38 M-377

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STATE OF MAINE

Inter-Departmental Memorandum Date May 11, 1976

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

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject:

QUESTIONS:

Your Department has requested an opinion of the Attorney General's Office describing generally the effect of the 1975 amendments to 38 M.R.S.A. § 599 relating to open burning at municipal solid waste facilities (P.L. 1975, c. 228) and also addressing the following more specific questions concerning the same law.

1. Upon what basis may a town be granted a variance under § 599 to continue burning at its solid waste site?

2. What is the meaning of the phrase "undue hardship" as used in 38 M.R.S.A. § 599(5)? Are there accepted criteria for making a decision as to "undue hardship" in a particular case?

3. Is the September 1, 1975, date now found in 38 M.R.S.A. § 599(1)(D) an absolute deadline for variance applications under that subsection?

4. What is the legal status of towns under 38 M.R.S.A. § 599 which were eligible for but did not apply for a variance?

5. If a new solid waste disposal site is opened after September 1, 1975, may the town operating it apply for a variance for that site under § 599?

ANSWERS:

The answers to your more specific questions are as follows:

1. Under 38 M.R.S.A. § 599, a municipality may be granted a variance to continue open burning at a solid waste disposal site only upon a finding of the Board that the municipality will suffer "undue hardship," as that phrase has been judicially construed, if the variance request is denied.

2. Zoning case law in this State and elsewhere delineate general principles for determining undue hardship in a particular case, but the Department must develop more specific criteria appropriate to this statute.

3. No request for a variance under § 599 made after September 1, 1975, may be considered.

4. Municipalities which were eligible for a variance but which failed to make a request prior to September 1, 1975, are prohibited from open burning after that date.

5. No variance request under § 599 filed after September 1, 1975, may be considered, even though it may relate to a site opened after the cutoff date.

DISCUSSION:

The Prior Law

Prior to the adoption of P.L. 1975, c. 228, the law prohibited all open burning of waste of any kind after July 1, 1975, except for the limited expressed exceptions contained in § 599(2) of Title 38. 38 M.R.S.A. § 599(1)(B) (1973 Supplement). The specific kinds of burning exempted under subsection 2 would require a permit after July 1, 1975, to be issued under the procedures set forth in subsection 3. Subsection 4 requires all persons using open burning as a method of waste disposal to notify the Board of Environmental Protection periodically of their progress toward employing alternate means of disposal, again specifying that all persons utilizing open burning (except for the exempted purposes) shall cease burning by July 1, 1975. 38 M.R.S.A. § 599(4)(E) (1973 Supplement).

The Amendments

Chapter 228 did not alter any of the language of subsection 2, 3 or 4. It did, however, amend subsection (1)(B) so that the July 1 cessation date applied only to open burning at sites other than municipal solid waste disposal sites. The chapter also added to the law a series of new requirements directed specifically at municipal solid waste disposal sites. These provisions are paragraphs C, D and E of subsection 1 and all of subsection 5.

In addition to exempting municipal dumps from the July 1, 1975, cessation date for burning, these amendments provide that no municipality may be required to cease burning at its municipal dump for at least two years and two months from that date. Longer extensions were expressly provided for or enabled under several different circumstances. Most significantly, municipal solid waste disposal sites serving fewer than one thousand persons cannot be required to cease burning until at least two years after the Board finds, after hearing, that burning at that site has violated air quality standards, with the burden of proof resting upon the Department. § 599(1)(C). A two-month extension is provided by § 599(1)(D) for all municipal sites serving more than one thousand

persons by giving the municipalities which maintain or lease such a site until September 1, 1975, to apply for a special variance to continue burning after that date. If a variance is not applied for prior to September 1, 1975, further burning at municipal sites serving more than one thousand persons is prohibited. § 599(1)(D). If the variance is requested prior to September 1, 1975, burning may continue at the subject site during the period when the application therefor is being processed by the Department, however long that may be. § 599(1)(D).

