

JUDGE TO DECIDE CONSTITUTIONALITY OF GROWTH CAP ORDINANCE



U.S. District Court Judge Gene Carter is expected to issue a ruling in July concerning the constitutionality of a Residential Growth Controlled Ordinance. Specifically, the judge will decide whether the ordinance violates the “takings clause” of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, which prohibits government from taking private property for public use without just compensation.

This case presents the interesting issue of whether or not a Residential Growth Cap Ordinance which limits the number of building permits that may be distributed in a given month and year constitutes a “taking” of property without just compensation in violation of the Fifth Amendment to the United States Constitution. The Town of York is cautiously optimistic that in the end, either at the summary judgment stage or at trial, it will convince Judge Carter that the Plaintiff’s claims have no merit and that judgment be entered in the Town’s favor.

The case of *Currier Builders, et al. vs the Town of York* was filed in February 2001 by developers David Currier, Cape Neddick Estates, Inc., Walter Woods and Homebuilder and Remodelers Association of Maine. The Plaintiffs challenged a town ordinance passed in August of 2000 limiting the number of residential building permits to 84 per year. The complaint alleged that the ordinance, both on its face and as applied, violated Maine’s “home rule statute,” violated the federal and state constitutional guarantees of due process and equal protection, represented an unconstitutional taking, and violated 30-A M.R.S.A. § 4356(1) which allows building permit moratoriums to be imposed by municipalities under certain conditions.

On May 30, 2002, Judge David Cohen issued a recommended decision to dismiss all remaining counts in the lawsuit except for Count IV relating to Mr. Woods’

unconstitutional takings claim. Specifically, Judge Cohen recommended that the Town of York be granted judgment as a matter of law on Count I which alleged that the ordinance violated Maine’s “home rule” statute and was inconsistent with the Town of York’s Comprehensive Plan. The Town successfully argued that the ordinance was not a zoning ordinance (which is required by statute to be consistent with a comprehensive plan); therefore, it could not be invalidated for failure to comply with Maine’s home rule statute.

Judge Cohen also found in the Town’s favor on Count III of the complaint alleging that the ordinance denied the Plaintiffs’ equal protection of the laws in violation of the Maine and federal constitutions. Judge Cohen found that the ordinance did not treat the Plaintiffs differently from other similarly situated individuals and that it bore a rational relationship to legitimate governmental interests. Judge Cohen also recommended that the Town of York be entitled to summary judgment on any claim raised by Home Builders and Remodelers Association of Maine after agreeing with the Town’s argument that Home Builders did not have “standing” to pursue a lawsuit. The judge ruled that Home Builders offered no evidence that any of its members had actually suffered or would more than likely suffer any particular injury as a result of the enactment or application of the ordinance.

Finally, Judge Cohen recommended that the Town of York be granted summary judgment on Count IV of the Plaintiffs’ complaint alleging an unconstitutional taking without just compensation, but only with respect to Plaintiffs Currier and Cape Neddick Estates. The judge reasoned that neither Plaintiff was able to prove that they had been deprived of the opportunity to derive economic benefit from their properties during the term of the ordinance.

With respect to Plaintiff Woods’ takings claim, the Town argued that the claim was not “ripe”



Vacation Safely

For Mainers, vacations often center around travel within our own beautiful state, going to the cottage or outdoor activities such as camping, hiking, boating and fishing. Whatever vacation pleasure you pursue, it can be quickly ruined by an accident or injury to a friend or family member. To help assure that you have a safe vacation, a few safety tips follow:

Traveling

- Make sure your vehicle is in good mechanical condition. Check tires, brakes and engine cooling systems, especially if you will tow a camper, boat, or other type trailer.
- If your trailer is only used seasonally, make sure you check the condition of its tires, brakes, lights and hitch. Secure your load and use backup safety systems.
- When visiting remote areas, carry emergency and safety gear such as first aid kit, emergency flares or lights, flashlight, battery booster cables, shovel and basic mechanics tools. Check the condition of your spare tire and don't forget a spare for the trailer.
- Avoid driving when fatigued. Stay alert and drive defensively!

