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PHILIP F. W. AHRENS
DIRECT
207.791.1298
E-MAIL
PAhrens@
PierceAtwood.com

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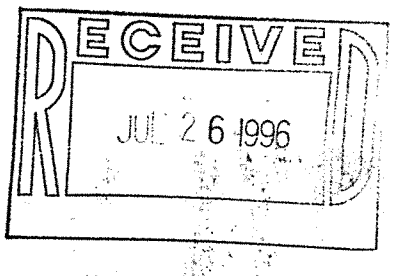

Patricia A. Finnigan
City Manager
City of Auburn
45 Spring Street
Auburn, ME 04210

RE: Agriculture and Resource Protection District

Dear Pat:

As you requested in your June 18 letter to me, we have considered the merits of the arguments raised on behalf of Peter and Mary Moore by Paul Frinsko in his May 8, 1996 letter to the Auburn City Council threatening litigation regarding the legality of the income test contained in the Auburn Ordinance's definition of a "farm." We also have considered whether there are any modifications that the City Council might consider to preserve the intent of the Ordinance in regard to the Agriculture and Resource Protection District while allowing some room for flexibility.

I. The Legality of the Income Test

In his May 8 letter Mr. Frinsko argues that the income test violates the due process and equal protection guarantees of the Maine and U.S. Constitutions. He also argues that the income test regulates the owner of the land rather than the land itself, and thus is an impermissible subject of a zoning ordinance. I will address each of these arguments in turn.

A. The Due Process Claim

Mr. Frinsko argues that the income test is arbitrary and thus violates the due process clause. He says that the income test bears no rational relationship to the Ordinance's goal of preserving agricultural land. He argues that "there is no predictable or measurable relationship between the percentage of household income derived from farm uses and the actual use of the land."

The Maine Supreme Court has stated that an ordinance satisfies due process requirements if the ordinance bears a reasonable relationship to the public health, safety, morals, or general welfare and is not unreasonable, arbitrary, or discriminatory based upon the reasonably foreseeable future development of the

One Monument Square
Portland, Maine
04101-1110
VOICE
207.791.1100
FAX
207.791.1350
E-MAIL
info@PierceAtwood.com

community. LaBay v. Town of Paris, 659 A.2d 263, 266 (Me. 1995). "Generally, there is a presumption of the constitutional validity of municipal ordinances." Id. Thus, the question is whether the income test bears any reasonable relationship to the public health, safety, morals, or general welfare or is unreasonable, arbitrary, or discriminatory.

Although Mr. Frinsko makes a convincing argument that the percentage of a family's income that is derived from farm uses is not necessarily related to the use of that family's land, the due process test, as outlined above, is not that stringent. Rather, there need only be a reasonable relationship between the ordinance and the goals sought to be achieved. In the case of the income test, it is reasonable to assume that if at least 50% of a family's income is derived from farm uses, the family's land is more likely to be devoted to farm uses. That there may be other, better ways to further that goal does not mean that the income test is invalid, as long as it has a reasonable relation to its goal. Further, the Ordinance may seek not only to protect agricultural land generally, but to protect small, family-owned (traditional) farms. The income test directly furthers that goal by preventing individuals or entities with substantial sources of non-farm income from operating a farm in the district.

Thus, it appears to us that there is a strong argument that the income test does not violate due process.

B. The Equal Protection Claim

Mr. Frinsko claims that to treat identical farm operations differently based on how much or how little money they make in comparison to some other source of revenue is "a totally irrational classification" that violates his clients' right to equal protection of the laws. He argues that to classify those who derive at least 50% of their income from farm uses separately from those who do not is irrational, and does not further the Ordinance's goals.

When an equal protection challenge does not involve a suspect classification or fundamental right, the test for whether a law meets equal protection requirements is similar to the test for whether a law satisfies due process requirements. In that case, to meet equal protection requirements the challenged classification need only be rationally related to a legitimate state interest. Berry v. H.R. Beal & Sons, 649 A.2d 1101, 1102 (Me. 1994). As discussed above, it is rational to assume that if at least 50% of a family's income is derived from farm uses, the family's land is more likely to be devoted to farm uses. That there may be other, better ways to further that goal does not mean that the income test is invalid, as long as is has a rational relation to its goal. Further, the income test directly furthers the goal of protecting

small, family-owned (traditional) farms by preventing individuals or entities with substantial sources of non-farm income from operating a farm in the district.

Mr. Frinsko also argues that the income test violates equal protection because it treats married persons differently than unmarried persons, amounting to discrimination based on marital status. As previously stated, when an equal protection challenge does not involve a suspect classification or fundamental right, the challenged classification need only be rationally related to a legitimate state interest. Id. Married persons, however, are not a suspect class deserving of special constitutional protection. Cf. Wellman v. Department of Human Services, 574 A.2d 879, 883 (Me. 1990) (giving no special protection to unmarried persons). Thus, the treatment of married couples differently than unmarried couples survives equal protection scrutiny, as long as that distinction has a rational relation to its goals.

The basis for including spouses in the income test appears to be to ensure that 50% of the family's income is derived from farming. Although a family may include the other members listed by Mr. Frinsko (e.g., a parent or sibling), it is rational to use the spousal test to further the goal of protecting agricultural land and the goal of protecting small, family-owned (traditional) farms at which most of the income is derived from farm sources.

