

LEGISLATIVE ADVOCACY



Maine Real Estate &
Development Association

Supporting Responsible Development

**SPECIAL EDITION: MEREDA's Landmark
Permitting Predictability Law Goes Into Effect**

Legislative Update – Summer 2024

August 19, 2024

MEREDA's Public Policy Committee continues to stay engaged on critical matters impacting our members.

MEREDA's Landmark Permitting Predictability Law Goes Into Effect

LD 772, now Public Law 2023, Chapter 598, Took Effect on August 9, 2024

On August 9, 2024, MEREDA's newest legislative success, Public Law 2023, Chapter 598, An Act to Limit Retroactive Application of Land Use Ordinances to Pending Permit Applications that Propose Housing, took effect. This new law protects land use applicants who have submitted their application for consideration (and which application has been deemed complete) from the retroactive application of new land use laws so long as the application includes the creation of at least one dwelling unit.

While MEREDA has previously written of its success in passing LD 772, this article dives deeper into the historical background of this issue and our advocacy efforts in Augusta.

Correcting the Law Court's 2004 Holding in Kittery Retail Ventures LLC v. Town of Kittery

The effect of MEREDA's landmark victory is to close a longtime loophole in Maine law that strongly weakened the effectiveness of land use planning and undermined the purpose of the comprehensive plan. This loophole was created by the Maine Supreme Judicial Court's holding in Kittery Retail Ventures LLC v. Town of Kittery. In that case, the Town of Kittery applied a site plan ordinance, enacted in September 2000, retroactively to an application that had been submitted in March 2000. Kittery Retail Ventures On appeal, the Law Court held that a municipality was not prohibited under Maine law from applying a land use ordinance with retroactive effect to an active land use application. That outcome, and its negative implications for land use planning and development, was discussed at length in a 2006 Maine Law Review article by the Honorable Heather Sanborn. In the article, she states that the Law Court's holding in Kittery Retail Ventures LLC:

Failed to properly balance the equities that underlie a traditional 'vested rights' analysis. . . The Law Court should remove the serious disincentives to planning it has created, by reconsidering its holding in Kittery Retail Ventures. Unless the court does so, the Maine Legislature should act to reinforce the

www.mereda.org

6 City Center, 3rd Floor • Portland, Maine 04101 • Tel: (207) 874-0801 • Fax: (207) 899-4870

LEGISLATIVE ADVOCACY

importance of comprehensive prospective planning by enacting a statute that limits the retroactive application of changes in land use standards.

Heather B. Sanborn, Striking an Equitable Balance: Placing Reasonable Limits on Retroactive Zoning Changes after Kittery Retail Ventures, LLC v. Town of Kittery, 58 Me. L. Rev. 601 (2006). Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol58/iss2/14>

Despite the glaring inconsistency between the State's own mandatory Growth Management Act, the Law Court never took action to reverse its decision in Kittery Retail Ventures, and it was not corrected at the legislature.

Twenty Years Later, A Different Kittery Project Spurs MEREDA to Action

Since 2000, few significant housing developments have occurred around the state of Maine. In part, due to a town's inability to effectively implement its comprehensive plan – another factor is the incredibly high risk for developers. The lack of any assurance in the underlying land use laws creates an unfair playing field where NIMBYs are effectively empowered to adjudicate housing projects on a case-by-case basis. Ironically, it was action taken in 2022, on a different project in the Town of Kittery, that spurred MEREDA to act by putting in legislation for the 131st Legislature.

In brief, a 900+ unit housing project was killed in Kittery in 2022 when the Town Council was persuaded by a small group of NIMBYs to go back on its own recent zoning decision to disallow housing creation on the property. Specifically, the project would have included ten percent affordable housing units, a daycare center, assisted living housing, a downtown area with shops and restaurants, retail locations, medical offices, and open space with walking and biking trails. Despite having recently re-zoned the underlying land for exactly this type of mixed-use development, a small group of residents pressured the Town's officials to act to zone the land back to industrial use only – effectively killing the project.

The size and scale of the project in Kittery drew attention to the risk borne by the developer – a local man who does not have deep pockets. Despite working for years with the town planner and going above and beyond to breathe life into the town's own community planning ambitions, the developer had little recourse when the town reversed itself. At a time when the State is putting much of its time and focus on housing creation, the action taken against this project felt particularly egregious and unfair. MEREDA decided to act.

