

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**ENVISION REALTY, LLC, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 v. )  
 )  
 **JAMES S. HENDERSON, et al.,** )  
 )  
 **Defendants** )

**Docket No. 01-179-P-H**

**RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS**

The defendants, James S. Henderson, Roland Weeman, John Papacosma, Howard Nannen, Donald Rogers, David I. Chipman, George Swallow, Douglas Webster and Paul Bird,<sup>1</sup> all of whom are sued both as individuals and as agents or representatives of the town of Harpswell, Maine, move to dismiss this action for failure to state a claim on which relief may be granted. I recommend that the court grant the motion in part and deny it in part.

**I. Applicable Legal Standard**

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Defendants’ Motion to Dismiss, etc. (“Motion”) (Docket No. 2) at 1. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a

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<sup>1</sup> Paul Bird was added as a defendant when the plaintiffs filed their first amended complaint on August 20, 2001, after the motion to dismiss had been filed. Docket No. 4. He has adopted all pleadings filed by the other defendants. Supplemental Memorandum of (continued on next page)

certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

## II. Factual Background

The first amended complaint includes the following relevant factual allegations. Plaintiff Envision Realty, LLC (“Envision”), is a Maine limited liability company with a place of business in Massachusetts. First Amended Complaint (Docket No. 4) ¶ 1. The individual plaintiffs, Chadwick W. Blair, Ryan B. Blair, Lauren W. Blair, Leo F. Blair, Lisa M. Blair and Kimberly A. Wogan are residents of Maine or Massachusetts. *Id.* ¶¶ 2-7. Defendant Henderson chairs the planning board of the town of Harpswell and defendants Weeman, Papacosma, Nannen and Rogers are members of that board. *Id.* ¶¶ 8-12. Defendants Chipman and Swallow are members of the board of selectmen of the town of Harpswell. *Id.* ¶¶ 13-14. Defendant Webster is the code enforcement officer for the town and defendant Bird is the town administrator. *Id.* ¶¶ 15-16.

In January 2000 Envision began negotiations to acquire a 23.7 acre parcel of land with two multi-family dwellings located on Middle Bay Cove in Harpswell (“the property”), which it eventually did acquire in October 2000. *Id.* ¶¶ 18-19. By memorandum dated May 10, 2000 defendant Webster informed members of the planning board that he understood that this property had been acquired by an out-of-state developer. *Id.* ¶ 19 & Exh. A thereto. On or about December 22, 2000 Envision submitted an application to subdivide the property into nine lots, seven of which were to be building sites for single-family homes. *Id.* ¶ 20. A group consisting of several members of the planning board, the board of selectmen and residents of the town joined together to impair and obstruct Envision’s development of building sites on the property and to “deprive Envision of any beneficial

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Law Regarding Defendants’ Motion to Dismiss (“Defendants’ Supplemental Brief”) (Docket No. 14) at 1.

use of the Property.” *Id.* ¶ 21. Envision was treated in a manner substantially different from residents of the town who presented similar development proposals because Envision and some of its owners and officers were from out of state. *Id.*

At meetings held to consider Envision’s application the planning board refused to hear Envision, encouraged residents to speak against the application and to taunt and harass Envision and its agents, suggested that its members harbored personal animosity toward Envision and had discussed its application at a meeting that was held without proper notice and/or imposed conditions and requirements on Envision that it had not imposed on residents of the town as a result of Envision’s status as a commercial developer and non-resident of the town. *Id.* ¶¶ 22-24. Defendants Chipman and Swallow caused the chair of the planning board to be removed because he made public comments favorable to Envision and caused defendants Nannen and Rogers, both known opponents to Envision’s application, to be appointed to the planning board. *Id.* ¶ 26.

