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April 30, 2009

The Honorable Deborah L. Simpson, Senate Chair
The Honorable Stephen R. Beaudette, House Chair
Joint Standing Committee on State and Local Government
100 State House Station
Augusta, ME 04333-100

Dear Senator Simpson, Representative Beaudette, and Members of the Committee:

By letter dated April 16, 2009, you asked for legal advice in response to testimony presented by Curtis Webber, Esq., at the public hearing on L.D. 242 suggesting that the Informed Growth Act violates the dormant Commerce Clause as well as antitrust laws. Specifically, Mr. Webber takes the position that these violations result from a provision in existing law requiring the developer of a new big box store to demonstrate that it will not have a negative impact on existing businesses and jobs.

For the reasons that follow, we believe that the Informed Growth Act can be defended against these challenges.

The Informed Growth Act

The Informed Growth Act (the "Act"), 30-A M.R.S.A. § 4365, *et seq.*, imposes certain restrictions on large-scale retail development in Maine (*i.e.*, retail business establishments with at least 75,000 square feet of floor area). The Act does not prohibit such development, but does provide that the local planning board or other municipal reviewing authority may issue a land use permit for large-scale retail development only if it determines that there is likely to be no "undue adverse impact," which is defined as follows:

"Undue adverse impact" means that, within the comprehensive economic impact area, the estimated overall negative effects on the factors listed for consideration in section 4367, subsection 4 outweigh the estimated overall positive effects on those factors and that the estimated negative effects of at least 2 of the factors listed in section 4367, subsection 4, paragraph A outweigh the positive effects on those factors.

30-A M.R.S.A. § 4366(10).

The referenced language in § 4367(4) provides:

4. Comprehensive economic impact study. The comprehensive economic impact study must be completed within 4 months of the filing of the application and must be made available to the municipal reviewing authority, the applicant and the public. It must estimate the effects of the large-scale retail development as set out in this subsection.

A. The comprehensive economic impact study, using existing studies and data and through the collection and analysis of new data, must identify the economic effects of the large-scale retail development on existing retail operations; supply and demand for retail space; number and location of existing retail establishments where there is overlap of goods and services offered; employment, including projected net job creation and loss; retail wages and benefits; captured share of existing retail sales; sales revenue retained and reinvested in the comprehensive economic impact area; municipal revenues generated; municipal capital, service and maintenance costs caused by the development's construction and operation, including costs of roads and police, fire, rescue and sewer services; the amount of public subsidies, including tax increment financing; and public water utility, sewage disposal and solid waste disposal capacity.

B. The comprehensive economic impact study must identify, to the extent that there are available for reference, existing studies and data, the general environmental effects on those factors enumerated in section 4404, regardless of whether the project is a subdivision, and in Title 38, sections 480-D and 484, regardless of the acreage of the project site.

The Dormant Commerce Clause Issue

The Commerce Clause expressly grants Congress the power to enact legislation that affects interstate commerce. The dormant Commerce Clause is a judicially created doctrine holding that this grant of power implies a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce.

In a dormant Commerce Clause challenge, a court first asks whether the law “directly” burdens interstate commerce or “directly” discriminates against out-of-state interests. A law that has a discriminatory effect, for Commerce Clause purposes, is one that favors in-state economic interests while burdening out-of-state interests. A statute may directly discriminate against out-of-state interests on its face or in practical effect.

If the law directly burdens or discriminates against interstate commerce, the courts have applied a strict level of scrutiny. But if the law does not directly burden or discriminate, then the courts have applied a lower level of scrutiny and asked whether the burdens on interstate commerce are clearly excessive in relation to the local benefits. This lower level of scrutiny is known as the *Pike* balancing test. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The

person challenging the law has the burden of proving that any burdens on interstate commerce outweigh the benefits to intrastate commerce.

The federal courts recently have addressed dormant Commerce Clause challenges to state laws imposing restrictions on the development of large-scale retail operations. In two recent cases, the laws – which differed from the Maine Act and from each other in various respects -- were upheld. *Loesel v. City of Frankenmuth*, 2009 U.S. Dist. Lexis 25956 (E.D. Mich. 2009) (ordinance imposed a floor space limit of 65,000 square feet for certain development); *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006) (among other aspects, law prohibited development of discount superstores that had more than 100,000 square feet of floor space and that devoted more than 5% of sales floor area to grocery items). In a third case, the court held that the ordinance at issue violated the dormant Commerce Clause. *Island Silver & Spice, Inc. v. Islamorada, Village of Islands*, 475 F. Supp. 2d 1281 (S.D. Fla. 2007), *aff'd*, 542 F.3d 844 (11th Cir. 2008) (ordinance effectively prohibited formula stores with more than 50 feet of frontage or 2,000 square feet of floor area).

