STATE OF MAINE

Inter-Departmental Memorandum Date September 22, 1971

To Earle Tibbetts, Sanitary Engineering Dept. Health and Welfare

From John M. R. Paterson, Assistant Dept. Attorney General

Subject Applicability of Plumbing Code

SYLLABUS:

1. Plumbing inspectors may not issue permits for plumbing work unless the proposed work is in conformity with all applicable rules and regulations.

2. The current rules and regulations of the Department of Health and Welfare regarding plumbing may be retroactive in effect, however, it is the responsibility of the Department in the first instance to determine if that is the intent of their regulations.

3. The exemption found in Title 32 M.R.S.A. § 3302 only applies to the licensing requirements of Title 32, Chapter 49 and does not exempt those persons from complying with appropriate rules and regulations regarding plumbing.

FACTS:

The Plumbing Code of the State of Maine is promulgated by the Department of Health and Welfare pursuant to 22 M.R.S.A. § 42 and 32 M.R.S.A. §§ 3351-3353.

The Code and 32 M.R.S.A. §§ 3351 and 3352 provide that permits for installation of plumbing shall be obtained prior to the commencement of any work. Past practice has been for inspectors to issue such permits automatically upon payment of the requisite fee without regard to whether the proposed work will conform to the requirements of the Code. In addition, the Code has been assumed to apply only to plumbing installed after the effective date of the present regulations, May 22, 1970. Thus, for example, a great number of sewage disposal systems continue to exist in closer proximity to lakes and streams than present regulations permit, since they have traditionally been thought to be exempt from the present regulations. In addition, the Code has not been applied to those persons enumerated in 32 M.R.S.A. § 3302.

The result of the above three practices has been the proliferation of plumbing systems, particularly underground sewage disposal systems, in conflict with the current Code, which systems have also created considerable environmental and public health hazards.

QUESTIONS:

1. Must proposed plumbing work be planned in conformity with the Plumbing Code or local ordinance, whichever is applicable, in order for a permit to issue?

2. May the current Code be applied to plumbing installed prior to the effective date of the Code?

3. Are those persons enumerated in 32 M.R.S.A. § 3302 exempt from complying with the requirements of the Plumbing Code?

ANSWERS:

1. Yes.

2. Yes, as qualified in Opinion.

3. No.

REASONING:

1. Though the question is not before us, there can be no doubt as to the constitutional authority of the State to regulate plumbing. Clearly, such concerns are within the scope of the police powers of the State to regulate in the interest of protecting and improving health. See State v. Old Tavern Farm, 180 A. 473, 474, 133 Me. 468, 471 (1935). In fact, courts have traditionally attached such importance to the protection of public health that the states have been given extremely wide latitude in the field. See C.J.S., Health, §§ 1 and 2. The first question before us, however, is one solely of statutory interpretation.

Title 32 M.R.S.A. §§ 3351 and 3353 prohibit the installation of plumbing except in conformity with State or local regulations. Permits to install plumbing are issued by the local plumbing inspector. Section 3351 requires that a written description of the work to be performed be submitted to the inspector prior to issuance of the permit. Section 3452 defines the duties of the inspectors, including the issuance of permits and the inspecting of plumbing under "construction, alteration or repair" and for which a permit has been issued. In the case where no municipal inspector has been appointed, the Code provides for approval by the Department of Health and Welfare.

Though the statutory language does not unequivocally state the requirement, it must be implied that only plumbing proposed to be installed in conformity with the Code or local ordinance, whichever is applicable, may receive a permit. The plumbing inspector's duty is twofold; to issue permits and enforce the regulations. Plumbing must be installed as prescribed by the regulations. A description of the

proposed plumbing must be supplied to the inspector prior to issuance of a permit. Therefore, we must conclude that the inspector may not issue a permit for work which would be in violation of the Plumbing Code or local ordinance, whichever is applicable.

