

## Maine Law Review

---

Volume 58  
Number 2 *Symposium: French and American  
Perspectives Towards International Law  
and International Institutions*

---

Article 14

June 2006

### Striking an Equitable Balance: Placing Reasonable Limits on Retroactive Zoning Changes after *Kittery Retail Ventures, LLC v. Town of Kittery*

Heather B. Sanborn  
*University of Maine School of Law*

Follow this and additional works at: <https://digitalcommons.maineraw.maine.edu/mlr>



Part of the [Land Use Law Commons](#)

---

#### Recommended Citation

Heather B. Sanborn, *Striking an Equitable Balance: Placing Reasonable Limits on Retroactive Zoning Changes after Kittery Retail Ventures, LLC v. Town of Kittery*, 58 Me. L. Rev. 601 (2006).  
Available at: <https://digitalcommons.maineraw.maine.edu/mlr/vol58/iss2/14>

This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

## STRIKING AN EQUITABLE BALANCE: PLACING REASONABLE LIMITS ON RETROACTIVE ZONING CHANGES AFTER *KITTERY RETAIL VENTURES, LLC V. TOWN OF KITTERY*

### I. INTRODUCTION

Thirty years ago, a developer who wanted to build a shopping center had to do little more than obtain a building permit to go forward with the project.<sup>1</sup> Today, however, the regulation and review of development projects involves a lengthy process of securing a series of permits, often including site plan or subdivision approvals, traffic studies, and environmental impact reviews.<sup>2</sup> Navigating this review process forces developers to negotiate with the community and design their projects to fit the applicable standards adopted by the local, state, and federal regulations, arguably improving the quality of development in our communities. But the lengthy review process also forces developers to invest enormous amounts of money in the planning phase of development, a phase during which the developer in most states has few (if any) “vested rights” and in which land use ordinances can be changed in a manner that would prevent the entire project.

In *Kittery Retail Ventures, LLC v. Town of Kittery*,<sup>3</sup> the Maine Supreme Judicial Court, sitting as the Law Court, upheld a citizen-initiated zoning change that had this very effect—a retail development project was blocked.<sup>4</sup> The project had been proposed and was being reviewed by the town’s planning board under then-existing ordinances, before the referendum proposal was filed.<sup>5</sup> Indeed, the referendum was a direct effort to defeat the developer’s proposal.<sup>6</sup> Rather than acknowledging the increasingly complex development process, the Law Court adhered to traditional “vested rights” rules, holding that a developer does not obtain a “vested right” to develop until a valid building permit has been issued and physical construction has actually begun.<sup>7</sup> After rejecting the developer’s argument that the targeted nature of the zoning change should give the developer an equitable vested right,<sup>8</sup> the court found that retroactive application of the zoning change did not violate the developer’s right to substantive due process because the developer did not have a vested property right

---

1. See Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington’s Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043, 1053 (2000).

2. For an excellent discussion of the development process for several different types of projects, see John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL’Y 603 (2000).

3. 2004 ME 65, 856 A.2d 1183, cert. denied, 125 S. Ct. 1603 (2005).

4. *Id.* ¶ 1, 856 A.2d at 1186-87.

5. *Id.* ¶¶ 1-6, 856 A.2d at 1186-88.

6. Brief of Appellant at 17, *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183 (No. Yor-03-393).

7. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 32, 856 A.2d at 1193 (citing Sahl v. Town of York, 2000 ME 180, ¶¶ 12-13, 760 A.2d 266, 269-70).

8. *Id.* ¶ 31, 856 A.2d at 1193.

in the project.<sup>9</sup> Thus, the zoning change was permitted to reach back and bar a project that had been proposed months before the citizen-initiated referendum at issue in the case had been proposed.<sup>10</sup>

By validating a virtually unlimited reach-back power, the Law Court has failed to properly balance the equities that underlie a traditional “vested rights” analysis. Instead of “striking a fine balance between the competing interests of the developer and the municipality,”<sup>11</sup> the court has virtually ignored the interests of the developer. At the same time, by allowing municipalities to enact zoning changes with unlimited reach-back provisions, the court has removed any incentive for meaningful, comprehensive planning. Instead, municipalities<sup>12</sup> are free to change their standards at will to disapprove individual projects that a group of citizens happen not to like. Ultimately, this power to zone retroactively renders any attempts at prospective planning completely meaningless.

At roughly the same time that the Law Court was undermining the importance of prospective planning with its holding in *Kittery Retail Ventures*, the Maine Legislature, like many other legislatures across the country,<sup>13</sup> was sending precisely the opposite signal, mandating prospective planning by enacting a revised comprehensive planning statute.<sup>14</sup> The Law Court should remove the serious disincentives to planning it has created, by reconsidering its holding in *Kittery Retail Ventures*. Unless the court does so, the Maine Legislature should act to reinforce the importance of comprehensive, prospective planning by enacting a statute that limits the retroactive application of changes in land use standards.

This Note discusses the retroactive application of zoning changes generally and in Maine, reviews statutes adopted by other states, and proposes that Maine adopt a statute that limits the retroactive effect of any zoning change to development applications filed after the zoning change had been officially proposed.

## II. RETROACTIVITY OF ZONING ORDINANCES

In Maine, laws and ordinances do not generally apply retroactively.<sup>15</sup> An express

9. *Id.* ¶ 32, 856 A.2d at 1193. The court also rejected the developer’s equitable estoppel argument (based on statements made by town officials), *id.* ¶ 36, 856 A.2d at 1194, and Contract Clause claims, *id.* ¶ 42, 856 A.2d at 1196. Those aspects of the decision fall outside the scope of this Note.

10. *Id.* ¶¶ 2-6, 856 A.2d at 1187.

11. DANIEL R. MANDELKER, *LAND USE LAW* § 6.12 (5th ed. 2003).

12. Municipalities may change their ordinances by action of their town councils or by citizen initiative. When citizen initiative is used, the town’s citizens act as the town’s legislators.

13. See RAYMOND J. BURBY & PETER J. MAY, *MAKING GOVERNMENTS PLAN: STATE EXPERIMENTS IN MANAGING LAND USE* 4-5 (1997).

14. ME. REV. STAT. ANN. tit. 30-A, § 4314(3) (West 2004) (stating that after January 1, 2003, all local land use ordinances must be consistent with an adopted comprehensive plan).

15. Retroactive legislation is generally disfavored and has been throughout history. *Eastern Enters. v. Apfel*, 524 U.S. 498, 532-33 (1998). It presents problems of unfairness “because it can deprive citizens of legitimate expectations and upset settled transactions.” *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Justice Story explained: “Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.” *Eastern Enters. v. Apfel*, 503 U.S. at 533 (quoting 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* § 1398 (5th ed. 1891)). The farther back in time the retroactive legislation attempts to reach and the greater the magnitude of its financial impact, the more unfair it may be. *Id.* at 534-35.

retroactivity provision is required. The rule is codified in 1 M.R.S.A. § 302 (1979), which states in pertinent part:

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.<sup>16</sup>

The Law Court has characterized section 302 as a “standing rule of statutory construction,” which “can be avoided by the contrary intent embodied in a municipal ordinance.”<sup>17</sup> Thus, laws and ordinances can be drafted so as to have retroactive effect.<sup>18</sup>

In *City of Portland v. Fisherman’s Wharf Associates II*,<sup>19</sup> the Law Court affirmed that retroactivity provisions are permitted in the context of zoning ordinances.<sup>20</sup> In that case, a proposed citizen initiative to limit development of the Portland waterfront to marine-related uses was filed with the city clerk nearly two months before Fisherman’s Wharf Associates II (FWA II) filed its application to build a condominium development on the waterfront.<sup>21</sup> The initiative as proposed included a provision that explicitly made the amendment, if enacted, retroactive to the date it was filed with the city clerk.<sup>22</sup> Despite its awareness of the pending initiative, FWA II went forward with its application and obtained final site plan approval from the planning board on April 28, 1987.<sup>23</sup> On May 5, 1987, the citizen initiative passed and by its own terms would apply to and prevent the FWA II project from going forward.<sup>24</sup> The court held that the express retroactivity provision in the citizen-initiated ordinance was sufficient to trump the default rule against retroactivity in 1 M.R.S.A. § 302.<sup>25</sup> Thus, the ordinance applied to bar the FWA II project, which could not be approved if reviewed under the new regulations.<sup>26</sup>

Most jurisdictions follow this general rule and hold that a zoning regulation “may be retroactively applied to deny an application for a building permit, even though the

---

16. ME. REV. STAT. ANN. tit. 1, § 302 (West 2004). This statutory section is referred to in the text of this Note, in accordance with Maine practitioners’ usage, as 1 M.R.S.A. § 302.

