, 2000, available in 3/16/2000 APWIREs 02:18:00; Ted Cohen, *New Owner to Raze Shawmut Inn, The Kennebunkport Landmark is Sold for \$6.5 Million to a New Yorker for a Home Site*, PORTLAND PRESS HERALD, Mar. 16, 2000 at 1A.

shoreline. Because the properties themselves were similar, the sale prices of the surrounding residential properties had to be taken into account when calculating the property taxes on the commercial property under the system by which Maine property taxes are calculated.

Part II of this Article will examine the administration of the property tax system of Maine, exemptions to the general property tax, and the current proposal for another exemption. The effectiveness of the current exemptions, as well as the usefulness of the proposed exemption in fulfilling its goals will also be examined. Part III will analyze the history of zoning in the United States, as well as the Federal and State of Maine coastal regulation schemes. Next, this Article will focus on Portland, Maine, and the use of zoning there to preserve the waterfront for water-dependent uses. Last, this Article will examine the current situation in Portland, Maine, new developments on the waterfront, and recommendations for battling the new pressures in Portland that are working against the working waterfront.

II. THE PROPERTY TAX SYSTEM OF MAINE

A. *Just Value*

Under Maine law, “[a]ll real estate within the State, all personal property of residents of the State and all personal property within the State of persons not residents of the State is subject to taxation on the first day of each April as provided.”⁵ All property is to be assessed at its “just value,”⁶ a value that the legislature has directed assessors to define “in a manner which recognizes only that value arising from presently possible land use alternatives to which the particular parcel of land being valued may be put.”⁷ Maine courts have determined that “just value” means the “fair market value” of a property,⁸ or the value that a willing buyer will

5. ME. REV. STAT. ANN. tit. 36, § 502 (West 1990 & Supp. 1999). This provision simply means that all property taxes due to a municipality become due on April 1st of each year, as the tax year runs from April 1 to April 1. *See id.*

6. *See* ME. CONST. art. IX, § 8.

7. ME. REV. STAT. ANN. tit. 36, § 701-A. This section also defines what tax assessors must consider when determining the “just value” of a property, considerations that include “all relevant factors, including without limitation, the effect upon value of any enforceable restrictions to which the use of the land may be subjected, current use, physical depreciation, sales in the secondary market, functional obsolescence and economic obsolescence.” *Id.* § 701-A (West Supp. 1999).

8. The Maine Supreme Judicial Court has consistently defined “just value” as set out in the Maine Constitution, to mean “market value.” *See* Alfred J. Sweet, Inc. v. City of Auburn, 134 Me. 28, 180 A. 803, 804 (1935) (referring to Bangor & P.R.R. Co. v. McComb,

pay; a value that can be as difficult to assess as under the statutory definition. Tax assessors are allowed several methods to determine what is the “fair market value” of a property.⁹ Traditionally, the legislature has given assessors great leeway in determining the method that they use, as long as the minimum assessing standards are met.¹⁰ Maine courts have also historically upheld the adoption of different methods by assessors, finding that it is part of the assessor’s duty to determine the best method for assessing the intended property,¹¹ and that the taxpayer has the burden of proving the assessment is “manifestly wrong.”¹²

B. *Methods of Property Assessment*

Three methods of property assessment are commonly used in Maine. One method of assessing the value of a property is the “Cost Approach” method.¹³ Under a “Cost Approach” estimation, the assessor determines how much it would cost at current materials price to reconstruct a particular building, and then subtracts how much the current building has depreciated.¹⁴ A second common method is to evaluate how much income the property would produce if it were rented.¹⁵ The “Income Approach” is often used in the assessment of commercial property.¹⁶

The most common method used to assess property, however, is to compare the selling price of similar types of property, such as all waterfront property.¹⁷ This is called the “market data approach.”¹⁸ This determination

60 Me. 290 (1872); *Chase v. City of Portland*, 86 Me. 367, 29 A. 1104 (1894)). The Court has expanded on this meaning in several cases, notably by stating that the sale price of property is evidence of market value, which is used in determining property value for tax assessment purposes. See *Shawmut Inn v. Town of Kennebunkport*, 428 A.2d 384, 394–95 (Me.1981); see also *Quoddy Realty Corp. v. City of Eastport*, 704 A.2d 407, 409 (Me.1998); *Weekley v. Town of Scarborough*, 676 A.2d 932, 934 (Me. 1996).

9. See *A Homeowner’s Guide to Property Tax* (visited Oct. 24, 2000) <<http://www.ci.portland.me.us/propertytax.htm>>.

10. See *Central Maine Power Co. v. Town of Moscow*, 649 A.2d 320, 324 (Me. 1994) (citing *South Portland Assocs. v. City of South Portland*, 550 A. 2d 363, 366 (Me. 1998) (quoting *Shawmut Inn v. Town of Kennebunkport*, 428 A.2d at 390)).

11. See *Shawmut Inn v. Town of Kennebunkport*, 428 A.2d at 389–90.

12. See *City of Waterville v. Waterville Homes, Inc.*, 655 A.2d 365, 366–67 (Me.1995).

13. See CRAIG HIGGINS, MAINE PUBLIC INTEREST RESEARCH GROUP, TAX FACTS: THE PERILS OF PROPERTY, A CONSUMER’S GUIDE TO MAINE PROPERTY TAXES at 3 [hereinafter TAX FACTS].

14. See *Shawmut Inn v. Town of Kennebunkport*, 428 A.2d at 389.

15. See *id.* at 390.

16. See TAX FACTS, *supra* note 13, at 4.

17. See *A Homeowner’s Guide to Property Tax* *supra* note 9.

18. See TAX FACTS, *supra* note 13, at 3.

can be difficult, as an assessor must analyze a particular selling price to see what factors went into the determination by buyer and seller of that price.¹⁹ Anomalies in the selling price can occur when a seller needs to sell a property quickly and perhaps takes less than the property is worth; or perhaps the buyer needs to close the deal quickly and will pay any price. Sales prices must sometimes be analyzed on a home by home basis. However, when the majority of the surrounding properties are selling for prices higher than they have historically, as is happening along the Maine coast, this seems to point to a general rise in the fair market value of such properties, not just an anomaly in a particular sale.

It is because of the increase in sales price, or "fair market value," of the surrounding residential properties that the commercial fishing properties' sales tax rose so dramatically. By statute, the tax assessor must keep the valuations of similar properties in an area located within twenty-percent of each other,²⁰ and the valuation of a particular property must not fall below seventy percent of the property's fair market value.²¹ Under this regime, it was necessary for a reassessment of the shoreline properties in Maine. As the selling price of one property rose, then another, town tax assessors were obligated to reassess all properties to make sure the assessments fell within the constitutional guidelines.

However, these standards set for valuing property in Maine do not take into account the type of activity for which a property is being used. For this reason, in the context of an assessment, shoreline property is shoreline property, whether it is used for residential or used in commercial fishing purposes.²² In assessing the property tax, *all* uses to which a property may

19. The Maine Supreme Court has itself noted the difficulty in determining the correct market value of a home, noting that "[d]epreciation, like the market value of property, cannot be proved with mathematical certainty and must ultimately remain in the realm of opinion, estimate and judgment." *Shawmut Inn v. Town of Kennebunkport*, 428 A.2d at 390 (citing *Kittery Electric Light Co. v. Assessors of the Town of Kittery*, 219 A.2d 728, 738 (Me. 1966)).

20. See ME. REV. STAT. ANN, tit. 36, § 327(2) (West 1990).

21. See *id.* § 327(1). Section 327 sets out the minimum assessing standards that municipalities must meet in their property assessments. These standards were enacted by the legislature in 1977 to help municipalities and tax assessors in the demanding task of evaluating fair market value, especially in light of the fact that real estate values are ever-changing, and the cost on local governments of currently reassessing "just value."

22. It is important to remember that an assessor's job is only to determine the "just value" of a property, not to determine the property tax owed by a particular property owner. The amount of property taxes owed is determined by applying the tax rate, as set by the city, county, or possibly school district, to the "just value" determined by the assessor. See *For the Property Owner Who Wants to Know How Your Property is Appraised* (visited April 9, 2000) <<http://www.ci.portland.me.us/propowner.html>>.

be put must be considered. Though a property is currently used for a water-dependent operation, if it could be used for a residential purpose, which would result in a higher fair market value, the property is taxed at that use.²³ The Maine constitutional standard of “just value” is often referred to as the “best and highest use” standard, a term that reflects the common capitalistic notion that the fair market value of a property, the highest amount for which a buyer will pay to use a land for a particular purpose, must be the property’s “best use.” It is this failure of tax assessing guidelines to take into account the use to which a property is being put, and an adoption of the idea that the best use to which a property can be put is the one for which a buyer will pay most, that accounts for the rising property taxes on land used for commercial activities that are water-dependent.

C. *Adjustments in Assessment Values*

It is only by legislative adjustment that the actual use of a property can be considered in determining the taxes owed, and it is only by constitutional referendum that this legislative adjustment may be approved.²⁴ Maine voters have approved four such adjustments, the latest being in November 1999.²⁵ Maine voters passed “Amendment 9” in 1999, which allows municipalities to offer tax breaks to owners of historic or scenic property.²⁶ The amendment was proposed after Cape Elizabeth, Maine

23. “In appraisal for tax purposes, due consideration must be given to all uses to which property may be put by owner, and its “value” is measured by what it would bring at fair public sale, when one party wishes to sell and another to buy.” *Alfred J. Sweet, Inc., v. City of Auburn*, 134 Me. 28, 180 A. 803, 804 (1935) (*citing* *Lodge v. Inhabitants of Swampscott*, 103 N.E. 635, 636 (Mass. 1913)). Its value is measured by what it will bring at a fair public sale; when one party wishes to sell and another party wishes to buy. *See Alfred J. Sweet, Inc. v. City of Auburn*, 180 A. at 804 (*citing* *Chase v. City of Portland*, 86 Me. 367, 29 A. 1104, 1107 (1894); *Lawrence v. City of Boston*, 119 Mass. 126 (1875); *Blackstone Mfg. Co. v. Town of Blackstone*, 85 N.E. 880, 882 (Mass. 1908)).

24. *See* ME. CONST. art. X, § 4. This is so because a change in the assessing standard calls for a change to Maine’s Constitution, which can only be amended through the referendum process. *See id.*

25. The text of Amendment 9 is as follows: “Historic and scenic preservation. The Legislature shall have the power to provide that municipalities may reduce taxes on real property if the property owner agrees to maintain the property in accordance with criteria adopted by the governing legislative body of the municipality to maintain the historic integrity of important structures or to provide scenic view easements of significant vistas.” ME. CONST. art. IX, § 8.

26. Amendment 9 was sponsored by Senate Minority Leader Jane Amero, and was opposed by the Maine Municipal Association on the basis that the measure “was confusing and would undermine the integrity of Maine’s local property tax system.” *See* Renee Orday, *Tax Break Favored for Historic Property*, BANGOR DAILY NEWS, Nov. 3, 1999,

residents tried to save a historic landmark, the Two Lights keeper's house.²⁷ Amendment 9 grew from the same fear that propelled the Amendment considered in this paper, fear of commercial developers "gobbling up," in that case historic or scenic property.²⁸ In their efforts to save the keeper's house, the town and residents felt that they could do nothing more than "ask" the owner to maintain the property, but felt a tax incentive would encourage owners to keep a property intact or renovate it within the historic framework.²⁹

The original land tax exemptions are for landowners of 1) "[f]arms and agricultural lands, timberlands and woodlands" 2) "open space lands which are used for recreation or the enjoyment of scenic natural beauty" and, 3) "lands used for game management or wildlife sanctuaries."³⁰ Under these exemptions, property owners with land so used have their land assessed at a value based on the use, which thereby lowers the property taxes. Exemptions such as these are passed as preservation methods, to reduce the effect or chance of urbanization of the land.³¹

1. Tree Growth Tax Law

Passed in 1972, the Tree Growth Tax Law³² has as its primary purposes: sustaining yield harvest practices, preserving forested land,³³ and taxing "on the basis of their potential for annual wood production"³⁴ Through a property tax exemption it was hoped that landowners would find it economically feasible to retain the land for forestry.³⁵ Forestry land was often only harvested every fifty years, and with no income production from the land in the intervening years, it was hard to keep the land from converting to other uses as property taxes rose,³⁶ taxes based on a system that assumes economic use of the land.

available in 1999 WL 29477732; see also Bruce Kyle, *Look at Question 9: Pretty is as Pretty Duns*, BANGOR DAILY NEWS, Oct. 28, 1999, available in 1999 WL 19810696.