C. The Ultra Vires Claim

Mr. Frinsko alleges that because the income test regulates the owner of the land rather than the land itself, it is not a proper subject of zoning. Mr. Frinsko appears to be arguing that such regulation is beyond the power of the City Council, and is thus an *ultra vires* action. The only Maine case Mr. Frinsko cites to support his claim is Keith v. Saco River Corridor Commission, 464 A.2d 150, 154 (Me. 1983). The Keith case, however, merely stands for the proposition that grandfathering applies to the land in question, not to the owner of the land. It does not necessarily follow from this proposition that a municipality cannot regulate land by reference to certain attributes of the owner or occupant of the land. In fact, in 1978 the Maine Supreme Court relied in part on an income test to find that a pole barn used for storage of bakery waste was not accessory to a farm use under the Auburn Ordinance. In Giguere v. City of Auburn, 390 A.2d 514 (Me. 1978), the plaintiff asked the court to rule that his pole barn was accessory to a farm use. The court declined to do so, noting that record demonstrated "that the Plaintiff's principal occupation is the bakery waste business, and that he sells no farm produce. The referee found that the Plaintiff's income from farming was negligible." Id. at 516. Thus, the court relied on the plaintiff's income to show that the plaintiff's use of the property was not primarily farm-related.

Mr. Frinsko cites several cases from outside of Maine to support his proposition that a municipality cannot regulate land by reference to certain attributes of the owner or occupant of the land. Those cases, however, relate to the ability of municipal administrative bodies to impose restrictions on the owner, rather than the ability of the municipality itself to regulate land by reference to certain attributes of the owner or occupant of the land. In Vlahos Realty Co. v. Little Boar's Head District, 146 A.2d 257 (N.H. 1958), for example, the question was the legality of a variance that was limited to a specific owner of the premises. The court had no occasion to reach the question of whether the municipal legislative body could regulate land by reference to certain attributes of the owner or occupant of the land. The same is true of the other cases cited by Mr. Frinsko. The cases in which courts have struck down a municipal legislative classification based on the identity of the owner have involved situations in which the State authorizing statute has been interpreted to preclude such distinctions or where the distinction had no rational relationship to the ends sought to be achieved. See, e.g., Vermont Baptist Convention v. Burlington Zoning Board, 613 A.2d 710, 711 (Vt. 1992)

Municipalities in Maine have broad home rule authority to enact ordinances as long as they "conform to the enabling legislation by which the legislature has delegated police powers" to towns and cities. LaBay v. Town of Paris, 659 A.2d 263, 266 n.5 (Me. 1995). Under the State's land use statutes, "a municipal zoning ordinance may provide for any form of zoning consistent with this chapter." 30-A M.R.S.A. § 4352. Thus, as long as an ordinance is consistent with State law, there appears to be no reason it cannot regulate land by reference to certain attributes of the owner or occupant of the land.

II. The Prudence of the Income Test and Proposed Ordinance Modification

Although we believe that there are strong arguments that the income test is legal, we believe Mr. Frinsko makes several valid points regarding its effect. The income test may not be a very effective tool to achieve the City's goals, and that it may cause problems that the City may want to avoid.

First, we agree with Mr. Frinsko that it seems to make more sense to regulate the land itself and avoid regulating by reference to certain attributes of the owner or occupant of the land. Such regulation invariably results in problems with administration of an ordinance, and raises issues of the type raised by Mr. Frinsko in his May 8 letter. Although we believe that there are strong arguments to persuade a court to uphold the validity of the income test, that question is by no means free from doubt.

Second, it does not seem that a farm is much more likely to retain its traditional flavor merely because the farmer spouse earns more money than the non-

farmer spouse. Nor is a farm necessarily more likely to retain its traditional flavor merely because the farmer does not have outside sources of income.

Third, we agree with Mr. Frinsko that the income test discourages start-up farmers, and may be construed require farmers who are unable to make a profit to cease operations entirely (because they could earn more money from bank interest income, for example, than from farm operations).

Fourth, we believe the income test is somewhat ambiguous. For example, who is the "farm occupant"? Does it include a parent living with the farmer? The farmer's children? How does one determine total annual income? For example, is it on a net or gross basis? How will that income test be enforced without raising issues concerning the privacy of the farmer and his or her sources of income?

In short, we believe the income test raises concerns that militate in favor of its repeal. We do not believe, however, that Mr. Frinsko's proposed alternative is the best approach. In fact, his approach would not even address his own concerns with the income test. Rather, his approach would simply <u>also</u> allow single family dwellings on very large (100+ acres) otherwise undeveloped lots. This would retain the <u>rural</u> character of the Agriculture and Resource Protection District, but it would not further the goal of protecting <u>agricultural</u> uses.

Thus, in order to serve the goal of protecting agricultural uses, one suggestion would be to eliminate the income test. In that event, the "farm" definition would still require that the land be used for agricultural purposes. It thus would require the Moores, for example, to engage in farming activities, and not simply to use the land for their dwelling. Mr. Frinsko indicated in his letter that the Moores can and will comply with all of the existing ordinance's requirements except for the income test.

There are certainly other modifications to the ordinance that can be considered; I'd be happy to talk with you further if you wish.

* * * * *

Pat, I trust that this analysis serves the City's needs. If we can be of further assistance, please do not hesitate to call me.

Sincerely,

Philip F. W. Ahrens