17. *City of Portland v. Fisherman’s Wharf Assocs. II*, 541 A.2d 160, 162-63 (Me. 1988).

18. *See, e.g., Coates v. Me. Employment Sec. Comm’n*, 406 A.2d 94, 97 (Me. 1979).

19. 541 A.2d 160 (Me. 1988).

20. *Id.* at 164.

21. *Id.* at 161.

22. *Id.*

23. *Id.* at 162.

24. *Id.*

25. *Id.* at 164. Without an express retroactivity clause, section 302 prevents a new ordinance from being applied to development applications that are “pending” prior to the new ordinance’s enactment date. The Law Court has applied section 302 to bar the application of moratoria to development applications that had been accepted by the municipality as complete, and thus were “pending,” prior to the enactment of the moratoria. *See, e.g., Littlefield v. Inhabitants of the Town of Lyman*, 447 A.2d 1231 (Me. 1982); *Cardinali v. Planning Bd. of Lebanon*, 373 A.2d 251 (Me. 1977). In a later case, when the developer’s application was found by the municipality to be inadequate under the then-current ordinances, the court held that the application was not “pending,” and a later-enacted ordinance could be enforced to prevent the project. *See Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 782 (Me. 1989).

26. *City of Portland v. Fisherman’s Wharf Assocs. II*, 541 A.2d at 164.

permit could have been lawfully issued at the time of application.”<sup>27</sup> These jurisdictions hold that the zoning changes will be permitted to retroactively invalidate building permits and other municipal approvals, unless the developer’s right to proceed with the project has “vested.”<sup>28</sup> The concept of “vested rights” is examined more fully in the next section of this Note.

### III. UNPACKING COMMON LAW VESTED RIGHTS DOCTRINE

Simply owning property that is zoned a particular way does not give the landowner a permanent right to develop his or her property at any time he or she wishes in accordance with the zoning in place at the time the property was acquired.<sup>29</sup> Instead, property is held “in subordination to the police power,”<sup>30</sup> and towns may plan for changing community needs and desires by revising their zoning and land use ordinances from time to time.<sup>31</sup> Nonetheless, at some point after a landowner has gone forward with a development proposal in reliance on current land use ordinances, the landowner should be able to complete the development under those rules.<sup>32</sup> At some point, it should be too late for the municipality to change those rules, but courts have struggled to find that point.<sup>33</sup>

To analyze this situation, courts have developed an “amorphous body of vested rights” law to strike a balance between the competing interests of the developer and the municipality.<sup>34</sup> As this body of law has developed, the term “vested rights” has been used by courts, legislatures, and commentators to embody very different concepts. One commentator has suggested that this confusion regarding “vested rights” may be clarified by asking two separate, but related questions: (1) when, i.e. at what point in the development process, are vested rights triggered? and (2) once triggered, what is the scope of the protection those vested rights provide?<sup>35</sup>

#### A. *The Triggering Question: When Do Rights Vest?*

The analysis of when rights vest is generally based on estoppel principles: a municipality is estopped from applying a new regulation when the developer has changed its position in good faith reliance on some act of the municipality.<sup>36</sup> Many

27. Roland F. Chase, Annotation, *Retroactive Effect of Zoning Regulation, in Absence of Saving Clause, on Pending Application for Building Permit*, 50 A.L.R. 3D 596, 607 (1973).

28. *Id.* at 643.

29. Ralph D. Rinaldi, Note, *Virginia’s Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77, 91-92 (1994). See also *Thomas v. Zoning Bd. of Appeals*, 381 A.2d 643, 647 (Me. 1978).

30. *Thomas v. Zoning Bd. of Appeals*, 381 A.2d at 647 (quoting *R.A. Vachon & Son, Inc. v. Concord*, 289 A.2d 646, 648 (N.H. 1972)).

31. Rinaldi, *supra* note 29, at 91.

32. MANDELKER, *supra* note 11, § 6.12.

33. *Id.*

34. *Id.* See also Overstreet & Kirchheim, *supra* note 1, at 1044-45; Karen L. Crocker, Note, *Vested Rights and Zoning: Avoiding All-or-Nothing Results*, 43 B.C. L. REV. 935, 935 (2002).

35. Overstreet & Kirchheim, *supra* note 1, at 1076 (citing Professor Settle, a prominent commentator on Washington land use law, as suggesting this analytical framework).

36. Professor Mandelker points out that while some courts have grounded their analysis in a constitutional property rights theory rather than estoppel, the analysis is substantially the same either way.

jurisdictions hold that only the issuance of a valid building permit may be relied upon; preliminary development approvals are not sufficient.<sup>37</sup> Most of these jurisdictions further require that good faith reliance must be in the form of either substantial expenditures or commencement of building construction.<sup>38</sup> Thus, under this analysis, vested rights are not triggered until the very end of the development process after all approvals have been issued and construction has actually begun.<sup>39</sup> In many jurisdictions, the concept of vested rights is further complicated when extensive site work, including grading, road building, and utility installation are required to be in place before a building permit can issue.<sup>40</sup> Under such a process, expenditures required in the early stages of a development project can easily reach millions of dollars.<sup>41</sup> However, until the foundations for the buildings are actually constructed, the developer goes forward with no assurances whatsoever that its development has acquired a vested right to proceed.<sup>42</sup>

A second approach loosens the requirements for estoppel by broadening the definition of an "act of the municipality" on which reasonable reliance may be based to include the granting of planning approvals, such as site-plan or subdivision approvals.<sup>43</sup> These jurisdictions often dispense with or loosen the requirement for substantial expenditures or actual construction in reliance on the approval.<sup>44</sup> This approach recognizes that the land use permitting process has become more complex; the issuance of a building permit and actual construction will almost certainly follow once the critical process of obtaining planning approval is complete.<sup>45</sup> However, by

---

MANDELKER, *supra* note 11, § 6.12. The estoppel theory emphasizes equitable principles of fairness while the constitutional theory emphasizes the protection of property rights. Rinaldi, *supra* note 29, at 82-83. The distinction is largely academic because the elements of the analysis are generally set forth in the same terms. Rinaldi, *supra* note 29, at 83; Delaney, *supra* note 2, at 607.

37. Chase, *supra* note 27, § 9 (collecting cases); MANDELKER, *supra* note 11, § 6.15; Crocker, *supra* note 34, at 940-44. In Maine, see *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266, 269.

38. Chase, *supra* note 27, § 9 (collecting cases); MANDELKER, *supra* note 11, § 6.19.

39. Overstreet & Kirchheim, *supra* note 1, at 1053.

40. See Overstreet & Kirchheim, *supra* note 1, at 1047-51, for a creative hypothetical illustration of the modern development process. See also Delaney, *supra* note 2, at 604-607.

41. In one case, a developer spent more than \$3 million dollars on site work, in reliance on final approval of a subdivision map and initial approval of a development permit, before the zoning regulations covering the parcel were changed. *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546 (Cal. 1976). In another case, a developer received many permits, including building permits for part of the project, and expended \$27 million on property acquisition and engineering costs before the law changed to prevent the project from proceeding. *Oceanic Cal. Inc. v. N. Cent. Coast Reg'l Comm'n*, 133 Cal. Rptr. 644 (1976), *cert denied*, 431 U.S. 951 (1977). The California legislature responded to the seeming imbalance resulting from these cases by passing a form of early-vesting statute. Overstreet & Kirchheim, *supra* note 1, at 1064 n.117. Statutory approaches to vesting are discussed *infra* at Section VII(A).