27. See Renee Ordway, *Tax Break Favored for Historic Property*, BANGOR DAILY NEWS, Nov. 3, 1999, available in 1999 WL 29477732.

28. See *id.*

29. See *id.*

30. ME. CONST. art. IX, § 8.

31. See NEAL A. ROBERTS & H. JAMES BROWN, *PROPERTY TAX PREFERENCES FOR AGRICULTURAL LAND* 47 (1980).

32. ME. REV. STAT. ANN. tit. 36, §§ 571 to 584-A (West 1990).

33. See PETER J. CARNEY, *THE INFLUENCE OF MAINE TAX CODE PROVISIONS ON WILDLIFE HABITAT CONSERVATION IN THE CASCO BAY WATERSHED* 16 (1999).

34. ME. REV. STAT. ANN. tit. 36, § 572.

35. See CARNEY, *supra* note 33, at 16.

36. See ME. REV. STAT. ANN. tit. 36, § 572. This situation is somewhat different from

The law requires the property owners to opt-in to the program and compose a “forest management and harvest plan” that must be updated every ten years.³⁷ There are, however, no required standards that have to be met, a frequent criticism of the law.³⁸ Without any state requirements, the plan is left in the hands of the individual property owners, which means inconsistency in forestry practices and possibly substandard management. Proof of compliance with the program is also required at the time the plan is updated.³⁹

2. Farm and Open Space Tax Law

The Farm and Open Space Tax Law provides a similar tax scheme for those lands that are used for agricultural purposes, conserving scenic resources, or promoting wildlife habitation or preservation. The defined legislative purpose stated that it was to the public’s benefit “to prevent forced conversion” of such lands on account of economic pressures.⁴⁰

Valuation for land under the Farm and Open Space exemption can be formulated in two ways, either by current-use valuation, or a statutory formula that deducts percentages of valuation based on the land attributes.⁴¹ The land is classified based on its intended use, whether it is generally or permanently protected open space, forever wild open space, or open space land with public access. Each classification qualifies the land for a specific percentage reduction, and the classifications are cumulative. Thus general open space land (20%) which qualified as permanently protected (30%) and forever wild open space (20%) would qualify for a seventy percent reduction, whereas if that land was also open to public access, it would qualify for an additional twenty-five percent reduction. This valuation, however, cannot be less than if the property were enrolled in the Tree Growth exemption and the valuation also cannot exceed a “just value” assessment of the land.⁴²

the situation faced by the owners of land used for commercial fishing. There the businesses are often economically viable and revenue producing, but, as discussed previously in this article, property taxes began to soar due to surrounding residential uses. The purpose behind the current land exemptions and the proposed exemption are the same though, to preserve and protect the land from competing uses.

37. See CARNEY, *supra* note 33, at 16.

38. See *id.* at 16–17.

39. See *id.* at 16.

40. See ME. REV. STAT. ANN. tit. 36, §§ 1101–1121.

41. See ME. REV. STAT. ANN. tit. 36, § 1106-A.

42. See ME. REV. STAT. ANN. tit. 36, § 1106-A(2). See generally MAINE BUREAU OF TAXATION, PROPERTY TAX BULLETIN NO.18 (1993).

In each case, certain judgments about the use of the land have to be made. The legislature and Maine citizens have decided that what economically the state may consider to be the "highest or best," socially and politically are necessarily not the best use. With all property tax exemptions, certain direct, higher economic benefits will be lost, but through the exemptions, the state has decided that socially, culturally and in some cases even economically, it is more important to preserve other uses.

Under the existing constitutional language, landowners who opt to take advantage of this exemption would be penalized for converting their land to another use, once it had been classified as property exempt under sub-section 2.⁴³ The penalty for converting exempted land is the imposition, at a minimum, of taxes that would have been imposed over the last five years had the property been assessed at its "best and highest use," plus interest.⁴⁴

The Tree Growth Tax Law offers an alternative higher penalty, one that imposes the higher between twenty to thirty percent of the fair market value of the withdrawn land.⁴⁵ These exemptions therefore work to preserve the specified property for commercial fishing use not only through incentives, but through a deterrent as well.

Under the Maine Constitution, the state is required to repay all municipalities for fifty percent of any money loss due to property owners taking advantage of these exemptions.⁴⁶ The state had hoped to provide the loss revenue so that the extra financial burden would not be felt by other taxpayers. However, as with many state budget plans, this one also often goes unfunded, and the other property owners and the municipality must bear the burden of the loss of revenue. Similarly, the Tree Growth Tax Law statutorily provides that the state will reimburse any municipality up to ninety percent for any revenue lost due to that specific exemption.⁴⁷

As feared with any mandated reimbursement, the program for the Tree Growth Tax Law was often only partially funded and municipalities received only a pro-rata share of the lost revenue. The law was changed

43. See ME. CONST. art. IX, § 8(2).

44. "[A]ny change of use higher than those set forth in paragraph A, B, and C shall result in the imposition of a minimum penalty equal to the tax which would have been imposed over the 5 years preceding that change of use had that real estate been assessed at its highest and best use, less all taxes paid on the real estate over the preceding 5 years, and interest, upon such reasonable and equitable basis as the Legislature shall determine." See *id.*

45. See ME. REV. STAT. ANN. tit. 36, § 581.

46. See ME. CONST. art. IV, § 23.

47. See ME. REV. STAT. ANN. tit. 36, § 578(1).

in 1997⁴⁸ to provide for full reimbursement based on a statutory formula,⁴⁹ not on the program's funding.⁵⁰ Any money lost due to the new proposal would have to be repaid to municipalities as well, but unless the state foots the bill, that burden also will be distributed among the taxpayers.

D. A New Proposal to Bring Relief to Commercial Fishermen

1. The Mechanics of Rep. Etnier's Proposed Tax Amendment

Now Rep. David Etnier, D-Harpswell, has brought another tax relief proposal to Maine voters that appeared on the ballot in November, 2000 as Question 4.⁵¹ Legislative Document #2422, "Proposing an Amendment to the Constitution of Maine to Allow the Legislature to Provide for Assessment of Property Used for Commercial Fishing at Current Use" intends to allow property taxes for those with working waterfront property to be levied at just that, a value that reflects the current use of the property, not the just value/fair market value reflecting the rising sales prices of surrounding property.⁵² Rep. Etnier proposed this bill in reaction to the escalating property taxes of his constituents in Phippsburg, a town in which non-residents now own ninety-three percent of the shoreline property.⁵³ Etnier hoped that the exemption will allow commercial fishing businesses to continue to operate on the waterfront instead of being driven inland by the escalating property taxes.

Etnier's proposal would work by allowing those who own shoreline property used in connection with commercial fishing to have their property

48. See CARNEY, *supra* note 33, at 18.

49. See ME. REV. STAT. ANN. tit. 36, § 578(1).

50. The Tree Growth Tax Law's mandated reimbursement predates the constitutional reimbursement, which functions as a minimum reimbursement.

51. RESOLUTION, *Proposing an Amendment to the Constitution of Maine to Allow the Legislature to Provide for Assessment of Property Used for Commercial Fishing at Current Use*, H. Res. 119-2422, 2nd Legis. Sess. (Me. 2000). The resolution passed the House on March 14, 2000, the Senate on April 3, 2000, and was signed by the Governor on April 4, 2000. See *Bill Status-199th Legislature* (visited April 8, 2000) <http://www.state.me.us/legis/status/bill_status2.asp> [hereinafter RESOLUTION] Under the proposal, the ballot language in November will read: Do you favor amending the Constitution of Maine to allow the Legislature to provide for the assessment of land and structures used primarily for commercial fishing purposes based on the current use of that property? As with many ballot referendums, voter education will be important, as many are unaware of how property taxes are levied and at what rates, and unaware of many of the consequences of such a proposal.

52. See *id.*

53. See *Lawmaker Proposes Tax Relief for Waterfront Property Owners*, ASSOCIATED PRESS NEWSWIREs, Jan. 17, 2000, available in 1/17/00 APWIREs 02:19:00.

assessed based on its current use, as is property falling under the other land exemptions. The type of property to be taxed in such a way would consist of the following:

Waterfront land and structures used primarily for commercial fishing purposes, including, but not limited to, access, dockage, processing, vessel and gear storage and the purchase of marine products from a person who fishes commercially.⁵⁴

Under this language, waterfront restaurants and other businesses not involved in commercial fishing would not be eligible for the exemption; however, the breadth of the exemption can only truly be determined once the proposal is put to use. The proposal would amend Article IX, Section 8, sub-section two of the Maine Constitution, and would follow closely Maine's other major property tax exemptions for certain lands,⁵⁵ although it has generally been compared to Maine's Tree Growth Tax Law.

2. The Effectiveness of the Tax Incentive as a Preservation Tool

Etnier's proposed tax exemption has its heart in the right place. As commercial fishing and water-dependent uses are pushed off the waterfront by competing uses, preserving the waterfront for water-dependent uses will become an increasingly important task for Maine municipalities. Using a tax-exemption to preserve the waterfront may only be a temporary fix however. Economically, in order for a property tax exemption to be an effective preservation tool, property tax expenses must be an important reason that water-dependent uses are leaving the waterfront. If property taxes are a large expense for the waterfront businesses, and an expense that is pushing owners over the edge to sell their land for competing uses, then the tax will clearly be a benefit to landowners, and help to achieve the purpose of preserving land for water-dependent uses.

But is such a tax-exemption enough to keep landowners from selling to competing uses? In many cases the amount of money saved by a property tax exemption will not outweigh the economics of selling the land for other uses, as the price that buyers are willing to pay has reached such a high level. The economics of the buyout may also be such that even the deterrent of owing back taxes may not be enough to stop the changeover. Historically, penalties have not been a deterrent in preventing

54. See RESOLUTION, *supra* note 51.

55. See ME. CONST. art. IX, § 8(2)(A)-(C).

land-use changes, although withdrawal from the Maine Tree Growth and Open Spaces program has been relatively low.⁵⁶

Another consideration is the economic and political impact on the towns and other residents. As a town must raise a specific amount of its budget through its property taxes, if the amount commercial fishing property owners have to pay decreases, then the amount of property taxes paid by others must increase. Tax exemptions in effect become a government subsidy for those taking advantage of the exemptions.⁵⁷ The same subsidy is true for the land exemptions currently in place, and will continue to be true with any proposed exemption as long as the property tax continues to pull such a heavy load in municipal budgets. However, as current law stands, municipalities cannot impose any other forms of taxation on its residents, and therefore the property tax must provide the majority of a municipality's revenue.⁵⁸

Voters on the referendum need to understand that although the direct subsidy to the property owners is socially and politically a move that is well intended, the indirect economic effects may be harsh. As much of the land in question is already in residential use, and as towns continue to grow, the property tax base will need to grow as towns need to offer more services to its residents, or improve and update existing services. Less money from commercial waterfront property will mean that the tax burden on others will grow proportionately. Also, once an owner takes advantage of the tax exemption, there may be other pressures on him to sell that land and the tax exemption will be rendered ineffective. Residential uses are usually found to be incompatible with a "working waterfront," as the needs of the two are often very different.

