MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

This document is from the files of the Office of the Maine Attorney General as transferred to the Maine State Law and Legislative Reference Library on January 19, 2022

STATE OF MAINE

Inter-Departmental Memorandum Date June 11, 1974

To Rich Rothe, Fourtin Powell Dept. State Planning Office

From Edward Lee Rogers, Assistant Dept. Assistant Attorney General

Subject

In your letter of April 9, 1974, you ask the following questions:

(1.) Where State law defines subdivision for the purpose of required municipal review, can a municipality, by ordinance or by planning board regulation, define subdivision more stringently, or establish controls for the regulation of land divisions which are exempt from the law's definition of subdivision (i.e., define subdivision as two lots instead of three, and include the land retained by the subdivider)?

(2.) If the answer to #1 is negative, will the recently enacted changes in the Law apply only to ordinances and regulations adopted pursuant to its enactment, or will the new amendments nullify provisions in existing ordinances or planning board regulations?

(3.) The recent amendment of § 4956, sub-sect. 1, added a new sentence at the end to read as follows:

"For the purposes of this section, a lot shall not include a transfer of an interest in land to an abutting landowner, however accomplished."

Since this follows, rather than precedes, the provision dealing with 40 acre lots, does the clause, ". . . except where the intent of such sale or lease is to avoid the objectives of this statute.", apply to this new amendment? (If it does not, then the new subdivision law amendment exempting from review transfer of land to an abutting owner appears to create the possibility of unlimited subdivision without municipal review since such land is by definition a non-lot. In other words, if A sells 20,000 square foot separate parcels to abuttor B, can B then build on these parcels and sell them without review?)

In our opinion, the answer to question (1) is yes, and we therefore do not reach the second question. In our opinion, the answer to question (3) is no, the exception does not apply to the new amendment.

AN INFORMAL OPINION

With regard to (1), 30 M.R.S.A. § 4956 expressly authorizes the municipalities to "adopt additional reasonable regulations governing subdivisions" in subsection 2B. This authorization is reiterated in 12 M.R.S.A. § 4812-A. Since 30 M.R.S.A. § 1917 grants municipalities the right to act unless prohibited from doing so by the State, the question is whether promulgation of a definition of subdivision by the State is a prohibition of the municipalities' right to adopt a more restrictive definition.

The State could have expressly denied the municipality the right to redefine subdivision. Instead it granted municipalities the unrestricted right to adopt additional regulations and ordinances. It is evident, therefore, the State was merely setting minimum standards, while leaving municipalities the freedom to adopt regulations consistent with the State law. Municipalities have in fact assumed that by passing a state minimum lot size law, the State did not preempt the right to define "lots" more restrictely and have acted accordingly. Given the expressed authorization in 30 M.R.S.A. § 4956, it is even more reasonable to assume municipalities are free to define subdivision more restrictively.

The definition may be made by regulation or ordinance. Anderson 19.20, Yokley 12.3, Villa-Laken Corp. v. Planning Board, 138 N.Y.S.2d 362 (1954). However, in view of the provision in subsection 2B a definition by ordinance would be more secure.

A warning should be added. Subsection 2B requires that additional regulations be "reasonable." It may, therefore, be unwise for a town to alter the "reasonable" provision in the State definition without having particular justification therefor. For example, the State law says no sale or lease of a lot 40 acres of larger shall be considered part of a subdivision. Unless a town was attempting to preserve an agricultural or natural area where 40 acre lots would not be sufficient to retain the character desired, it would seem of dubious validity for the town to attempt to impose a stricter definition than provided by this statute.

Turning to question (3), the new amendment to subsection 1 cannot be qualified by a clause preceding it in a separate sentence. Thus, literally construed, the clause in subsection 1, "except where the intent of such sale or lease is to avoid the objectives of the statute" does not apply to transfers to abutting landowners.

You express further concern about this point in your letter because the amendment states (somewhat ungrammatically) that "a lot shall not include a transfer * * * to an abutting landowner." (Underscoring supplied.) Further, the new amendment to subsection 5 (Section 2 of Chapter 700, P.L. 1973) provides that:

AN INFORMAL OPINION

> "The owner of a lot which, at the time of its creation, was not part of a subdivision, shall not be required to secure the approval of the municipal reviewing authority for such lot in the event that the subsequent actions of a prior owner, or his successor in interest, of the lot creates a subdivision of which the lots is a part, however, the municipal reviewing authority shall consider the existence of such a previously created lot in passing upon the application of any prior owner, or his successor in interest, of the lot for approval of a proposed subdivision."

Considering these two amendments together, your concern is that the lot or lots transferred to an abutting landowner will be exempt from the law even if a subdivision is thus created by sequence of transfers from owner A to abutting owner B.