42. See MANDELKER, *supra* note 11, § 6.21. While most courts agree that actual physical construction is required for rights to vest, the courts are split on how much construction is sufficient. *Id.* Many courts find that site preparation is not sufficient. *Id.* Some even find that excavation for foundations is insufficient. *Id.* In Maine, the Law Court has held that there must be "actual physical commencement of some significant and visible construction . . . undertaken in good faith . . . with the intention to continue with the construction and carry it through to completion." *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d at 269.

43. Crocker, *supra* note 34, at 944-45.

44. *Id.*

45. *Id.* at 947.

relying on permit *approval*, the approval-approach retains much of the uncertainty and risk for the developer that was inherent in the traditional late-vesting rule. As one commentator points out:

[The approval-date approach] allows regulators to change the rules between the date of the project application and final approval, a period of time often extending for months or years, forcing a property owner to guess whether the project will ever be built. During this guessing period, a property owner often expends huge sums of money on engineering and consulting costs without knowing whether the proposed project will still be permissible.<sup>46</sup>

The “guessing period” also has a chilling effect on development financing because lenders cannot rely on the current zoning rules to evaluate the likelihood that the project will be permitted or to determine the collateral value of the land that is financed.<sup>47</sup>

A third approach, sometimes termed the “early-vesting rule,” was adopted by the Washington courts.<sup>48</sup> Under this rule, vested rights are acquired when the developer submits a completed *application* for a site-specific permit.<sup>49</sup> The Washington Supreme Court explained, “[W]e prefer to have a date certain upon which the right vests . . . . We prefer not to adopt a rule which forces the court to search through . . . ‘the moves and countermoves of . . . parties . . . .’ The more practical rule to administer, we feel, is that the right vests [upon application.]”<sup>50</sup> This “date certain” approach eliminates the “guessing period” that characterizes the traditional and approval-date analyses. Washington’s approach has, understandably, been criticized for tipping the balance too far in favor of developers.<sup>51</sup> However, the “date certain” approach is not as one-sided as it may seem.<sup>52</sup> Washington courts developed an exception to the early-vesting rule for “reasonable legislation enacted to protect public health, safety, and welfare.”<sup>53</sup> Thus, Washington courts have held that ordinances related to sewage disposal, railroad safety, and fire protection may be applied retroactively.<sup>54</sup> In short, localities retain the flexibility to change their zoning rules retroactively to respond to real, immediate needs; at the same time, the “early-vesting rule” creates an incentive to respond to changing but more routine community needs and values in a timely, forward-thinking manner precisely because they will have lost

46. Overstreet & Kirchheim, *supra* note 1, at 1065 (emphasis omitted).

47. *Id.*

48. Crocker, *supra* note 34, at 950. Washington has since codified this approach into statute. WASH. REV. CODE § 19.27.095(1) (2005). Other states have also adopted this approach by statute. Statutory vesting is discussed *infra* Part VII.A.

49. Crocker, *supra* note 34, at 949.

50. Hull v. Hunt, 331 P.2d 856, 859 (Wash. 1958).

51. Crocker, *supra* note 34, at 957-58.

52. Overstreet & Kirchheim, *supra* note 1, at 1073.

53. *Id.* at 1058.

54. *Id.* at 1059. Overstreet & Kirchheim note that the Washington Supreme Court has held that there is no vested right to “imperil the health or impair the safety of the community.” *Id.* (quoting City of Seattle v. Hinckley, 82 P. 747, 748 (Wash. 1905)). Typically, building codes are also not locked in place by early-vesting. 2 AM. PLANNING ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK 8-105 to 8-106 (2002) [hereinafter GROWING SMART].

the ability to “retroactively prevent currently lawful—but politically unpopular—land uses.”<sup>55</sup>

*B. The Scope Question: Vested Right To Do What?*

Under the traditional approach, once the “vested right” is established based upon estoppel principles, it is then treated as a constitutionally-protected property right.<sup>56</sup> As such, the holder of the vested right may proceed with the development without further review.<sup>57</sup> This broad scope makes sense under the traditional estoppel analysis: a specific building permit has already been issued and construction has already commenced, so the developer has a “vested right” to finish what it has started. Land use reviews have already occurred and approvals have already issued, so there is no further decision-making for the government to do.

However, when an early-vesting rule, such as Washington’s, is adopted, the scope of the “vested right” must necessarily be narrowed. A completed application is on the table, entitled to be heard on the basis of then-existing law, but this “vested right to be heard” does not guarantee project approval.<sup>58</sup> A developer does not have an unfettered right to build a supermarket on her land in Washington simply by virtue of having submitted an application.<sup>59</sup> Instead, the scope of the vesting protection merely guarantees that the application will be reviewed under the rules in place when the application was submitted.<sup>60</sup> Rather than a constitutionally-protected right to build, the protection is merely a procedural right not to have later-enacted ordinances retroactively applied to the project application.<sup>61</sup> Thus, as the vesting point moves to an earlier point in the development review process, the scope of the protection that vesting affords is diminished.

The fact that a single term, “vested rights,” has been used to capture two quite different concepts is unfortunate. But courts need not be confused. Under the traditional analysis, the developer with vested rights is so far along in the project that no further approvals are required and construction has begun, so the vested rights enable the developer to complete the project. Under the Washington approach, a developer’s completed application affords him or her the right to have the application reviewed on the basis of the ordinance in place at the time the application was filed—it is a procedural right that has vested.<sup>62</sup> If the project is subsequently approved, the developer may then build; if it is not approved, the developer may exercise whatever appeal rights he or she has preserved. Unless the developer prevails

---

55. Overstreet & Kirchheim, *supra* note 1, at 1073.

56. *See, e.g., Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (“A landowner’s vested rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due process protections under the federal Constitution.”).

57. Crocker, *supra* note 34, at 960 (describing the traditional estoppel approach as creating an “all-or-nothing” result with deleterious effect).

58. *See* Overstreet & Kirchheim, *supra* note 1, at 1058.

59. *See id.*

60. *Id.*

61. Overstreet & Kirchheim, *supra* note 1, at 1058.

62. *See* GROWING SMART, *supra* note 54, at 8-108 (using the term “vested right to develop” to describe a right to have a development proposal reviewed under the regulations in effect at the date of application).



under the standards in place at the time of the application, he or she may not build the project.

*C. The Equitable Backstop: Wrongful Delay, Bad Faith,  
and Discriminatory Enactment*

When zoning changes are targeted at a particular project, courts in several states, including Maine, have been willing to apply an additional layer of equitable analysis, an equitable “backstop” of sorts.<sup>63</sup> Rather than focusing on the good faith reliance of the developer, this analysis focuses on the tactics and motives of the municipality.<sup>64</sup> In a handful of cases, this equitable backstop has served to secure vested rights for a developer when a municipality has changed its zoning solely to frustrate a developer who may have been entitled to a permit under existing regulations when she applied for one.<sup>65</sup> As one court explained:

[A] zoning authority may not use its powers to reward its friends or punish its enemies; thus, where a zoning authority is guilty of misconduct or bad faith in its dealings with the applicant for a use permit in accordance with the then existing zoning regulations or arbitrarily and unreasonably adopts a new regulation in order to frustrate the applicant’s plans for development rather than to promote the general welfare, the new regulation may not be applied retroactively.<sup>66</sup>

The Law Court adopted a version of this equitable backstop doctrine, which it has labeled “equitable vesting,” in *Thomas v. Zoning Board of Appeals*.<sup>67</sup> The court noted that “[a]n applicant may . . . obtain vested rights when a municipality wrongfully delays in passing on the application until after the effective date of the new Ordinance or arbitrarily fails to perform a ministerial duty to issue a permit to which the applicant was entitled.”<sup>68</sup> Additionally, the court recognized that “a bad faith or discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant may confer vested rights on the applicant.”<sup>69</sup> On its face, this standard directs the court to consider the *purpose* for which the ordinance was enacted and to reject ordinances designed to target or single-out a particular applicant.

In *Thomas*, the court found that the Bangor Zoning Board “engaged in no delaying tactics” where the applicant’s permit was reviewed promptly and denied under rules in the old ordinance.<sup>70</sup> The court also found that because “[t]he new Ordinance constituted a total revision of every aspect of the old Zoning Ordinance,”

63. MANDELKER, *supra* note 11, § 6.16.

64. 4 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 70:26 (4th ed. West 2006).