As stated earlier, the proposed tax amendment has been compared with Maine's Tree Growth Tax law, a comparison that may not be desirable. The Tree Growth Tax law has been criticized for its lack of guidelines to both assessors and those enrolled in the program and for not requiring any minimum standards for land management. Although the land in question for the current proposal is not "managed land," assessment guidelines would provide useful tools, as well as more information

56. See CARNEY, *supra* note 33, at 22.

57. In fact, Maine law defines tax exemptions as "tax expenditures" by the state. "Tax expenditures" are "provisions of state law which result in a reduction of tax revenue due to special exclusions, exemptions, deductions, credits, preferential rates or deferral of tax liability." ME. REV. STAT. ANN. tit. 36, § 196 (West 1990).

58. However, the Maine Supreme Court has issued an opinion that the legislature could allow a municipality to impose a one-percent gross receipts tax. See Opinion of the Justices, 159 Me. 420, 424-27, 191 A.2d 627, 630-32 (1963).

on exactly how broad a base of properties the legislature intends to allow under the exemption.⁵⁹

E. Alternatives and Additional Tools for Preservation

Although the tax exemption is well intended, and has been regarded as one tool in the preservation of the working waterfront, it is perhaps best a tool not used alone. Preservation of the working waterfront requires that residents make a clear determination about the types of uses that they value not just for the economics of the use, but for social, cultural and political values as well. The working waterfront in Maine is a viable waterfront, but pressure is increasing and other methods of preservation need to be engaged. One method that works well in combination with a tax exemption, and in fact may alleviate the need for such an exemption, is the use of zoning.

By zoning an area for specific uses, a municipality can better assure that land will be preserved, and also reduce one of the risks associated with the use of tax exemptions as a preservation tool. With a tax exemption, property owners can still sell their property to an owner who will develop a competing or incompatible use. In fact, as stated earlier, the economics of the situation are often still in favor of selling to a competing use even when a tax exemption is employed. If property is zoned for a specific use, then this property, although it could be sold to anyone, could only support specific uses.

This is not to say that the same pressures facing water-dependent uses will subside, only that the use will be legislatively protected, instead of being at the mercy of each individual property owner. Zoning is also not a perfect tool. As waterfront property becomes desirable for residential or other non-water-dependent uses, such as restaurants or hotels, residents could change their minds and decide to value those uses instead. As explored in the next section, however, if residents decide that a "working waterfront" is a valuable asset to Maine, not only in a cultural or historical context, but also in the sense that waterfront industry is commercially viable and expanding, then zoning can be an effective tool if the correct balance between economics and preservation is found.

59. On November 7, 2000, Maine voters defeated the proposal by a slim margin; 49.54% voted in favor of the referendum, and 50.46% voted against it.

III. THE CASE FOR ZONING: A CASE STUDY OF WATERFRONT ZONING IN PORTLAND, MAINE

A. *Introduction*

Tax incentives are, of course, not the only way to encourage and ensure the preservation of waterfront property for water-dependent uses. Several other tools are available, one of the most popular being zoning ordinances, usually enacted at the municipal level. Part III of this Article will examine the use of zoning as an effective tool by way of a case study of zoning on the waterfront in Portland, Maine. In order to best understand the effectiveness of this tool, it is important to first look at background information on several topics. First, it is important to understand the history of zoning, and the power of a municipality to zone. Second, an understanding of the federal Coastal Zone Management Plan, its history and purpose, and its interplay with state and city regulations. Next, Maine's plans for coastal property and the state's dedication to preserving this property for water-dependent uses will be examined. In the final section, this Article will explore the history of Portland's waterfront, the history of the current ordinances in place, and finally, the effectiveness of the waterfront's zoning in preserving water-dependent uses while still encouraging the economic growth of the area.

B. *The History of Zoning*

Zoning is the most common device used by governments to control land development and use. The power of municipalities to enact zoning ordinances results from the police power, an inherent power of a state to regulate the use and development of land for the public good.⁶⁰ Zoning has long been used in this country in many forms, although the actual concept of "zoning" dates back to 1916 in New York City. Even before the formation of the country itself, however, settlements and colonial cities regulated the development of certain "industrial" sites, such as gunpowder mills and storehouses, and in early Massachusetts history, some towns were authorized to assign slaughterhouses and other noxious business to specific areas of town.⁶¹ Although much of what early regulation existed

60. See ARDEN H. RATHKOPF & DAREN A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* 1-6 (1991).

61. This type of zoning existed in many colonial towns. Boston and Salem, Massachusetts, and Charlestown, South Carolina, are three cities in which the location of certain businesses, such as slaughterhouses and distilleries, were controlled by local

was focused on businesses, some residential regulation was in place in some towns to restrict certain dwellings to single-family.⁶²

This early zoning focused little on town growth, building size or design. The regulations were relegating certain businesses to a specific place in town, but the regulation was not part of an overall town plan. No regulation was in place to dictate the size, design, or location of most new construction, of either residential or commercial buildings and most towns expanded with unregulated growth. The result was the emergence of cities with land uses mixed throughout: commercial, industrial, and residential occupying the same area. However, as the industrial revolution took hold of the country and brought an influx of workers to the city, more regulation became necessary for sanitary reasons, and was demanded by the cultural movements such as the "city planning" and "city beautiful" movements.⁶³

The first city zoning ordinance appeared in New York City in 1916, the "Zoning Resolution of the City of New York."⁶⁴ The "Resolution" was born of a need to bring some order to New York's skyline, and to the mix of real estate uses throughout the city, as well as a desire to control and protect real estate prices.⁶⁵ Although other major cities had by this time adopted zoning regulations governing building uses or heights, New York's was the first comprehensive city plan established that contemplated controlling land use, size and proportion to surroundings.⁶⁶ The piecemeal regulations of other cities had generally been upheld by courts as within the "police power,"⁶⁷ as was New York's comprehensive plan when challenged. New York's plan, as well as the growth of regulated land use in other major cities, inspired then Secretary of Commerce Herbert Hoover to formulate the Standard State Zoning Enabling Act (SZEA) in 1926.

The SZEA was enacted to help states authorize and encourage municipalities to zone their land by laying out a model zoning plan.⁶⁸ By

government as early as 1692. By 1741, other businesses were being regulated, including chandlers, couriers, and the location of kilns. *See id.* at 1-7.

62. *See id.*

63. *See* ROBERT C. ELLICKSON & A. DAN TARLOCK, *LAND-USE CONTROLS, CASES AND MATERIALS* 41-42 (1981).

64. *See* RATHKOPF et al., *supra* note 60, at 1-16.

65. *See* ELLICKSON et al., *supra* note 63, at 42.

66. *See id.* at 502.

67. *See generally* *Hadacheck v. City of Los Angeles*, 239 U.S. 394 (1915) (upholding an ordinance prohibiting brickyards within city limits), *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (holding constitutional a city ordinance regulating the location of livery stables), and *Fischer v. St. Louis*, 194 U.S. 361 (1904) (upholding a St. Louis ordinance prohibiting the location of a dairy stable within city limits).

68. *See* ELLICKSON et al., *supra* note 63, at 40.

1930 thirty-five states had passed zoning ordinances similar to the SZEA, and other types of zoning regulations were expanding. Since 1926 all fifty states have at one time adopted the SZEA, and it is still the basis for zoning regulations in many states, though with some modifications.⁶⁹

A pivotal case in municipal zoning was *Village of Euclid v. Ambler Realty Co.*,⁷⁰ decided in 1926, the first zoning case to reach the Supreme Court. In a six to three decision, the Court upheld the ordinance in question as a valid exercise of police power. By that time, the Court had an array of state court cases to look to, cases that fell both ways. The state cases that upheld city planning had often upheld the regulations as a valid exercise of a municipality's police power, an exercise of power to protect the health, safety, welfare and morals of the public.⁷¹ The Court in *Euclid* determined that municipalities could zone property, as an exercise of the police power, without violating a property owner's substantive due process rights.

In writing for the Court, Justice Sutherland noted that there was not a clear line of demarcation between a valid and invalid "assumption of power,"⁷² under the "police power" doctrine. The Court noted that "there is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings" nor the materials, nor other regulations concerning specific aspects of a construction.⁷³ The ordinance in question in *Euclid* however was in general terms, and possibly excluded industries that were "neither offensive nor dangerous."⁷⁴ The Court, though, found no difficulty in sustaining the regulation in question and adopting a broad view of the police power. Reviewing the numerous state court decisions, as well as the numerous reports by commissions and experts expounding on the adoption of such an expansive view, Justice Sutherland wrote that at the least, the reasoning the Court proposed—the necessity of zoning to promote safety, sanity, noise control and the such—demonstrated the "wisdom or sound policy in all respects of those restrictions" under review.⁷⁵

The Supreme Court would take few zoning cases in the next few years, but with *Euclid* the Court had ensured the continuation and growth of zoning across the United States. The majority of cities today have

69. See *id.* at 41.

70. 272 U.S. 365 (1926).

71. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 962–63 (1998).

72. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 387.

73. *Id.* at 388.

74. See *id.*

75. See *id.* at 395.

enacted zoning laws to control growth and development, and of the major cities in the United States, those with a population over two hundred and fifty thousand, only one, Houston, Texas, has not enacted zoning ordinances.

C. *The Federal Coastal Zone Management Act*

The most important federal regulation concerning coastal development is the federal Coastal Zone Management Act (CZMA).⁷⁶ Enacted in 1972, the CZMA is administered by the National Oceanic and Atmospheric Administration, a division of the United States Department of Commerce. The CZMA was enacted to encourage co-operation among coastal states in protecting coastal resources, as well as to aid both financially and administratively with the formation of state plans. Even before 1972, many states had some type of plan in place—the New England coastal states being national leaders—but the CZMA set out basic guidelines and goals, and provided federal money to the states in implementing their plans. The Act's Congressional findings included a finding that "present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate,"⁷⁷ and hence, the need for a national plan.

By April of 1990, twenty-nine of the thirty-five eligible coastal states and territories⁷⁸ had enacted federally approved plans and had received federal financial assistance, and the number of states and territories participating had risen to thirty-one by 1999.⁷⁹ Of the thirty-one participating states, nineteen have enacted regulations regarding water-dependent uses, and twenty-nine states had guidelines for coastal development.⁸⁰ Although the CZMA is a voluntary program, the federal monetary aid is a large incentive for states to comply with the federal guidelines, even

76. See 16 U.S.C.A §§ 1451–1465 (West 1985 & Supp. 2000).

77. See *id.* § 1451(h).

78. See *id.* § 1453.

Definitions (Section 304)

For the purposes of this chapter— (4) The term "coastal state" means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this title, the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.

Id.

79. See NOAA *Preserving Waterfronts for Water Dependent Uses* (visited Apr. 16, 2000), <http://state-of-coast.noaa.gov/bulletins/html/wdu_11/national.html>.

80. See *id.* at Appendix B.

those states that already have a management plan and are dedicated to preserving shoreline for water-dependent uses. In implementing the CZMA, Congress found an overall scheme was favorable:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the land and waters in the coastal zone by assisting the states, in co-operation with the Federal and local governments and other vitally affected interest, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.⁸¹

By having all states comply with federal guidelines, Congress could reduce the conflicts between state plans that sometimes focussed on competing uses and values.

This is not to say that all federally approved state plans were alike. Each state faced different coastal challenges and focussed its plan to address that state's particular needs. The guidelines set by the CZMA were broad enough to allow states the flexibility needed to address individual coastal and administrative concerns, while ensuring coordination and focus on preserving and restoring land for water-dependent uses.⁸² The CZMA recognizes the need for states to balance the demands put upon the shoreline and its finite resources, and that these competing demands may be commercial, recreational, historical or cultural.⁸³ By providing federal administrators to work with the states to develop their plan, the states could be assured that their needs would be met and would comply with the Act in order to receive funding.