During the hearings on its application, Envision was asked by the planning board to submit an alternative plan. *Id.* ¶ 27. On May 1, 2001 Envision submitted a plan for a campground, the only other permitted use in the zoning district where the property was located, as a back-up and alternative. *Id.* ¶¶ 27-28. Members of the planning board publicly derided the campground plan, vowed to pursue all measures to block it, and met secretly with members of the board of selectmen to devise a plan to block any possible application for the campground permit. *Id.* ¶¶ 29-30. A few weeks later, the board of selectmen, in conjunction with the planning board, proposed a moratorium on campground permits in the shoreland zoning district. *Id.* ¶ 30. The board also proposed a moratorium on applications for the destruction or disturbance of historical sites or buildings, a category that included one of the existing buildings on the property. *Id.* The moratorium was to apply retroactively to any application that had been submitted but had not received at least one substantive review by the planning board as

of the date the moratorium was proposed. *Id.* ¶ 31. The moratorium was proposed solely to block Envision's building plan. *Id.*

At a meeting in May 2001 the planning board denied Envision's application for subdivision approval. *Id.* ¶ 33. On or about May 3, 2001 Envision conveyed the property to plaintiff Leo F. Blair who in turn conveyed the property as gifts to each of the named individual plaintiffs, all of whom are related by blood or marriage. *Id.* ¶ 34. The division effectively precludes any resale of the property by the individual plaintiffs for a period of five years under state statute. *Id.* The board of selectmen voted to sue Envision and the individual plaintiffs contending that the family division was illegal. *Id.* ¶ 35. Two of the individual plaintiffs have been denied building permits because their lots within the property were illegal, according to the town. *Id.* The planning board and members of the board of selectmen have drafted changes to the town's land use ordinance targeting the individual plaintiffs and attempting to have the property rezoned as a resource protection zone when that zoning had been rejected at a March town meeting. *Id.* ¶ 36. After the family division of the property, the town deleted the retroactive provision of the proposed moratorium. *Id.* ¶ 37. The defendants have treated the plaintiffs with ill will based on the fact that they are not residents of the town or are engaged in commercial real estate development and have treated them differently from others similarly situated in an arbitrary and capricious manner. *Id.* ¶ 38.

After they initiated this action, the plaintiffs sought to review certain town records concerning permit applications but Bird refused to allow them to do so. *Id.* ¶ 39.

### **III. Discussion**

The amended complaint alleges deprivation of property interests, *ex post facto* regulatory changes directed at the plaintiffs, violation of procedural and substantive due process rights and violation of the plaintiffs' right to equal protection, all under the Constitution. *Id.* ¶¶ 41-48. These

claims are brought under 42 U.S.C. § 1983. *Id.* ¶ 48. To prevail on such claims, a plaintiff must establish two elements: “that conduct (1) under color of state law has (2) deprived him of rights secured by the Constitution or Federal law.” *Welch v. Paicos*, 66 F.Supp.2d 138, 161 (D. Mass. 1999). The plaintiffs also allege that defendant Bird has violated 1 M.R.S.A. § 408. First Amended Complaint at 16. The defendants contend that the plaintiffs’ federal claims are not ripe and, in the alternative, that each claim is subject to dismissal as pleaded. Motion at 5-18. They also argue that the plaintiffs lack standing to seek relief under the state statute and, in the alternative, that the plaintiffs have failed to exhaust available administrative remedies on this claim. Defendants’ Supplemental Brief at 2–3.

#### **A. Ripeness**

The defendants contend that the plaintiffs have failed to allege the necessary facts to establish that their constitutional claims are ripe. They observe that the plaintiffs “have failed to allege a specific land use action by the Planning Board, the failure to pursue any appeal of any such land use action through local and state remedies and the preclusive mootness effect of the family subdivision.” Motion at 4. The plaintiffs respond that the planning board’s denial of Envision’s application in May 2001 constitutes the necessary final action required in order to pursue their claims and that they cannot be required to undertake further attempts to receive permits for any use of the property because “there can be no doubt that the Town has denied and intends to deny the plaintiffs any reasonable development opportunities of the property,” making any such possible efforts on their part futile. Plaintiffs’ Objection to Defendants’ Motion to Dismiss, etc. (“Plaintiffs’ Objection”) (Docket No. 3) at 16.

