

April 6, 2018

Danielle Young, Clerk
Business and Consumer Docket
205 Newbury Street, Ground Floor
Portland, ME 04101

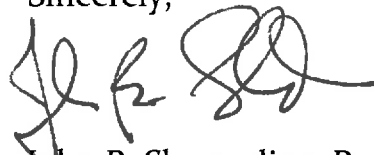
**RE: *Town of Wiscasset v. State of Maine Department of
Transportation
Docket No. BCD-CV-17-59***

Dear Danielle:

Enclosed for filing in the above-referenced matter please find *Plaintiff's Reply Memorandum in Support of Motion for Preliminary Injunction*.

Thank you for your assistance. If you have any questions, please feel free to contact me.

Sincerely,



John B. Shumadine, Bar No. 8989

JBS/mfm

Enclosures

cc: Nathaniel M. Rosenblatt, Esq.
Town of Wiscasset

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-59

THE TOWN OF WISCASSET,)
)
Plaintiff)
)
v.)
)
STATE OF MAINE DEPARTMENT OF)
TRANSPORTATION,)
)
Defendant)

**PLAINTIFF’S REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

State of Maine Department of Transportation (“MDOT”) does not possess untrammelled authority to do what it wants to do either in Wiscasset (the “Town”) or elsewhere in Maine. MDOT is a creation of, and is subject to, Maine law. In pursuing the development of the Project, MDOT is bound by 30-A M.R.S. § 4352(6) to comply with the Town’s valid Historic Preservation Ordinance (“HPO”) because it is a zoning ordinance which is consistent with the Town’s comprehensive plan. To the extent that MDOT seeks (for whatever reason) to unilaterally change the primary attributes of the Project, such as by removing the existing off-street parking without providing substitute parking, it would be pursuing a materially different Project. MDOT is restrained from undertaking such a new and materially different Project by 23 M.R.S. § 651 until and unless it has considered the Town’s interests.

I. MDOT is required by 30-A M.R.S. § 4352(6) to obey the Town’s zoning ordinance, including the HPO, in developing parking facilities and other publicly owned structures

As a state agency, MDOT and its activities are governed by state law. It is, however, required to comply with municipal ordinances to the extent required by state law. Title 30-A M.R.S. § 4352(6) explicitly provides that “a state agency shall comply with a zoning ordinance consistent with a

comprehensive plan that is consistent with the provisions of section 4326 in seeking to develop any building, parking facility or other publicly owned structure.” Thus, while the HPO does not apply to the alteration of the Route 1 roadway itself, other elements of the Project are well within its ambit. Specifically, the demolition of Haggett’s Garage, the improvement or construction of parking facilities, as well as the installation of signs, signals, bollards, benches, fences, and other publicly owned structures will require MDOT to apply for and receive a COA before commencing the project. *See* Zoning Ordinance § 10.5.1.1(b), (e) and (f).

MDOT advances two arguments to excuse it from compliance with section 4352(6) and thus the HPO: (1) that MDOT “is not ‘seeking to develop’ a ‘building, parking facility, or other publicly owned structure,’” *MDOT Opposition* at 7; and (2) that the HPO is not a zoning ordinance. Both arguments are mistaken.

a. MDOT is seeking to develop parking facilities and other publicly owned structures

Development is defined in 30-A M.R.S. § 4301(6) as “a change in land use involving alteration of the land, water or vegetation, or the addition or alteration of structures or other construction not naturally occurring.”¹ A reading of this plain language conveys that “development” includes both the modification of land itself, as well as intentional changes to the built environment – whether new construction or the alteration of existing structures.

To create the parking lots required by the Project, MDOT will first need to demolish the existing structure on Water Street and then install pavement, as well as other improvements, at both parking lot

¹ MDOT provides a purported “common sense” reading of this definition that defies both logic and the rules of English grammar to limit section 4352(6)’s applicability exclusively to new construction where there is also a change in land use. *MDOT Opposition* at 7 n.9. MDOT’s tortured reading impermissibly renders “or the addition or alteration of structures or other construction not naturally occurring” as meaningless surplusage. *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 22 (When undertaking statutory construction the court will “reject interpretations that render some language mere surplusage”). Moreover, such a reading is simply nonsensical. It would come as quite a shock to property owners, abutters, and municipalities across the State of Maine to discover that only completely new construction that also involves a change in land use, qualifies as “development.”

sites.² The installation of the signs, signals, bollards, benches, fences, walls, and the other publicly owned structures included in the Project, both at the parking facilities and along Main Street, will similarly require that MDOT undertake “construction not naturally occurring.” All of these activities will intentionally alter the land itself and modify the existing built environment. Therefore, MDOT is indeed “seeking to develop” parking facilities and publicly owned structures, and section 4352(6) requires that it comply with the Town’s zoning ordinance, including the HPO.