Outdoors

- b Use a sunscreen (SPF-15 or higher). The sun can be especially damaging when in the open or on the water, hiking, boating or fishing. A bad sunburn can ruin a vacation. To avoid heat exhaustion and heat stroke, wear a light weight hat with visor and light "T" shirt. Drink plenty of water, rest in the shade and don't overexert.



The Municipal Risk Manager

The Municipal Risk Manager is published seasonally to inform you of developments in municipal risk management which may be of interest to you in your daily municipal activities. The information in these articles is general in nature and should not be considered advice for any specific risk management or legal question; you should consult with legal counsel or other qualified professional of your own choice.

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Learn to recognize and avoid poisonous plants such as poison ivy, oak and sumac. When walking through wooded areas, wear long pants and shirts with long sleeves. If exposed, wash the affected area with cool water as soon as possible. Remove and wash all exposed clothing. Wash off all camping and sporting gear as well, if there is a chance that it has been contaminated with the oils from the plant.

- Always be aware of bees, wasps, ticks, and caterpillars such as the Browntail Moth. Ticks are numerous in southern Maine and the deer tick is known to sometimes be a carrier of Lyme disease. The hairs of the Browntail caterpillar carry a poison that can cause a rash on humans even after the caterpillar has shed them. A good policy is to avoid brushy, grown over and grassy pasture areas. Wear long sleeved shirts and long trousers with tight-fitting cuffs. Ticks are easier to see (and remove) on light colored clothing and black flies are less attracted to lighter colors than dark.

Have a Great and Safe Vacation!

(Additional information on the topics outlined in this article is available from the MMA Risk Management Services, Loss Control Department).

ACCIDENT INSURANCE FOR VOLUNTEERS ENHANCED COVERAGE

Members of the Workers Compensation Fund or Property and Casualty Pool are eligible to purchase Accident Insurance for their Volunteers through The McCarthy Companies. Coverage Includes:

- **\$25,000 Accident Medical Expense per accident**
- **\$2,500 Accidental Death & Dismemberment per accident**
- **\$900 Accident Dental Expense per accident**
- **Now covers named Coaches and Volunteers of organized sports (not players)**

COST PER VOLUNTEER PER YEAR: \$3.75

Coverage year runs from July 1 to July 1 but the cost may be pro-rated for mid-term enrollment. For an application or more information, contact Pam Corrigan at 1-800-590-5583, ext. 244.

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for consideration since Mr. Woods had not applied to the Planning Board for approval of an elderly congregate care housing project and had yet to apply for any building permits under the ordinance. Mr. Woods countered that argument by alleging that it would have been futile to apply for approval of the project since, even if it was approved by the Planning Board, the ordinance prevented him from obtaining building permits. Interestingly, Judge Cohen also recommended that Mr. Woods' motion for partial summary judgment on the takings claim be denied reasoning that there existed disputed material facts on that claim that could not be resolved at the summary judgment stage of the proceedings. Hence, Judge Cohen recommended that Mr. Woods' "as applied" takings claim proceed to trial.

The Town of York has filed an objection to Judge Cohen's recommended decision arguing that Mr. Woods' takings claim is not ripe for consideration and that Woods' "futility defense" should be rejected. The Town

has also argued that even if the takings claim is ripe, Mr. Woods is unable to prove that the growth cap ordinance (which essentially delays the time frame by which Mr. Woods may develop his property) has not deprived or restricted Woods' ability to construct residential housing on his land, it merely delays the construction. Moreover, the Town has argued that Mr. Woods has already enjoyed a significant windfall and profit with respect to his land in that Phase I of his project involved the sale of 32 units at an average cost of \$219,000 per unit. Moreover, the Town has argued that it is by no means certain that Woods' Phase II development project (wherein he contemplates building an additional 100 units) would be approved by the Planning Board.

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Thompson & Bowie, LLP*

N.B. We will provide an update for our readers when the case has been concluded.



Correction re Tax Acquired Property

In our effort to be brief, we edited out some important words in the article on Tax Acquired Property in the Spring 2002 issue of The Municipal Risk Manager. The first sentence in the second paragraph should read:

"First, the provisions of the Maine Tort Claims Act, Title 14 MRSA, Sec. 8104-A (2)(B), make municipalities liable for third party injuries or property damage caused by negligence on the part of the municipality after possession by the delinquent taxpayer or taxpayer's lessee or licensee has ceased for a period of 60 days."

