

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. CUM-21-31

PORTLAND REGIONAL CHAMBER OF COMMERCE; ALLIANCE FOR
ADDICTION AND MENTAL HEALTH SERVICES, MAINE; SLAB, LLC;
NOSH, LLC; GRITTY MCDUFF'S, and PLAY IT AGAIN SPORTS,
Plaintiffs-Appellants,

v.

CITY OF PORTLAND and JON JENNINGS, in his official capacity as City
Manager for the City of Portland,
Defendant-Appellees,

and

CALEB HORTON and MARIO ROBERGE-REYES,
Intervenor-Appellees.

On Appeal from Cumberland County Superior Court
Docket No. CV-2020-518

**REPLY BRIEF OF DEFENDANT-APPELLEES CITY OF PORTLAND
AND JON JENNINGS, IN HIS OFFICIAL CAPACITY AS CITY
MANAGER FOR THE CITY OF PORTLAND**

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ARGUMENT

A. The unambiguous language of the Initiative repealed the previous local minimum wage.

The Superior Court declared that the Emergency Provision of the Initiative is not effective until January 1, 2022 because the unambiguous plain language of the Initiative repealed the provisions of the previously existing local minimum wage. (A. 26.) Intervenors contend that the Superior Court erred because the Emergency Provision sets a minimum wage by cross-reference to the State minimum wage in subsection (b)(iv). (Ints.' Br. 16.) According to Intervenors, this cross-reference establishes a local minimum wage under subsection (b) of the Ordinance, facilitating the present effectiveness of the Emergency Provision. However, this argument is fatally flawed because under no circumstances could paragraph (b)(iv) be read to signify implementation of a local minimum wage before January 1, 2025.

First, the Emergency Provision explicitly ties hazard pay to “the regular minimum wage rate under subsection (b)” of the Ordinance. Portland City Code § 33.7(g). Paragraph (b)(i) establishes a minimum wage of \$13 per hour beginning on January 1, 2022, which then increases incrementally under paragraphs (b)(ii) for January 1, 2023 and (b)(iii) for January 1, 2024. Portland City Code § 33.7(b)(i)-(iii). Following these incremental increases, paragraph (b)(iv) establishes that

[o]n January 1, 2025 and each January 1st thereafter, the minimum hourly wage then in effect must be increased by the increase, if any, in the cost of living. The increase in the cost of living must be measured

by the percentage increase, if any, as of August of the previous year over the level as of August of the year preceding that year in the Consumer Price Index for All Urban Consumers, CPI-U, for the Northeast Region, or its successor index, as published by the United States Department of Labor, Bureau of Labor Statistics or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of 5¢. If the state minimum wage established by 26 M.R.S. § 664 is increased in excess of the minimum wage in effect under this ordinance, the minimum wage under this ordinance is increased to the same amount, effective on the same date as the increase in the state minimum wage, and must be increased in accordance with this ordinance thereafter.

Portland City Code § 33.7(b)(iv) (emphasis added). Each paragraph of subsection (b) establishes the required minimum wage beginning on a specified date. Under paragraph (b)(iv), the specified date is “January 1, 2025 and each January 1st thereafter.” Portland City Code § 33.7(b)(iv). The paragraph is forward-looking, setting forth the minimum wage for 2025 and for each year thereafter. It makes sense that the drafters would state that, in the future, the local minimum wage must be increased when the state minimum wage is increased. First, it ensures that the local minimum wage will not conflict with the state minimum wage in the future. The state minimum wage provides the floor below which no employee may be paid, 26 M.R.S. § 664, and as long as a municipality does not attempt to establish a minimum wage below that floor, the local wage is not in conflict. Without this key provision, if in the future the state minimum wage is increased above \$15 per hour and the local minimum wage remained stagnant at \$15 per hour, the local minimum wage would be in conflict. This provision prevents preemption. Second, the

provision ensures that a local minimum wage remains in effect indefinitely, therefore preserving the functionality of the Emergency Provision and other similarly tied provisions under the Ordinance. Paragraph (b)(iv) serves a prospective function.