In general, statutes enacted for the purpose of protecting the public health should be liberally construed to effect their purpose. See for example, United States v. Omar, Inc., 91 F. Supp. 121 (1950), People v. Whitestone Boosters Civic Association, 76 N.Y.S. 2d 518 (1948); State v. Kunze, 262 A. 2d 126 (1970); State v. Vachon, 101 A.2d 509 (1953); and State v. Fadely, 308 P.2d 537 (1957). The principle supporting liberal construction of health statutes is also recognized by the text writers, Sutherland, Statutory Construction, § 7207. In the area of administrative enforcement of health statutes, Sutherland states:

> "In most cases the proper enforcement of health laws is dependent upon administrative officers and agencies upon whom the efficacy of such legislation is dependent. While the courts have usually employed a rather rigid interpretation of statutes granting powers to administrative agencies, this rule has notably been relaxed in the interpretation of statutes granting powers to boards having control over public health."

To conclude that the inspector had no authority to refuse to issue a permit for improper work would defeat the purpose of having such inspectors. Their only duty then would be to collect a statutory fee for which no service was performed in return. Such an answer would be both logically inconsistent and in conflict with the clear public policy contained in the above cited statutes. It is therefore our conclusion not only that plumbing inspectors have authority to review proposed work in light of the rules and regulations, but that they have no authority to issue permits for work not proposed to be done in compliance with appropriate regulations.

2. The question of whether the rules and regulations regarding plumbing apply to all facilities or only facilities installed after the effective date of the new regulations involves two subissues. First, does the Department have the authority to enact regulations which are retroactive or retrospective in effect? Secondly, does the Code as written operate in such a fashion? Of these two issues, the former is the more critical and more difficult to answer.

Retroactive rules and regulations involve all the difficulties of retroactive statutes with the added issue that one must determine whether the agency had the statutory power to enact a retroactive regulation. In the case of the plumbing regulations, the enabling statutes allow the Department to adopt rules "in relation to all plumbing work for the carrying of waste and sewage and for the materials and sizes of pipe which carry water to all plumbing fixtures" and such other rules "as it shall think necessary and proper for the protection of life, health and welfare. ....and the successful operation of the health and welfare laws." 32 M.R.S.A. § 333 and 22 M.R.S.A. § 42 respectively. Using the standard of liberal construction discussed above, it is apparent that the power granted by the Legislature is complete and clearly authorizes the Department to regulate all plumbing if it effects public health. There can be little dispute that existing plumbing systems create as great if not a greater health hazard than new systems. To place them beyond the bounds of regulation is patently inconsistent with the public purpose behind the health statutes in question.

Retroactive regulations or statutes are not per se prohibited. They may not, however, interfere with or divest vested rights. See Sutherland, § 2205, n.1, and exhaustive citations. In the instant case the "vested right" is the property right an individual has to utilize his home or other building without regulation that would deprive him of his reasonable use of the property. See e.g. State v. Johnson, 265 A.2d 711 (1970). However, it is a clear principle, touched on initially, that the State may exercise the police power to protect the public health. No one has a vested right to maintain his property in a fashion which is or may be injurious to the public health.

> "When the object of the enactment is to promote the public health, there is no constitutional invasion, even if the enforcement of the law interferes to some extent with liberty or property. Thus it may be required of owners of private property that they incur expenses in improving such property so as to remedy unsanitary or unhealthful conditions." C.J.S., Health, § 2, p. 812.

Merely because it is expensive to comply with the regulations does not mean that any property right is diminished. The owner of property must simply bear the expense of maintaining his plumbing and sewage system in a fashion that will prevent public health

hazards. State v. City of Miami, 27 So. 2d 118 (1946). (Miami ordinance requiring owners of property abutting on streets to connect to municipal sewer and cease using other systems not unconstitutional deprivation of property); Rouna v. City of Billings, 323 P. 2d 29 (1958) (statute authorizing shooting of dogs roaming at large); Richardson v. Beattie, 95 A. 2d (1953) (regulation by state board of health prohibiting human activities in certain portion of a lake not unconstitutional even though it interfered with private and public rights); and Cooper v. State, 48 N.Y.S. 2d 212 (1944) (state health law prohibiting draining of sewage into state waters is not deprivation of a property right without due process).

