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Unraveling red tape

MEREDA scores legislative successes for developers

BY CAROL COULTAS

PHOTO/TIM GREENWAY

Attorney Gary Vogel says Maine is shedding its anti-development image

Attorney Gary Vogel of Drummond Woodsum has served on the legislative committee of the Maine Real Estate and Development Association for about a dozen years, the last eight as chairman. So when he says there's been a significant change in attitudes around development issues in Augusta, he speaks with experience.

"In a typical legislative session, we are mostly playing defense," says Vogel. "We review proposed bills and find those with a detrimental impact on development, most of which are well-intentioned but can have a detrimental impact, almost as an unintended consequence. This time around, we put in two bills of our own and advocated for two others and have more to show for it. They passed on a bi-partisan basis."

More importantly, the changes collectively position Maine in a more favorable development light — an important shift that Vogel hopes will send a message.

"Maine has been dealing with an image that it is too risky for development investments, at a time when the market is risky enough," says Vogel. "Many Maine developers have been doing developments out of state, where they can do much better with less risk. My hope is these folks and others like them — as the economic climate improves — will decide they want to come back and do developments in Maine."

Mainebiz sat down with Vogel to talk about how recent legislative changes will affect the Maine's development landscape. The following is an edited transcript of that conversation.

***Mainebiz:* What drove MEREDA's success with this legislative session?**

Vogel: First, the economy, and the recognition by the Legislature (regardless of party affiliation for the most part) that legislative changes that promote investment in Maine — usually represented by investment capital coming in from out of state on large projects — and the elimination of laws that severely discourage investment capital coming into Maine are vitally needed to create an environment for job creation.

Secondly, and this is likely related to the first reason, was the change in the Legislature and the governor's office, although they were often not necessarily in sync, with the Republican-led Legislature providing a check on some of the governor's most aggressive initiatives.

Third, and related to the second reason, was the pent-up demand for changes now that the Republicans control the State House and the Blaine House, resulting in many individual legislators submitting bills that have been submitted in the past, or addressing issues that have been the subject of legislation in the past.

What were the most significant changes from this last legislative session?

That's a little hard to say. There are two that are similar and significant — not perhaps in actual impact as much as the message they send that Maine is less hostile and more positive toward development — and they are the retroactive referendum bill and the Informed Growth Act. The first, because it eliminates a key, unfair tactic available to development opponents who could get zoning changed retroactively, and the Informed Growth Act because of the message it sends.

Can you elaborate on the retroactive referendum law change?

When we're dealing with an out-of-state developer, we have to warn them that despite getting all their permits and approvals, if there are opponents of a project, those opponents could seek to change zoning retroactively and undo all the permits they've obtained. Most developers are, No. 1, shocked by that possibility, and No. 2, saying, "Why would I want to come to Maine, spend all that money and take that risk only to have that effort undone after several years and what could be millions of dollars of investment?" What we hear, is, "I'm not coming to Maine; it's not worth it."

The change created by LD 86 prohibits any referenda to have a retroactive effect unless it is adopted within 45 days after a project receives its permits. Under current law, the retroactive referendum can kill any project that has not begun construction. So changing this is, in my view, a big deal. It sends a message that you can't unfairly oppose a project. Everybody has their right to appear before the planning board on a project and argue that it doesn't meet the standards, there ought to be greater buffers or whatever, all of that is a good part of the process. But to change the process after the fact, after they've played by the rules and received all their permits,

that's something that is really very unfair, and what most developers won't tolerate.

Do you have an example of a project that had its permits reversed after the fact?

There are three I'm aware of. The original Fisherman's Wharf case in Portland, which was the development on the DiMillo's marina parking lot; a retail development in Kittery; and the Dunstan Corner Great American Neighborhood project in Scarborough.

Have you heard any buzz about this change in the development community?

No, we're trying to get the word out. Of course, it's happening at the time when there's a real downturn in development. I think developers are waiting for a lot of things to come together before moving forward, including financing, but this is obviously a very positive thing.

And the Informed Growth Act?

We are aware of some things happening that may not have happened if that law had remained unchanged. It only affects big-box stores, but I think the impact of the IGA change is really much broader in terms of the message it sends about not restricting development.

What are the changes to the Informed Growth Act?

