

## When Do Permitted Development Rights "Vest" in Maine?

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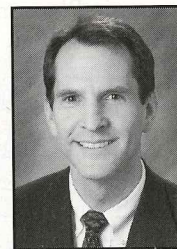
A recent decision of the Maine Supreme Judicial Court (SJC) adds further instability to the law governing land use developments in Maine. In *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65 (May 11, 2004), the SJC had the opportunity to strike down an ordinance amendment that targeted a specific proposed development and took away that developer's right to proceed with the development. But the SJC chose not to strike down the ordinance – even though a site plan application had been accepted as complete for processing – ruling that even in those circumstances the developer is not protected unless the developer has obtained the development permit and commenced construction.

### Background

The facts in the *Kittery Retail Ventures* case are somewhat convoluted, but they carry an important lesson to developers not to be too cavalier in their

assumptions that meeting applicable deadlines will protect them. On March 23, 2000, *Kittery Retail Ventures (KRV)* filed a site plan application with the *Kittery Planning Board* for a 250,000-square foot retail outlet mall – the *Kittery Marketplace* – in a mixed-use district on Route 1 in Kittery. On June 13, 2000, Kittery voters approved a citizen-initiated ordinance amendment that (1) reduced from 30% to 15% the space available for retail uses in mixed-use districts and (2) eliminated the ability to use transferable development rights (TDRs) to add to the amount of available retail space by shifting development rights from another site. This amendment was intended to stop the *Kittery Marketplace* development but, under the *Town of Kittery Charter*, it did not take effect for one month – on July 14, 2000.

After the June 13 vote, KRV submitted a revised site plan



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application, and on July 13, 2000 – one day before the effective date of the ordinance amendment, and after working late into the evening – the Planning Board accepted the application as complete for processing. Under Maine law, that completeness determination meant that the law in effect on that date – and not the ordinance amendment that took effect the next day – applied to the review of the *Kittery Marketplace* application, because the amendment contained no language that applied it retroactively to pending applications.

On September 26, 2000, Kittery voters approved another amendment to the ordinance, this time providing that the June 13 amendments were applicable to all applications pending before the Planning Board after September 30, 1999, even if those applications had been accepted as complete. Pursuant to that amendment, on May 9, 2002, the Planning Board denied the *Kittery Marketplace* application. KRV appealed to court, arguing (among other arguments) that the amendment (1) was enacted in bad faith with the sole purpose of stopping the *Kittery Marketplace* project, and therefore KRV acquired vested rights to pursue the project notwithstanding the amendment, and (2) the

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amendment violated KRV's due process rights because its sole purpose was to target and defeat KRV's project.

### When does bad faith provide vested rights?

In ruling against KRV, the SJC was clear that even issuance of a development permit does not establish vested rights to a project. The SJC confirmed its prior holdings in regard to vested rights, noting that to acquire vested rights a developer must have obtained all development permits and actually commenced construction.

Although in some unusual cases bad faith by the municipality may confer vested rights, the court set a high hurdle for developers trying to establish such bad faith.

In this case, KRV proceeded with its application with full knowledge of the effort to stop its development; nothing was hidden from it. In addition, the SJC appears to have drawn an implicit distinction between bad faith by town officials – which may provide vested rights – and “bad faith” by the voters – which appears to be entitled to heightened deference, apparently on the basis of democratic principles. Thus, KRV did not acquire vested rights to proceed with its application.

### Can due process protections help a developer who has not acquired vested rights?

As noted above, KRV also argued that the retroactive ordinance amendment violated KRV's due process rights because its sole purpose was to target and defeat KRV's project. The SJC's decision on the vested rights issue, though, also answered KRV's due process argument because, for due process rights to be implicated, there must

be some property interest at stake. The SJC stated that “KRV cannot contend that it legally acquired vested rights because it did not begin construction.” That is, simply spending money on the legal process of acquiring permits is not sufficient to acquire vested rights. Instead, the developer must actually obtain all necessary permits and begin construction.

Because the loss of the right to pursue the site plan approval did not deprive KRV of any property right, the due process claim had no basis.

### Summary

In short, the SJC had an opportunity in the Kittery Retail Ventures case to limit the application of retroactive ordinances to development projects in Maine, but chose not to do so, leaving developers at the mercy of well organized project opponents. ■

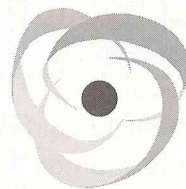
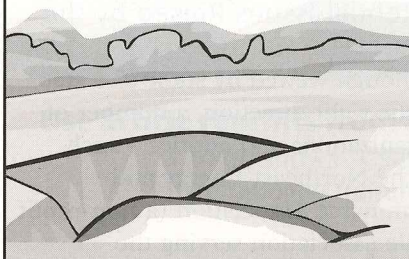
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