The amended complaint on its face alleges that Envision can no longer develop the property, because it has be conveyed to the individual plaintiffs under 30-A M.R.S.A. § 4401. Amended

Complaint ¶ 34. Accordingly, Envision has standing at most only to seek damages arising from the alleged denial of its application through May 3, 2001, when the conveyance took place. *Id.* ¶¶ 33-34. The “futility” argument is thus irrelevant as to Envision. Although it fails to identify the two among the eight individual plaintiffs who were denied building permits “because the lots were, according to the Town, ‘illegal,’” *id.* ¶ 35, the amended complaint does appear to allege, when interpreted with the use of reasonable inferences, that any further applications by any of the individual plaintiffs would be futile. Specifically, it alleges: “The Town has informed the plaintiffs not to seek further permits.” *Id.* “[A]lthough futility can excuse a plaintiff’s eschewal of a permit application, the mere possibility, or even the probability, that the responsible agency may deny the permit should not be enough to trigger the excuse. To come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so).” *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) (citations omitted). At the pleading stage, the amended complaint sufficiently alleges futility with respect to the current owners of the property.

“[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 193 (1985). Here, the amended complaint alleges that the planning board voted to deny Envision’s application for subdivision approval in May 2001 and that Envision conveyed out the property on May 3, 2001. Amended Complaint ¶¶ 33-34. Even assuming that this vote was the town’s “definitive position” on the application and that no further review was available within the town,<sup>2</sup> Envision’s injury, if any, could not exist beyond May 3, 2001, nor does it have standing to seek relief after that date. *See Tisei v. Town of Ogunquit*, 491 A.2d 564,

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<sup>2</sup> To be “definitive” for purposes of finality, a denial of an application must “conclusively determine whether [the applicant] will be denied all reasonably beneficial use of its property.” *Williamson*, 473 U.S. at 194. Envision’s action in conveying the property to Leo Blair who in turn conveyed it to the individual plaintiffs strongly suggests that this standard was not met.

567-68 (Me. 1985) (plaintiff challenging town's land use regulations must possess sufficient title, right or interest to confer lawful power to use it or to control its use). The Supreme Court's discussion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-13 (1992), suggests that Envision retains a takings claim for the period before it transferred title to the property. While it is difficult to discern when that period began and the nature of the injury to Envision, the amended complaint's standing allegations appear sufficient.<sup>3</sup>

It is not possible to determine from the face of the amended complaint that the plaintiffs' claims are not ripe. Accordingly, it is necessary to consider individually the substantive claims as pleaded.

### **B. Takings Claim**

The defendants do not attack the plaintiffs' takings claim directly, arguing instead that the amended complaint lacks any allegation of a viable property interest which would be entitled to constitutional protection. Motion at 9-10. This argument assumes that the subdivision or building permits for which the plaintiffs allege they have applied are the only possible property interest at issue, but that is not the case. The plaintiffs deny that they claim an interest in the permits themselves and instead rely, Plaintiff's Opposition at 11, on a line of cases culminating in *Palazzolo* in which a taking has been found when a regulation or government action denies all economically beneficial or productive use of land owned by the plaintiff. 121 S.Ct. at 2457.

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from forcing some

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<sup>3</sup> Because Envision remains a party to this action, the plaintiffs' argument, Plaintiffs' Opposition at 18-19, that under *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2462 (2001), the individual plaintiffs are "invested with all of the rights incident to the property that were transferred to them from Envision, including the right to seek redress for injuries pertinent to their land arising out of decisions that were made prior to their ownership," need not be reached.

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

*Id.* at 2457-58 (citation and internal quotation marks omitted). The plaintiffs contend that there was a substantial economic impact and interference with their investment-backed expectations because “[t]he land sits vacant, with subdivision and building applications rejected.” Plaintiffs’ Opposition at 12. “A suit by the Town to challenge the ‘family division’ . . . hangs over the property and clouds the title. A moratorium on the only alternative use remains pending.” *Id.* These facts, they conclude, mean that “[a]ll economically viable use of the land has been taken by the Town and a federal remedy for such action clearly lies.” *Id.*<sup>4</sup>

There are several problems with the plaintiffs’ position. First, the amended complaint does not allege that the town has in fact sued the plaintiffs, but only that the board of selectmen “voted to commence legal action against” them, “contending that the family division was, for some unspecified reasons, illegal.” Amended Complaint ¶ 35. This vote creates no cloud on the plaintiffs’ title.<sup>5</sup> Unless and until suit is actually brought, it cannot “hang over the property” in any way that causes the plaintiffs harm. Next, the amended complaint does allege that single-family homes and a campground were the only permitted uses of the property under the town’s zoning regulations, *id.* ¶ 27,<sup>6</sup> but it does not allege that the proposed moratorium on permits for campgrounds in a shoreland zoning district was in fact adopted by the town before Envision conveyed the property to the individual plaintiffs, *id.* ¶¶