Contrary to MDOT’s assertion, this application of section 4352(6) does not “effectively put[] ‘road’” into the statute. *MDOT Opposition* at 8. MDOT is not required to submit an application for a COA for the roadway, only for the parking facilities and other publicly owned structures. Moreover, the plain language of section 4352(6), as adopted, demonstrates that the “Legislature has expressly mandated th[is] restraint” on the actions of all state agencies, including MDOT. *Dep’t of Corr. v. PUC*, 2009 ME 40, ¶ 11.

b. The HPO is a zoning ordinance

The essential elements of a zoning ordinance are that it is a land use ordinance which divides a municipality into zones “and prescribes and reasonably applies different regulations” in each zone. *Bragdon v. Town of Vassellboro*, 2001 ME 137, ¶ 8; 30-A M.R.S. § 4301(15-A). A land use ordinance “controls, directs or delineates allowable uses of land and standards for those uses.” *Bragdon*, 2001 ME 137, ¶ 8; 30-A M.R.S. § 4301(8). The HPO has all of these elements. First, and as MDOT explicitly concedes, the HPO designates a zone, the Wiscasset Historic District. Zoning Ordinance § 10.4.4.1. Second, the HPO prescribes and applies specific regulations and standards that control the allowable uses in that zone. *Id.* at § 10.4.5 (Permitted Uses), 10.5 (COA), and 10.7 (standards of evaluation and ordinary maintenance). Therefore the HPO is a zoning ordinance.

² MDOT claims that section 4352(6) is ambiguous but has not identified any such ambiguity. *MDOT Opposition* at 7 n.11. A parking lot, however minimalist or amenity rich, is self-evidently a parking facility because it is a facility that exists to provide parking.

In its effort to refute this MDOT cites to numerous cases that have one common theme – they indisputably do not concern zoning ordinances. *See MDOT Opposition* at 11-12 (citing *Bragdon*, 2001 ME137, ¶ 9 (site review ordinance); *Benjamin v. Houle*, 431 A.2d 48 (Me. 1981) (gravel extraction permit ordinance); *LaBay v. Town of Paris*, 659 A.2d 263, 265 (Me. 1985) (building code ordinance applicable across entire municipality); *Madden v. Town of Frankfort*, 2012 WL 9189534 (Me. Super. Sept 26, 2012) *aff'd*, Mem-14-17 (Feb. 4, 2014) (wind energy facility ordinance)). Indeed, none of the cited cases involved ordinances that divide a municipality into zones. Thus, unlike the Town’s HPO, they are not zoning ordinances.

MDOT further asserts – without any authority – that a town could enact an historic preservation ordinance that created an historic preservation zone without first adopting a comprehensive plan. *Id.* at 12; *but see* 30-A M.R.S. § 4352(2) (Relation to comprehensive plan). That is not the law. Where an HPO creates a historic preservation zone akin to the Wiscasset Historic District, and prescribes specific regulation for that district, it is a zoning ordinance. Zoning ordinances must meet the requirements of section 4352, including consistency with a valid comprehensive plan. The Town followed that procedure. Prior to enacting the HPO, the Town adopted a Comprehensive Plan which highlights the rich historic character and resources of the Town. *See* Wiscasset Comprehensive Plan at 1-2. Moreover, the Comprehensive Plan unambiguously sets forth the Town’s intent to develop and enact the HPO. *Id.* at 11-2 to 11-4. Therefore, having met all of the statutory requirements, the HPO is a zoning ordinance. More importantly, MDOT is obligated to comply with the HPO.

II. 23 M.R.S. § 651 restrains MDOT from proceeding with a unilaterally and materially altered Project until and unless it has taken the Town’s interests into consideration

Contrary to MDOT’s assertions, the Town is not attempting to assert a veto right over the Project. The Town is asserting its rights under Maine law to have its interests taken into consideration in connection with the version of the Project that will actually be constructed. *See* 23 M.R.S. § 651 (“The department *shall take into consideration the interests of a municipality* as to the location of any state or state aid highway . . . alteration within the boundaries of that municipality.”) (emphasis added). Because MDOT’s

proposed Project will alter Route 1, a state highway, within the Town's boundaries, and MDOT is now threatening to build a new materially different version of the Project (one that removes parking on Main Street without providing substitute off-street parking) this requirement is triggered.