65. MANDELKER, *supra* note 11, § 6.16. For example, in *U.S. Cellular Corp. v. Bd. of Adjustment*, 589 N.W.2d 712 (Iowa 1999), the Board denied U.S. Cellular’s application to build a cell tower, without any legal justification, in order to allow sufficient time for the city to enact a new ordinance prohibiting such towers. *Id.* at 719. The court held that the Board acted in bad faith and/or with malice, and thus U.S. Cellular had a right to proceed with the tower under the original rules. *Id.*

66. *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390, 397 (Neb. 1994).

67. 381 A.2d 643, 647 (Me. 1978).

68. *Id.*

69. *Id.*

70. *Id.*

it “plainly was not directed to [the] plaintiff’s application.”<sup>71</sup> Thus, the court’s test for equitable vesting, as announced in *Thomas*, appeared to have two meaningful prongs: (1) did the municipality wrongfully delay its review of the application so as to allow a new ordinance to go into effect? and (2) was the new ordinance enacted in a targeted manner for the purpose of preventing a legal use of the land by the applicant?

In *Fisherman’s Wharf*, the court addressed and quickly rejected FWA II’s argument that it had acquired equitably vested rights to proceed under the standards announced in *Thomas*.<sup>72</sup> The court concluded that “considering . . . the lack of any evidence of bad faith or discriminatory treatment by the City or initiated ordinance proponents, FWA II has failed to established any vested rights based on equitable grounds.”<sup>73</sup> Though the court made only this conclusory statement, a brief look at the facts of the case shows that FWA II could not possibly have made a worthy equitable claim under the rules set forth in *Thomas*. First, city officials certainly did not engage in wrongful delaying tactics; indeed, they proceeded quickly with their review of the project under the original ordinance and agreed to approve it under those rules.<sup>74</sup> Second, the citizens’ purpose in proposing the amendment cannot have been to target directly the FWA II development application because the citizen petition was filed before FWA II had even submitted their initial application.<sup>75</sup> In addition to the elements of analysis set forth in *Thomas*, the court in *Fisherman’s Wharf* also noted that “FWA II’s knowledge of the contents of the proposed ordinance and its retroactive provisions prior to acquiring title to the property” suggests that it was FWA II, not the municipality or the initiators, whose actions failed to meet the requirement of good faith.<sup>76</sup>

Thus, the Maine Law Court has firmly established vested rights rules that include an equitable backstop analysis.<sup>77</sup> Unfortunately, as we shall see, in the *Kittery Retail Ventures* case, the court failed to adhere to these previously enunciated equitable backstop provisions.

#### IV. *KITTERY RETAIL VENTURES, LLC v. TOWN OF KITTERY*

In *Kittery Retail Ventures, LLC v. Town of Kittery*,<sup>78</sup> a developer appealed the decision of Kittery’s Planning Board to apply the terms of a zoning ordinance amendment enacted in September 2000 to deny its site plan application that had been

---

71. *Id.*

72. *City of Portland v. Fisherman’s Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988).

73. *Id.*

74. *Id.* at 161-62.

75. *Id.* at 162. Indeed, the citizen’s petition was filed before FWA II had acquired any interest in the land it sought to develop.

76. *Id.* at 164. Because equitable analysis requires a balancing test, it makes sense that FWA II’s knowledge of the proposed ordinance would be relevant; it suggests a lack of “good faith reliance” by the developer on the then-current zoning rules.

77. There are at least two Maine cases that seem to have met the requirement for the application of the equitable vesting exception. See *Cardinali v. Planning Bd. of Lebanon*, 373 A.2d 251 (Me. 1977); *Littlefield v. Inhabitants of the Town of Lyman*, 447 A.2d 1231 (Me. 1982). However, in both cases the court relied on 1 M.R.S.A. § 302 to block newly enacted ordinances aimed at stopping unwanted development and did not reach a full equitable backstop analysis.

78. 2004 ME 65, 856 A.2d 1183.

filed in March 2000.<sup>79</sup> The developer also sought a declaratory judgment that the amendment could not be retroactively applied to the project.<sup>80</sup> The Superior Court (York County, Fritzsche, J.) found in favor of the Town of Kittery on both claims, concluding that the developer did not acquire vested rights in its proposed project because it did not begin construction and because the Town had not acted in bad faith.<sup>81</sup> On appeal, the Law Court affirmed the judgment of the Superior Court,<sup>82</sup> and established a broad presumption in favor of allowing municipalities to apply zoning changes retroactively to pending development applications.

In January 2000, Kittery Retail Ventures, LLC (KRV) filed a sketch plan with the Kittery Planning Board, proposing a 250,000 square-foot retail outlet mall, called Kittery Marketplace, on land near Route 1 in Kittery.<sup>83</sup> Under the town's zoning ordinance, the land was located in a mixed-use district, which allowed up to thirty percent of each parcel to be developed for retail use.<sup>84</sup> The Kittery Marketplace site was also eligible for the transfer of retail development rights from other nearby sites; this would have permitted KRV to increase the amount of retail development area on the site by purchasing retail development rights from other landowners in the zone.<sup>85</sup>

KRV submitted its site plan application and tendered its application fee to the town on March 23, 2000.<sup>86</sup> On July 13, the Board, in a late night session, voted unanimously to approve, as substantially complete, the site plan for the Kittery Marketplace.<sup>87</sup>

Meanwhile, a citizens' group had organized to oppose the Kittery Marketplace proposal and one other proposed retail development along Route 1.<sup>88</sup> On March 27,

79. *Id.* ¶ 1, 856 A.2d at 1186. KRV met with town officials as early as July 1999 to explain its proposal; a sketch plan was presented to the Planning Board on January 13, 2000. *Id.* This appeal was brought under ME. R. CIV. P. 80B, which provides for judicial review of municipal board actions.

80. *Id.*

81. *Kittery Retail Ventures, LLC v. Town of Kittery*, No. Civ.A. CV-02-162, 2003 WL 21386952 at \*3-4 (Me. Super.). Both the Superior Court and the Law Court also found that the developer's equitable estoppel and Contract Clause claims lacked merit. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 9, 856 A.2d at 1188. Although the discussions on these issues in the Law Court's opinion are noteworthy, they fall outside the scope of this Note.

82. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 9, 856 A.2d at 1188.

83. *Id.* ¶ 2, 856 A.2d at 1187.

84. *Id.*

85. *Id.* ¶ 2 & n.1, 856 A.2d 1186 & n.1 (quoting section 16.12.130 of the then-effective Kittery zoning ordinance, which explained the transfer of retail development rights as allowing for the development of a "few well-designed, multistore retail projects . . . rather than . . . a proliferation of individual retail stores on individual parcels"). Transferable development rights are a "smart growth" concept designed to reduce sprawl and preserve undeveloped land, while still meeting growing communities' needs for additional homes and services. *See, e.g.*, Planning Comm'rs Journal, *Sprawl Guide: Transferable Development Rights*, [http://www.plannersweb.com/sprawl/solutions\\_sub\\_tdr.html](http://www.plannersweb.com/sprawl/solutions_sub_tdr.html) (last visited Nov. 18, 2005). The Maine Legislature has specifically endorsed Transferable Development Rights, ME. REV. STAT. ANN. tit. 30-A, § 4328 (West 2005), but few Maine communities have embraced this creative, progressive approach.

86. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 2, 856 A.2d at 1187. The Planning Board requested additional information from KRV and proposed alterations to the site plan on April 13, April 27, and June 7, 2000. *Id.*

87. *Id.* ¶ 5, 856 A.2d at 1187. Subsequently, a public hearing was held on August 23, 2000. *Id.*

88. *Id.* ¶ 3, 856 A.2d at 1187. The developers of the second proposed development brought suit in federal court. *See JSS Realty Co., LLC v. Town of Kittery*, 177 F. Supp. 2d 64 (D. Me. 2001).

