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March 6, 1974

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Comprehensive Plan Preparation and Shorelands Zoning Act

SYLLABUS:

Preparation of a comprehensive plan by a municipality as required by 12 M.R.S.A. § 4811, et seq., need not be done by any particular governmental agency as long as the substantive elements set forth in 30 M.R.S.A. § 4961 are contained in such comprehensive plan.

FACTS:

Communities throughout the State have adopted a variety of techniques for preparation of comprehensive plans under § 4812(2)(A) of the Mandatory Shorelands Zoning Act. Usually such plan is prepared by a planning board created by a municipal ordinance. In some towns where no planning board has been created by ordinance, the municipal officers or special committees appointed by the municipal officers are preparing the comprehensive plan. In one particular community the planning board is unable or unwilling to prepare a comprehensive plan for the shoreland area. In that case, the Conservation Commission of the municipality is preparing a comprehensive plan for presentation to the planning board.

QUESTION:

Can a comprehensive plan sufficient to satisfy the requirements of 12 M.R.S.A. § 4812(2)(A) be prepared by an agency of municipal government other than a planning board created pursuant to an ordinance of the municipality?

ANSWER:

Yes.

REASONING:

Section 4812(2)(B) requires that prior to July 1, 1974, all municipalities zone the shoreland areas within such municipality. As a prerequisite to such zoning, section 4812(2)(A) requires that a comprehensive plan be prepared which is "adequate to comply with the requirements of Title 30, Section 4961 and this Chapter."

Title 30, § 4961, in turn requires that a comprehensive plan be prepared by a municipal "planning board agency or office." On first blush, therefore, the answer to the question would appear to be in the negative. We believe, however, that the statutes should not be so strictly construed. As was earlier stated in a memo on a related subject (Informal Opinion of Jon A. Lund to you dated December 14, 1973), compliance with § 4812 does not require preparation of a comprehensive plan for the entire municipality. The rationale behind this opinion was that the Shorelands Zoning Act did not incorporate all the requirements of § 4961 but only so much of those requirements as are necessary to fulfill the requirements of shorelands zoning, i.e., a comprehensive plan for the shorelands area. Consistent with that view, we believe that § 4812(2) is concerned principally with substantive compliance with the planning requirements of § 4961. It is less important that a particular body prepare the plan than that it reflect the considerations enunciated in § 4961 and provide the basis for a shorelands zoning ordinance for the municipality. Section 4961 was drafted to establish a procedural and planning process as a prerequisite to zoning an entire municipality. We read § 4812 as incorporating those requirements only to the extent necessary to comply with and implement that Mandatory Shorelands Zoning Act.

A municipality will in the first instance be governed by its own ordinances. If it has established a governmental body to prepare plans for the community's development (i.e., a planning board) that agency will obviously be the agency responsible for preparing the plan under § 4812(2)(A). It is, of course, permissible for that agency to retain a third party to assist in the preparation of the plan, including data collection and drafting of the plan document. Indeed, it is common procedure for administrative agencies at all levels of government to delegate such functions to a staff or consultant with recommendations to be made to the agency. It is not necessary that the actual planning be done by the agency provided that agency reviews and approves the work product submitted to it. So long as the agency exercises the final discretionary authority, it has fulfilled its statutory duties.

As noted above, however, many municipalities have not created a "planning board," or any other agency by whatever name authorized to prepare a comprehensive plan for the community. In such a case we must determine who, if anyone, can prepare such plan. Prior to 1971 the term "planning board" had a technical meaning. It meant that agency established by a municipality in the manner prescribed by Title 30 M.R.S.A. § 4952. In P.L. 1971, c. 455, § 3, that provision was repealed. While the term "planning board" had a particular meaning prior to the repealer, thereafter it did not have a technical definition. Lacking such definition and with no legislative history on this issue we must attempt to construe

the meaning of the term "planning board, agency or office" in Title 30, § 4961 from the face of the statute. It is reasonable to construe the Legislature's intention in § 4961 when it referred to a "planning board, agency or office" as not meaning any particular administrative body. Rather it appeared to be using language to describe the agency in terms of its function. There is no indication that the Legislature intended to limit the performance of the duties described in § 4961 to any particular agency. As long as a plan was prepared incorporating the substantive provisions of § 4961, the spirit of the legislation was satisfied. Similarly, in § 4812(2)(A) the incorporation by reference of § 4961 appears to be limited only to the substantive provisions of § 4961, which are necessary for preparation of a shorelands zoning ordinance. Other language in § 4812 does not refer to a "planning board." For example, section 4812(1) only requires appointment by municipal officers of an "appropriate municipal body" to prepare a shoreland zoning ordinance for the municipality. It seems entirely consistent with the spirit of the act that such "body" could prepare a comprehensive plan. Furthermore, such "body" could consist of the municipal officers, for if they can delegate the power to plan, they can also exercise such power themselves. What appears to be essential, therefore, is the preparation of a plan and not the creation of a particular governmental agency called a "planning board."

In conclusion, our opinion is that a comprehensive plan for the shoreland area as defined in 12 M.R.S.A. § 4811 must be prepared prior to enactment of a zoning ordinance for that area. The plan, being as much a process as a document, must be prepared by the body assigned that duty under the appropriate municipal ordinance. Absent such ordinance the comprehensive plan may be prepared by any governmental agency delegated that task by the municipal officers, and may be prepared by the municipal officers themselves. The reference to "planning board, agency or office" found in § 4961 is intended to be descriptive of the functions of municipal governmental body and is not intended to limit performance of those functions to a particular governmental body. A comprehensive plan can be prepared by the municipal officers or a committee created or delegated by the municipal officers. Similarly, a Conservation Commission may prepare a plan for a planning board as long as such plan is ultimately approved by the planning board.

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