While the statute is not as clear as it ought to be, we believe that such a misuse of the law could be successfully challenged. Subsection 5 was amended solely to afford adequate title protection to a landowner when the prior owner subsequently creates a subdivision. An intentional avoidance of the law by transfers of lots to an abutting landowner would constitute a subterfuge. The courts ought to consider such conveyances dependent steps in an overall transaction designed to achieve a subdivision in violation of the law (the so-called "step transaction" doctrine).

The matter is not altogether free from doubt, however, and the statute ought to be amended to clarify it with regard to these matters, as well as several others. In particular, the assumption that we should look to "intent" in administering a statute is a dubious one because matters of intent or motive are difficult to prove as such. It would be preferable if the statute were rephrased in terms of the effect of certain conveyances resulting in evasion of the objectives or purposes of the law. We therefore suggest for your consideration the following changes:

1. Subsection 1 of § 4956 would be amended to read as follows:

> 1. Defined. A subdivision is the division of a tract or parcel of land into 3 or more lots within any 5-year period, whether accomplished by sale, lease, development, building or otherwise, except when the division is accomplished by inheritance, order of court or gift to a relative.~~,-unless-the-intent-of-such-gift-is-to avoid-the-objectives-of-this-section.--For-the-purposes of-this-section,-a-lot-shall-not-include~~
>
> A transfer of interest in land to an abutting landowner~~,-however-accomplished.~~ shall not be considered part of a division of land for the purposes of this statute.

In determining whether a parcel of land is divided into 3 or more lots, land retained by the subdivider for his own use as a single family residence for a period of at least 5 years shall not be included.

No sale or lease of any lot or parcel shall be considered as being a part of a subdivision if such a lot or parcel is 40 acres or more in size. ~~, except where the intent of such sale or lease is to avoid the objectives of this statute.~~

The grantee, including a lessee, or his successors in interest of a lot which at the time of its creation and transfer to such grantee is not part of a subdivision may, at his or their option, elect (1) to have the lot not considered a part of a subdivision, or (2) as against the grantor, including a lessor, or his successor in interest who engaged in the actions hereinafter described, rescind the transfer and recover the purchase price, with interest, together with damages and costs in addition to any other remedies provided by law, if, solely by reason of the subsequent actions of the grantor of such lot or his successor in interest with regard to nearby lands, a subdivision is created of which the lot is a part. Such lot, however, shall be deemed a part of such a subdivision for the purpose of considering an application of such grantor of such lot or his successor in interest for approval of such proposed subdivision or for the purpose of determining whether there has been a violation of this statute by such grantor or his successor in interest.

The exceptions to the definition of a division or subdivision provided in this section shall not apply to a gift to a relative, to a lot 40 acres or more in size, or to a transfer to an abutting landowner if, the effect of such transaction or transactions would result in avoiding the objectives of this statute.

The present amendment of subsection 5 provided by Chap. 700 of P.L. 1973, would, of course, be struck if the foregoing amendment were to be adopted.

EDWARD LEE ROGERS
Assistant Attorney General

ELR/ec

AN INFORMAL OPINION

May 8, 1974

Fourtin Powell, Regional Planner
Cabanne Howard, Assistant

State Planning Office
Attorney General

You asked: what effect incorporation would have on a regional planning commission's ability toundertake law enforcement activities or to assess its member municipalities for financial support. It is clear that the commissions do not have these powers at present, but they are concerned lest they take any action, such as incorporating, which might limit the Legislature's ability to devolve such authority on them in the future.

The answer, however, is that incorporation has no effect on any governmental unit's ability to discharge its governmental functions.

As the Supreme Judicial Court stated in Libby v. City of Portland, 105 Me. 370, 372, (1909), a clear distinction exists between a governmental subdivision's corporate and governmental functions.

> "In the absence of any special rights conferred or liabilities imposed by legislative charter, towns and cities act in a dual capacity, the one corporate, the other governmental. To the former belongs the performance of acts done in what may be called their private character, in the management of property or rights held voluntarily for their own immediate profit and advantage as a corporation, although ultimately inuring to the benefit of the public, such as the ownership and management of real estate, the making of contracts and the right to sue and be sued; to the latter belongs the discharge of duties imposed upon them by the Legislature for the public benefit, such as the support of the poor, the maintenance of schools, the construction and maintenance of highways and bridges, and the assessment and collection of taxes . . . . The Revised Statutes recognize this two fold character, [30 M.R.S.A. § 1902] making the inhabitants of each town a body corporate, and [1 M.R.S.A. § 7] making towns a subdivision of the State."

See also Merrill v. Inhabitants of Town of Gray, 37 F. Supp. 61 (D. Me. 1941).

Should the Legislature desire to invest the regional planning commissions with such governmental functions as those enumerated by the Libby court or in the request for this opinion, it has the power to do so. The fact that the regional planning commission might already be incorporated need have no more effect on their legal capacity to meet their newfound governmental responsibilities than a town's corporate status would prevent it from discharging the identical functions.

AN INFORMAL OPINION

CABANNE HOWARD
Assistant Attorney General

CH:mfe