Right Time, Right Venue

With the passage of the Housing Act in 2022 (commonly referred to as LD 2003), the 130th Legislature made clear that outdated local housing policies that created barriers to housing creation would no

www.mereda.org

6 City Center, 3rd Floor • Portland, Maine 04101 • Tel: (207) 874-0801 • Fax: (207) 899-4870

LEGISLATIVE ADVOCACY

longer be deemed acceptable. Simultaneously, the Maine State Housing Authority (MSHA) published a housing needs study (Housing Production Needs Study) that called for 85,000 housing units to be built by 2030. State of Maine Housing Production Needs Study, [MaineHousing.org](https://mainehousing.org/docs/default-source/default-document-library/state-of-maine-housing-production-needs-study_full_final-v2.pdf), October, 2023, available at: https://mainehousing.org/docs/default-source/default-document-library/state-of-maine-housing-production-needs-study_full_final-v2.pdf.

In 2023, the 131st Legislature, immediately upon gaveling into session, created the standalone Joint Select Committee on Housing. Known as the Housing Committee, this group of 13 Senators and House members was charged with investigating the root causes of homelessness, taking action to eliminate barriers to and incentivize housing creation, and examining the state's existing land use laws to ensure best practices for modern planning and development.

With all eyes on housing creation, MEREDA recognized an opportunity that had not previously existed – a chance to correct the law and protect planning and developers from retroactive action. Working with Senator Matt Pouliot, a Republican Senator from Augusta and member of the Housing Committee, MEREDA submitted LD 772. The bill had its first public hearing before the Housing Committee on November 11, 2023, after being carried over from the first legislative session.

Making the Case to Correct the Law

Despite the positive attention LD 772 received at its public hearing, passage of the final legislation was no simple matter. At the public hearing, testimony in support came from organizations including the Maine Affordable Housing Coalition, the Maine State Housing Authority, the City of Westbrook, and the Developer's Collaborative. The primary opponent was the Maine Municipal Association.

In the months that followed, the Housing Committee held not less than seven work sessions on the bill. Initially, the Committee had concerns with some technical aspects of the proposal, which MEREDA was easily able to overcome. However, we encountered some pushback at the last minute as committee members expressed concern that the law would apply to all types of real estate development, not just housing. MEREDA retains its conviction that a developer should be able to count on a land use ordinance – whether the project is for housing, mixed-use, or another type of land use. In a compromise to push LD 772 over the final hurdle, we agreed to a provision that the protections in the law would only extend to a project so long as the project included the creation of at least one dwelling unit.

With that compromise in place, the Housing Committee voted unanimously to support and Ought to Pass as Amended report for LD 772, which passed easily through the House and Senate. The final version of the bill was signed into law by Governor Mills on April 9, 2024.

www.mereda.org

6 City Center, 3rd Floor • Portland, Maine 04101 • Tel: (207) 874-0801 • Fax: (207) 899-4870

LEGISLATIVE ADVOCACY

Finally Taking Effect – Conclusion is Just the Beginning

This new law has just taken effect on August 9, 2024 – 90 days after the adjournment of the Second Regular Session of the 131st Legislature. MEREDA is confident that this new protection will provide greater assurances to developers, encourage effective implementation of community planning, and drive housing creation.

MEREDA believes its efforts in enacting this new law demonstrate the importance of small but significant changes in state statute. In particular, we believe the level playing field created by statewide policy helps ensure responsible real estate development for Maine. We also believe that a more level playing field will produce more housing – housing that is needed in all towns and for all income levels – to ensure we meet the 85,000-unit goal identified by Housing Production Needs Study.

MEREDA thanks the sponsor, Senator Matt Pouliot, as well as the Chairs of the Housing Committee, Senator Teresa Pierce and Representative Traci Gere, for their persistence in helping enact this legislation. While more work remains to create the kind of housing-friendly land use policies necessary statewide, we believe the new law enacted by LD 772 provides a critical underpinning for that work.

MEREDA looks forward to building on its success with this bill to continue to advance fair, practical, and predictable land use policies in Augusta and across the state.

MEREDA will continue to remain diligent in protecting its members' interests. Our members represent a critical pillar of the state economy, and we will continue to advocate for policies that are fair, practical, and predictable. We encourage all those who are interested in rolling up their sleeves and helping to further MEREDA's mission and vision in policymaking to contact Shelly R. Clark, MEREDA's Executive Director at info@mereda.org.

www.mereda.org

6 City Center, 3rd Floor • Portland, Maine 04101 • Tel: (207) 874-0801 • Fax: (207) 899-4870