The CZMA also has an adopted policy of encouraging states to revitalize and restore "deteriorating urban waterfronts and ports," with the main priority being the preservation of water-dependent uses.⁸⁴ This provision, together with the Act's recognition of competing demands upon the waterfront, makes the CZMA an effective and useful tool in waterfront preservation. By recognizing the different needs of waterfront property users and owners, the CZMA has outlined a program with a focus on preservation, but with an understanding of the realities. With such goals,

81. See 16 U.S.C.A. § 1451(i).

82. See *id.* § 1455. This section sets out the requirements that a plan must meet before funding will be advanced.

83. See *id.* § 1452.

84. See *id.* § 1452(2)(E).

the CZMA has been effective in encouraging states to develop some sort of management scheme; this in turn forces states to pinpoint problems, examine existing regulation at the state and local level, and take a preventive view of preserving their coastal resources.

D. Maine Coastal Regulatory Scheme

As mentioned before, the New England states have traditionally been ahead of other states in planning for and giving protection to their coastal regions; Maine was no exception. As early as 1969, Maine was involved in formal planning for its coastal resources.⁸⁵ The Maine State Planning Office took the lead on the project, and by 1970 had formed the Coastal Planning Advisory Task Force. The Task Force included sixteen members from both state agencies and academic institutions, and by 1970 had almost completed "phase one" of its study, which was to "prepare a plan for coastal development and management considering state, regional, and national needs and objectives."⁸⁶ By 1970, the United States Congress had begun to hold hearings on implementing what would become the Federal Coastal Zone Management Program,⁸⁷ and Maine saw its nearly completed plan as a possible "pilot program" of federal and state cooperation.⁸⁸

The Maine State Planning Office presented its plan goal, along with seven guidelines, at the New England Coastal Zone Management Conference, April 1970. The objective of the original plan was broad but obtainable: "Goal: To develop a comprehensive plan providing for compatible and multiple uses of the coastal zone, optimizing those intrinsic and real values assuring the greatest long-term social and economic benefits for the people of the State of Maine."⁸⁹

The goals included taking inventory of Maine's coastal resources and uses, identifying areas of conflict, proposing regulations and controls, and indicating priorities for immediate action.⁹⁰ Cooperation was stressed with not only federal and other New England states, but also among Maine agencies and institutions; the Planning Board recognized that in order for any state plan to succeed, "effective cooperation of the State, Federal,

85. See NEW ENGLAND COUNCIL, PROCEEDINGS, NEW ENGLAND COASTAL ZONE MANAGEMENT CONFERENCE 116 (Robert H. Forste ed., 1970).

86. *Id.* at 118.

87. See NEW ENGLAND RIVER BASINS COMMISSION, STATE COASTAL MANAGEMENT LEGISLATION, A STAFF REPORT 1 (1970).

88. See NEW ENGLAND COUNCIL, *supra* note 85, at 118.

89. *Id.*

90. See *id.*

Regional and Local agencies” was necessary.⁹¹ In furtherance of this goal, then Governor Curtis issued in March 1970 an “Executive Order on Cooperative Action to Protect Maine’s Coastal Zone,” which required all state agencies and departments to submit any coastal development plans to the Planning Office for review.⁹² Through cooperation with other agencies and a working task force, in 1970 the state Planning Board was optimistic enough to hope to have its plan completed by the end of 1972.⁹³

It was not until 1978, however, that Maine’s Coastal Program was approved and implemented under the 1972 Federal Coastal Zone Management Plan.⁹⁴ The focus of Maine’s Coastal Program was two-fold: 1) resource protection and conservation, and 2) resource development and management.⁹⁵ The Plan was a combination of thirteen core environmental and land use statutes, which provided for state and local government implementation and enforcement, as well as cooperation, which was the main theory behind successful implementation of Maine’s plan.⁹⁶ These thirteen statutes, including the Maine Shoreline Public Access Protection Program⁹⁷ and the Mandatory Zoning and Subdivision Control in Shoreland Areas⁹⁸ focused on water quality, development siting, and zoning, and remained at the core of Maine’s program until the mid-1980’s. In 1986, the Maine legislature enacted Maine’s Coastal Management Act,⁹⁹ which established nine specific coastal policies:¹⁰⁰

1. Port and harbor development. Promote the maintenance, development and revitalization of the State’s ports and harbors for fishing, transportation and recreation;
2. Marine resource management. Manage the marine environment and its related resources to preserve and improve the ecological integrity and diversity of marine communities and habitats, to expand our understanding of the productivity of the Gulf of Maine

91. *Id.* at 121.

92. *See id.* at 119.

93. *See id.*

94. *See* Maine State Planning Office, *Sustaining Maine’s Coastal Resources and Economy* (visited Apr. 23, 2000) <<http://janus.state.me.us/spo/mcp/aboutcoast.html>>.

95. *See* MARINE LAW INSTITUTE, *MANAGING THE SHORELINE FOR WATER DEPENDENT USES, A HANDBOOK OF LEGAL TOOLS* 20 (1988) [hereinafter *Handbook*].

96. *See* MAINE COASTAL PROGRAM, MAINE STATE PLANNING OFFICE, *THE FIRST DECADE AND BEYOND*, 4 (1988).

97. *See* ME. REV. STAT. ANN. tit. 12 §§ 5201–5203 (West 1994).

98. *See* ME. REV. STAT. ANN. tit. 38 § 435 (West 1989).

99. *See id.* §§ 1801–1803.

100. *See* MAINE DEPT. OF ECONOMIC AND COMMUNITY DEVELOPMENT, *COASTAL MANAGEMENT TECHNIQUES: A HANDBOOK FOR LOCAL OFFICIALS* 2 (1988).

and coastal waters and to enhance the economic value of the State's renewable marine resources;

3. Shoreline management and access. Support shoreline management that gives preference to water-dependent uses over other uses, that promotes public access to the shoreline and that considers the cumulative effects of development on coastal resources;

4. Hazard area development. Discourage growth and new development in coastal areas where, because of coastal storms, flooding, landslides or sea-level rise, it is hazardous to human health and safety;

5. State and local cooperative management. Encourage and support cooperative state and municipal management of coastal resources;

6. Scenic and natural areas protection. Protect and manage critical habitat and natural areas of state and national significance and maintain the scenic beauty and character of the coast even in areas where development occurs;

7. Recreation and tourism. Expand the opportunities for outdoor recreation and encourage appropriate coastal tourist activities and development;

8. Water quality. Restore and maintain the quality of our fresh, marine and estuarine waters to allow for the broadest possible diversity of public and private uses; and

9. Air quality. Restore and maintain coastal air quality to protect the health of citizens and visitors and to protect enjoyment of the natural beauty and maritime characteristics of the Maine coast.¹⁰¹

State agencies and local governments, working together, were made responsible for ensuring that these policies were enacted when making coastal planning decisions. With this legislation, the state committed itself to preserving the coast for water-dependent uses, recognizing that pressure was growing to drive these uses off their historical coastal locations.

This state commitment to preservation of water-dependent uses would become increasingly important in 1988 when the legislature passed the Comprehensive Planning Law.¹⁰² Municipalities were now required to adopt a comprehensive growth management plan, which also had to enact the policies established by the Coastal Management Act. The Growth

101. See ME. REV. STAT. ANN. tit. 38, § 1801.

102. ME. REV. STAT. ANN. tit. 30-A § 4321 (West 1996).

Management Act ensured that coastal planning at the municipal level would not only be accomplished, but also would implement state coastal policies, community policies, and would be implemented within a reasonable time frame.¹⁰³ The mandate of local participation and assessment of community policies would prove to be both beneficial and complicating to local waterfront planning.

E. Portland Waterfront Zoning, 1957–2000

The history of Portland's waterfront zoning has been a mix of city and community planning, along with a healthy dose of citizen activism. Portland's first comprehensive plan was adopted in 1957, and zoned the waterfront mostly for industrial uses, but included no provisions to protect water-dependent uses.¹⁰⁴ This ordinance remained in place with relatively little controversy until the late 1970's, when several factors led city leaders to reexamine the waterfront and its uses. One factor was the energy crisis of the late 1970's and the "back to the city" movement that it spurred.¹⁰⁵ As citizens became more interested in living in a downtown city environment, the quality and appearance of Portland, including the waterfront, became more important. Also spurring renewed interest in the waterfront was the construction of two new sewage plants in Portland, and South Portland, which greatly improved the water quality of the Port of Portland. Historic renovation of downtown buildings, helped by tax incentives, also renewed interest in what had been a dilapidated and forgotten area. The improvement of the infrastructure itself led to plans for

103. See *id* § 4324(3), (4). "Citizen participation. In order to encourage citizen participation in the development of a local growth management program, municipalities may adopt local growth management programs only after soliciting and considering a broad range of public review and comment. The intent of this subsection is to provide for the broad dissemination of proposals and alternatives, opportunity for written comments, open discussions, information dissemination and consideration of and response to public comments. 4. Meetings to be public. The local planning committee shall conduct all of its meetings in open, public session. Prior public notice must be given for all meetings of the local planning committee pursuant to Title 1, section 406. Prior to April 1, 1990, if the local planning committee provided notice in compliance with Title 1, section 406, that notice was sufficient for all legal purposes. *Id*."

104. See MARINE LAW INSTITUTE, *GUIDEBOOK TO THE ECONOMICS OF WATERFRONT PLANNING AND WATER DEPENDENT USES* 247 (1988) [hereinafter *Guidebook*].

105. See PORTLAND PLANNING BOARD, *LAND USE POLICY PLAN, REVISION OF ZONING ORDINANCE, SECTION II WATERFRONT POLICIES AND ZONING REVISION, STAFF REPORT 3* (1982).

new developments¹⁰⁶ and the city became interested in its own resource again.

The Portland city government began an extensive land and building use survey examining the area from Fort Allen Park on the Eastern Promenade to the Veteran's Memorial Bridge at the end of Commercial Street. This report concluded that the waterfront was in a state of transformation and that the waterfront land and buildings were severely underutilized.¹⁰⁷ In 1973, over fifty-percent of the use of the surveyed land was transportation related due largely to the landholdings of the railroad, a fact which greatly contributed to the under-utilization of waterfront land; the railroad simply did not use or need the amount of land it owned.¹⁰⁸ Also of note in the report was the lack of open space on and public access to the waterfront, due to the mostly industrial zoning in place at the time.

Portland's land use report led to the development of the 1974 Land Development Plan, in which it was suggested that a wide variety of uses could co-exist with the industrial and commercial uses already in place.¹⁰⁹ The plan endorsed the focus and direction of the land use study that concentrated efforts in four areas: "1) developing programs designed to eliminate or upgrade dilapidated piers; 2) provide public access through establishing public open spaces; 3) promote expansion of pleasure boating and marina facilities; and 4) provide locations for fish processing."¹¹⁰ The Land Use plan also recognized the need for a visually pleasing waterfront, calling for "careful and thoughtful control" of infrastructure appearance and landscape on the waterfront.¹¹¹ As Portland increasingly became a tourist (and cruise boat) destination, the visual impact as well as the goals adopted by the plan became important in attracting these tourists and their dollars.

At approximately the same time as the adoption of the Land Use Plan, Portland was conducting studies and public hearings that led to the 1975 adoption of the City Edges' Waterfront Improvement Plan.¹¹² The recommendations of the Waterfront plan complemented the goals adopted by the Land Use Plan and addressed some overlapping issues, including "land use, zoning, building conditions, piers and wharves, public

106. *See id.* at 3-4. New developments planned at the time were "a new marina, a planned floating restaurant (which would become DiMillo's Floating Restaurant) a \$25 million fish pier complex and a \$46 million ship repair and overhaul facility. *Id.*

107. *See id.*

108. *See id.* at 5.