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<sup>4</sup> The plaintiffs refer to their claim as a “due process takings claim,” relying on *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990). Plaintiffs’ Opposition at 10. Contrary to their contention, *id.* n.3, the Supreme Court did not adopt such a hybrid constitutional claim in *Williamson*, and the First Circuit apparently has not adopted it. I will analyze the plaintiffs’ takings and due process claims separately, pursuant to existing First Circuit precedent.

<sup>5</sup> Even if such a “cloud” were created, the amended complaint also alleges that the family division chosen by the plaintiffs “effectively precludes any resale of the Property by any of the individual plaintiffs for a period of five years,” Amended Complaint ¶ 34, substantially lessening the impact of any such cloud.

<sup>6</sup> The defendants’ contention that “[s]ince Envision could have proposed other uses for the property, short of sub-dividing it into several residences, or creating a campground, there will be no taking as a matter of law,” Defendants’ Reply to Plaintiffs’ Objections to Defendants’ Motion to Dismiss (“Defendants’ Reply”) (Docket No. 8) at 6, cannot be considered in connection with their motion to dismiss because the amended complaint alleges otherwise.

30-32, so the fact that the moratorium “remains pending” can have no effect on any property interest Envision currently holds and cannot have had any effect on the interest it once had in the property. In addition, the amended complaint does not allege that Envision conveyed the property to Leo Blair for less than adequate value or that Envision was compelled so to convey the property. *Id.* ¶ 34. Even interpreting the amended complaint as generously as possible under applicable case law, it fails to plead the necessary economic elements of a takings claim for Envision. The conclusory allegations of paragraph 43 of the amended complaint do not remedy this omission. *Lyle Richards Int’l, Ltd. v. Ashworth, Inc.*, 132 F.3d 111, 112 n.1 (1st Cir. 1997) (court reviewing motion to dismiss will not credit complaint’s conclusory allegations).

The individual plaintiffs’ claims do not suffer from the same infirmity, because the amended complaint alleges that the town has directed them not to apply for any permits to use the property and has thus “deprived [them] of the right to build on their property in any fashion.” Amended Complaint ¶ 35. However, the amended complaint does suffer from a jurisdictional defect as to any takings claim on behalf of the individual plaintiffs. A Fifth Amendment takings claim is not ripe when the plaintiff has not “utilized the procedures [the state] provides for obtaining just compensation,” *Williamson*, 473 U.S. at 186. The individual plaintiffs’ takings claims can only be “inverse condemnation” claims, in which the allegation is not that the governmental agency or agent had physically appropriated the property at issue but rather that the defendant has acted indirectly to deprive the owner of the use or enjoyment of the property. *Van Horn v. Town of Castine*, 167 F.Supp.2d 103, 105 (D. Me. 2001). Here, it may be reasonable to infer that the individual plaintiffs have alleged that the defendants have deprived them of all economically viable use of their property, *id.*, but the amended complaint cannot reasonably be construed to allege that the plaintiffs have pursued available state inverse condemnation

remedies, a necessary prerequisite to their federal takings claims. *Lerman v. City of Portland*, 675 F. Supp. 11, 15-16 (D. Me. 1987).

Accordingly, to the extent that the amended complaint purports to seek relief for the allegedly unconstitutional taking of property interests the defendants are entitled to dismissal.