The new subsection 5 describes the process by which the Department shall receive and act on these variance applications. The Board is instructed to grant a variance whenever the applicant municipality "shows that compliance with the open burning requirements of [section 599] would produce undue hardship," unless the Department can show that emissions resulting from burning at the subject site endanger human health and safety, in which case the variance must be denied. Under the law of variances established in this State and very broadly accepted throughout the country, this provision requires an evidentiary submission by the applicant and a finding by the Board on the question of "undue hardship," which is the only criterion specified, as an essential prerequisite to granting a variance. Lippoth v. Zoning Board of Appeals, 311 A.2d 552 (Me. 1973); Barnard v. Zoning Board of Appeals of Town of Yarmouth, 313 A.2d 741 (Me. 1974); Anderson, American Law of Zoning, §§ 14.09, 14.33 (1968).

The general format of the amendments adopted in Chapter 228 places it squarely within the confines of the law of zoning. The Legislature has exercised the police power of the State to generally decree the cessation of open burning on September 1, 1975, while providing at the same time a mechanism for relief from that prohibition by means of a variance. In considering a variety of zoning provisions, the Maine Supreme Judicial Court has repeatedly invoked the essentially universal rule that "variances should not be easily or lightly granted and a variance should be the exception and not the rule." Lovely v. Zoning Board of Appeals of the City of Presque Isle, 259 A.2d 666 (Me. 1969); Barnard, supra.

The "undue hardship" decision must plainly be informed by consideration of the burden that will be placed upon the applicant municipality by the primary requirements of the section. Paragraph E of subsection 1 addresses that question. By the terms of that paragraph, the Board is required, when it denies a variance, to consult with the applicant municipality and "establish a reasonable compliance schedule aimed at bringing about the cessation of open burning at the municipal waste disposal site under consideration." The same paragraph further provides that such a compliance schedule "shall be for a time of not less than 2 years."

Denial of a variance, then, does not amount to an immediate prohibition of burning, but rather initiates a process that will establish a definite date, at least two years in the future, by which time burning at the subject site must cease. The "undue hardship" question is whether establishment of a definite future date for the cessation of this burning is so unusually burdensome in a particular case to constitute an "undue hardship."

Section 599(1)(E) also establishes a wholly separate basis for establishing a compliance schedule for the termination of burning at a particular site. If, at any time, the Department can show that legally permitted burning at a municipal solid waste site (whether serving fewer or more than a thousand persons, and whether or not operating under a variance) violates Maine's air quality standards, then that site shall also be made subject to a compliance schedule.

In either case, the compliance schedule is itself a form of variance, since burning would obviously not be prohibited until the terminus date in the schedule. The Legislature has, however, expressly provided that this permission to burn be conditioned upon, first, the establishment of a definite terminus date for burning, and second, provision for specific interim activities [§ 599(1)(E)(1)-(6)] related to the development of alternate means of disposal. No conditions are legislatively imposed on variances contemplated under subsections 1(E) and 5.

The Legislative History

The legislative history of Chapter 228 supports the foregoing construction of the terms of the statute.

The bill was originally introduced as L.D. 154 and was subsequently redrafted in the Natural Resources Committee, renumbered L.D. 1502 and then amended by S. 83 in the Senate. Both Legislative Documents recite the same emergency preamble, declaring the need to extend the previous (July 1, 1975) deadline for closing open burning dumps to avoid hardship to those towns which must find alternate means of disposal.

The original bill, L.D. 154, did not amend § 599. Rather, it proposed the amendment of the reference to the open burning deadline in § 361 by changing "1975" to "1978" and adding a requirement that municipalities report semi-annually their progress "in plans for halting open burning at their respective dumps." Prior to any floor debate, the bill was redrafted to both amend the reference in § 361 and establish essentially the variance and compliance schedule provisions in § 599 described above.

That the generalized "hardship" cited in the preamble is the foundation for an extension to a new deadline is shown by the original bill which contained no provision for variances and no reference to "undue hardship." The original bill contemplated a flat three-year extension.

