STATE OF MAINE

Inter-Departmental Memorandum Date July 21, 1976

To Rich Rothe Dept. State Planning

From Cabanne Howard, Assistant Dept. Attorney General

Subject Municipal Regulation of Subdivisions

SYLLABUS: Under its Home Rule powers, a municipality may by ordinance regulate a subdivision of land regardless of the provisions of the Municipal Subidivision Law, 30 M.R.S. §4956. A municipal planning board, however, (or municipal officers acting in place of a planning board) may not, when discharging their responsibilities under the Municipal Subdivision Law, alter, by regulation or otherwise, the statutory definition of a subdivision.

FACTS: On June 11, 1974, this office rendered an opinion at the request of you and Fourtin Powell answering various questions regarding the interpretation of the Municipal Subdivision Law, 30 M.R.S. §4956. One of those questions was whether a municipality may by ordinance or planning board regulation, define and therefore regulate a subdivision in a manner more restrictive than the statute. In the opinion we answered this question in the affirmative. Id at 2. On April 22 and April 27, 1976, however, we received letters from two lawyers in the state who deal frequently with questions of this type, Mr. David Plimpton of Portland and Mr. Atherton Fuller of Ellsworth, indicating that they have been taking a contrary position with their clients and asking whether we would reconsider our position. Because of the state-wide importance of the question, we have determined to do so.

The relevant portion of the 1974 opinion is as follows:

> "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 restrictly 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 or 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."

QUESTION: May a municipality by ordinance, or a municipal reviewing authority under the Subdivision Law by regulation, define a subdivision more restrictively than contemplated by the Subdivision Law?

ANSWER: A municipality may make such a definition by ordinance, but a municipal reviewing authority may not alter the statutory definition by regulation.

REASONING: The 1974 opinion that municipalities may regulate in a manner more restrictive than the statute was based on two grounds: (1) the existence, since 1969, of municipal "home rule" powers, MAINE CONSTITUTION, art. VIII, pt. 2, §1; 30 M.R.S. §1917, by which the municipalities may exercise any power inhering in government generally which is not prohibited to them, expressly or by clear implication, by the Legislature; and (2) the authority conferred by subsection 2(B) of the Subdivision Law which permits municipalities to adopt "additional reasonable regulations governing subdivisions."

In basing its result on the second of these two reasons, it appears the opinion was in error. In granting the authority to municipal reviewing authorities to adopt "regulations governing subdivisions" under the Subdivision Law, the Legislature clearly could not have been using the word "subdivision" in any sense other than the definition of that word explicitly provided in subsection 1 of the law. Thus, while a municipality might be able to adopt a regulation clarifying any ambiguity in the statutory definition of subdivision, it could not adopt a regulation defining a subdivision which is flatly contradictory to the statute. For example, a municipality might adopt a regulation defining with more precision the word "lease" in the statutory definition (so as to exclude, for example, motels - whose tenants might be thought to have one day "leases" - from the purview of the law), but a municipality cannot by regulation define a subdivision as consisting of only two lots, rather than the three required by the statute.

This is not to say, however, that a municipality cannot, through the exercize of its "home rule" powers, pass an ordinance regulating subdivisions in any way at all, so long as it does not violate the State or Federal Constitutions. To the extent the 1974 opinion rests on this basis, it is correct. A municipality could be prevented from so regulating only if it can be shown that the Legislature "expressly or by clear implication" has denied it the power to do so. Such a prohibition cannot be found in the Subdivision Law. That statute merely requires that the municipalities of the state regulate subdivisions to the degree set forth therein. Nowhere does it prohibit - or even imply - that they may not go further. In the absence of such a prohibition or implication, therefore, the municipalities must be judged to have the power (since 1969) to pass general subdivision regulatory ordinances defining subdivisions therein in any constitutional manner they choose.