

MEMORANDUM

To: Amanda Stearns
From: Amy Tchao
Re: Contract Zoning – Summary of Legal Standards
Date: June 16, 2016

1. Definition of Contract Zoning

“‘Contract zoning’ means the process by which the property owner, in consideration of the rezoning of that person's property, agrees to the imposition of certain conditions or restrictions not imposed on other similarly zoned properties.” 30-A M.R.S.A. § 4301(5).

2. Maine Statutory Requirements on Contract Zoning

The statutory requirements for conditional and contract rezoning in Maine are contained in 30-A M.R.S.A. § 4352(8). Generally, a request to rezone must: “A. Be consistent with the growth management program adopted under [the Growth Management Act]; B. Establish rezoned areas that are consistent with the existing and permitted uses within the original zones; and C. Only include conditions and restrictions that relate to the physical development or operation of the property.” 30-A M.R.S.A. § 4352(8).

In addition to these general substantive requirements, the contract zoning statute sets forth specific procedural steps that must be taken before an application for conditional zoning may be approved. These are as follows:

The municipal reviewing authority¹ shall conduct a public hearing before any property is rezoned under this subsection. Notice of this hearing must be posted in the municipal office at least 13 days before the public hearing. Notice must also be published at least 2 times in a newspaper having general circulation in the municipality. The date of the first publication must be at least 7 days before the hearing. Notice must also be sent to the owner or owners of the property to be rezoned and to the owners of all property abutting the property to be rezoned at

¹ “‘Municipal reviewing authority’ means the municipal planning board, agency or office or, if none, the municipal officers.” 30-A M.R.S.A. § 4301(12).

the owners' last known addresses. Notice also must be sent to a public drinking water supplier if the area to be rezoned is within its source water protection area. This notice must contain a copy of the proposed conditions and restrictions with a map indicating the property to be rezoned.

30-A M.R.S.A. § 4352(8).

3. Case Law

In a relatively recent case addressing contract zoning, the Law Court made clear that it will give substantial deference to a municipality's legislative body when it approves a properly authorized contract zoning agreement (CZA). In *Rommel v. City of Portland*, 2014 ME 114, 102 A.3d 1168, 1171 (Me. 2014), the owner of property in the City of Portland containing two buildings – a sanctuary and a parish house formerly occupied by a historic church, applied to the City for conditional rezoning of the property to permit renovation of residential space on the top two floors of the parish house and creation of office space for a software development company on the building's first floor. The City's comprehensive plan established numerous goals to guide rezoning decisions, including promoting an economic climate that increases job opportunities, supporting neighborhood livability, preserving and improving the City's housing stock, and preserving architectural and historic sites and structures. *Id.* at 1170. The City Council, pursuant to its ordinance authorizing conditional and contract zoning, approved a CZA which, among other things, placed limitations on the size of converted office space, the number of employees, and the number of visits from clients or the public. *Id.* at 1171. The plaintiffs, abutters to the property, filed suit seeking to have the CZA declared unlawful on a number of different grounds. The Law Court ultimately agreed with the City Council and upheld the CZA, finding that it complied with both ordinance and statutory requirements governing conditional and contract zoning.

The Law Court made several points in *Remmel* that are worth mentioning here. First, the Court recognized that judicial review of a municipality's contract zoning decision is highly deferential to the municipality's legislative body because "zoning is a legislative act." *Id.* Thus, the Court noted that:

Judicial review of a conditional rezoning decision is ultimately limited to determining whether the City Council could rationally have adopted the conditional zone in light of the evidence presented to it, the various policies articulated in the comprehensive plan, and the mandate of 30-A M.R.S. § 4352(8).

Id.

In analyzing the substantive requirements of the contract zoning statute, the Court also stated that when considering whether a conditional rezoning decision is consistent with a town's comprehensive plan, a court must determine that the city/town council "could have, from the evidence before it, found that the rezoning was 'in basic harmony with the comprehensive plan.'" *Id.* at 1172 (citing *Adelman v. Town of Baldwin*, 2000 ME 91, ¶ 22, 750 A.2d 577; *LaBonta v. City of Waterville*, 528 A.2d 1262, 1265 (Me.1987)). Similarly, a rezoning decision "need not perfectly fulfill the goals of a comprehensive plan . . . so long as it 'strikes a reasonable balance among the municipality's various zoning goals.'" *Id.* at 1172 (citing *Nestle Waters N. Amer., Inc. v. Town of Fryeburg*, 2009 ME 30, ¶ 23, 967 A.2d 702; *Stewart v. Town of Durham*, 451 A.2d 308, 312 (Me.1982)). The burden of proving inconsistency with the comprehensive plan lies with the party challenging the CZA or ordinance. *City of Old Town v. Dimoulas*, 803 A.2d 1018, 1023 (Me. 2002).