In *Loesel v City of Frankenmuth*, the trial court held there was no dormant Commerce Clause violation as to an ordinance that imposed a 65,000 square-foot floor space limit on certain development. The court reasoned as follows with respect to the threshold issue as to whether the law's purpose or practical effect was to harm out-of-state interests:

Even if Defendant's purpose was to discriminate against Wal-Mart and “large scale uses,” such a purpose cannot be characterized as a purpose to discriminate against all interstate retailers. Thus, Plaintiff cannot show that the ordinance has a discriminatory purpose. Plaintiff also argues that the ordinance has a discriminatory effect because it discriminates against out-of-state commerce in favor of in-state interests (i.e., Bronner's and the Kroger store) as a result of the 65,000 square foot size cap. However, according to a report, the size cap would still allow at least sixteen of fifty-six national retailers to build a typical store on Plaintiffs' property. . . . Thus, Plaintiff has not carried the burden of showing that the law directly burdens interstate commerce facially, purposefully, or in practical effect.

2009 U.S. Dist. Lexis 25956, at ** 59-60. The court in *Loesel* upheld the law under *Pike* balancing, as well.

By comparison, in *Island Silver & Spice*, one of the cases cited by Mr. Webber, the court held that the practical effect of the ordinance (which limited “formula” retail stores to no more than 50 feet of frontage and 2,000 square feet of floor area) was to:

...discriminate between local and national business. Even though on its face the statute allows formula retail stores, in actuality, the ordinance eliminates national retail chain stores because they cannot operate within the strict size constraints imposed by the ordinance.

475 F. Supp. 2d at 1291.

The other case cited by Mr. Webber involved a New York law (a so-called flow control ordinance) that required all non-recyclable solid waste generated in a municipality to be processed at a designated transfer station before leaving the municipality. *C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994). The Supreme Court held that the flow control ordinance discriminated against interstate commerce in violation of the dormant Commerce Clause. We believe that such an ordinance can be readily distinguished from the Maine Act.

The Maine Act does not prohibit development of large retail stores, as did the Michigan ordinance upheld by the court in *Loesel*, but rather provides that the local planning board or other municipal reviewing authority may not issue a land use permit for large-scale retail development unless it determines that there is likely to be no “undue adverse impact” from the project. Based on the decisions from Michigan and California cited above, in which more restrictive laws were upheld against dormant Commerce Clause challenges, we believe that the Act can be defended against a dormant Commerce Clause challenge. Although a person challenging the Act might seek to rely on the *Island Silver & Spice* decision, we believe not only that the ordinance at issue in that case can be distinguished from the Act, but also that the Michigan and California courts provided the sounder analysis under the dormant Commerce Clause.

Application of Antitrust Laws

Antitrust laws do not apply to actions taken by a municipality if the municipality’s restriction of competition is an authorized implementation of state policy. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991). State law authorizes a municipal action for antitrust purposes so long as it provides the municipality with a grant of authority to take actions of the sort in question. *Id.*

In *Columbia* the plaintiff alleged that the City promulgated bill board zoning restrictions solely to help one private competitor hurt another. The court held the city immune from antitrust liability, pointing out that the “very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition.” *Id.* at 373.

The court also explained that the purpose of this immunity was to prevent antitrust courts from becoming the reviewer of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.

The First Circuit applied the test set forth in *Columbia* in *Fischelli v. Methuen*, 956 F. 2d 12 (1992). Plaintiffs wanted to build a mall in Methuen and applied for special tax free development bonds. The City Council voted not to give the developers bonds allegedly because one city councilor owned a drug store and the developers were going to include a CVS in the mall which would hurt his business. The First Circuit said that decisions increasing or restricting competition are the logical and necessary outcome of the authority to grant industrial revenue bonds and found the city immune from antitrust liability.

In sum, municipalities applying the Informed Growth Act would be immune from antitrust liability to the extent that they take action under the authority of a state law.

I hope this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet T. Mills". The signature is written in a cursive style with a large initial "J" and "M".

JANET T. MILLS
Attorney General

cc: The Honorable Elizabeth H. Mitchell, President of the Senate
The Honorable Hannah Pingree, Speaker of the House
Curtis Webber, Esq.