

MAINE STATE LEGISLATURE

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October 5, 1973

Clinton Townsend, Acting Chairman

Land Use Regulation Comm.

David Roseman, Assistant

Attorney General

Special Exceptions

This informal opinion is written in response to your questions about your power to issue special exceptions under 12 M.R.S.A. § 685-A.10. The question arose in regard to the application by Mr. James Malia, Jr. for such a special exception.

It has often been said by the courts that a special exception is one allowable when the facts and circumstances specified in the statute as being those upon which the exception is permitted, are found to exist. Thus, in granting or denying a special exception LURC must base its decision upon, and only upon, those factors enumerated in the statute itself (Section 685-A.10) which specify when a special exception may be granted. It is irrelevant and it is improper for LURC to base its decision upon any factors not so enumerated in the statute.

On September 21, 1973, at a meeting of the Commission, LURC granted Mr. Malia a special exception ("Building Permit #851 by special exception"). As will be explained, the manner in which you based your decision was in error. In your Finding of Fact #29 you stated that "The applicant (Mr. Malia) has applied for a special exception to the Standards for Interim Land Use District Permitted Uses on the basis of: (a) his status as a disabled veteran, (b) his certain bankruptcy if his application is denied, (c) his genuine efforts to comply with all applicable laws prior to initiating construction." In your Conclusion #1 you stated that "The requested Special Exception. . . should be granted because of the unusual extenuating circumstances." While Mr. Malia's personal circumstances were obviously most unfortunate -- under § 685-A.10 they were irrelevant. Consequently, LURC acted improperly.

For LURC to have granted Mr. Malia a special exception, LURC should not have based its decision upon his personal and financial problems. Those factors are not enumerated in § 685-A.10. Instead, the Commission should have looked to the terms of § 685-A.10 and the elements specified therein as well as to regulations of the Commission in implementation thereof. LURC should have determined, for example, whether granting Mr. Malia the special exception to build a residential home in a forest management district "is consistent with the purpose and scope of this chapter." The purpose and scope of the chapter are found in 12 M.R.S.A. § 681. You look to that Section and then determine whether, for example, granting the special exception would lead to "intermixing of incompatible. . . activities." Another factor to be considered is "the effect of

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permitting the special exception upon. . . lands likely to be affected by the proposed use." The Commission must then base its decision upon those findings.

In the future, LURC should, of course, be guided by these proper standards. However, it is important to mention that in granting the special exception to Mr. Malia, LURC may well have acted under an honest, good faith mistake. It was the first special exception request to come before the Commission. LURC should not, of course, repeat that mistake. But the mere fact that the Commission acted improperly once, does not allow others to demand like treatment -- i.e., special exceptions for similar "personal" reasons. You have set no precedent that will bind you in future cases. You will not be estopped or precluded from proper enforcement of the statute in the future.

I hope that this is an adequate treatment of the issue, and that the matter is now sufficiently clear for future action in this regard. If you have any additional questions, please do not hesitate to contact this office.

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Environmental Protection Division

DR/ec

cc, James Haskell

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