It cannot be said that it is unreasonable to require the public to incorporate new technical changes into their plumbing systems. Clearly the passage of time will result in considerable development of improved methods to dispose of human wastes that provide a greater protection for the public health. The State cannot be prohibited from requiring the installation of such improved devices or the replacing of out-dated ones solely on the grounds that it would be "expensive". Protection of public health is of overriding importance. There is no deprivation of property simply by virtue of some "expense" imposed on the property owner. See for example State v. Beattie, supra.

Of course, in each particular case the actual regulation itself must be weighed against the burden that is occasioned by its enactment. Absent a particular fact situation relating to a specific provision of the Code, we do not purport to rule on each and every provision, only on the authority for its enactment and that it may apply to all plumbing regardless of when the installation was made.

As to the final issue in this question, whether or not the Code as a whole or any particular provision thereof is intended to apply to all plumbing systems, or only ones installed after the effective date of the Code, that is a matter of administrative determination in the first instance. The agency that wrote the regulations should interpret its own intent and if necessary, provide further clarification in the regulations. The Department is free to apply certain requirements immediately and to "grandfather" others, or to provide timetables for compliance. On its face, however, the present Code indicates no intent to limit its application, and we interpret it as applying to all plumbing installations not otherwise regulated.

3. Title 32 M.R.S.A. § 3302 exempts from compliance with the "Chapter", including the plumbing rules and regulations, certain enumerated persons. Examination of the statutory history sheds some interesting light on the scope of this exception. The provision was derived from Chapter 25, § 192 of the Revised Statutes of 1954. At that time the exemption provision applied only to the sections of law dealing with plumbers licenses, presently §§ 3301-3394, 3401-3496 and 3502-3507. The sections of the 1954 Revised Statutes dealing with plumbing regulations and plumbing inspectors were not covered by the exemption.

After the codification of the statutes in 1964, the plumbing laws were all combined in one chapter, both general regulations and licensing sections. The exception section was amended to apply to the whole chapter. Such amendment now makes little sense and in fact is inconsistent with the public policy of the whole regulatory scheme discussed above. Clearly, the rational way to read § 3302 is as if it said, "The licensing provisions of this Chapter shall not apply . . . .", rather than as it presently reads, "This Chapter shall not apply . . . .". Furthermore, given again the public policy of the statute, it makes even less sense to exempt from complying with the Code employees of public utilities, oil burner men, regular employees of lessees or owners of real property or persons employed in miscellaneous manual labor jobs.

In interpreting the effect of "exceptions" and "provisos", Sutherland points out that they "are interpreted principally in view of the legislative intent, and no presumption arises because of the form of the act that the interpretation must be strict." Sutherland, Statutory Construction, § 4936. Given the context of the section and the history of its transfer from the Revised Statutes of 1954 to the present statutes, it is unreasonable to read it in a strictly literal sense. The rationale for applying legislative intent in such a case was aptly stated by Chief Justice Field in United States v. Kirby, 7 Wall, 482 (1868) in a passage quoted with approval by Chief Justice Hughes in Sorrells v. United States, 287 U.S. 435 (1932):

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." (Emphasis supplied.)

Should such exception be read literally it might also raise the constitutional issue of equal protection. For what rational or reasonable purpose is an oil burner repairman exempt from the Plumbing Code? Is not the potential harm created by his installation of a domestic sewerage disposal system as great as that created when the work is done by a master plumber? In order to avoid any constitutional difficulties and to implement the public policy implicit in these statutes, it is our conclusion that § 3302 does not exempt those persons from compliance with the provisions of Title 32 §§ 3351-3353 and 3451-3454.

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