We apologize for the error.

\$\$\$ DIVIDENDS \$\$\$



The Workers Compensation Fund Board of Trustees and the Property and Casualty Pool Board of Directors voted at their respective May 2002 meetings to pay dividends to qualified members of the programs in accordance with established guidelines.

We expect a majority of program participants will qualify for dividend payments. The actual amounts payable will be calculated in late July or early August and checks will be distributed soon after that. Stay tuned!



{Update to cover story}

JUDGE RULES IN TOWN'S FAVOR

On July 8th, Judge Gene Carter granted the Town of York's Objection to Magistrate Judge Cohen's decision and ruled that plaintiff Woods' "takings" claim is barred by his failure to apply to the Planning Board for project approval. The Town's Motion for Summary Judgment was granted in its entirety. The plaintiffs have the right to appeal Judge Carter's decision to the 1st Circuit within 30 days.

**MMA CONVENTION OCTOBER 16, 17 and 18, BANGOR CIVIC CENTER
DON'T FORGET TO VISIT THE RISK MANAGEMENT BOOTH!!!**



WELCOME NEW MEMBERS!!



Property & Casualty Pool

Town of Aurora
Town of Baileyville
Town of Bradley
Town of Bridgewater
Town of Brownfield
Town of Brunswick
Town of Casco
Town of Clinton
Town of Cornville
Town of Cutler
Town of East Machias
Town of Gouldsboro
Town of Greenville
Town of Harpswell
Town of Haynesville
Town of Hermon

Town of Jay
Town of Knox
Town of Kennebunk
Lincoln Plantation
Lucerne-in-Maine Village
Town of Machias
Magalloway Plantation
Town of Milbridge
Town of North Berwick
Northern Oxford Regional Ambulance
Town of Norway
Town of Peru
Presque Isle Water District
Reed Plantation
Richmond Utilities District
Richmond Schools

Town of Ripley
Town of Rumford
Town of Saint Albans
Sanford Sewerage District
Town of Sebago
Town of Solon
Town of Sumner
Town of Sweden
Town of Thomaston
Waterville Sewerage District
Town of Weld
Town of Westfield
Town of Wilton
Town of Winterport
Town of Winthrop

Workers' Compensation Fund

Town of Aurora
Town of Bradley
Town of Brownfield
Town of Buxton
Chelsea School Department
City of Ellsworth

Town of Haynesville
Town of Hermon
Town of Kennebunk
Kennebunk Sewer District
Lake George Corporation
Lucerne-in-Maine Village

Magalloway Plantation
Mars Hill
Minot School
Reed Plantation
Sanford Water District
Windsor School Department
Town of Wiscasset

MMA RISK MANAGEMENT SAFETY GRANT PROGRAM

In May, fifty-eight Safety Enhancement Grants for the purchase of safety related equipment which "directly enhances the health and safety of employees" were approved. The grants, awarded to participants of the Workers' Compensation Fund, through a competitive application process, match the member's investment on a 2:1 ratio, up to \$2,000 per grant. The May awards provided \$76,200 towards the purchase of \$142,600 of safety equipment.

~Grants were awarded in May for items ranging from cold water rescue survival suits and fire fighting protective equipment to hydraulic materials handling equipment and trenching safety equipment.

~Since the program's inception in 1999 more than \$301,000 has been committed, distributed through 225 grant awards. Additional grants will be awarded in September. To be

considered, applications must be received at MMA no later than August 30, 2002.

~Risk Management Services also offers a scholarship program to participants of the Workers' Compensation Fund. The scholarships provide financial assistance for employees who wish to advance their skills in the area of safety or risk management.

~Scholarships are granted throughout the year and completed applications must be submitted to RMS at least forty-five days before the intended educational event.

For more information or to receive a copy of the Safety Enhancement Grant or Scholarship Program guidelines and application, please call Deb Balmer, Ed MacDonald, or your assigned Loss Control Consultant at 1-800-590-5583.

