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Dean Fisher, M.D., Commissioner
Att: Donald G. Hoxie, Assistant Director, Division of Health Engineering

Andrews B. Campbell, Assistant Attorney General

Licensing Requirements Relating to Condominium Rentals

SYLLABUS:

Individual owners of condominium units holding out such units for rental or renting such units by the day, week or weekend are subject to licensure as lodging places by the Department of Health and Welfare under 22 M.R.S.A. § 2482, et. seq.

FACTS:

Condominiums in this state constitute a form of property ownership pursuant to the Unit Ownership Act, Chapter 10, 33 M.R.S.A. § 560 et. seq. In this form of ownership, property generally is held by an association of individuals, each of whom is entitled to the exclusive ownership and possession of an individual apartment type unit and to an undivided interest in common areas and facilities, including the land, building, and improvements thereon. The administration of the property is governed by a board of directors, representing the unit owners pursuant to bylaws, which may provide for a variety of common services available to individual owners, depending on the nature of the condominium. See 33 M.R.S.A. § 560 et. seq.

It has come to the attention of the Department of Health and Welfare that many individual owners of condominium units are renting their units by the day, week or weekend, and sometimes for overall periods of time as long as a season (three months) or even a majority of a year. Frequently, the condominium office will act as the agent of the unit owner and provide such functions as taking reservations and assigning units to persons who come to the condominium and may even advertise the availability of such units on a daily, weekend or weekly basis. In other instances, the unit owner may make his unit available to the public through a rental agent or other means. In many instances a unit owner's investment in a condominium is premised on his intention to rent his individual unit for most of the year or at least a substantial portion of a year. Very often condominiums are built in resort areas such as seashore or ski areas and to the extent that condominium units are available to members of the public such units are obviously in direct competition with other lodging places such as hotels, motels, and guest homes.

QUESTION 1:

Do condominium units fall under the definition of "lodging place" in the regulations adopted pursuant to Chapter 561, 22 M.R.S.A. § 2481 et. seq.?

ANSWER TO QUESTION 1:

Yes.

QUESTION 2:

Are such rentals excepted from the licensing requirements as to lodging places by the provisions of 22 M.R.S.A. § 2466?

ANSWER TO QUESTION 2:

No.

QUESTION 3:

Who is the appropriate party to be licensed, the condominium association, itself, or the unit holders?

ANSWER TO QUESTION 3:

Either the association or the unit holders or both.

REASONS:

22 M.R.S.A. § 2462 states that "No person, corporation, firm or copartnership shall conduct, control, manage or operate, for compensation, directly or indirectly...any lodging place...unless the same shall be licensed by the department." 22 M.R.S.A. § 2464 further provides:

> "No person, corporation, firm or copartnership shall engage in the business of conducting an eating or lodging place, recreational camp or overnight camp without first procuring a license from the department for each eating or lodging place, recreational camp or overnight camp so conducted or proposed to be conducted. One license shall be sufficient for each combined eating place and lodging place where both are conducted in the same building and under the same management. Each license shall expire on the 30th day of June next following the issuance and shall not be transferable."

In 1927, in order to further the attractiveness of Maine and to develop the vacation and tourist business, the Legislature adopted a law to provide for the licensing and inspection of various places which were catering to vacationers, tourists, and similar visitors. In an effort to show clearly what places were intended to be supervised, they called them eating places, lodging places, recreational camps and overnight camps, leaving the interpretation beyond that in accordance with the manner in which they are operated, but apparently intending to provide sanitary inspections of the facilities of any establishment providing meals and lodging or lodging or possible recreational facilities for the accommodation of such persons indicated above. See Chapter 561, 22 M.R.S.A. § 2481 et. seq.

In accordance with this law and later amendments to it, Section 23 of the rules and regulations relating to establishments including lodging places, recreational and overnight camps, pursuant to Chapter 561, approved and adopted December 1, 1964, defines "Eating and Lodging and Lodging Places" as follows:

> "The words 'Eating and Lodging Place' or 'Lodging Place', shall mean every building or structure or any part thereof, kept, used as, maintained as, advertised as, or held out to the public to be a place where eating and sleeping or sleeping accomodations are furnished to the public as a business, such as; hotels, motels, guest homes and cottages."

The enumeration of establishments in the above regulation is not exclusive but only designed to show the types of place which may be subject to licensure and puts any establishment which provides the type service that the enumerated establishments provide on notice that licensure may be required. The statute requires the department to determine what types of establishment should or should not be included in the licensing requirement.

The department has adopted and applied in its regulations the test of furnishing sleeping and other accomodations (or holding out such service) "as a business." See Section 23, Rules and Regulations, supra. Exactly what constitutes furnishing facilities "as a business" is a question of fact. Material factors include the intent of the lessor, the income he derives from rentals, his tax treatment of such income, the services provided, and whether such owner is in more or less competition with similar places conducting a business catering to the public.

Condominium units rented on a daily, weekend, or weekly basis are clearly in direct competition with guest houses, overnight camps, tourist homes, motels, hotels, and similar establishments. Indeed, it is striking how similar this rental is as a matter of practice to the rental of motel or hotel units.

However, the most important consideration as to whether such rentals are "a business" is not whether condominium units are rented in a manner similar to that employed by hotels and motels or even cottages. What is important is that such units are held out as ready to and do accept transient guests, thus participating and having a major impact on the state's resort and vacation business. To the extent that the rental of any condominium unit falls into this broad category, it is appropriate to require licensing.

Such rentals are not excepted from licensing requirements by the provisions of 22 M.R.S.A. § 2486, which excepts private homes renting less than three rooms unless "they hold themselves in any way as ready to accept or do accept transient guests." The policy of the department has been to consider that the furnishing of sleeping accomodations by the day, week, or month, but not more than an entire season, i.e. three months, constitutes acceptance of "transient guests." See Eating and Lodging Memorandum, Department of Health and Welfare, dated July 16, 1965. The rentals herein treated are by day, week, weekend or less than a season and must, therefore, be considered to constitute the acceptance of transients.

Indeed, it is doubtful that the excepting provisions of 22 M.R.S.A. § 2486 apply to condominium rentals. Although technically, as in the instance of home rentals, it is the individual owner of a condominium unit who rents out just his unit, as a matter of practice, the rental is often akin to the rental of a hotel or motel unit inasmuch as the lessee may have the right to use various common facilities, to stay for varying lengths of time, and inasmuch as the rented units may be under common management, have common services provided and for all practical purposes unit assignment may be interchangeable, not unlike hotel or motel units.

Although from the above analysis it is clear that the Department has the power to require licensing of individual unit owners in some instances it may be deemed more appropriate to license the condominium association, itself, than the unit holders. The association may often be the entity which is really engaged in conducting lodging place business while the unit holders may for all practical purposes be passive investors.

Achievement of the purposes of the regulations, that is maintenance of certain standards as to water supply, cleaning, linen, ventilation, screening, general layout, refuse and garbage disposal, sewage, fire prevention, etc., may be as effectively gained by licensing the association as by licensing unit holders since most if not all of these facilities will be provided in common for each unit holder by the association.

The determination as to whether licensing should be required of unit holders individually, of the association, or both, will probably vary depending on the condominium involved, its business structure and manner of operation. To the extent that the regulatory purposes of the statute can be met as effectively by licensing the condominium association, itself, as opposed to each unit owner separately, licensing of the association seems preferable.