

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date April 19, 1974

To William R. Adams, Jr., Commissioner Dept. Environmental Protection
From Donald G. Alexander, Assistant Dept. Attorney General
Subject Relationship of Department of Environmental Protection Approvals
to Local Approvals of the Same Activity

Your memorandum of April 4, 1974, contained two questions regarding the relationship of DEP considerations to local land use regulations.

QUESTION:

Can the Board consider applications involving property which has not yet been zoned for its proposed use or which has not yet received the required local subdivision approval?

ANSWER:

Yes.

DISCUSSION:

I could find no case holding that the State agency would not have jurisdiction of a matter simply because local approvals relating to that matter had not been received. In addition, adverse local zoning or other land use regulations do not compromise an owner's title, right or interest in a property as that term is defined in Walsh v. City of Brewer, Me., 315 A.2d 200 (1974), since zoning or other land use regulations in no way compromise a person's capacity to convey the affected property. There are a number of cases which have held that both a city and a state may regulate a particular activity as long as the regulations are not inconsistent. Vela v. People, Colo., 484 P.2d 1204 (1971); Town of Cicero v. Weiland, Ill., 183 N.E.2d 40 (1962); Stary v. City of Brooklyn, Ohio, 114 N.E.2d 633 (1953); McQuillin, Municipal Corporations, 26.23(a). The facts in some of these cases indicate that local and state approvals may have been considered concurrently. Where there is inconsistency, the local regulations will be preempted by state action. Rinzler v. Carson, Fla., 262 So.2d 661 (1972); McQuillin, Municipal Corporations, 15.21.

QUESTION:

Conversely, can the Board adopt a policy that it will not consider applications until required local zoning and subdivision approval has been received?

ANSWER:

The Board may, by regulation, adopt such a policy, and such a policy would be most appropriately applied in cases where an actual change in a zoning ordinance is required before a project can proceed.

AN INFORMAL OPINION

DISCUSSION:


The Maine Supreme Judicial Court has upheld a statutory provision whereby a local approval (in this case for liquor licenses) was required before the state agency would take action, though a local disapproval could be appealed to the state agency on the ground that it was arbitrary and capricious, Glovsky v. State Liquor Commission, 146 Me. 38 (1950). Another court has upheld one local agency's requiring that permits be obtained from other agencies before an approval could be given:

"We see no reason why compliance with other ordinances of the town and pertinent state laws may not be made a precondition of the issuance or renewal of a license, or part of the regulation of the licensed business."
Belleville Chamber of Commerce v. Belleville, N.J., 226 A.2d 23, 27 (1967).

Such a posture would, however, raise the danger of placing an applicant in a chicken-and-egg situation if several approval agencies adopted a similar policy.

Several state and local licenses are required for most developments. These permits must be acquired at varying stages of the development process. To avoid having to distinguish which local permits it determines are preconditions for an application and which are not, the Board may decide that it will consider applications even though a local subdivision permit, zoning variance or other permit may not have been granted. However, the Board may wish to make a distinction where a complete change in a local zoning ordinance is required in order for the project to proceed. The justification for this would be that permits and variances can be obtained within existing state laws and local ordinances, but a change in the zoning ordinance itself involves actual revision of local laws. Were the Board to approve a development which would be prohibited by a local zoning ordinance and for which a variance could not be obtained, it would be approving a development which was illegal at the local level and could not be made legal except by change in the law.

Further, the same policy reasons specified for the Walsh v. Brewer decision would apply in a situation where a zoning ordinance change was required. The Board's action in considering such an application could be rendered a nullity by factors entirely outside the control of the Board, and though it is not the same "right" as discussed in Walsh v. Brewer, certainly the applicant would have a similar lack of "right" to use the land for the desired purpose.


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