

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

March 3, 1971

Alan Goodwin, Director
Technical Services
State Planning Office
Augusta, Maine

Dear Mr. Goodwin:

In a memorandum dated February 23, 1971, you asked for my opinion as to the legality of an ordinance proposed by some citizens of the Town of Durham, Maine which would limit the number of building permits issued each year to 25 for a period of 5 years or until a comprehensive zoning plan was implemented, whichever should come first. A copy of this proposed ordinance is attached for your reference.

Municipalities have the power to enact zoning ordinances^{1/} and the Maine courts have held zoning to have "a substantial relation to public health, public safety and general welfare."^{2/}

The State Legislature has delegated to municipalities the power to enact ordinances for "Promoting the general welfare; preventing disease and promoting health; providing for the public safety."^{3/} Thus it would be reasonable to conclude that municipalities have the power to pass so-called "stop-gap" or "interim" or "emergency" ordinances which have the effect of "promoting the general welfare; preventing disease and promoting health; providing for the

^{1/} 30 M.R.S.A. § 4951, et seq. (as amended).

^{2/} City of Portland v. Swovlos, 136 Me. 4, 1 A.2d 179 (1938).

^{3/} 30 M.R.S.A. § 2151.1.A.

public safety. "^{1/}

So-called "interim ordinances" which place a moratorium upon the issuance of building permits "for a reasonable time" have been upheld by a number of courts. See Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925); Darlington v. City of Frankfort, 282 Ky. 778, 140 S.W.2d 392 (1940); Walworth County v. Elkhorn, 27 Wis.2d 30, 133 N.W.2d 257 (1965); Campana v. Clark, 82 N.J. Super. 392, 197 A.2d 711 (1964); Belclaire Holding Corp. v. Klengher, 28 App. Div. 2d 689, 280 N.Y.S.2d 942 (1967); 1 Am. Law of Zoning § 5.15 at p. 279 (as amended) and generally 136 A.L.R. 844 (1942). As the court in Metro Realty v. County of El Dorado, 222 Cal. App.2d 508, 35 Cal. Rptr. 480 (1963) stated:

"It is a matter of common knowledge that a zoning plan of the extent contemplated in the instant case cannot be made in a day; therefore we may take judicial notice of the fact that it will take much time to work out the details of such a plan and that obviously it would be destructive of the plan if, during the period of its incubation, parties seeking to evade the operation thereof should be permitted to enter upon a course of construction which might progress so far as to defeat in whole or in part the ultimate execution of the plan." Metro Realty, Id. at 514, 35 Cal. Rptr. at 484.

^{1/} We are not unmindful of the provisions of 30 M.R.S.A. § 2151.4.A which grants to municipalities the power to regulate "the design, construction materials and construction of new buildings. . . (and to require) permits . . . for (such) operations. . . ." It is not only arguable that this provision merely supplements the other powers granted to municipalities, but further that this provision itself grants the municipalities the power to place a reasonable limitation upon the number of building permits issued in a year because "in addition to express powers granted to municipalities, municipalities are also deemed to have all those powers necessarily implied to make effective the expressly granted powers. (See 1 Antieau, Municipal Corporation Law § 5.00.)

It should be noted that many of the cases cited involve a total ban upon the issuance of permits, whereas the proposed ordinance is even less restrictive, i.e., it merely limits the number of permits to 25 in a year. I suggest that this ordinance would be viewed by the courts as even more reasonable than the more restrictive ordinances which have been upheld, if the number "25" bears a reasonable relation to the number of permits which have been issued annually during past years.

While no case could be found where the Maine courts have passed upon a similar issue^{1/}, there is no reason to believe that the Maine court will not follow the lead of the courts of California, Kentucky, Wisconsin, New Jersey and New York and hold that an ordinance limiting the number of building permits issued in a year is "legal and constitutional".

Sincerely,

E. STEPHEN MURRAY
Assistant Attorney General

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The Maine courts have held that where a city has the power to license, that power of necessity, involve determining both extent and duration of license. State v. Thompson, 135 Me. 144, 190 A. 255 (1937).