109. *See id.* *See also* Guidebook, *supra* note 104, at 248.

110. *See* LAND USE POLICY PLAN, *supra* note 105, at 5-6.

111. *See id.*

112. *See* Guidebook, *supra* note 104, at 247.

improvements, and historic preservation.”¹¹³ Together these plans laid the foundation for a revitalization of the waterfront area with recommendations focusing on and taking into account the public’s interest in the area, the need and desire to see the area become more than just an industrial zone while still protecting the area as a “working waterfront.”

With these plans in place, Portland hired the American City Corporation (ACC) in 1981 to assist the city in conducting an analysis of the development potential of the waterfront, developing a land use report outlining zoning principles for waterfront development, and assisting in outlining potential development projects.¹¹⁴ The findings of ACC’s report caused intense public debate and criticism, and a swift reaction from Portland City government. ACC’s report concluded that Portland’s waterfront, due to current demand, could easily sustain “600 new residential units, 400,000 square feet of new office space, and a 275-room hotel with conference facilities” all over the next five years.¹¹⁵

The focus of ACC’s report was on commercial development of the waterfront, not on preserving the land for public use access, or on preserving any “working waterfront” uses. The plan outraged those activists and city officials who were working to open up and preserve the waterfront for water-dependent and public use, and were opposed to turning the waterfront over to large developers and condominiums. The commercial development focus of the ACC report did not fit with the character and feel of the 1974 and 1975 reports, and the Portland City government was quick to respond to the report. In April, 1982 the Portland City manager prepared the report “Strategies for the Development and Revitalization of the Portland Waterfront.”¹¹⁶ The “Strategies” plan was a 152-page document addressing twenty-nine specific issues and tasks, and was meant to guide policy and development along the waterfront:

These recommendations are designed to chart a course of action—a course which will bring change and redevelopment, while at the same time enhancing our maritime and fishing related activities the Portland Waterfront should continue to prosper as a “working waterfront”—that its principle function is to provide jobs and economic activity that are uniquely related to and dependent upon a waterfront location.¹¹⁷

113. *Id.*

114. *See id.* at 248.

115. *Id.*

116. *See* LAND USE POLICY PLAN, *supra* note 105, at 14.

117. *Id.* at 1.

It is possible to say that the ACC report, with its prediction of commercial development, helped to push Portland into protecting its waterfront. The report got the public's attention and aroused the demand for protection.

Protection for water-dependent uses on Portland's waterfront began with the April 1983 zoning amendments. The Portland City Council adopted six waterfront zoning amendments, revising the "W-1" zone and creating the new "W-2" maritime zone.¹¹⁸ Although still making an allowance for many different uses, the 1983 zoning was the first to try to protect Portland's working waterfront. Four piers were incorporated under the "W-1" mixed-use zoning¹¹⁹ in order to try and expand the developing Old Port into the waterfront, as well as maximize public access.¹²⁰ The "W-1" zone included only about twenty-five percent of the waterfront land and much of the property on the land-side of Commercial Street. Permitted land-side uses in the "W-1" zone included a full range of marine uses, offices, restaurants, hotels and residential uses above the first story. The stated purpose of the revised "W-1" zoning was three-fold:

- 1) to provide an area for the compatible mixture of waterfront dependent uses—such as marine shipping and fishing related activities, and waterfront enhanced uses—such as traditional commercial, industrial and residential uses.
- 2) to encourage adaptive reuse of existing structure,
- 3) to encourage more intensive use of land and buildings to promote the utilization of vacant land and building floor area and to encourage the upgrading of underutilized facilities.¹²¹

118. See MEMORANDUM FROM STEPHEN T. HONEY, CITY MANAGER TO MAYOR WILLIAM B. TROUBH AND MEMBERS OF THE PORTLAND CITY COUNCIL (July 25, 1983) (on file with the OCLJ). The six amendments adopted by the City Council were: 1) Revision to W-1 Zone (mixed-use); 2) Creation of new W-2 zone (maritime); 3) Building heights in Waterfront Zones; 4) Building heights in B-3 buffer zone; 5) Off Street Parking Requirements; 6) Zoning map boundary changes. See *id.*

119. See PORTLAND, ME AMENDMENT TO ZONING MAP, RE: W-1, W-2, AND ADJACENT B-3 ZONE LINES. (Map showing boundaries of the redesigned zones). Only three piers were originally going to be drawn into the W-1 zone, which were Long Wharf, Portland Pier, and Custom House Wharf. In the end, Central Wharf (now Chandler's Wharf) was also brought into the W-1 zone at the insistence of the owner, a decision that would allow for the Chandler's Wharf's condominiums to be built, which in turn caused greater restrictions to be placed on the waterfront property. The building of Chandler's Wharf and the reaction to the development will be discussed later in this paper.

120. See Guidebook, *supra* note 104, at 249.

121. See NOTICE OF MEETING FROM THE PORTLAND CITY COUNCIL FOR CONSIDERATION OF PLANNING BOARD RECOMMENDATIONS ON WATERFRONT ZONING (Apr. 1983) (on file with OCLJ).

The more restrictive, pro-preservation "W-2" zone covered approximately seventy-five percent of the waterfront land, and permitted uses included marine industrial uses, ferry terminals with accessory restaurants, and retail service establishments that were primarily marine or fishing-related. Conditional uses in the "W-2" zone, which were permitted only if they were part of and accessory to a permitted use, consisted of restaurants, off-street parking lots, storage of non-marine goods in existing structures, and fish by-products processing.¹²² The W-2 zone reflected two important goals the City Council had adopted for the waterfront: fostering port development and renewal and preserving the "working character" of the area.¹²³ The Planning Board and City Council, following the 1974 and 1975 plans, continued to support a policy of protecting water-dependent uses from competing but incompatible non-water-dependent uses.

This is not to say that everyone was happy with the proposed amendments. One member of the Portland Planning Board, John L. Baker,¹²⁴ expressed concern over the zoning of the four piers as W-1, as did the leading community activist at the time, Karen Sanford.¹²⁵ Baker's concern focused on W-1 provisions allowing offices, meeting and convention halls, hotels and motels and residential uses in new building and existing buildings.¹²⁶ Baker's concerns were addressed in the amendments that finally passed, as the first three uses were not permitted along the waterfront in the W-1 zone, while residential uses were conditional.

Activist Karen Sanford, who had recently moved to Portland from Seattle, Washington, was more concerned with allowing any mixed use along the waterfront. Sanborn's letter to city officials reflected the concern of many Portland citizens that mixed-use zoning forces marine uses to compete with other "highest/best uses," which when located next to marine businesses, can drive up property taxes and push out marine uses.¹²⁷ Sanborn expressed the fear that once water-dependent uses are driven out, and the property turned over to competing uses, "there is

122. See Guidebook, *supra* note 104, at 249.

123. See PORTLAND PLANNING BOARD, PLANNING BOARD REPORT: PROPOSED WATERFRONT ZONING AMENDMENTS 14 (1983).

124. See *id.* at 29.

125. See LETTER FROM KAREN SANFORD TO LINDA ABROMSON, MAYOR, AND STEPHEN T. HONEY, CITY MANAGER, CITY OF PORTLAND [hereinafter SANFORD LETTER] (Apr. 14, 1983) (on file with OCLJ).

126. See PORTLAND PLANNING BOARD, *supra* note 123, at 29.

127. See SANFORD LETTER, *supra* note 125, at 1.

virtually no possibility that commercial water-dependent or water-related uses will return to the site."¹²⁸

Despite dissenting views, the amendments to the zoning ordinance were adopted by the City Council. Two developments in the W-1 zone on the waterfront would lead to further revamping in 1987. The first catalyst for change was the development of the Chandler's Wharf condominiums. Chandler's Wharf was a ninety-unit residential development built by the Liberty Group on what was then known as Central Wharf.¹²⁹ Central Wharf had been the fourth pier designated under the W-1 mixed-use zoning, under which zoning residential uses on the waterfront were permitted "provided that they did not displace existing fish boat berthing which could not reasonably relocate elsewhere in Portland Harbor."¹³⁰ The Chandler's Wharf proposal raised questions over the interpretation of the conditional use standard. As to whether the standard should be comparing the proposed space with the existing space only, or taking into account the potential overall shortage of berthing space in the harbor; the former standard won out and the berthing space was relocated. Public access to the waterfront was the other concern raised by the Chandler's Wharf development, and at resolution of the issue, the development pointed out some flaws in Portland's zoning ordinance. The city wished to force the developer to give wide public access, but the developer refused and wanted to allow only limited public access.¹³¹ Upon close examination of the city's zoning ordinances, city officials found no language or standard that would require the conditional residential uses to allow public access to the water.¹³² Chandler's Wharf, however, brought on more than worries about current waterfront access. Residents saw the guarded gate and the displaced fishing vessels and worried what else would be able to move in on the working waterfront.¹³³

Portland residents did not have to wait long to see what other developments were in store for the waterfront; four more major proposals would push forward a citizen referendum on the waterfront zoning. The first proposed re-zone was of the site of Cumberland Cold Storage, on the eastern end of Commercial Street, from W-2 to W-1 mixed-use. The owner of Cumberland Cold storage claimed he was not able to obtain any

128. *Id.* at 2.

129. See Guidebook, *supra* note 104, at 250.

130. *Id.*

131. See *id.* at 251.

132. See SANFORD LETTER, *supra* note 125, at 1.

133. See Clarke Canfield, *Waterfront: From Frenzy to Neglect*, PORTLAND PRESS HERALD, Mar. 30, 1992, at A1.

financial return on the property and needed rezoning in order to make his property economically feasible; conversion of the facility into residential condominiums and offices was planned.¹³⁴ The City Council denied the request for the rezoning amid concern that the facility's proximity to the Fish Pier made residential and office use incompatible with the fish pier.¹³⁵ The Council also reasserted its commitment to protecting the waterfront for "working waterfront" uses and only allowing limited mixed-use, even in the W-2 zone.¹³⁶

The Liberty Group also re-emerged with a proposal for a fifty million-dollar development on Long Wharf, which was in the W-1 zone. The development would have included residential, office, and retail space, and would have required several exceptions to the zone's height requirements.¹³⁷ Late in 1985, a group of W-2 property owners asked the city to allow them to have some non-marine-based tenants occupy their property, as they claimed that there were not enough marine tenants to fill the rentals.¹³⁸ The Planning Board, after much debate, did recommend to the City Council that a small amount of upper-level space in the buildings could be filled with non-marine tenants, as long as water-dependent industries were not harmed.¹³⁹ The Planning Board also recommended that this plan only be temporary, until marine-tenant demand for the space re-emerged.¹⁴⁰ The City Council refused to accept the recommendation, however well-intended it may have been, stating again their support for preserving the "working waterfront" from other competing uses.¹⁴¹

The last in the series of catalysts occurred in June 1986, in the form of a proposal by the Eastern Points Associates to re-zone twelve acres near Bath Iron Works from heavy industrial to W-1.¹⁴² Eastern Points, as had the Liberty Group, wanted to develop residential and retail spaces, but faced opposition by 7 of 9 Portland City Councilors.¹⁴³

134. See Guidebook, *supra* note 104, at 251.

135. See *id.*

136. See *id.*

137. See *id.*

138. See *id.*

139. See *id.*

140. See *id.*

141. See *id.*

142. See *id.* at 251-52.

143. See *id.* at 252. The Eastern Points Associates proposed their development in June, 1986, and it was still under consideration at the time of the referendum in May 1987. Once the overlay zone initiative passed, the Eastern Points development was no longer viable, as even if the Eastern Points land was re-zoned W-1, the overlay zone did not permit that type of development.