### **C. Equal Protection**

The defendants contend that the amended complaint fails to alleged violation of the plaintiffs' equal protection rights with sufficient specificity. Motion at 10-12. The plaintiffs respond that they have alleged that they were treated differently from others similarly situated and that there was no rational basis for the disparate treatment, which is all that is required. Plaintiffs' Opposition at 7-10. Specifically, the amended complaint alleges that Envision "was treated substantially differently from residents of the community presenting similar development proposals," Amended Complaint ¶ 21, "the [planning] Board began to impose conditions and engineering and technical requirements that it had not imposed on any other residents of the Town;" "[t]he Board insisted the Envision pay for the Town's engineering and legal expense in connection with the subdivision review, which, upon information and belief, the Town had never previously required;" and "[t]he Board imposed a 250-Foot [sic] setback requirement on the plaintiffs, yet only a 75-foot setback requirement has been imposed on the immediate abutter and, on information and belief, on other developers of oceanfront property," *id.* ¶ 24; the defendants "intentionally have treated plaintiffs substantially differently from others similarly situated for no rational or legitimate reason," *id.* ¶ 38; and "[t]he defendants have allowed an immediate abutter (a local resident) to construct a home within 75 feet of the ocean and yet have denied the plaintiffs the same property right for no rational or legitimate reason;" "[t]he defendants have applied a specially created wetlands map to the Property while continuing to apply

other, more permissive, wetlands maps to local residents seeking permits;” and “[t]he defendants have imposed other conditions to approvals never applied to residents of the Town,” *id.* ¶ 45.

In *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the Supreme Court held that a plaintiff may assert an equal protection claim by alleging that “she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Id.* at 564. The plaintiffs’ allegations appear to be sufficient under this test. The test for “determining whether individuals or entities are ‘similarly situated’ for equal protection purposes is not always susceptible to precise demarcation,” *Barrington Cove Ltd. P’ship v. Rhode Island Hous. & Mortgage Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001), but the plaintiffs here have alleged sufficient facts to allow “a prudent person, looking objectively at the incidents, [to] think them roughly equivalent and the protagonists similarly situated,” *id.* The defendants may certainly seek to disprove these allegations in the context of summary judgment, but for the purposes of a motion to dismiss, the allegations of the amended complaint are sufficient to state a claim upon which relief may be granted. *Cf. Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 43-44 (1st Cir. 1992).

The defendants are not entitled to dismissal of the plaintiffs’ equal protection claims.

#### **D. Due Process**

The defendants argue that the plaintiffs have failed to allege either a procedural or a substantive due process claim. Motion at 13-16. The plaintiffs in their opposition discuss only a substantive due process claim, Plaintiffs’ Objection at 12-14, and must therefore be deemed to have waived objection to dismissal on any procedural due process claim.<sup>7</sup> Accordingly, the defendants are entitled to dismissal of any procedural due process claim. *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990).

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<sup>7</sup> Such a claim is mentioned in paragraph 45 of the amended complaint.

The defendants contend that a substantive due process claim may only be maintained under the circumstances of this case when the plaintiff alleges conduct that shocks the conscience. Motion at 15-16. The plaintiffs respond that they need only allege that the defendants' actions were arbitrary and capricious. Plaintiffs' Opposition at 12-14. The First Circuit has recognized two theories under which a plaintiff may bring a substantive due process claim.

Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state's conduct "shocks the conscience."

*Cruz-Erazo v. Rivera-Montanez*, 212 F.3d 617, 622 (1st Cir. 2000) (quoting *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 531 (1st Cir. 1995)). Here, the amended complaint does not allege conduct that could reasonably be construed to meet the "shocks the conscience" test. *See id.* at 622-23 (discussing case law). While, as discussed above, it is possible to assume *arguendo* that the amended complaint does allege the existence of protected property interests of which the individual plaintiffs have been deprived by the defendants, it does not do so with respect to Envision. Accordingly, the defendants are entitled to dismissal of Envision's substantive due process claim.

Even in situations in which a plaintiff has alleged a protected property interest, however, the First Circuit directs that a substantive due process claim in the context of land use permits may be maintained only in severely limited circumstances.

[W]e have consistently held that the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes. In the vast majority of instances, local and state agencies and courts are closer to the situation and better equipped to provide relief. We have left the door slightly ajar for federal relief in truly horrendous situations. But this circuit's precedent makes clear that the threshold for establishing the requisite abuse of government power is a high one indeed.

