STATE OF MAINE

Inter-Departmental Memorandum Date March 26, 1974

To William R. Adams, Jr., Commissioner Dept. Environmental Protection

From Jon A. Lund, Attorney General Dept. Attorney General

Subject Pittston Company

SYLLABUS:

A person applying to the Board of Environmental Protection for a permit to build a development under the Site Location Act, 38 M.R.S.A. §§ 481-488, must demonstrate to the Board sufficient "title, right or interest" in the land for which the development is proposed to entitle him to status as an applicant before the Board.

FACTS:

The Pittston Company has applied to the Board of Environmental Protection for a permit to build an oil refinery and marine terminal in Eastport, Maine, pursuant to 38 M.R.S.A. §§ 481-488. At a late stage in the hearings before the Board at which such application was under consideration, a question was raised regarding Pittston's legal interest in the land proposed to be developed. According to your memorandum of March 18, 1974: "The record is clear that several significant parcels, including land necessary for the VLCC pier, are not under applicant's [Pittston's] control. . . . "

QUESTION:

May the Board act upon the application of The Pittston Company and either approve or disapprove the proposal?

ANSWER:

In order for the Board to have jurisdiction in this or any other case under the Site Law, it must find as a matter of fact that the applicant has sufficient "title, right or interest" in the property proposed for development.

REASONING:

We base our conclusion on the recent decision of Walsh v. City of Brewer, Me., --A.2d-- (Law Docket No. 73-3, February 5, 1974). In that case, Mr. Walsh applied to the Brewer Planning Board pursuant to a mobile home ordinance to use a parcel of land, owned by his wife and mother, as a mobile home park. As a result of the actions of the Brewer City Council and inaction of the Brewer Planning Board, Mr. Walsh filed suit for Declaratory Judgment. On appeal from a decision of the

Superior Court in favor of Walsh, the Law Court inquired into Walsh's relationship to the land in question to determine whether he had standing before the Brewer Planning Board as an applicant for a mobile home park. The Court questioned Walsh's standing despite the fact that the land was owned jointly by his wife and mother and that Mr. Walsh and the City of Brewer had stipulated in the Superior Court that

> "At all times the Plaintiff [Mr. Walsh]. . . had authority from . . . [the legal owners] to propose and develop and operate a mobile home park on that site, with all related utilities and appurtenances."

The Law Court said that in order to have "standing" before the Planning Board the applicant would have to demonstrate that his relationship to the site of the proposed project was germane to the scope of the law regulating the use of such land. The Court concluded that the factual record was insufficient to establish Walsh's "standing" to be an applicant before the Brewer Planning Board and remanded the case to the Superior Court for further factual findings. The jurisdictional requirement of "standing" recognized by the Court was deemed by the Court to be:

> "reasonable and highly desirable, policy-wise, to ensure that, absent clear and unquestionable legislative expression manifesting a different legislative attitude, governmental officials and agencies should not be required to dissipate their time and energies in dealing with persons who are 'strangers' to the particular governmental regulation and control being undertaken."

The law and facts at issue in Walsh are substantially similar to those involved in the instant question. The Brewer mobile home park ordinance was not a zoning ordinance, but a general land use ordinance, similar in form and purpose to the Site Law. As in the Brewer ordinance, we find in the Site Law no evidence of any "clear and unquestionable legislative attitude" that "title, right or interest" is not a prerequisite to standing as an "applicant" before the Board. The public policy on which the Walsh decision was premised is equally applicable to the Site Law. Indeed we can anticipate a variety of problems which might arise under the Site Law absent a requirement that an applicant have "title, right or interest" in the land for which a development is proposed. We can cite several examples. First, two or more applicants could apply to develop the same site, making it impossible for the Board to determine to whom approval ought to be given. Second, absent some indication that an applicant could implement a project, consideration of such application would require the Board members to "dissipate their time and energies" in dealing with hypothetical projects. Third, just

as a landowner should not find his property rezoned at the behest of a stranger, so a landowner should not find his land approved for an oil refinery at the request of a stranger. In short, we believe that all the public policy reasons underlying the Walsh decision apply with equal force to the question we confront here. We believe that "title, right or interest" is a necessary jurisdictional prerequisite to any decision by the Board in this or any other case.

The Court in Walsh did not clearly establish the type or extent of a "title, right or interest" which an applicant must demonstrate. However, based on our understanding of the rationale in Walsh and the cases cited by the Court therein, we can establish some general criteria for the Board to use. In order to establish such interest, an applicant must demonstrate to the finder of fact that it has control over the site and that the site can be developed by the applicant as proposed within a reasonable period of time. Sufficient control would include not only ownership in fee, but also some lesser interest, including a contract or option to purchase or other contractual agreement to acquire a right to develop the land, which right is enforceable by way of specific performance. Since contracts or options to purchase land may vary widely, the details of such contract, option or agreement are of critical importance. There are an infinite variety of such contracts and the applicant must demonstrate that the contract or option empowers it to develop the site within a reasonable period of time. A mere oral representation regarding the exixtence of an option or contract is insufficient to establish standing. Tripp v. Zoning Board of Review, 123 A.2d 144 (R.I., 1956), Rathkopf, The Law of Planning and Zoning, § 55.5(1956). A willingness to negotiate for or seek sufficient interest in the future is no substitute for this requirement.

Final disposition of this case depends on factual findings to be made by the Board based on the record of any hearings. Since we are not the finder of fact, we have no way of knowing whether the applicant has carried his burden of proof regarding these jurisdictional facts. If the Board determines on the basis of the record that the applicant has not demonstrated sufficient "title, right or interest," it can either (1) dismiss the application for lack of jurisdiction, if satisfied that applicant has had sufficient opportunity to so demonstrate, or (2) reopen the record to permit the applicant an opportunity to establish the necessary jurisdictional facts. If the Board determines on the basis of the record that the applicant has demonstrated sufficient "title, right or interest," it must consider and rule on the proposal on its merits. If at some point the Board determines that it has jurisdiction over part of the proposal, it must then decide whether that partial development, standing alone, constitutes a development which can satisfy all the requirements of § 484 of the Site Law.

We would note in conclusion that the Board may not make a decision on the merits regarding any portion of the development over which it has no jurisdiction. We believe it would be in excess of the Board's authority and improper for the Board to make any informal ruling or issue an "advisory opinion" on an application over which it has no jurisdiction.

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