As residents became aware of the potential for retail and residential development along the waterfront to displace the "working waterfront," they began to take action. Fueled by waterfront activist Karen Sanford and other waterfront supporters, the Working Waterfront Coalition introduced an initiative in December 1986 that would ban all non-marine uses along the entire waterfront.¹⁴⁴ The initiative would create an overlay zone on the existing zoning that would extend from Veteran's Memorial Bridge to Tukey's Bridge.¹⁴⁵ This overlay zone would specifically prohibit "hotels, motels, boatels, residential uses and office, commercial and industrial uses which [were] not accessory to fishing activities, maritime activities, functionally water dependent activities or authorized public uses."¹⁴⁶

Although the overlay zone initiative was a direct reaction to proposed developments that would have pushed out the "working waterfront," not all waterfront property owners and water-dependent users were in favor of the initiative.¹⁴⁷ Waterfront property owners had previously aired their grievances to the city, stating that the zones in place were too restrictive and did not allow them to rent out all available space, or make a profitable return on the property. The water-dependent business owners felt that in order to be viable there needed to be a mix of uses on the waterfront to bring in enough revenue to keep the waterfront infrastructure in working shape.¹⁴⁸

The City Council itself was opposed to the citizen's referendum on the same basis as the property owners, and the city-wide debate intensified until the vote on May 5, 1987.¹⁴⁹ The initiative, however, won easily by a two-to-one margin, winning in every voting district.¹⁵⁰ The new overlay zone stated that it was retroactive to its date of filing (December 1986), a provision that would be immediately tested by the Fisherman's Wharf Associates II (FWA II).¹⁵¹ The FWA II had decided to try another development, for which the group had bought land after the filing of the initiative. The Portland Planning Board gave the group approval one week before the referendum vote,¹⁵² but once the overlay zone won, the City

144. *See id.*

145. *See id.*

146. *Id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d 160, 162 (Me. 1988).

152. *See id.*

refused to deliver the building permit.¹⁵³ Although the City Council had vehemently opposed the overlay zone proposal,¹⁵⁴ the city staunchly fought for the proposal in subsequent litigation brought by the FWA II.¹⁵⁵

The City of Portland, the Director of Planning and Urban Development and the City Manager filed suit on June 4, 1987 seeking a declaration of their duties and their right to enforce the initiated ordinance against the FWA II.¹⁵⁶ The FWA II counter-claimed, asserting that the ordinance did not apply to their project, which was proposed before the referendum. They argued that the ordinance violated the Maine Constitution, state statutes, the City of Portland's Comprehensive Plan, and the Portland Land Use Code, and claimed that the ordinance constituted a "taking."¹⁵⁷ The FWA II won in Superior Court, but the City appealed to the Maine Supreme Judicial Court sitting as the Law Court, who reversed the lower court's decision. The Law Court stated that despite the law regarding the construction and effect of repealing and amending statutes,¹⁵⁸ which prohibits the retroactive applicability of ordinances to actions "pending at the time of the passage [of the ordinance]," the Legislature "clearly has the power to confer upon municipalities the authority to apply municipal ordinances retroactively."¹⁵⁹ The Legislature could do so given that the Legislature itself can give retroactive effect to a statute, and under the then existing Maine statute,¹⁶⁰ any municipality, "by the adoption, amendment or repeal of ordinances," had the right to exercise any power that the

153. The Planning Board had granted approval of the application on April 28, 1987, and the city did approve and sign the building permit on June 4, 1987, almost one month after the referendum passed; the permit, however, was not delivered to Fisherman's Wharf Associates "pending a determination of the duties of the appropriate city officials." *See id.*

154. Interview with Alexander Jaegerman, Chief City Planner, City of Portland Planning Office, in Portland, Maine. (Apr. 18, 2000).

155. *See City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d at 160.

156. *See id.* at 162.

157. *See id.*

158. ME. REV. STAT. ANN. tit. 1, § 302 (West 1998) "Actions and proceedings pending at the time of the passage, amendment, or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing." *Id.*

159. *See City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d at 164.

160. ME. REV. STAT. ANN. tit. 30, § 1917 (West 1996), repealed by P.L. 1987, ch. 583, § 9 (effective Feb. 26, 1988). "Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power of function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law or charter." *Id.*

Legislature had the authority to give to the municipality; the power to apply ordinances retroactively is one such power.¹⁶¹

The FWA II litigation proved to be the only legal challenge to the ordinance, but that is not to say that everyone was satisfied with the overlay zoning. Although there was a five-year moratorium on changing the referendum, just nine months later there were already complaints and calls for zoning changes.¹⁶² Although citizen activists from the group "Keep the Port in Portland" claimed that there had been new expansion and development on the piers in the W-2 zone, property owners told a much different story. Property owners complained of thirty-percent or higher vacancy rates, and claimed that although they might be able to pay their bills now, there was no money to pay for upkeep on the piers due to the low occupancy.¹⁶³ Groups such as the Fishermans Wives Association, although acknowledging that the activists had good intentions, felt that the Working Waterfront Coalition "went just a little too far" although groups such as the Wives Association did not want large condominium developments, they "didn't want to shut off the waterfront as we've seen happen in the last couple of months."¹⁶⁴

By January of 1991, the City of Portland had begun to think about changing the zoning system. There was trouble on the waterfront, as the referendum had slowed growth on the piers and left vacancies that could no longer be filled by non-marine uses, but were also not able to be filled with marine-dependent renters.¹⁶⁵ In 1991, the City accepted the assistance of the Waterfront Alliance¹⁶⁶ to review the current waterfront zoning

161. See *City of Portland v. Fisherman's Wharf Associates II*, 541 A. 2d at 164.

162. See Jeff Smith, *Waterfront Pressure Building*, EVENING EXPRESS, Mar. 2, 1988, at 1.

163. See *id.*

164. See Jeff Smith, *Keep the Port's Sanford rejects 'Pie in Sky' Image*, EVENING EXPRESS, Mar. 3, 1988, at 6.

165. See Canfield, *supra* note 133, at 1A. By the time of the report in the Portland Press Herald, many piers on the waterfront had fallen into such a state of disrepair that they were no longer safe to even walk on. Owners simply did not have the money to repair the piers and buildings, as the rent from the water-dependent users was barely enough to pay taxes or keep-up basic maintenance. Under the pre-1987 zoning, space above the second story could have been, and was intended to be, rented by non-water-dependent users; it was the idea that by allowing some mixed use, the rent from those users would offset the cost of repair and maintenance. Once the referendum was in place, those second and third story spaces could no longer be rented to non-marine users, and there simply was not a strong enough market to fill the space with marine-dependent users. See *id.*

166. See WATERFRONT ALLIANCE, WATERFRONT ALLIANCE RECOMMENDATION TO THE CITY OF PORTLAND, GREATER PORTLAND COUNCIL OF GOVERNMENTS, Apr. 14, 1992, at 1 [hereinafter the ALLIANCE REPORT]. The Waterfront Alliance for the Port of Portland consisted of various groups concerned with the waterfront, including developers, waterfront

and prepare a report [the Alliance Report] on the zoning and its consequences.¹⁶⁷ The report and recommendation submitted by the Alliance in April 1992 were to become the basis for the new zoning on the waterfront, and would bring small changes and some relief for waterfront property owners.

The Alliance Report kept and re-enforced the previous ordinance's commitment to keeping the area a "working waterfront." The report's preamble stated that "water-dependent users are the lifeblood of Portland's waterfront and their interests must be protected above all others."¹⁶⁸ The report recommended three new zones along the waterfront, as well as recommending five basic measures to be taken:

- 1) Preserve the entire perimeter of the Harbor from Tukey's Bridge to the Veteran's Memorial Bridge for berthing.
- 2) Recognize that property with direct water access is limited and should be reserved exclusively for marine use.
- 3) Allow marine compatible use of other property that does not interfere in any way with the activities of water-dependent users.
- 4) Divide the waterfront into four zones that reflect the type of berthing or land use that each zone can accommodate.
- 5) The Alliance believes that the City should renew its commitment to promoting public access to the Port for the benefit and enjoyment of its citizens and continue to insure ecological safety through the promotion of environmentally sound practices.¹⁶⁹

The Alliance believed that the waterfront area could continue to be a force that supported the local economy and provide jobs and tax revenue to the city. The three zones proposed by the Alliance Report were: 1) the Special Use Zone (WSUZ); 2) the Port Development Zone (WPDZ); and 3) the Central Zone (WCZ); all three were to be adopted by City Ordinances.¹⁷⁰ The Alliance Report presented recommended lines for drawing

activists, fisherman associations, and City government members. The Board of Directors of the Alliance included Board Members from the following groups: Marine Trade Center, Munjoy Hill Neighborhood Organization, the economic Development Director for the City of Portland, The Maine Fisherman's Wives Association, Bath Iron Works, Keep the Port in Portland, the CIANBRO Corporation, and the Getty Petroleum Corp.

167. *See id.*

168. *See id.* at 2.

169. *See id.*

170. The three zones were to become the new zoning districts in Portland, and when adopted the names recommended by the Alliance were used, except that "Waterfront" was added to the beginning of each, hence the *Waterfront* Central Zone, the WCZ. *See* PORTLAND PLANNING BOARD, PORTLAND'S COMPREHENSIVE PLAN, CITY OF PORTLAND

the new districts, as well as mapping out the specific uses that were to be allowed in each zone.

The Special Use Zone fell at the eastern end of Commercial St, beginning just east of the BIW property, and wrapping around the Eastern Promenade. The idea for this zone was to allow some of the uses not allowed in the other two zones, and to use the area as a "gateway" to the waterfront region.¹⁷¹ The Alliance Reports listed six specific recommendations for the area, which were:

- 1) to provide an area where Marine Industrial and Marine-Compatible Uses can operate;
- 2) to allow Marine Compatible Uses to occupy existing vacant facilities that are not directly water related;
- 3) to provide a plan which directs new non-marine development (new construction/substantial rehabilitation) to contribute to the maintenance and improvement of the infrastructure along the water's edge as a condition of use;
- 4) to promote the use of the land along the water's edge be used by water dependent uses;
- 5) to encourage public access to the waterfront;
- 6) to promote uses that do not harm abutting neighborhoods and are environmentally sound.¹⁷²

These recommendations were largely based on the fact that in 1992 there was little public access to the waterfront in the WSUZ area, and most of the buildings were underutilized or unoccupied.¹⁷³

As adopted by the City Council, the WSUZ allows industrial, commercial and marine uses to co-exist, as recommended in the Alliance Report.¹⁷⁴ By allowing certain industrial, office, retail, and food establishment uses in this area, the Alliance hoped that those uses would not have the same negative impact or infringement on water-dependent uses as they would in any of the other waterfront zones.¹⁷⁵ Any use in the area, however, was subject to the standard that it would not "have an impermis-

MAINE, GOALS AND POLICIES, 38 (1996).

171. See ALLIANCE REPORT, *supra* note 166, at 5.

172. *Id.*

173. See *id.* at 5-6.

174. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-320.6 (1999).

175. See ALLIANCE REPORT, *supra* note 166, at 6.

sible adverse impact on future marine development opportunities.”¹⁷⁶ Such impermissible uses were defined in the statute to include displacing an existing water-dependent use, or reducing commercial vessel berthing space.¹⁷⁷

One important aspect of all the new zoning districts was that both the Alliance Report and the City Council focused on the needs of the surrounding neighborhood in adopting the ordinances.¹⁷⁸ In order for the zoning to be effective, the needs of both the waterfront users and the surrounding community needed to be taken into consideration. This “neighborhood standard” had to be met by all uses in the zone, even those permitted marine uses. It was expected that most of the permitted uses would not interfere with the residential development in the area.

