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Home Rule is Local Power

By Bonnie Preston

In the Local Food and Community Self-Governance Ordinance (see pages 18-19), Maine's Home Rule laws and Maine's law on the establishment of the Department of Agriculture, Food, and Rural Resources are both cited for authority. We have always been convinced that these laws meant that the ordinance is actually more supportive of Maine law than the new regulations are.

After the state sued Dan Brown as a test case of the ordinance, we heard from a 2014 doctoral candidate from the University of Maine School of Law that he was working on an article for the *Maine Law Review* about the case. We met him and talked with him in February, 2013 at the Food Law Colloquium. When his article appeared, it repeated, in great depth, the arguments we had made, and concluded that the State could have found in favor of the defendant on the basis of home rule.

We also met Associate Professor of Law at Willamette University College of Law, Paul A. Diller at the Food Law Colloquium. Professor Diller has written frequently about home rule, and is a supporter of home rule because it allows municipalities to be laboratories of innovation. States are often seen this way, but Diller has tracked many areas of law in which local laws have diffused from one municipality to others before percolating up to state and federal levels. This was his focus at the Colloquium. It gave us great hope. Not being lawyers, however, it did take a while to gather the courage to read some of his articles, and then re-read them to more fully understand them. We were greatly rewarded, particularly by his article in the *Boston University Law Review*, "Intrastate Preemption." In it, he detailed a history of home rule in the United States.

Maine's Home Rule laws came in the second wave of home rule, which occurred in the 1950s and '60s. These new laws gave towns the right to exercise any power or function not denied to them either expressly or implicitly. Courts may still decide on preemption, and Diller believes the best test for them to use is the doctrine of "substantial interference." Diller points to Maine's ordinance power as an example of the use of substantial interference. The law states, in part, that "the legislature shall not be held to have implicitly denied any power granted to municipalities... unless the...ordinance in question would frustrate the purpose of state law."

The Maine law establishing the Department of Agriculture, Food, and Rural Resources (DAFRR), in 1979, states that "the survival of the family farm is of special concern to the people of the State, and the ability of the family farm to prosper, while producing an abundance of high quality food and fiber, deserves a place of high priority in the determination of public policy. For this purpose there is established the [DAFRR]."

Clearly, the local food ordinance does not frustrate the purpose of state law. Nor has a court in Maine pre-empted it. Maine's Home Rule laws are being trumped by a regulatory system favoring industrial food production. Diller postulates that good local laws will move first from town to town, then move up to the state level, and finally to the federal level. This is systemic change, and as we change the system, it will come to a place where it does work to support small, local farms and traditional foodways.

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Maine Home Rule

§3001. Ordinance power

Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.

1. Liberal construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes. 2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority. 3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.

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