MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date November 7, 1974

To Fourtin Powell, Regional Planner Dept. State Planning Office

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

Subject Building Line and Minimum Lot Size Ordinances

You have asked whether a municipality in Maine may enact provisions in its building code regarding set back lines, minimum distances between buildings and minimum lot sizes.

Our response is that it would appear that they can, at least until a definitive ruling of the Supreme Judicial Court says otherwise.

Two barriers present themselves to a municipality seeking to enact the kind of ordinance in question: (1) does such an ordinance deprive its owner of his property without compensation and thereby violate the Fourteenth Amendment of the Constitution of the United States and Article I, §6-A of the Constitution of the State of Maine, and (2) has the enactment of such an ordinance been authorized by the Legislature of the State of Maine.

I. Constitutionality

A. Federal Constitution. As far as the Federal Constitution is concerned, it is clear that the establishment of setback lines (and by implication the establishment of minimum distances between buildings) is a valid exercise of the police power and does not violate the Fourteenth Amendment. In 1927, the Supreme Court of the United States so held in Gorieb v. Fox, 274 U. S. 603, 608-10 (1927). Six months earlier, the Court had decided the case of Euclid v. Ambler Realty Corporation, 272 U. S. 365 (1926), which sustained the constitutionality of comprehensive zoning. In Gorieb the Court extended that ruling to setback lines promulgated in the absence of a comprehensive plan, finding either kind of ordinance to be a valid exercise of the police power. Id. at 610. See also 7 McQuillen, Municipal Corporations, §24.541 (3rd ed. 1968).

The Supreme Court has not had occasion to rule on an ordinance imposing a minimum lot size, but such ordinances, at least when part of a comprehensive plan, have been upheld by state courts as valid exercises of the police power. Clemons v. City of Los Angeles, 222 P. 2d 439 (Cal. 1950); Gignoux v. Village of Kings Point, 99 N.Y.S.

2d 280 (Sup. Ct. N. Y. 1950); State ex rel. Grant v. Kiefaber, 181 N. E. 2d 905 (C. A. Ohio 1962); see generally 9 McQuillen, supra, §25.140 a.

B. State Constitution. In 1925, in an advisory opinion to the Legislature, the Maine Supreme Judicial Court had the following to say about the establishment of building lines:

> "The weight of authority seems to be, /sic, as to the comma/ that building lines cannot be justified under the police power, (12 A.L.R. 681. 2 Dillon, Mun. Corp., 5th Ed., Sec. 695. 1 Lewis, Em. Domain, 2d Ed., Sec. 144a.), but must be accomplished by the exercise of the right of eminent domain with compensation." Opinion of the Justices, 124 Me. 501, 510 (1925).

This single sentence appears to be the only utterance of the Law Court which could in any way be considered as squarely interpreting Article I, §6-A of the State Constitution,[1] but it is fraught with problems.

The most obvious difficulty presented by the sentence is that it does not indicate whether it is relying as a basis for its holding, on the Federal or State Constitution (or both). To the extent it relies on the former, it can clearly be said to be no longer the law, since Euclid and Gorieb conclusively terminated debate on that

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1/ In Town of Windham v. LaPointe, 308 A.2d 285, 292 (Me. 1973), the Court characterized its ruling in Town of Waterboro v. Lessard, 287 A.2d 126 (Me. 1972) as holding that the establishment of building lines was "an area of regulation not justified under the police power." As will be seen in Section II, infra, Lessard held no such thing, the issue there being solely whether the Legislature had authorized the ordinance in question and not whether the ordinance itself was unconstitutional. Having decided the former question in the negative, the Court never reached the constitutional issue.

point shortly thereafter. To the extent that it relies on the State Constitution, it must seriously be questioned whether the Court would reach the same result today. The authority on which it relies is either out of date or off the point.[2/] That being the case, the position which it adopts is now distinctly in the minority among the various state appellate courts which have had occasion to rule in the recent past on the point.

> "The majority view, at least now if not formerly, is that the establishment of reasonable setback or building lines constitutes a proper exercise of the police power, since they tend to preserve the public health, add to the safety from fire and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood. There is no physical taking of property, in a legal sense, in the imposing of such lines, although the owner is deprived of part of his land for the purpose of building." 7 McQuillen, Municipal Corporations, §24.541 (3rd Ed. 1968).

In consequence, it may well be that if squarely presented with the constitutional issue today - nearly fifty years since its last ruling - the Court might well be persuaded to reconsider its position.

2/ The sentence relies on an A.L.R. article based on a series of cases subsequently found unpersuasive by the Supreme Court in in Euclid, including one (Eubank v. Richmond, 226 U. S. 137 (1912)) which was actually distinguished by the Court in Gorieb, supra at 610. Its second citation is to a section of the old Dillon treatise on Municipal Corporations which says only that setback lines may not be used for aesthetic purposes. The third citation is from an edition of the Lewis treatise on Eminent Domain which can no longer be found.

II. Statutory Authorization. Two years ago, the Supreme Court held, in Town of Waterboro v. Lessard, 287 A.2d 126 (Me. 1972), that a setback ordinance, enacted by a town in 1958, had not been authorized by any state statute, and in particular, by 30 M.R.S.A. §2151(4)(A), a statute authorizing municipalities to enact "police power ordinances" for various purposes including the design, construction and maintenance of buildings. The basis for the Court's ruling was that ever since its 1925 opinion, supra, casting doubt on the constitutionality of any statute authorizing the establishment of "building lines," the Legislature has been careful not to enact any laws which purported to do so. Thus, 30 M.R.S.A. §2151, originally enacted in 1939 and amended several times since, cannot be interpreted to have authorized something which the Supreme Court had forbidden in 1925. This is probably a fair reading of the statute and constitutes the narrow holding of the case: The Town of Waterboro's setback ordinance was not authorized by Section 2151. As indicated supra, at note 1, the Court did not reopen the constitutional issue itself.

Lessard would, however, have effectively settled the question of statutory authorization were it not for the actions of the Legislature and the electorate (subsequent to the enactment of the Waterboro ordinance) in conferring "home rule" on Maine municipalities, through the enactment of new Article VIII-A to the Maine Constitution in 1969. This amendment provides:

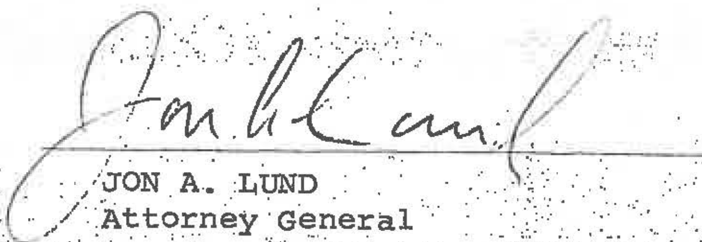
> "The inhabitants of any municipality shall have the power to alter or amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character.
>
> The Legislature shall prescribe the procedure by which the municipality may so act."

Pursuant to this provision, the Legislature, in 1970, enacted the following statute:

> "Any municipality may, by the adoption, amendment or repeal of ordinances or by-laws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any

> power or function granted to the municipality by the Constitution, general law or charter." 30 M.R.S.A. §1917.

Whether the Supreme Judicial Court would rule that the home rule provisions now authorize ordinances dealing with building lines or minimum lot sizes is not clear, and until the question is squarely ruled upon by the Court, the legality of setback ordinances would not be free from doubt. We reiterate, however, that the prevailing view under recent authorities is that such ordinances are permissible.



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