The next proposed district was the Port Development Zone (WPDZ), which was to include “the land east of the Veterans Memorial Bridge to the south side of the State Street Wharf and all land west of the Million Dollar Bridge [now the Casco Bay Bridge].”¹⁷⁹ The WPDZ also included an area of land on the east side of Commercial Street, which abutted the WSUZ.¹⁸⁰ The activity and uses in this area historically had depended on water access, as the majority of the commerce was tankers requiring deep-water access. Ensuring the viability of the deep-water access to the tankers was directly tied to the continued viability of the Port of Portland, as the transportation of goods to and from the port was and is an important

176. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-320.55 (1999).

177. See *id.* The ordinance states that “A proposed development will have an impermissible adverse impact if it will result in any one (1) or more of the following: 1) The proposed nonwater-dependent use will displace an existing water-dependent use; 2) The proposed use will reduce existing commercial vessel berthing space; 3) The proposed nonwater-dependent use, structure or activities, including but not limited to access, circulation, parking, dumpsters, exterior storage or loading facilities, and other structures, will unreasonably interfere with the activities and operation of existing water-dependent uses or significantly impede access to vessel berthing or other access to the water by water-dependent uses; or 4) The siting of a proposed nonwater-dependent use will substantially reduce or inhibit existing public access to marine or tidal waters. *Id.*”

178. See ALLIANCE REPORT, *supra* note 166, at 5. The ordinance as adopted specifically states that “[u]ses to be located in this zone must be compatible with these existing neighborhood uses.” See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-320.5 (1999).

179. ALLIANCE REPORT, *supra* note 166, at 7.

180. See *id.* at 8. The specific language of the recommendation reads: “The area from the east side of the Maine Wharf to the easterly end of the current W-1, all areas south of the Grand Trunk Railroad r-o-w and including the r-o-w (part of old IM2).” *Id.*

economic factor.¹⁸¹ The uses in the zone were therefore governed by the standards of other industrial zones in Portland, but limited to those uses that required deep-water access.

The Alliance Report did acknowledge, however, that there may be an economic need to allow non-marine industrial uses in the area and so recommended a standard that permitted such uses "only on a temporary basis and only to the extent it will not preclude or impede any future water dependent development."¹⁸² The report recommended flexibility in applying the standard in order to retain the land for water-dependent uses but also to allow the area to remain economically viable. The recommended flexibility was adopted by the City Council by listing these uses as "conditional uses" that would be permitted, provided that "such uses will not impede or preclude existing or potential water-dependent development and . . . will allow for adequate right-of-way access to the water and are compatible with marine uses."¹⁸³

The Alliance Report also listed ten specific uses that were not to be allowed in the WPDZ. This list of ten was: 1) new residential; 2) hotels; 3) new retail complex; 4) new office buildings; 5) boatels; 6) aquariums; 7) auditoriums; 8) civic centers; 9) institutional; and 10) marine incompatible.¹⁸⁴ The list of ten specifically prohibited uses was in response to the development that had been proposed in the 1980's near the BIW site, as it was seen that if the area now defined as WPDZ was opened to these uses, it would be infringing on the water-dependent uses in the other zones as well. The Alliance felt that these uses were best suited in other areas, possibly even other waterfront zones such as the WSUZ for aquariums or auditoriums.¹⁸⁵

The ordinance as adopted picked up on the majority of the prohibited uses from the Alliance Report, but also left some ambiguity. The ordinances language prohibiting certain uses read as follows: a) residential uses (not in existence on May 5, 1987); b) hotels, motels or boatels; c)

181. *See id.* The uses in this area include tanker docking facilities, a cruise ship terminal, and a cargo tanker shipping and unloading dock.

182. *Id.* at 7.

183. *See* PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-318.5 (1999). These "conditional uses" included four categories of uses: marine, commercial industrial, and public. Conditional marine uses among others, included wholesale or retail sale of marine products, seafood processing, seafood packing and packaging and fabrication of marine-related goods. The only conditional commercial use was for off-street parking lots, but excluding parking structure. Industrial conditional uses included existing storage facilities and facilities for marine and general construction, and the public conditional use was for utility substations. *See id.*

184. *See* ALLIANCE REPORT, *supra* note 166, at 8.

185. *See id.*

auditoriums, civic centers, convention centers or other meeting facilities; and d) restaurants and drinking establishments.¹⁸⁶ The failure of the City Council and Portland Planning Board to pick up the specific language of the report caused a split between the city and some of the members of the Waterfront Alliance. Some members of the Alliance were working with the Planning Board to adopt the report language into the text of the ordinance.¹⁸⁷ The members of the Alliance who broke with the city and refused to work on the ordinance felt that the failure of the city to pick-up all of the Alliance Report's language showed a lack of support for the preservation of the waterfront for water-dependent uses.¹⁸⁸ The activists were perhaps justified in being suspicious of city officials, as all but one member of the City Council had opposed the 1987 referendum, but the city government had supported the referendum in all subsequent litigation and policy statements.

The Alliance's split affected not only the ordinance's language concerning the WPDZ, but also the language regarding the third new zone, the Central Zone (WCZ.) The WCZ included the waterfront land from "the east side of the State Street Wharf to the centerline between the Maine Wharf and the Casco Bay Island Terminal."¹⁸⁹ This area included the majority of the piers and the property directly across from Portland's "Old Port" area. The Alliance's recommended prohibited uses for the zone included all those listed for the WPDZ, except for the "marine incompatible" language; the report also replaced "institutional" with "non-marine institutional."¹⁹⁰ The Alliance Report's general recommendation for prohibited uses stated that no large projects should be permitted that would place unreasonable demands on the zone's infrastructure or would interfere at any time "with marine only and marine compatible support."¹⁹¹

The language of the ordinance itself, however, includes only four specifically prohibited uses, which are: a) residential uses (not in existence on May 5, 1987); b) hotels, motels or boatels; c) auditoriums, civic centers, convention centers or other meeting facilities; and d) drinking

186. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-320.1 (1999).

187. Interview with Alexander Jaegerman, City Planner, in Portland, Maine (Apr. 18, 2000). Jaegerman has been with the City Planning Board since the early 1980's and was actively involved with drafting the language of the 1992 ordinances. See *id.*

188. See Edward D. Murphy, *Waterfront Debate Still Simmering*, PORTLAND PRESS HERALD, Jan. 6, 1993, at 7A.

189. ALLIANCE REPORT, *supra* note 166, at 9.

190. See *id.* at 8, 10.

191. See *id.* at 10.

establishments.¹⁹² The language does not specifically prohibit “new large retail complexes, new office buildings or non-marine industrial uses; it was this language that made Alliance members feel that the waterfront could be “very tempting to someone,” and made them “very nervous.”¹⁹³ The ordinance as written and adopted allows for non-marine conditional uses, provided that they are “compatible with existing and potential marine uses,” and does “not impede access to the water by existing or potential marine uses.”¹⁹⁴

Other language that worried, or in some cases angered, waterfront activists was language that specifically allowed non-marine uses on the waterfront, but restricted the second floor or higher.¹⁹⁵ In addition to a long list of permitted marine and water-dependent uses, the ordinance also specifically allows professional, business and general offices, business service establishments, cabinet and carpentry shops that sell only items made on the premises, intermodal transportation facilities, and cold storage facilities.¹⁹⁶ Other industrial and public uses were also permitted on the second floor or higher of the buildings.¹⁹⁷

Another provision specifically permitted an even broader range of non-marine uses in buildings that were in existence “on January 4, 1993, and located within thirty-five feet of the southerly edge of Commercial Street between Maine Wharf and the city fish pier.”¹⁹⁸ The uses permitted in this area, while not residential uses, were those that waterfront activists had believed to be most incompatible with and harmful to a working waterfront. Such uses included professional and business offices, retail and service establishments, restaurants, banking services, laundry and dry cleaning services, and museums and art galleries. The provision basically allowed for many of the Old Port-type stores to extend to certain buildings that, while located on the waterfront side of Commercial Street, were not specifically on the piers.

Despite that broader and more flexible language of the ordinance, city waterfront activists considered the ordinance a victory, and one developer claimed that there was “no way” any developer or financial institution “will ever think about going down and doing any kind of development [on

192. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-315.5 (1999).

193. Murphy, *supra* note 188, at 7A.

194. PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-315 (1999).

195. See Murphy, *supra* note 188, at 7A.

196. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-314 (1999).

197. See *id.*

198. *Id.*

the waterfront]. Period.”¹⁹⁹ Part of the reason activists could claim a victory was due to the “Pringle Amendment,” an amendment written by city councilor Anne Pringle and adopted by the city council, which enforced a tone of giving priority to water-dependent uses. The Pringle Amendment was primarily concerned with the area west of the Million Dollar Bridge [now Casco Bay Bridge], as that was the largest parcel of undeveloped waterfront land:

The property along the shore west of the Million Dollar Bridge [Casco Bay Bridge] is an important resource as the largest remaining undeveloped parcel abutting deep water, with significant potential value for use by deep draft vessels in the future, including such uses dependent on the convergence of water, rail and highway transportation linkages. Non-marine commercial or industrial development of this property should be allowed only the extent that it will not impede or preclude future water dependent development. Such non-marine uses must allow for adequate right-of-way access to the shore, must be compatible with marine uses, and must be physically adaptable or relocatable to make way for future development for water-dependent uses, especially those which utilize the deep water frontage of site.²⁰⁰

Although this specific language was not incorporated into the ordinance itself, the Waterfront Alliance Report (of which the amendment was part) was adopted as part of the City of Portland’s Comprehensive Plan,²⁰¹ and thereby effectively became part of Portland’s planning scheme.

F. Portland 2000

In the years since the passage of the current zoning regulations, the city of Portland itself has undergone revitalization and has grown along

199. Murphy, *supra* note 188, at 7A.

200. See ALLIANCE REPORT, *supra* note 166, at 19.

201. See PORTLAND PLANNING BOARD, *supra* note 170, at 39. Portland’s Comprehensive Plan is not newly written with each change, but instead incorporates various parts of reports or recommendation as it is made. Once a new report or recommendation becomes a part of the comprehensive plan, the sections of old plans that were effectively overruled or outdated by the new report are omitted, but any parts which are not overruled remain a part of the comprehensive plan. Currently Portland’s Comprehensive Plan consists of various sections of the Waterfront Alliance Report, Waterfront Task Force Recommendations of April 1990, a Waterfront Action Plan for the Port of Portland, Maine—April 1988, Waterfront Zoning Goals and Policies—August 3, 1983, Portland Waterfront Public Access Design Project—1983, and Portland Shoreway Access Plan—Nov. 1987. See *id.* at 39–42.

with the economy. Although in the early 1990's the Old Port area of Portland had a reputation for rowdiness and late-night drinking and dancing, the Old Port's image today is one of high-end stores, professional offices, apartments, trendy restaurants and a few drinking establishments where patrons still have a good time. The Old Port area has historically also been known for its unique craftsmen shops that were locally owned. Until early 2000, national chains were almost unknown in the Old Port. In April 2000 however, plans were announced for several national chains to open, including a "42 Old Chicago" pizza restaurant, Vermont-based "American Flatbread," and a pub associated with the Guinness brewery²⁰²

Waterfront property owners carefully watch the development of the Old Port area, with its proximity to the waterfront, as well as proposed developments on the waterfront itself. As the Old Port area expands and becomes more popular and populated, that growth will tend to spill over onto the waterfront, likely in areas not currently zoned in most parts to permit such uses as bars, restaurants or other tourist amenities. But proposals for the waterfront land itself have been made, proposals that do not necessarily fit with the current zoning scheme and will call for Portland residents to once again examine the uses of the waterfront land.