*Nestor Colon Medina*, 964 F.2d at 45 (citation and internal quotation marks omitted). As was the case in *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 830-34 (1st Cir. 1982), the plaintiffs in this case have alleged no facts to distinguish their claim “sufficiently from the usual land developer’s claim under state law to warrant recognition of a federal constitutional question,” *id.* at 833. Adequate state-law remedies exist to vindicate these claims. The plaintiffs have not cited any reported decisions of the First Circuit that suggest that this standard applies only to cases in which no property interest is asserted, and my research has located none. Indeed, in *PFZ Props., Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), the First Circuit specifically assumed that a protected property interest had been alleged but nonetheless held that an allegation of arbitrary and capricious action by a state planning agency could not withstand a motion to dismiss under *Creative Environments* and subsequent case law, *id.* at 31-32. I therefore conclude that the defendants are entitled to dismissal of the plaintiffs’ substantive due process claims. *See Nestor Colon Medina*, 964 F.2d at 47 (political decision making based on parochial view of local interests does not violate substantive due process).

#### **E. Ex Post Facto Claims**

The amended complaint alleges that “[t]he defendants have adopted or proposed ex post facto changes to the rules and regulations specifically targeted to the Property of the plaintiffs and specifically designed to prevent the plaintiffs from any beneficial use of their Property.” Amended Complaint ¶ 44. The defendants seek dismissal of any claim asserted under the *ex post facto* clauses of the Constitution. Motion at 16-18. The plaintiffs do not respond to this argument, thereby waiving opposition. Even if this waiver did not in itself provide sufficient reason to grant the motion to dismiss any such claims, it is clear that the *ex post facto* clauses apply only when a law “punishes, as a crime, an act which was innocent when committed; or which, after a crime has been perpetrated,

changes the punishment and renders it more onerous; or which strips away a defense that was available at the time when the defendant committed the crime.” *Libby v. Magnusson*, 177 F.3d 43, 46 (1st Cir. 1999). This case is a civil matter, and to the extent that the amended complaint purports to assert a claim under the *ex post facto* clauses, such a claim must be dismissed. *See also Baker v. Town of Woolwich*, 517 A.2d 64, 69 (Me. 1987) (rejecting attempt to claim violation of *ex post facto* clauses of federal and state constitutions in zoning dispute).

#### **F. State Law Claim**

The amended complaint alleges a violation of 1 M.R.S.A. § 408 by defendant Bird for which the plaintiffs seek damages pursuant to 1 M.R.S.A. § 410. Amended Complaint at 16-17. The defendants contend that the plaintiffs cannot maintain such a claim, that they are barred by their failure to pursue the remedies provided by state statute and that they should not be allowed to pursue such a claim when their first request under the statute was made only after this litigation commenced. Defendants’ Supplemental Brief at 2-5.

Under the statutory subchapter heading “Freedom of Access,” the statute invoked by the amended complaint provides, in relevant part: “Except as otherwise provided by statute, every person shall have the right to inspect and copy any public record during the regular business hours of the custodian or location of such record.” 1 M.R.S.A. § 408. A refusal to allow such inspection or copying must be made in writing. 1 M.R.S.A. § 409(1). A person aggrieved by such a refusal may appeal to the state Superior Court within five days of receipt of the written notice of refusal. *Id.* Such a proceeding is not exclusive of any other civil remedy provided by law. *Id.* § 409(3). Finally, the remedial section invoked by the plaintiffs provides, in full:

For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than \$500 may be adjudged.

1 M.R.S.A. § 410. Maine law provides an exclusive means of enforcement for civil violations.

All civil violations are expressly declared not to be criminal offenses. They are enforceable by the Attorney General, his representative or any other appropriate public official in a civil action to recover what may be designated a fine, penalty or other sanction, or to secure the forfeiture that may be decreed by the law.

17-A M.R.S.A. § 4-B(1). By the terms of the amended complaint, none of the plaintiffs is a public official of any kind and accordingly they may not seek the forfeiture provided by 1 M.R.S.A. § 410. *See also Scola v. Town of Sanford*, 695 A.2d 1194, 1995 (Me. 1997).

The amended complaint cannot reasonably be read to seek any civil remedy provided by law other than the forfeiture provided by section 410. Therefore, defendant Bird is entitled to dismissal of this claim.

#### IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **DENIED** as to the plaintiffs' equal protection claims and otherwise **GRANTED**.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 28th day of November, 2001.

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David M. Cohen  
United States Magistrate Judge

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