In contrast, Intervenors' proposed construction of the Initiative's language to establish a currently operative local minimum wage by cross-reference to the state minimum wage requires a suspension of logic. The Emergency Provision is tied to the local wage set under subsection (b), and subsection (b) simply does not provide for a local minimum wage prior to January 1, 2022. *See* Portland City Code § 33.7(b). The cross-reference to the state minimum wage in paragraph (b)(iv) governs only if the state minimum wage "is increased in excess of the minimum wage *in effect under this ordinance.*" Portland City Code § 33.7(b)(iv). Under this Ordinance, no local minimum wage is in effect until January 1, 2022. Therefore, the Superior Court correctly concluded that the Ordinance unambiguously repealed the previously existing minimum wage provisions, replacing them with the above-described provisions which do not take effect until January 1, 2022 and that, subsequently, the Emergency Provision does not take effect until January 1, 2022.

B. The Superior Court's construction of the plain language of the Initiative aligns with the ballot question presented to voters.

Intervenors argue throughout their brief that the Superior Court erred by failing to construe the language of the Initiative in harmony with the ballot question presented to voters. (Ints.' Br. 8-11, 21-27.) They contend that the Superior Court

should have examined the language in conjunction with the ballot question whether the language was unambiguous or ambiguous. (Ints.’ Br. 9-11). Assuming for the sake of argument that a court may consider the ballot question when construing the language of an initiative regardless of ambiguity, the Superior Court’s construction of the language of this Initiative aligns with the ballot question as it was actually presented to voters.

First, Intervenors assert that even if the language of the Initiative unambiguously repealed the previous local minimum wage, “a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute.” (Ints.’ Br. 22) (quoting *Dickau v. Vermont Mut. Ins. Co.*, 2014 ME 158, ¶ 20, 107 A.3d 621). This argument fails because the literal language of the Initiative repealing the previous local minimum wage and replacing it with a gradually increasing minimum wage beginning in January 2022 directly corresponds with a stated purpose of the Ordinance and follows the structure that was previously in place.

The Ordinance declares as its purpose that “phasing in the wage increase over time will allow businesses to adjust and result in reasonable annual increases in expenses.” Portland City Code § 33.1. In line with this purpose, the previously implemented minimum wage provisions established a gradual increase in the local minimum wage over a period of years. A key purpose of the Ordinance has been

and continues to be balancing the need for increased wages with the sustainability of business. It makes sense, then, that the revised subsection (b) would continue to include a gradually increasing minimum wage scheme and that the Emergency Provision would be similarly introduced over time, “allow[ing] businesses to adjust and result[ing] in *reasonable* annual increases in expenses.” Portland City Code § 33.1 (emphasis added). This is particularly logical in the context of the Initiative. In the midst of a pandemic in which both individual workers and small businesses are financially struggling, it is logical to implement a gradual increase in wages that addresses workers’ needs while also giving businesses the necessary time to adjust their business model to meet those needs.

Assuming then that the court could reach the ballot question either because the plain language is ambiguous or the plain language leads to disharmony with the Ordinance’s purpose or the voters’ intent, Intervenors’ argument still fails because the Superior Court’s construction of the language does not conflict with the ballot question as presented to the voters. Intervenors support their argument in three ways: (1) the ballot question states that the minimum wage will be increased over a period of three years; (2) the ballot question does not mention that it repeals the existing local minimum wage until January 2022; and (3) the ballot question states that the Emergency Provision would increase the minimum wage from \$12 to \$18

in an emergency like the current pandemic. (Ints.’ Br. 24-25.) None of these arguments are compelling.

First, construing the Initiative to establish a *local* minimum wage beginning in January 2022 does not conflict with the ballot question’s statement that the Initiative “will increase the minimum wage in Portland to \$15.00 an hour over three years.” (A. 250.) Repealing the previously existing local minimum wage does not mean that there is no minimum wage in effect in Portland. In the absence of a local minimum wage, the state minimum wage remains in effect in 2021 and governs until a higher local wage is implemented. Beginning on January 1, 2022, the local minimum wage takes effect and gradually increases to \$15 an hour on January 1, 2024. Portland City Code § 33.7(b)(i)-(iii). Therefore, from 2021 to 2024, the minimum wage in Portland increases from \$12.15 an hour to \$15 an hour. This construction aligns with the ballot question.