Of particular note, in recognizing that comprehensive plans occasionally have conflicting goals, the Court in *Remmel* determined that "a municipality may conclude that a rezoning action is consistent with a comprehensive plan when it is in harmony with some provisions of the plan,

even if the action appears inconsistent with other provisions of the plan.” *Id.* (citing *Adelman*, 2000 ME 91, ¶¶ 23–24, 750 A.2d 577; *LaBonta*, 528 A.2d at 1265). See also *Brenner v. City of Portland*, 2008 WL 7022519 (Me. Super. June 9, 2008) (sole determination on a CZA’s consistency with the comprehensive plan is whether the two are “in basic harmony, not absolute harmony”). The Court in *Remmel* concluded that the City Council had a “rational basis” for its conclusion that the CZA was consistent with the comprehensive plan as a whole, because it struck a “reasonable balance among the competing goals of the plan.” *Id.* at 1173.

The *Remmel* Court also analyzed the statutory requirement that the CZA must be “consistent with the existing and permitted uses within the original zones” 30-A M.R.S. § 4352(8), concluding that the City Council had a “rational basis” to conclude that the proposed use of the parish house was “in basic harmony with uses in the neighborhood” which included prior use of the property, while previously operated as a church, as nursery school and office space, and a “mix of residential, commercial and institutional uses” in the neighborhood. *Id.* at 1175.

As in *Remmel*, it appears that the most common challenge to a CZA is the claim that it is inconsistent with some aspect of a municipality’s comprehensive plan or with the existing and permitted uses in the applicable zone. See e.g. *LaBonta*, 528 A.2d at 1264 (where plaintiff’s primary challenge was that the CZA was inconsistent with the goal of protecting residential neighborhoods); *McMillan*, 2005 WL 6000897 (Me. Super. 2005) (upholding contract zoning agreement for development of property near Morrill’s Corner, finding that evidence presented to City Council that the rezoning proposal is consistent with the comprehensive plan and consistent with existing and permitted uses was rational). Other challenges include constitutional

challenges,² allegations that the CZA or the ordinance illegitimately constitutes or allows illegal spot zoning,³ or a challenge suggesting that proper procedure to establish a CZA was not followed.⁴

In sum, as *Rommel* and other case law on this topic demonstrates, courts appear to consistently defer to municipalities and their legislative bodies in their decisions to approve CZAs as long as there is rational evidence to support that the rezoning proposal is consistent with, and in basic harmony with, the land uses permitted in the applicable zone and the goals articulated in the municipality's comprehensive plan.

² See *Vella v. Town of Camden*, 677 A.2d 1051, 1054 (Me. 1996) (Plaintiff's allegation that the ordinance allowing conditional zoning violated Equal Protection and Due Process under the United States and Maine Constitutions lacked merit because the ordinance did not facially violate Equal Protection, and noting, "[i]t is well established law that zoning ordinances are presumed to be constitutional.") .

³ See *Brenner*, 2008 WL 7022519 (deciding the CZA did not constitute illegal spot zoning because it was not inconsistent with the Comprehensive Plan); *Vella v. Town of Camden*, 677 A.2d at 1053 (indicating "[t]he fact that a zoning amendment benefits only a particular property or is adopted at the request of a particular property owner for that owner's benefit is not determinative of whether it is an illegal spot zoning").

⁴ At least one trial court dealt with the issue of whether a rezoning constituted a CZA when a challenge arose because a public hearing was not conducted by the Planning Board, as required by 30-A M.R.S.A. § 4352(8). *Pike Indus., Inc. v. City of Westbrook*, 2010 WL 9597662 (Me.B.C.D.), 1. Eventually, the Court decided, "[d]espite its ostensible resemblance to contract zoning, the court is convinced that the proposed Consent Decree is not in fact an instance of contract or conditional zoning," but rather a "settlement of legitimate equitable claims." *Id.* at 6.