2000, after the Town Council refused to pass a proposed emergency ordinance to amend the mixed-use district to allow only 15% of each parcel to be developed and to eliminate transferred retail development rights, the citizens' group filed a petition for a referendum to enact those zoning changes.<sup>89</sup> The proposed referendum was passed by voters on June 13, 2000, and pursuant to the Kittery Town Charter, went into effect on July 14, 2000.<sup>90</sup> The June Referendum did not include a retroactivity provision, and thus, under 1 M.R.S.A. § 302, would not apply to the Kittery Marketplace proposal which had been submitted in March 2000 and approved as "substantially complete" on July 13.<sup>91</sup> Undeterred, the citizen's group mounted a second referendum campaign and, on September 26, 2000, Kittery voters approved a referendum identical to the June Referendum, but adding the following language:

Notwithstanding the provisions of 1 M.R.S.A. § 302, and regardless of the date on which it is approved by the voters, this amendment shall be effective as of September 30, 1999, and shall govern any and all applications for permits or approvals required under the Land Use and Development Code of the Town of Kittery, Maine that were or have been pending before any officer, board, or agency of the Town of Kittery on or at any time after September 30, 1999.<sup>92</sup>

The Planning Board formally rejected KRV's development proposal on May 9, 2002, finding that it failed to comply with the limitation on retail use contained in the retroactive September Referendum.<sup>93</sup>

KRV conceded that it had not yet acquired a vested right to actually build the Kittery Marketplace project because it could not show actual physical commencement of visible construction as required under Maine law.<sup>94</sup> Instead, KRV contended that

---

89. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 3, 856 A.2d at 1187.

90. *Id.* ¶ 4, 856 A.2d at 1187.

91. *Id.* ¶ 5, 856 A.2d at 1187. Section 302 defines a "pending proceeding." An application is considered a "pending proceeding when the reviewing authority has conducted at least one substantive review of the application." *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 781 (Me. 1989) (quoting the statutory provision). "Substantive review" is defined as "a review of that application to determine whether it complies with the review criteria and other applicable requirements of law." *Id.* Indeed, one reason the Planning Board worked late into the night on July 13 was to ensure that the Kittery Marketplace proposal would remain unaffected by the zoning changes. Brief of Appellant at 22 & n.9, *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183 (No. Yor-03-393).

92. 2004 ME 65, ¶ 6, 856 A.2d at 1187-88. The Law Court held that in so far as the September Referendum purported to have an *effective* date of September 30, 1999, it violated the Kittery Town Charter which provides that ordinances become effective 30 days after their adoption. *Id.* ¶ 17, 856 A.2d at 1190. However, the court found that the *effective* date of the ordinance was different from and severable from the provision for a retroactive *application* of the amendment. *Id.* ¶ 21, 856 A.2d at 1191. Because the September Referendum "contains clear and unequivocal language applying it to pending proceedings," it was able to overcome the general rule of statutory construction expressed in 1 M.R.S.A. § 302 that pending proceedings will remain unaffected by subsequent enactments. *Id.* ¶ 21, 856 A.2d at 1191.

93. *Id.* ¶ 6, 856 A.2d at 1188. The town planner had notified KRV in October 2000 that the September Referendum would apply to the Kittery Marketplace proposal. *Id.* At that time, KRV appealed to the superior court for relief, but the superior court dismissed the complaint without prejudice, finding that the communication of the town planner did not constitute a final governmental action that could be reviewed by the court. *Kittery Retail Ventures, LLC v. Town of Kittery*, No. Civ.A. AP-00-103, 2002 WL 746114, at \*3-4 (Me. Super. Ct. Apr. 4, 2002).

94. Brief of Appellant at 16, *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183 (No. Yor-03-393). See *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266, 269.

it had an equitable vested right in the project. The court noted that “mere reliance on the language of an existing ordinance, or the incurrence of preliminary expenses to satisfy application requirements, is not sufficient to establish [equitable] vested rights.”<sup>95</sup> The court held that equitable vesting of rights can occur only when the developer can show “bad faith or discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant.”<sup>96</sup> At this critical juncture, the court erred in how it defined a “bad faith or discriminatory enactment” and this error led it to an erroneous holding in the case.<sup>97</sup> In discussing *Thomas and Fisherman’s Wharf*, the court noted that those developers had not been successful in proving the requisite “bad faith” and “discriminatory enactment” elements.<sup>98</sup> Though this observation is correct, it is unclear what bearing it has on KRV’s case; the indicia of bad faith asserted by KRV were simply not present in *Thomas and Fisherman’s Wharf*. The court then proceeded to distinguish each of the four out-of-state cases cited in the KRV brief where other courts have found “bad faith on the part of town officials.”<sup>99</sup> The court determined that “this is not a case in which every time the developers complied with a request, town officials ‘hastily erected barriers,’”<sup>100</sup> or where a board “denied the [developer’s] application without any legal justification, and the resulting delay provided the [b]oard with time to enact a new ordinance,”<sup>101</sup> or where the board “delayed approving the [developer’s] permit until the city council changed the parcel’s zoning designation so as not to allow the requested use.”<sup>102</sup> In the absence of such delaying tactics by town officials, the court found that “bad faith” by citizen’s groups in targeting a particular project should not be “imputed to the city.”<sup>103</sup> Relying on this dubious distinction between municipal and citizen action, the court failed to address KRV’s argument that the targeted attack on KRV’s proposal amounted to a “discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant” despite the court’s recitation of this standard earlier in the opinion.<sup>104</sup>

Instead of properly applying the “discriminatory enactment” test, the court announced that KRV’s “knowledge of the situation must be taken into account.”<sup>105</sup> The court emphasized that KRV knew that “discussions regarding the mixed-use districts started taking place during Town Council meetings shortly after KRV filed its

---

95. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 24, 856 A.2d at 1191.

96. *Id.* (quoting *Thomas v. Zoning Bd. of Appeals*, 381 A.2d 643, 647 (Me. 1978)).

97. *Id.* ¶¶ 27-31, 856 A.2d at 1192-93.

98. *Id.* ¶ 26, 856 A.2d at 1192.

99. *Id.* ¶¶ 28-31, 856 A.2d at 1192-93.

100. *Id.* ¶ 28, 856 A.2d at 1192 (discussing *Commercial Props., Inc. v. Peternel*, 211 A.2d 514, 519 (Pa. 1965)).

101. *Id.* ¶ 29, 856 A.2d at 1192-93 (discussing *United States Cellular Corp. v. Bd. of Adjustment*, 589 N.W.2d 712, 719 (Iowa 1999) and *State ex. rel. Humble Oil & Refining Co. v. Wahner*, 130 N.W.2d 304, 311-12 (Wis. 1964)).

102. *Id.* ¶ 30, 856 A.2d at 1193 (discussing *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 390, 395-96 (Neb. 1994)).

103. *Id.* (quoting *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d at 400).

104. *See id.* ¶ 24, 856 A.2d at 1191 (quoting *Thomas v. Zoning Bd. of Appeals*, 381 A.2d 643, 647 (Me. 1978)).

105. *Id.* ¶ 27, 856 A.2d at 1192.

sketch plan and before it filed its plan application” and that the June Referendum petition had been filed “almost two months before KRV entered into its purchase and sale agreement.”<sup>106</sup> Thus, KRV’s knowledge of the June Referendum was held against them, even though the June Referendum, on its face, would not have applied to the KRV project because it contained no retroactivity provision and the KRV project was already “pending” when the June Referendum became effective as law.<sup>107</sup>

After dispensing with the argument that KRV had acquired equitable vested rights to proceed under the old zoning rules, the court quickly dismissed KRV’s substantive due process argument.<sup>108</sup> The court’s reasoning here turned on its failure to find any protectable property interest; if KRV had no right to begin (or complete) actual construction, and no “vested equitable right” arising out of bad faith, there was nothing for due process to protect.<sup>109</sup> However if, as this Note argues, the court erred in failing to find that KRV had a procedural vested right to be heard under the old ordinance, then its *procedural* due process rights were indeed violated.