Similarly, there is no conflict where the ballot question “does not mention January 2022 at all.” (Ints.’ Br. 25.) The ballot question as written contained no effective date for a local minimum wage at all. (A. 250.) Intervenors argue that because an effective date was not mentioned, voters assumed that the then-existing local minimum wage would remain in effect, but this assumption is not supported by the actual ballot question language. The ballot language makes it clear that the minimum wage in Portland will increase over a three-year period. (A. 250.) It would

be logical to assume that the increased local wage could take effect at any point within those three years. Where there is no specific effective date mentioned in the ballot question, it cannot be said that construing the Initiative as having an effective date of January 1, 2022 conflicts with the ballot language.

Lastly, Intervenors misconstrue the ballot question, turning what was provided to voters as an example of how the Emergency Provision will function into a declaratory statement of its present functionality. The ballot question actually presented to voters reads:

It also requires that employees be paid 1.5 times the minimum wage rate for any work performed during an emergency declared by the state or the municipality if that emergency applies to the employee's geographical workplace. *For instance*, if the minimum wage *were* \$12/hr, and the State of Maine or the City of Portland issued emergency proclamations *such as* the emergency orders declared during the COVID-19 pandemic, work performed during that emergency *would be paid* at 1.5 times the minimum wage, or \$18/hr.

(A. 250) (emphasis added). The ballot presented voters with an example, not a statement of law. This would perhaps be a different scenario if the ballot question informed voters that the Emergency Provision would be effective in December 2020, increasing wages under the present declared states of emergency, but that is not what the question stated. It presented an illustrative example and explicitly informed voters that it was an example. Even if the “[f]or instance” language were omitted, the verb tenses used denote the sentence’s exemplary nature. Intervenors themselves recognized that the question presented an example, stating in their brief, “the ballot

question states that the hazard pay provision would increase a \$12 an hour minimum wage to \$18 an hour during an emergency *like* that declared during the COVID-19 pandemic . . .”. (Ints.’ Br. 25) (emphasis added). The ballot question offered voters an example of the potential functionality of the Initiative, not a definitive statement of its immediate effect. For this reason, Intervenors’ argument fails.

C. The plain language of the Initiative is unambiguous and the Superior Court did not err in failing to look beyond that language.

Intervenors again contend that the Superior Court erred in failing to look beyond the unambiguous plain language of the Initiative. (Ints.’ Br. 22, 28.) This Court, however, has stated time and again that “[o]nly if the plain language of the statute is ambiguous will we look beyond that language to examine other indicia of legislative intent, such as legislative history.” *Scamman v. Shaw’s Supermarkets, Inc.*, 2017 ME 41, ¶ 14, 157 A.3d 223; *see also, Zablotny v. State Board of Nursing*, 2014 ME 46, ¶ 18, 89 A.3d 143. “Statutory language is considered ambiguous if it is reasonably susceptible to different interpretations.” *Scamman*, 2017 ME 41, ¶ 14, 157 A.3d 223 (internal quotations omitted). As much as Intervenors would like to introduce various indicia of voters’ supposed intent, the plain language of the Initiative simply is not ambiguous. As previously described, the Initiative clearly and unambiguously sets an effective date of January 1, 2022. The Superior Court was correct in declining to look beyond the unambiguous language of the Initiative.

CONCLUSION

For these reasons, Defendant-Appellees, City of Portland and Jon Jennings, in his official capacity as City Manager of the City of Portland, respectfully request that this Court affirm the trial court's Order: (1) on Count III, entering a declaratory judgment that the effective date of the Emergency Provision is January 1, 2022; and (2) dismissing Intervenor's Cross-Claim against the City.

Dated at Portland, Maine this 5th day of April, 2021.

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CERTIFICATE OF SERVICE

I, Dawn M. Harmon, Esq., hereby certify that on April 5, 2021, I caused to be served upon the counsel of record the Reply Brief of Defendant-Appellees City of Portland and Jon Jennings, in his official capacity as City Manager for the City of Portland, in native PDF format, and further certify that the Parties have agreed to waive service of bound paper copies.

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