Section 651 does not categorically prevent MDOT from changing the scope or elements of the Project. Rather it restrains MDOT from unilaterally choosing to construct a materially different Project without "taking into consideration" the interests of the Town. Adequate consideration includes both a substantive and a procedural component. MDOT is required, as a matter of substance, to address salient interests of the Town in its design and implementation of the project. Procedurally, "consideration" requires some interaction with the Town to ascertain the Town's interests. Procedural considerations could take the form of a vote of the citizenship or approved consultation with Town entities, but it must be about the Project as it will be built.

So called "Option 2" that was originally submitted to Wiscasset voters in 2016 showed some substantive consideration for the evident interests of the Town in that it proposed to replace parking to be removed from Main Street with convenient parking at the site of the Haggett's Garage on Water Street, and somewhat less convenient parking at the MDOT lot on Railroad Avenue. As a matter of procedure, MDOT consulted the Town in the form of the 2016 non-binding referendum and the activities of the Public Advisory Committee since then.

All of the consultation between the Town and MDOT to date has been based on a version of the Project that would provide significant substitute parking to replace parking to be removed from Main Street. The version of the Project that MDOT now threatens to pursue if it is required to comply with the HPO is substantially different from any of the plans presented to or voted on by the Town. *See Declaration of Ernest Martin*, Exhibit 1 (Wiscasset Downtown Improvements Draft Purpose & Need Statement, March 8, 2016), Exhibit 6 (conceptual drawing of Option 2), and Exhibit 9 (MDOT letter of intent to pursue Option 2). If required to comply with the Wiscasset HPO, MDOT threatens simply to drop the features of the Project that require such approval, such as the Haggett's Garage parking lot,

which would leave the Town with no convenient substitute parking to replace the parking that the Project will take from Main Street. By removing the parking lots on Water Street and Railroad Avenue from the Project MDOT in effect proposes an entirely new Project that takes no substantive consideration of the Town's evident need for parking to service its historic village core. This renders all of its previous consultation immaterial.

If MDOT were to build Option 2 as previously defined by MDOT and discussed with the Town, then Section 651 does not require any additional process. Similarly, if MDOT were only changing the Project marginally, such as removing a few parking spaces, altering a minor design choice, or relocating a sign, its obligations under section 651 would likely already have been met. However, if MDOT chooses to build a version of the Project which omits one of the key elements of Option 2, namely the provision of substitute parking, it must meet the obligation of section 651 anew and give meaningful consideration to the interests of the Town interests in that new Project.

MDOT's analogy of a private landowner who changes building plans to avoid burdensome regulatory requirements (*MDOT Opposition* at 16 n. 22) does not respond to the Town's argument. MDOT is not a private landowner, it is a state agency. As a state agency, MDOT has numerous statutory obligations to the people and municipalities of Maine that constrain its actions, and which simply do not apply to any private landowner. Most pointedly, these obligations include section 651.

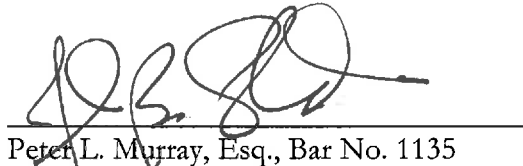
Finally, MDOT claims that the Town is inconsistent in both asserting its rights under section 651 and in seeking to stop the demolition of Haggett's Garage. Again, this misconstrues the Town's position. The Town is not trying to permanently prevent the demolition of Haggett's Garage. Rather it is invoking section 4352(6) to require MDOT to obey the Town's valid HPO. This is the law. It requires MDOT to apply for a COA to the extent that process is applicable to the development of buildings, parking facilities and other structures in the Project. This includes the demolition of Haggett's Garage. If MDOT wants to pursue a different project, one that is materially different from the Project that the Town has approved, then section 651 applies to require MDOT to return to the drawing board

and consider the interests of the Town in the new plan. There is no inconsistency in requiring MDOT to obey state law.

CONCLUSION

For the forgoing reasons, the Town respectfully requests that the Court grant its motion for preliminary injunction.

Dated: April 6, 2018



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