In its redrafted format, this blanket extension was made more indefinite in duration. At the very minimum, however, every eligible town which applied for a variance would have two years and two months before being required to cease burning. This term, which appears prominently in the floor comments of Committee members, is the sum of the two month absolute extension to September 1, 1975, and the minimum two year duration of a compliance schedule imposed when a town was unable to show any "undue hardship" or its site was found to violate air quality standards.

The revised legislation (L.D. 1502, as amended) also provided for extensions of indefinite duration for sites which fit in one of two classes: (1) sites serving fewer than a thousand people, evidently based upon the results of mathematical modelling which warranted a presumption that such sites would not violate air quality standards (Remarks of Representative Peterson, Legis. Record, May 1, 1975), and (2) towns for which even the blanket extension would cause "undue hardship." In either case, if air quality standards could be shown to have been violated, a compliance schedule would be imposed.

Against this background, the following discussion is given of the specific questions posed:

1. Upon what basis may a town be granted a variance under § 599 to continue burning at its solid waste site?

Under the provisions of § 599, a variance may be granted only upon a showing by the applicant municipality that it will suffer "undue hardship." If the applicant town can show "undue hardship" (see next question) to the Board's satisfaction, and the Department cannot show that there will be health and safety hazards as a result of emissions from burning at the subject site, then the variance must be granted. 38 M.R.S.A. § 599(5), second paragraph.

If the Board is not persuaded that the town will suffer "undue hardship" by being subject to a compliance schedule under § 599(1)(E), then the Board must notify the town of its intent to deny the variance and give the town an opportunity to have a public hearing on the question, before the denial becomes effective. If the hearing is called, the town must show (1) that the emissions from its open

burning do not endanger human health or safety, and (2) that the town would suffer "serious hardship" by being obligated to adhere to a compliance schedule to terminate open burning.

The source or meaning of the term "serious hardship" is not evident from any legislative record, nor does it seem to appear in other Maine statutes or the cases construing them. If the showing required was of greater hardship than "undue hardship," the town's position would be futile, inasmuch as the Board would have already determined that the town's hardship was not "undue." If the required showing is that the hardship was "serious" in an absolute sense, even though not "undue" in a relative sense (see below), then the true standards for granting a variance would be an absolute one rather than the universally accepted relative one. A reasonable conclusion would be that the intention was to use the same standard (as indeed the Natural Resources Committee redraft did. The Senate amendment which changes the phrase had the principal effect of shifting the burden of proof.), and that the hearing merely provides the town with the opportunity to present evidence and argue orally in the hope of persuading the Board to reverse its prior determination.

2. What is the meaning of the phrase "undue hardship" as used in 38 M.R.S.A. § 599(5)? Are there accepted criteria for making a decision as to "undue hardship" in a particular case?

As mentioned above, 38 M.R.S.A. § 599 represents an exercise of the State police power in a format familiar to zoning legislation, and in Maine the phrase "undue hardship" is one that is widely used as the principal criterion for the granting of a variance from some general proscription. As such, it has been considered on several occasions by the Supreme Judicial Court. In those decisions, the Maine Court has drawn directly upon the case law from other states interpreting the more common phrase "unnecessary hardship." Lovely v. Zoning Board of Appeals of the City of Presque Isle, supra, and cases following. In Lovely, the Court rejected the formulation utilized in New Hampshire where "any hardship suffered by the applicant [for a variance] as a result of the interference with his right to use his property, without commensurate public advantage, is an unnecessary hardship." Instead, the Court adopted the "somewhat more exacting requirements" used by the majority of states. Lovely, 259 A.2d at 669.

While the constituent parts of the majority rule are several, and while the rules governing zoning of private property by a public authority do not always transpose flawlessly to the effective zoning of public property, there are several criteria which would seem to lend themselves to the situation at hand.

To state first the general rule regarding private property zoning adopted in Lovely, a finding of "undue hardship" is held to require each of three subfindings: (1) "that the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone;" (2) "that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself;" and (3) "that the use to be authorized by the variance will not alter the essential character of the locality." 259 A.2d at 669.