It's now optional. [A 2007 law required a $40,000 economic impact study of retail developments 75,000 square feet and larger before a municipality could issue permits.] A municipality can have a local referendum and put it back on the books if residents want, or they can do what Damariscotta did and change their municipal zoning to restrict that kind of retail development.

What are other significant changes from this session?

Some procedural things that were part of LD 1, the regulatory reform bill, having to do with some of the ways permits are handled at the DEP; some are timing issues, such as how long permits are good for and the process for granting extensions. Another important change is the continuation of the state historic tax credit for another 10 years. That has been a very useful tool in revitalizing downtown areas.

What about the Maine Uniform Building and Energy Code rules passed last year? It caused a lot of discussion in development circles when it passed. What's the impact of the modifications from this legislative session?

When MUBEC was passed, it created a uniform building code for all of Maine. Unfortunately, many towns didn't have staff with the required training, and part of the law required code enforcement officers to implement the law. It took effect and many towns weren't ready. As a result, building permits were held up.

There were a number of bills related to MUBEC, and what ultimately got passed was a compromise. The law now provides that the only building code we're going to have is the MUBEC code, and for towns under 4,000 [people], they can elect not to have a building code and have the code enforcement officer review and approve permits. Or if they do have a code, it has to be the MUBEC code. MEREDA has taken the position that having six or eight different building codes applied throughout the state has not been good for development; we've always been a strong proponent of uniformity. I believe the current legislation is a step toward greater uniformity and eventually we'll get there, but it will be a process.

Many Maine developers have been doing developments out of state, where they can do much better with less risk. My hope is these folks and others like them — as the economic climate improves — will decide they want to come back and do developments in Maine.

There were changes to vernal pool legislation this session, as well. Can you tell us a little about that?

MEREDA had a bill that ultimately got passed that made a few minor, but important, changes in the way vernal pool laws were implemented. Vernal pools can only be measured during a few weeks in the spring when biologists take samples and count egg masses for various species. There had been a policy, incorporated into the original legislation, that if the vernal pool dries up by June 15 in the southern half of the state and July 31 in the northern half of the state, then the DEP has the authority to deem it as a non-significant vernal pool; the restrictions only apply to significant vernal pools. That was negotiated when the original legislation was implemented so projects wouldn't all be held up if you can reach a decision, based on a reasonable determination, that there is not a significant vernal pool on the property. Although DEP had that authority, it virtually never utilized it and, instead, made every project go out and test the vernal pool in the spring. Our legislation makes it easier to enable the hydro period rules and assess non-significant vernal pools.

The other vernal pool change affects when a vernal pool straddles two property lines. The bill changes the rule so a developer only has to deal with a vernal pool on his property. The more controversial piece of the vernal pool legislation involved reducing the setback around a vernal pool from 250 to 75 feet. That's being carried over and looked at by a study group and will be revisited in the next session of the Legislature.

Anything else from this session?

One of things MEREDA is also focused on is the modernization of the site location of development law, the primary DEP permitting law for larger developments. MEREDA is seeking to increase the jurisdictional thresholds so fewer projects will have to get both municipal and state review. Things have changed a lot since 1971 when the law was originally implemented; many Maine municipalities have qualified planning staffs to evaluate larger projects. Developers complain, legitimately, I think, about differing standards between state and municipal reviews, and, for many communities with adequate municipal planning staff, the state review seems unnecessary. So we had a bill that would increase the size of projects requiring state review.

What are the specifics?

Right now, the standard is if you have a project with more than three acres of impervious surface, or over 20 acres, [30 acres for residential subdivisions], it will require review under the site location law and DEP. We are seeking to make that 10 acres of impervious surface — your parking lots, building roofs and so on — and 40 acres for non-residential subdivisions and 60 acres for residential subdivisions.

The Natural Resources Committee had some concerns about that, the environmental community had some concerns about that, so that one is the subject of a stakeholders study group that is meeting over the summer and fall, which MEREDA is participating in. I'm not sure whether 10 and 60 are the right measures, but the group will be looking at that and hopefully coming forward with legislation that modernizes the law and enables fewer projects to require both state and municipal review, especially where the municipality is able to apply municipal laws that protect the environment and ensure good development. We're very encouraged about that.

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