#### V. DISTINGUISHING *KITTERY RETAIL VENTURES* AND *FISHERMAN’S WHARF*

The Law Court’s analysis in *Kittery Retail Ventures* was particularly flawed in two respects: first, the court failed to properly analyze KRV’s knowledge of the pending ordinance; second, it failed to consider the bad faith, discriminatory purpose of the September Referendum.

These analytical weaknesses can each be seen most starkly by contrasting *Kittery Retail Ventures* with *Fisherman’s Wharf*. At first glance, the similarities between the two cases are striking; and indeed, the court fails to see any meaningful distinction between them. However, with a more careful examination of the facts in each case, it becomes clear that the retroactivity provision in *Fisherman’s Wharf* was both reasonable and equitable, while the scenario in *Kittery Retail Ventures* was not.

In *Fisherman’s Wharf*, citizens filed with the Portland City Clerk the text of a proposed zoning amendment on December 22, 1986.<sup>110</sup> The proposed amendment contained an express retroactivity clause, which stated that it would apply to “all pending proceedings, applications and petitions commenced after December 22, 1986, which is the date of filing this initiative in the City Clerk’s office of the City of Portland.”<sup>111</sup> *Fisherman’s Wharf Associates II* stipulated that it knew about the retroactivity provision of the proposed ordinance prior to December 29, 1986, when

---

106. *Id.*

107. In conflating the June and September Referenda, the court ignored the fact that KRV’s application unquestionably achieved “pending” status under 1 M.R.S.A. § 302 before the June Referendum (without a retroactivity clause) was adopted and long before the September Referendum (with a retroactivity clause) was ever proposed. This judicial slight of hand was unfair to KRV. KRV had no way of knowing before the September Referendum was proposed in August that the zoning change could eventually be adopted by Kittery voters in such a way as to prevent the KRV project from proceeding. In other words, the court held KRV liable in March for knowledge of the contents of a citizen initiative that was not proposed until August.

108. *Id.* ¶ 32, 856 A.2d at 1193.

109. *Id.*

110. *City of Portland v. Fisherman’s Wharf Assocs. II*, 541 A.2d 160, 161 (Me. 1988).

111. *Id.*

its predecessor in title had acquired the property.<sup>112</sup> FWA II did not file an application to develop its property until February 11, 1987, well after the initiated measure with its limited retroactivity provision was on the table.<sup>113</sup> Furthermore, although the development approval process is generally a lengthy one, in *Fisherman's Wharf*, it was shorter than the legislative process. This situation arose because Portland's initiative ordinance had built-in time frames for signature gathering, checking the validity of signatures, and public debate prior to scheduling an election. The initiated ordinance did not come before voters until May 5, 1987.<sup>114</sup> By that time, the Portland Planning Board had approved the FWA II proposal under the land use standards in force prior to May 5th.<sup>115</sup> Nonetheless, the Planning Board had agreed to review the proposal under the then-effective standards with full awareness that if the initiated ordinance passed, the FWA II proposal would have to be scrapped.<sup>116</sup>

This factual scenario can be contrasted with the facts in *Kittery Retail Ventures*. In that case, KRV filed a site plan application on March 23, 2000.<sup>117</sup> Four days later, on March 27, 2000, a citizen's group filed a petition to amend the applicable ordinance.<sup>118</sup> That petition, which would be voted on in June, contained no retroactivity clause and thus would go into effect, if passed, one month after the vote on July 13, 2000.<sup>119</sup> By that time, the KRV application was "pending" under 1 M.R.S.A. § 302, and the ordinance did not apply.<sup>120</sup> Then, realizing their mistake, the initiators proposed a second initiative that contained a retroactivity provision reaching back an entire year to govern any application pending after September 30, 1999.<sup>121</sup> Despite the late arrival of this retroactivity provision, the court inexplicably charges KRV with "knowledge" that zoning changes would prevent its project if they passed. Thus, the court failed to distinguish between what FWA II actually knew when it filed its development proposal (i.e., that if passed, the proposed ordinance, on its face, would prevent the project) and what KRV knew (i.e., that if passed, the proposed ordinance, on its face, would not apply to KRV).<sup>122</sup> In failing to make this distinction, the court suggests that the developer's knowledge that the project is unpopular counts against it because at some point those citizens may successfully propose a retroactive ordinance that will prohibit the developer's project.<sup>123</sup>

Additionally, the court failed to distinguish the bad faith discriminatory purpose of the September Referendum from the good faith enactment in *Fisherman's Wharf*.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 162.

116. *Id.* at 161.

117. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 2, 856 A.2d 1183, 1187.

118. *Id.* ¶ 3, 856 A.2d at 1187.

119. *Id.* ¶¶ 4-5, 856 A.2d at 1187.

120. *See supra* note 91.

121. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 6, 856 A.2d at 1187-88.

122. Note that KRV could not even have known this much when it actually filed the application because the citizen proposal was filed four days *after* the KRV application.

123. The court's reasoning in *Kittery Retail Ventures* suggests that even a two- or three-year reach-back period would be permissible, even if the reach-back dates were chosen specifically to target an already-approved project that had not yet begun construction.

The referendum in *Fisherman's Wharf* contained a modest retroactivity provision that reached back only as far as the initiative's filing date. The referendum was proposed to prevent future non-marine related uses along a two-mile stretch of Portland's waterfront, but it did not apply to or specifically target any projects that had already been proposed. By contrast, the September Referendum had *no other purpose* than to extend the reach of the prospective June Referendum back in time far enough to target the KRV proposal. Unlike the revision of the entire zoning ordinance at issue in *Thomas* and the referendum dealing with the entire Portland waterfront in *Fisherman's Wharf*, the specific targeting of one developer in *Kittery Retail Ventures* ought to have been a clear-cut example of "bad faith" and "discriminatory enactment" under the standard set forth in *Thomas*.

Ultimately, the court immunized the September Referendum by holding that the "bad faith" of the initiators in targeting a particular project should not be "imputed to the city."<sup>124</sup> Other than quoting the Nebraska Supreme Court, the Law Court offers no support for distinction between the bad faith of citizen initiators and municipal officials. Indeed, there is no support for such a distinction under Maine law. The citizen initiative, once adopted by voters, becomes quite literally an exercise of legislative power by the town—by "the people, as sovereign, hav[ing] retaken unto themselves legislative power."<sup>125</sup> If the Kittery Town Council had passed an ordinance with the language and effect of the September Referendum, they likely would have been acting in bad faith. By refusing to consider the bad faith motives of the initiators in proposing and the citizens in enacting the referendum to target a single project, the court allows the Kittery voters to pass an ordinance that the Kittery Town Council likely could not have enacted in good faith. This extension of the scope of citizen initiative is illogical. When citizens pass ordinances by initiative, they are acting in place of the town council; their powers cannot *exceed* those of the town council itself. Indeed, allowing towns to circumvent the discriminatory enactment and bad faith requirements through use of the initiative process opens the door to legislating out whatever a town happens not to like in the guise of grass-roots democracy. Unless the initiative power is more rationally limited by the state, specific affordable housing projects that meet all applicable zoning requirements may be kept out by voters acting with discriminatory intent.<sup>126</sup> In short, the adopted initiated ordinance was an action of the municipality as much as any ordinance passed by the town council; it should not have been immunized from bad faith analysis by its method of adoption (a factor over which KRV had no control).

Under its own case law, the Law Court could have struck a fair and equitable balance between the interests of developers in certainty and the interests of municipalities in flexibility by distinguishing the reasonable "filing date retroactivity" in *Fisherman's Wharf* from the second try, one year retroactivity provision in *Kittery Retail Ventures*. Instead, the court tipped the scales too far in favor of retroactivity. Moreover, the court in *Kittery Retail Ventures* suggests no limit on how far back in time retroactivity provisions may reach. Unless the court reconsiders this inequitable

---

124. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶¶ 30-31, 856 A.2d at 1193.

125. *See* Opinion of the Justices, 275 A.2d 800, 803 (Me. 1971).

126. *See, e.g., City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003).



and unwise holding in a future case, it will be up to the Legislature to craft a law to rebalance the scales.