As to the first of these, the notion of "reasonable return" is obviously inappropriate to regulation of a municipal facility. Likewise, the consideration of the "general conditions in the neighborhood" in the second criterion and the "essential character of the locality" in the third criterion would seem to have little carryover value to the regulation of widely scattered dumps.

Nonetheless, the essence of these criteria is applicable. The first criterion requires, in essence, a finding that the regulation from which a variance is sought would make infeasible (in the particular case) a use of the property which the regulation purports to permit. For example, the combination of a fifty foot setback requirement in a residential zone and the extraordinary terrain of a particular lot may make the permitted use (residence) infeasible unless a variance to the setback requirement is granted. In the context of your question, if the requirement that open burning cease in the near future would make it infeasible for a town to dispose of its solid waste, then the first test might be deemed satisfied. This test would appear, then, to raise questions of the burdens - geologic, financial or otherwise - of alternative disposal methods open to each applicant municipality.

The second test is perhaps the most central. It states, in essence, that the applicant must show that his plight is unique - i.e., is not the common plight of others subject to the same regulation. This requirement is reflected in the common statement that the variance must be the exception and not the rule. The Maine Court quoted with approval the statement: "Reasonable restriction upon use, which affects one no more than another, is not 'unnecessary hardship.'" Lovely at 669 (Maine Court's emphasis).

The third test assumes that application of the regulation would indeed be burdensome, and uniquely so. Even so, it requires the denial of a variance if granting it for the use proposed by the applicant would be unseemly by comparison to those subject to the same regulation. Its application would seem marginal in the open burning context.

The Maine Supreme Court has also endorsed in Lovely the proposition that "financial hardship in and of itself does not warrant a variance." 259 A.2d at 669.

Zoning cases have often considered particular topographic conditions relevant, as surely they would be here. Anderson, supra, §§ 14.27, 14.33. Moreover, there is some authority for giving weight to a public need for the granting of the variance. Anderson, supra, § 14.78.

Beyond designating certain factors as relevant or irrelevant to consideration of a variance application, the law does not specify what criteria an administering agency should utilize. The statute authorizes the Department to gather information from the applicant towns. The judgment thereafter must be a comparative one.

Since, however, a finding on the question of "undue hardship" is a prerequisite to either granting or denying a variance, the applicant towns must be permitted to continue burning at the subject sites until that finding is made. If an air quality violation is shown while a variance application is pending, the application becomes irrelevant, since a compliance schedule must be imposed under the terms of § 599(1)(E).

3. Is the September 1, 1975, date now found in 38 M.R.S.A. § 599(1)(D) an absolute deadline for variance applications under that subsection?

Although the statute itself is ambiguous as to whether a variance requested after September 1, 1975, may be entertained, the legislative history indicates plainly that it may not - that September 1 was intended as a cutoff date. The "Statement of Fact" attached to and printed with L.D. 1502 states unambiguously:

> "This bill will exempt municipalities of less than 1,000 in population from applying for a variance for their open burning dumps. . . . Other municipalities may apply for a variance until September 1, 1975."

Floor comments of the Senate Chairman and two House members of the Natural Resources Committee (which added this provision in its redraft of the original bill) also state expressly that variances may be applied for "before" or "until" September 1. There are no floor comments or other legislative record to the contrary. 107th Legislative Record B481, B792.

4. What is the legal status of towns under 38 M.R.S.A. § 599 which were eligible for but did not apply for a variance?

Under the express terms of 38 M.R.S.A. § 599(1)(D), towns that did not apply for a variance (or, under the construction adopted in the prior question, towns that did not request a variance before September 1) are prohibited from burning after September 1. After that date, any open burning that takes place anywhere in the State is illegal and subject to penalty unless (1) it is expressly exempt under the terms of § 599(2), or (2) it is exempt under the terms of § 599(1)(C), or (3) it is at a site that is the subject of a variance application and/or compliance schedule under § 599(1)(D).

5. If a new solid waste disposal site is opened after September 1, 1975, may the town operating it apply for a variance for that site under § 599?

The statute makes no provision for special treatment of solid waste sites established after September 1, 1975, the final date for open burning variance applications. An application filed after that date could not be considered.

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