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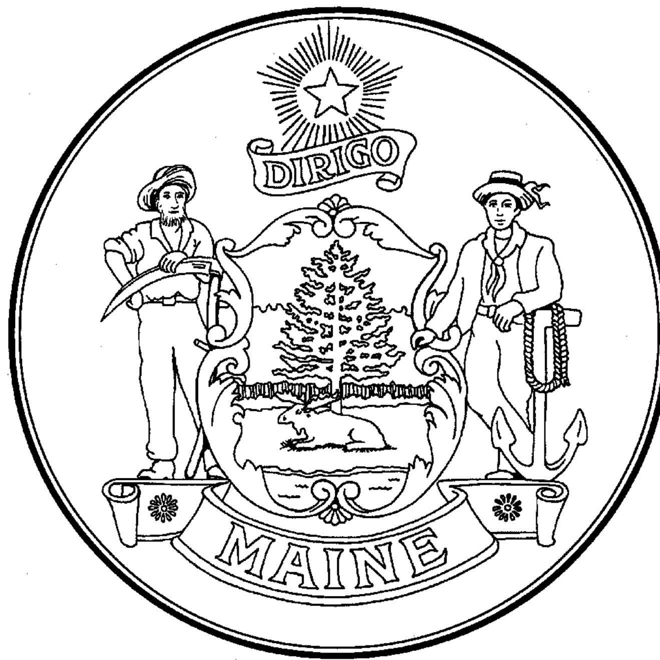

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November 15, 1973

James S. Haskell, Exec. Dir. Land Use Regulation Commission

David Roseman, Assistant Attorney General

Special Exceptions and Amendments

This informal opinion is written in response to your memo of October 4, 1973, wherein you requested a legal opinion on several questions.

The first question was whether, under the provisions of 12 M.R.S.A. § 685-A.6, 8, 10, the Land Use Regulation Commission has the power to grant special exceptions and amendments to district boundaries and guidance standards during the interim period. Under 12 M.R.S.A. § 685-C.5.A, LURC has the power to adopt rules to interpret and carry out this chapter. LURC has, in fact, already adopted "Standards for Interim Land Use District Boundaries and Permitted Uses." Section 218 thereof specifically states that "The Commission may amend interim district boundaries and land use standards and grant special exceptions to the land use standards pursuant to the provisions of Title 12, M.R.S.A., Section 685-A, sub-sections 8 and 10. . . . " These Standards were approved as to form and legality by the Attorney General's Office on August 27, 1973. Furthermore, standards, rules and regulations adopted by LURC have the force and effect of law. 12 M.R.S.A. § 685-C.8. Therefore, LURC, acting pursuant to the powers granted to it by statute has adopted standards interpreting and carrying out that statute -- and these standards specifically give LURC the power to amend boundaries and land use standards and to grant special exceptions to land use standards during the interim period.

It should be briefly noted that on April 26, 1973, a memo from a member of this office to you, which dealt primarily with another related issue, did touch briefly on the precise question before us now. This informal opinion supersedes any statements to the contrary which were expressed therein.

The second question was whether the standards set forth in § 685-A.8 and 10 are too vague to withstand constitutional scrutiny. ". . . [A]ll Acts of the Legislature are presumed to be constitutional, . . . this is a presumption of great strength and. . . the burden is on him who claims that the Act is unconstitutional to show its unconstitutionality. . . . " <u>In Re Spring Valley Development</u>, 300 A.2d 736 (Me., 1973). Thus, until tested in court and until that court rules otherwise, there is a strong presumption that the standards in § 685-A.8 and 10 are not unconstitutionally vague. You can and should, therefore, assume that these standards are constitutionally adequate and you should act accordingly. At this time, any further legal opinion from me on this issue would be premature, speculative and unnecessary.

NOT A FORMAL OPINION

A redraft as requested in Question #3 is, of course, not now needed.

The fourth question was whether it is "absolutely necessary" that LURC enact regulations defining the standards in § 685-A.8 and 10. In the leading Supreme Court case, Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194 (1947), the Court stated that "the choice made between proceeding by general rule or by individual ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Other courts have similarly held that there is no rigid principle requiring an administrative agency to enact rules and regulations that define the legislative standards. The reasons given by the courts include the desire to keep the administrative process flexible, the understanding that it might not be as wise to enact a regulation yet due to the agency's insufficient experience with a problem, and the awareness that the problem may be of such a specialized and varying nature that it might be impossible to lay down a general rule. In situations like these the agency must have power to deal on a case-by-case basis. Thus, it is not "absolutely necessary" for LURC to enact these regulations. Regulations would have been required if the statute specifically called for this. Under some statutes, an administrative agency has the duty to make rules and regulations to administer the enactment. LURC is under no such duty. 12 M.R.S.A. § 685-C.5 states in applicable part that "[i]n order to implement this chapter, the Commission may. . . A. Adopt rules to interpret and carry out this chapter. . . . " (emphasis added) There are many cases which have held that the word "may" as used in a statute generally denotes discretionary or permissive power. The word "may" will be construed as mandatory only where this is clearly indicated by a relation of the word to other words and by the context of the statute. When "may" as used in the LURC statute is viewed as it relates to § 685-C.5.A through F, it is clear that the word is used in its usual sense as denoting discretionary power.

However, the courts have often stated that "as much as possible" an agency in defining statutory standards should act through rulemaking, rather than by ad hoc adjudication. Thus, while not absolutely required, the Land Use Regulation Commission might decide that it wants to adopt regulations. A treatment of your request in Question #5 for a draft of regulations must, therefore, wait until there is further Commission decision on this issue.

DAVID ROSEMAN
Assistant Attorney General

DR/ec

NOT A FORMAL OPINION