1. The Aquarium

The most controversial use of waterfront land proposed is a new aquarium, a project that has been under consideration for over twenty years, but is now finally appearing to come together. The proposed site for the aquarium is on the western end of Commercial Street next to the Portland Fish Exchange, in a location currently used as a naval reserve. The area is currently zoned WCZ, and would not permit such a use;²⁰³ an aquarium is in fact one of the prohibited uses suggested in the Alliance Report.²⁰⁴ The Naval base property will belong to the Gulf of Maine Aquarium once the aquarium group builds a new naval reserve base in Brunswick, Maine, as part of the deal for acquiring the property.²⁰⁵

202. See Mark Shanahan, *Old Port Evolution*, PORTLAND PRESS HERALD, Apr. 19, 2000, at 1A.

203. Although this specific use is not expressly prohibited in the adopted zoning ordinance, there is no language that would allow such a use in the current site, as an aquarium is essentially a tourist attraction. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-315.5 (1999).

204. See ALLIANCE REPORT, *supra* note 166, at 8.

205. See Mark Shanahan, *City Criticizes Proposed Site for the Aquarium*, [hereinafter Shanahan Aquarium] PORTLAND PRESS HERALD, Mar. 25, 2000, at 1A.

Aquarium officials estimated in 2000 that the base would take approximately one year to build, and that the aquarium could open in five.²⁰⁶

The chosen site for the aquarium has received considerable opposition from the city council which is worried about the impact such an attraction would have on the “working waterfront.”²⁰⁷ The Naval reserve site is at “the hub” of the working waterfront, is a tourist attraction, and could attract the type of pressures and uses that are both competing and incompatible with the waterfront. City Councilors Karen Geraghty and Jay Hibbard,²⁰⁸ and former Portland Mayor John F. McDonough, have publicly expressed their concerns over whether the proposed aquarium site will conflict with Portland’s view of its working waterfront.²⁰⁹

The proponents and developers of the aquarium say, however, that the aquarium can be a component of a working waterfront. The Gulf of Maine Development Corporation, the group responsible for the aquarium, has been in recent years touting that the facility will not only be an aquarium, but also a research and education facility benefitting Portland’s fishing industry.²¹⁰ As a result, the aquarium’s chosen location at the heart of the waterfront is important. The Group also sees the aquarium as a place of extensive public access to the waterfront, as well as an educational resource, therefore serving community and commercial interests. As the aquarium project and funding moves forward, its true development purpose remains to be seen.

2. The New Deep Water Berthing Terminal

As Portland’s cargo and cruise ship business has expanded in the last few years, the need for a new, larger terminal to facilitate deep-water vessels has become increasingly clear. In 1999, the Portland Harbor moved ahead of the larger Boston Harbor in the volume of cargo moving through the port.²¹¹ The cruise ship industry in Portland has grown at astounding rates, as Portland has become a popular tourist destination, with the amenities of Maine to offer and the popular L.L. Bean so close at hand. Sixteen cruise ships visited Portland Harbor in 1999, and fifty were

206. *See id.*

207. *See id.*

208. *See id.*

209. *See* Andrew D. Russell, *Aquarium Group Picks Naval Reserve Pier Site*, PORTLAND PRESS HERALD, Apr. 1, 1997, at 1A.

210. *See* Shanahan Aquarium, *supra* note 205, at 1A.

211. *See* Mark Shanahan, *City Plans for Better Transit, Fewer Cars*, PORTLAND PRESS HERALD, Feb. 17, 2000, at 1B.

expected in Summer 2000.²¹² Unfortunately, many of the cruise ships that currently visit Portland cannot actually dock due to the lack of space for deepwater vessels, and have to instead ferry their passengers into the city.²¹³

Portland is soon going to solve that problem with a new ferry terminal at the current Bath Iron Works site. Bath Iron Works' (BIW) lease of the land will expire on Dec. 31, 2001, and all of its resources will move to an improved site in Bath. The departure of BIW has presented Portland with the space to create a terminal to facilitate the growing cruise and cargo ship traffic. The increasingly popular Scotia Prince will also move its services to the new terminal, services it wishes to expand, as do Casco Bay Lines, who will also relocate.²¹⁴ Relocating the Scotia Prince and the traffic from the International Marine Terminal (IMT) to the BIW space would also allow the current cargo-handling facility next to the IMT to expand.²¹⁵ Maine voters approved a nine-million dollar bond in November 1999 that has allowed plans to get underway.

Although the current new facility as planned, tentatively called "Ocean Gate," will be operational, it presents two questions for Portland that will affect the waterfront and zoning. The first question will be whether the facility will also house tourist amenities, such as restaurants or hotels, although the area is currently not zoned for such uses.²¹⁶ City officials have noted that cruise ship tourists "expect certain amenities" when arriving at a destination,²¹⁷ and the current space could hold such uses. The impact of such uses on the waterfront has to be considered and studied, however, and the question of waterfront zoning will have to be re-addressed. Current zoning ordinances expressly support preserving the waterfront for water-dependent uses – restaurants and hotels clearly do not fit this description. A change in the fundamental purpose of the zoning

212. See Mark Shanahan, *Plans Evolve for Design of Ferry Facility* [hereinafter Shanahan Ferry], PORTLAND PRESS HERALD, Feb. 9, 2000, at 1A. These fifty cruise ships are estimated to bring 65,000 people to the city.

213. See John Richardson, *BIW to Let City Take Over Dry Dock Site*, PORTLAND PRESS HERALD, Jan. 5, 1999, at 1A.

214. See Shanahan Ferry, *supra* note 212, at 1A. The Scotia Prince currently carries around 165,000 people in between Portland and Nova Scotia, and is expected to grow at a rate of 6.5% per year. Casco Bay Lines carries almost one million people each year between Portland and the islands in Casco Bay.

215. See John Richardson, *Optimism Teems on the Waterfront*, PORTLAND PRESS HERALD, Dec. 28, 1999, at 1A.

216. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-318 (1999). This area is currently zoned WPDZ, and permitted uses are reserved for those that contribute to port activity and depend on deep-water space. See *id.*

217. See Shanahan Ferry, *supra* note 212.

provisions would be required in order to provide tourist services at the facility.

The second potential development on the waterfront at the new terminal site would be a new convention center. The idea of a new convention center is not new to Portland, but the first steps have been taken to explore the idea of one at the eastern end of Commercial Street. A convention center next to the new ferry terminal, especially one that would house restaurants and other consumer amenities, does seem like an ideal attraction for the city to some. One such supporter is Godfrey Wood, President of the Portland Chamber of Commerce, who presented such a vision in a letter in the Chamber's newsletter. Wood believes that a convention center would bring "huge economic benefit to this region" and would be a benefit to all Portland residents. A 1998 study by the Chamber of Commerce found that those who responded to the report saw the need for a new convention center as a top priority.²¹⁸ The City Council as well has begun to look into the feasibility of the project. Two task forces have been established to examine the development and the economics of the area around the BIW property in connection to the new ferry terminal, both led by City Councilor Karen Geraghty and Waterfront Director Ben Snow.²¹⁹ The task forces plan to release their results soon, as well as begin a third study, specifically examining the placement of a convention center in that area.

As with a ferry terminal that includes hotels and restaurants, a convention center, which is not water-dependent, would require a major shift in the zoning of the area. The third task force will look specifically at zoning issues and the impact that a convention center would have on the surrounding neighborhood. Traffic to the neighborhood, both pedestrian and vehicular, would increase dramatically, as would the traffic on Commercial Street itself, a fact that has Commercial Street merchants worried.

IV. CONCLUSION

After seven years of the current zoning, the Portland waterfront is at another turning point. In the last twenty years, sometimes with a little prodding, the city government has committed itself to preservation of the working waterfront. The question for Portland now is whether it intends

218. See George Neavoll, Editorial, *Let's 'Imagine a Great Waterfront'; A Convention Center for Greater Portland Could Be In It*, PORTLAND PRESS HERALD, Feb. 14, 1999, at 4C.

219. Interview with Alex Jaegermann, City Planner, in Portland, Me., (Apr. 19, 2000).

to carry that commitment into the twenty-first century. Due to the booming economy of Portland and the growth and attraction of the Old Port area, it is easy to understand the desire to see the same types of "Old Port" businesses move to the waterfront, as well as the attraction of the additional tax revenues that could be brought in by such uses. Important to understand and see, however, is that Portland's working waterfront is economically viable and bouncing back from a low point in the fishing industry. Yes, more tax revenue could be raised by zoning the waterfront area for other commercial or residential uses, but to do that would lead to the collapse of the waterfront as it stands today.

The current zoning in place leaves considerable leeway for buildings that were in existence when the zoning was passed and within thirty-five feet of the south side of Commercial Street;²²⁰ several buildings are used for professional office spaces and a new restaurant and pub are opening in another, all of which share terrific water views.²²¹ The current zoning has effectively worked to preserve the working waterfront, even during the lean periods of the fishing industry, as property owners claimed that they could not find enough water-dependent users to fill their spaces. What is important, however, is that the space for them was saved, whether it was utilized or not. True, underutilization of assets is never good economically for a city, but it is sometimes a necessity to some degree. Besides the economics, there are historical and cultural reasons for preserving the working aspect of the port, and Portlanders to date have said that those reasons are enough to overlook some of the economics of the situation. Without actively excluding some uses from the waterfront, the working aspect will be lost, especially in today's economy, as evidenced by those coastal areas in northern Maine.

220. See PORTLAND, ME., CODE OF ORDINANCES, ch. 14, art. III, Div. 18.7 § 14-314 (1999).

221. In July 2000, however, Charles Poole, manager of proprietors of Union Wharf, requested an amendment to the current zoning in order to build an addition to Sapporo Restaurant, which is located on Union Wharf. The amendment called for allowing property owners to expand existing buildings that are at least seven years old and within thirty-five feet of Commercial Street. The expansion would have to be within thirty five feet of Commercial Street, but it would be possible to house non-marine related business in the expansion as long as there was no adverse impact on marine uses. The arguments surfacing in the debate over this amendment were those heard in previous waterfront zoning debates regarding the need for preservation to be balanced with the property owners' need for income in order to make repairs and stay in business. The amendment, voted down by the City Council, is but a warning of the struggle and debate that the Portland waterfront is getting ready to revisit. See Mark Shanahan, *Proposed Waterfront Zone Change Stirs Debate*, PORTLAND PRESS HERALD, Aug. 4, 2000, at 1A, 12A.

The proposed tax exemption examined earlier in this paper can work effectively with zoning to produce a greater incentive to property owners to keep their land working waterfront; alone however the exemption will only be a temporary aid in the property owner's fight. There is in fact potential for the tax exemption to backfire. A tax exemption on top of a valuation based on property not zoned for waterfront residential use—the “best and highest” use—will provide an even greater subsidy to commercial fisherman. As examined previously, however, as this group is given an even greater subsidy, others must then pay more. Although the current political climate may support the exemption, that climate can quickly change if the majority of constituents react loudly to their growing property bills, as they also clamor for more municipal services.

The battle for the working waterfront that was fought in Portland in the last two decades, and is about to be revisited, is beginning to be fought in other Maine coastal towns. As the largest city in Maine, the pressures that drive out working waterfront uses developed in Portland first. Portland's effort to protect the waterfront has been commendable to date as evidenced by the continuance and growth of the harbor industry. Portland's zoning efforts could serve as a model for other coastal cities facing the extinction of their working waterfront, but at the basis of any zoning plan must be a firm commitment to preservation. Such a commitment to preservation must be expressly stated, not just in the goals of a plan, but in the plain language of the ordinances themselves, or else the preservation efforts will be for naught. Stated purposes and goals are good guidelines, and make for interesting political soundbites, but unfortunately that is all they are. If the ordinance language itself is not tightly drawn, towns will find that the incompatible uses and pressures will creep back to the waterfront, and the fight will have to begin again.