## VI. THE CONSEQUENCES OF UNLIMITED RETROACTIVITY

In upholding Kittery's retroactive ordinance and applying it to a project that was proposed months before the retroactive ordinance was proposed, the court tipped the scales just about as far as they could be tipped against developers. Perhaps most Mainers would find nothing wrong with that, asserting their right, as Kittery voters did, to keep specific unwanted development out of their communities. The problem is that this piecemeal, reactionary approach to zoning is not simply unfair to developers. It is also bad for communities because it undermines the important functions of comprehensive, prospective planning.

Maine's Comprehensive Planning Statute requires that all municipalities adopt a comprehensive plan and then enact zoning ordinances that are in accordance with that plan.<sup>127</sup> This scheme recognizes the importance of prospective planning as the key to controlling and shaping growth.<sup>128</sup> Citizen participation is required throughout the comprehensive planning process.<sup>129</sup> The use of "smart growth" or anti-sprawl devices, such as transferable development rights (TDRs)<sup>130</sup> and cluster developments, may be part of these plans and can serve as an invitation to developers to design their projects in accordance with the community's vision for its own future.<sup>131</sup>

In *Kittery Retail Ventures*, the town had adopted a transferable development rights program for its Route 1 corridor. The rationale behind the TDR scheme was to provide for more concentrated development on certain parcels of land along the busy road, rather than low-density strip mall development all along the route.<sup>132</sup> However, after the KRV project seeking to take advantage of the TDRs was proposed, a citizens' group managed to have the TDR system abolished retroactively by the September Referendum. Thus, the thoughtful, rational planning carried out by the citizens involved in prospective planning for the community was erased by the louder shouts of those reacting to the specifics of a particular project. This ability to change the rules at any time reduces the incentive for citizens and developers to become meaningfully engaged in thoughtful, prospective planning and calls into question the

127. ME. REV. STAT. ANN. tit. 30-A, § 4314 (West 2004).

128. See ME. REV. STAT. ANN. tit. 30-A, § 4312(3)(A) (West 2004) (A stated legislative purpose for enacting the Comprehensive Planning Statute was to "encourage orderly growth and development in appropriate areas of each community and region while protecting the State's rural character, making efficient use of public services and preventing development sprawl.").

129. ME. REV. STAT. ANN. tit. 30-A, § 4324(3) (West 2004) ("In order to encourage citizen participation in the development of a local growth management program, municipalities may adopt growth management programs only after soliciting and considering a broad range of public review and comment.").

130. See *supra* note 85.

131. The Legislature acknowledged that creating these plans would be costly, implementing a program of financial and technical assistance grants to needy communities, but evidently believed that the benefits of comprehensive, prospective planning outweighed these costs. See ME. REV. STAT. ANN. tit. 30-A, § 4346 (West 2004).

132. See *supra* note 85.

enormous time, money, and energy expended on creating comprehensive plans and “smart growth” ordinances.<sup>133</sup>

## VII. A LEGISLATIVE SOLUTION FOR REASONABLE RETROACTIVITY

To restore the incentive to plan for the future, the Maine legislature should consider adopting a statutory bright-line rule limiting retroactive application of new land use ordinances.<sup>134</sup> In considering this new statutory formula, Maine has multiple models on which it may draw.

### A. Statutory Approaches to “Vested Rights” in Other States

A number of states have adopted vesting statutes to clarify the issues raised by case law and create brighter lines for developers and municipalities to follow.<sup>135</sup> A few of these statutes merely recite the late-vesting, common law estoppel formula.<sup>136</sup> But most states have adopted either an approval-date or an application-date approach.<sup>137</sup>

The New Jersey statute is typical of the approval-date approach. It provides that preliminary approval of a subdivision plat or site plan vests the owner with a right to develop in accordance with that plat or plan for up to three years.<sup>138</sup> The time period

133. Indeed, the reactionary, targeted zoning by referendum, endorsed by the court in *Kittery Retail Ventures*, appears to be the preferred method of dealing with development pressures in Maine. In March 2006, the town of Damariscotta voted to approve a citizen-initiated six month moratorium on the approval of retail stores over 35,000 square feet after Walmart announced intentions to open a “supercenter” in the town. Also in 2006, a proposal to build a methadone clinic in Rockland raised community ire. One wonders why big retail stores and methadone clinics, both of which have existed for decades elsewhere, could not have been rationally anticipated and planned for (or prohibited altogether) by the communities involved, long before an actual proposal was put before the town by a particular developer.

134. In the summer of 2005, the Maine Legislature considered a proposal to prevent the retroactive application of new local ordinances enacted by citizen initiative to projects that had received site-specific approvals prior to the enactment date. L.D. 1481 (122nd Legis. 2005). L.D. 1481 was a direct response to *Kittery Retail Ventures*, but it would not have applied to the KRV situation because KRV had not received any approvals before the September Referendum was adopted. The proposal was originally framed as an odd adaptation of the approval-date approach that would apply only to cases where the ordinance was changed by citizen-initiative. The focus on citizen-initiated ordinances led the Attorney General to issue an opinion that the bill was a violation of Maine’s constitutional home rule provisions that protect municipalities’ right to use the citizen initiative process, subject only to state-wide procedural rules. This opinion led L.D. 1481 to be tabled and carried over to the Spring 2006 session. At that point, the bill was amended to provide that municipalities (by citizen initiative or otherwise) could change their ordinances and apply them retroactively for up to 75 days after issuance of a final permit approval. The amended bill passed in both houses, but was being held up by the leadership at the time of the publication of this Note. The amended bill bears little relationship to the solutions proposed in this Note. It would not have applied to the facts in KRV. Instead, the new bill, if signed into law, might appear to be a legislative imprimatur on egregiously targeted and retroactively-applied ordinances, provided that they don’t violate the 75-days-after-permit-approval rule.

135. GROWING SMART, *supra* note 54, ch. 8; MANDELKER, *supra* note 11, § 6.22.

136. For example, Florida’s law declares that a development that has been commenced and is presently proceeding in good faith is not affected by an amendment to the state statute authorizing local land-use planning and regulation. GROWING SMART, *supra* note 54, at 8-101; FLA. STAT. § 163.3167(8) (1997).

137. GROWING SMART, *supra* note 54, ch. 8.

138. N.J. STAT. ANN. § 40:55D-49(a) (West 1997).

may be extended for longer than three years on certain large-scale development plans, by consent of the municipality.<sup>139</sup> The scope of the vesting is thus circumscribed by the statutory time limit and by the specifics of the project as laid out in the approved plat or plan. Arizona, Colorado, and North Carolina have similar statutes based on site-specific approvals.<sup>140</sup> This approach still allows the municipality to target zoning changes at specific projects if the municipality can act quickly enough, but it sets up a potential race between the developer and the proponents of the zoning change: if the approvals can be obtained before the zoning change can be enacted, the developer will have a protected right to proceed under the old rules. This race may be extremely counterproductive, providing citizens or town officials with a perverse incentive to throw together sloppy or ill-conceived zoning amendments in order to enact them before the required hearings and votes on the disfavored projects.<sup>141</sup>

On the other hand, several other states have adopted statutes that mark the *application* date for the first site-specific permit as the critical moment of vesting. In California, a subdivision developer may file a “vesting tentative map” (VTM). Once the VTM is deemed complete, the developer obtains a right to proceed with the development if it is “in substantial compliance with the [local] ordinances, policies, and standards” in effect at the time the VTM was submitted.<sup>142</sup> Texas similarly provides that “the approval, disapproval or conditional approval of an application for a permit [shall be considered] solely on the basis of any . . . properly adopted requirements in effect at the time . . . the original application for the permit is filed.”<sup>143</sup> The Texas statute makes clear that all permits required for a given project are considered a single series of permits that are considered under the regulations in effect at the time of the original application for the first permit.<sup>144</sup> The Connecticut law provides that an application “shall not be required to comply with, nor shall it be disapproved for the reason that it does not comply with, any change in the zoning regulations or the boundaries of zoning districts . . . taking effect after the filing of such application.”<sup>145</sup> Washington, building on its unique common law early-vesting doctrine, enacted a similar law that explicitly expands its early-vesting rule to subdivisions. The Washington statute provides: “A proposed division of land . . . shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed

---

139. N.J. STAT. ANN. § 40:55D-49(d) (West 1997).

140. GROWING SMART, *supra* note 54, at 8-98 to 8-104; ARIZ. REV. STAT. § 9-1201 to § 9-1204 (LexisNexis 1997); COLO. REV. STAT. § 24-68-102 to § 24-68-106 (1999); N.C. GEN. STAT. ANN. § 160A-385.1 (West 2005).

141. Because delaying tactics by officials may trigger “equitable vesting,” approval-date statutes arguably will continue to spark costly litigation.

142. CAL. GOV’T CODE § 66498.1 (West 2000).

143. TEX. LOC. GOV’T CODE ANN. § 245.002(a) (Vernon 2005).

144. *Id.* §§ 245.0001(1), 245.002(b). On the other hand, Maine law continues to ignore the lengthy development approval process that has developed in recent decades and treats each permit as separate. Unless you have each and every final building permit you will ultimately need, you may be caught by a new, retroactive ordinance.

145. CONN. GEN. STAT. § 8-2h (2004).

application for preliminary plat . . . has been submitted to the appropriate county, city or town official.”<sup>146</sup>

While striking a considerably more developer-friendly balance, these application-date statutes still provide incentive for a counterproductive “race.” In this case, it is the developer who has the incentive to file rushed applications in advance of enactment of a pending proposal to downzone his property. This race may lead to less thoughtfully planned development and may foil the legitimate legislative efforts of the municipality simply because the legislative process takes a long time to complete.

Both the approval-date and application-date statutes limit the scope of the protection they offer: developers have the right to have their projects reviewed under the set of regulations in place at a given moment in time. This right to review translates into a vested right to proceed with development itself only where the developer can comply with those regulations. Thus, although these statutes are generally described in the legal literature as establishing “vested rights to develop,”<sup>147</sup> using the term “vested rights” in this context is actually quite misleading. Under the traditional approach, the vested right to *complete* a development project was a property right that was subject to constitutional protections. By contrast, these statutes create no property right. Instead, the statutes merely create a procedural rule that functions as a statutory limitation on ordinance retroactivity. Once framed as a rational limitation on the power of government to reach back and apply new rules retroactively, the policy objectives involved in crafting a beneficial statute are easier to see. We must simply determine how far back is too far back for government to be able to change the rules.

### *B. Crafting a Statutory Approach for Maine*

Neither the approval-date nor the application-date statutes take into account the fact that enacting a new ordinance or regulation can be a lengthy process. Just as developers want some certainty during the land use approval process, legislatures and citizens seeking to change land use laws need some certainty that their changes will have effect at the end of the legislative process. Thus, the best retroactive ordinance statute will take into account both the developer’s application date and the ordinance proposal date. Like the ordinance at issue in *Fisherman’s Wharf*, rule changes should be permitted to reach back only so far as their proposal dates and to govern only projects applied for after that date.

In Maine, this “filing date retroactivity” statute would need to set a definition of “proposal date” for land use regulation changes enacted in each of three ways: by citizen initiative, by regular legislative process, or by emergency measure. Following the rule set forth in 1 M.R.S.A. § 302, the statute should provide that in order to be retroactive at all, the land use regulation proposal must contain an explicit retroactivity

---

146. WASH. REV. CODE § 58.17.033(1) (1998). Washington passed a similar vesting statute at the same time that applies to building permits. WASH. REV. CODE § 19.27.095 (1998).

147. The American Planning Association’s model legislation provides two alternatives: an application-date statute and an approval-date statute. GROWING SMART, *supra* note 54, at 8-108 to 8-111. Both alternatives use the term “vested right to develop,” though the scope of the rights provided varies greatly. *Id.*

provision, which could extend back no further than this statutory “proposal date.” The statute would also need to define the developer’s “application date” so as to set forth as bright a line as possible.<sup>148</sup> The statute would provide that if the developer’s application date precedes the proposal date for the ordinance, the development would be reviewed according to the rules in place at the time of the application.<sup>149</sup> On the other hand, if the ordinance proposal comes before the development application date, and the ordinance is subsequently enacted, the new rule can apply to the development.

Surprisingly, no state has adopted precisely this type of limitation on retroactivity.<sup>150</sup> Vermont’s zoning retroactivity statute comes close to the model I have proposed. It provides:

If a public notice for a first public hearing . . . is issued . . . by the local legislative body with respect to the adoption or amendment of a bylaw . . . the administrative officer, for a period of 150 days following that notice, shall review any new application filed after the date of the notice under the proposed bylaw or amendment and applicable, existing bylaws and ordinances. If the new bylaw or amendment has not been adopted by the conclusion of the 150-day period, or if the proposed bylaw or amendment is rejected, then the permit shall be reviewed under existing bylaws and ordinances. An application that has been denied under a proposed bylaw or amendment that has been rejected, or that has not been adopted within the 150-day period, shall be reviewed again, at no cost, under the existing bylaws and ordinances, upon request of the applicant.<sup>151</sup>

Thus, under Vermont’s approach, the application date is compared with the proposal date to limit governmental reach back. However, the statute is missing the requirement that the retroactivity provision be explicit in the language of the proposed ordinance. Additionally, the statute contains an odd review mechanism: a development application is reviewed under proposed rules before they have been enacted. The obvious problem with this framework is that several competing or even contradictory proposals could be on the table at once. This hypothetical review of post-proposal-date application under several competing standards is likely to be unduly complex. Instead, it makes sense to review the developer’s application under

148. One possibility would be to use the definition of “pending” set forth in 1 M.R.S.A. § 302. However, this definition requires review and action by the municipality to accept the application as complete and ready for substantive review. Because municipality action is required, the opportunity for bad faith delaying tactics by town officials would still be present. These cases could be dealt with by the courts, but choosing a brighter-line rule for an application submission date that requires no municipal action may be easier to administer and reduce litigation by removing the risk of bad faith municipal action deeming an application incomplete.

149. An exception should be provided to allow emergency regulations necessary to protect the public’s health and safety to have longer reach back periods. This exception would allow building codes, fire codes, and waste disposal provisions to be applied without respect to the developer’s application date. Such a provision is a common feature of most statutory “vesting” schemes. See *GROWING SMART*, *supra* note 54, at 8-105 to 8-106.

150. A few early cases did suggest a “pending legislation” rule, which provided that only legislation pending at the time of the developer’s application could be applied to that project. Chase, *supra* note 27, at 620. However, this feature seems to have dropped out in most of the statutory schemes and is not included in the American Planning Association’s model legislation.

151. VT. STAT. ANN. tit. 24, § 4443(d) (2004).

the then-existing rules, as the Portland officials did in *Fisherman's Wharf*, and then re-review the application if the zoning change is subsequently enacted.

#### VIII. CONCLUSION

The outcome of *Kittery Retail Ventures* provides a serious disincentive for developers and communities to plan ahead and threatens to have a chilling effect on creative development proposals that may rely on transferable development rights, cluster development, or other anti-sprawl provisions in a particular town's ordinances. As long as towns can change their zoning regulations retroactively to keep out specific, politically-unpopular development proposals, prospective planning will be largely irrelevant. The community need not envision its future and enact zoning to make that vision a reality; instead, the community can sit back and wait to react to specific proposals as they arrive while merely paying lip-service to comprehensive plans and compatible zoning required by state mandates.

Both developers and communities will benefit from the Law Court's reconsideration of its holding in *Kittery Retail Ventures* or a new statute that prohibits the type of far-reaching retroactivity provision like that one sustained in *Kittery*. Developers will gain certainty: they will be able to go forward with preliminary expenditures with a fair knowledge of the standards their development will be held to and a confidence that those standards will not be changed late in the approval process. Communities will gain an important incentive to plan ahead and to create meaningful and comprehensive visions that are then reflected in thoughtful zoning ordinances. These ordinances may still evolve over time as circumstances and community needs shift, but the emphasis will always be on forward-looking, rather than reactionary, rule changes. Finally, the cost of litigation over development should be reduced as the vagaries of equitable analysis are taken out of the mix and brighter lines are put in place to protect both developers' applications and citizens' reasonable proposals for zoning changes.

*Heather B. Sanborn*