Administrative Law Standing DEP Title Right or Interest

STATE OF MAINE

Inter-Departmental Memorandum

Date March 24, 1977

To Board of Environmental Protection — Dept. Environmental Protection

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

Subject "Agreement to Lease" as Title, Right or Interest.

QUESTION and FACTS:

The Board has requested an opinion of the Attorney General as to the sufficiency of the attached document, entitled "Agreement to Lease" and executed by the Pittston Company and the Bureau of Public Lands on March 9, 1977, to confer the "title, right or interest" in the subject submerged lands necessary for the Board to act upon a Wetlands application involving the use of those lands. No other information concerning the course of dealings of the parties, or concerning the negotiation of the agreement were available for consideration.

ANSWER:

The agreement submitted fails to confer on the Pittston Company legally enforceable rights to an interest in the subject property in that (1) the agreement fails to impose sufficiently definite contractual obligations upon the Bureau of Public Lands, and (2) the Bureau has retained a power of termination dependent solely upon its own discretion. Consequently, under the governing law, Pittston lacks the legal right to compel the Board or Department to consider and decide upon its application.

DISCUSSION:

The legal doctrine requiring "title, right or interest" in property which is the subject of an application for an administrative approval of a zoning or land use proposal was established in Maine law by the decision of the Supreme Judicial Court in the case of Walsh v. City of Brewer, 315 A.2d 200 (Me. 1974). In previous Opinions, the Attorney General has interpreted that decision to apply to administrative decisions of agencies of the State. Opinions of April 11 and August 19, 1974. In this case at least, where the applicant proposes a physical occupation by a permanent structure of property which is subject to governmental regulation under legislation requiring any "person, firm, corporation . . . or other legal entity" to obtain a permit for a use of the land, clearly identified in the legislation*, the circumstances are directly analogous to those in Walsh. The description of those persons subject to the Act in §471 does not "plainly and expressly . . . authorize persons who lack 'title, right or interest' in the land to be recognized as 'applicants . . . ." Walsh, supra at 207, n.4 (emphasis by the Court). Thus, the requirement is implicit here, and it is against the criteria of Walsh that the document submitted must be measured.

Walsh describes a proper applicant under these circumstances as one who "has an independently existing relationship to regulate land in the nature of 'title,right or interest' in it which confers lawful power to use it, or control its use." 315 A.2d at 207.

---

*The Alteration of Coastal Wetlands Act requires a permit from the Board of Environmental Protection to "erect or cause to be erected a causeway, bridge, marina, wharf, dock or other permanent structure in, on or over any coastal wetland. . . ." 38 M.R.S.A. §471.

The document throughout implicitly recognizes the ownership of the subject submerged lands by the State, and their proprietary control by the Bureau of Public Lands. It does not contemplate the ownership of the property by the Pittston Company now or at any time in the future. Nor does it purport to confer upon Pittston a leasehold or other present interest in the land, possessory or non-possessory. The interest contemplated by the parties is plainly a future leasehold interest, and Paragraph 2 expressly makes the granting of a lease to Pittston "subject to the negotiation and agreement by the Bureau and Pittston of the rental and all other terms and conditions of a lease . . . . "

It is thus apparent that this document does not confer upon Pittston the "lawful power to use [the land]." Satisfaction of the Walsh criteria must then be found in powers conferred upon Pittston by the document to "control [the land's] use." In this respect, Pittston is in the same legal posture as the plaintiff in Walsh, lacking a proprietary interest, present or future, but possibly holding other legal rights sufficient to control the use of the land to accomodate his proposal.

While the Court in Walsh does not establish firm criteria for evaluating such a purported authority, several elements of that decision are suggested and applied. The "nature and source" of the authority are to be considered, as well as its duration, its revocability and, in apparent summation, its "legal enforcibility [sic]." 315 A.2d at 207, 208.

As stated above, there is no reason to doubt the source of rights conferred upon Pittston by this "Agreement to Lease." By the terms of the Submerged and Intertidal Lands Act" referred to in the Agreement, the Bureau of Public Lands has, in trust, certain of the State's proprietary powers over the subject lands and is authorized to negotiate and enter into leases of them for the purposes desired by Pittston, consistant with the public lands laws.

Nor, from the materials available, can there be any reasonable doubt that the parties have executed a written document with the intent that, at least as to certain of its terms, they be mutually bound thereby. Consideration is said at the outset to be found in the mutual obligations of the parties, and the Bureau's obligation under Paragraph one and Pittston's obligation under Paragraph five appear sufficient for this purpose.

Taken in the light most favorable to it, the relevant rights conferred upon the Pittston Company are:

(1) A right of exclusive dealing, arising from the Bureau's promise not to "lease or grant easements on or over the Property to any person or entity except Pittston," lasting for at least 12 months and capable of extension at Pittston's option, by virtue of the provisions of Paragraphs 1, 3 and 4;

(2) A right to the reasonably diligent procurement of appraisal of the property by the Bureau, acknowledged by Pittston to be an essential precondition to the negotiation of a lease, by virtue of Paragraphs 3 and 4;

(3) A right to negotiate the terms of a lease of the subject property with the Bureau, implicit in the terms of Paragraphs 2, 3 and 5;

(4) A right to an offer of a lease, "a proposal," under Paragraphs 2 and 4; and

(5) An option period of 45 days during which Pittston may accept the proposal, under Paragraphs 3 and 4;

all subject to the reservation by the Bureau of a conditional power of termination contained in Paragraph 12.

To have title, right or interest satisfying the standards of Walsh it is necessary that these rights enable Pittston to procure a lease from the Bureau, by means of the courts if necessary. This in turn poses two legal questions. First, whether the rights described, standing alone, are sufficient to compel issuance of a lease, and second, whether the Bureau's termination power in Paragraph 12 could be used to defeat Pittston's rights.

Our conclusion is that Pittston's rights, standing alone, are insufficient to create a judicially enforceable right to a lease, and, even if it were otherwise, the Bureau has retained an effective power to terminate the agreement at its discretion.

> " There is no more settled rule of law applicable to actions based on contracts than that an agreement, in order to be binding, must be sufficiently definite to enable the Court to determine its exact meaning and fix exactly the legal liability of the parties. Indifiniteness may relate to the time of performance, the price to be paid, work to be done, property to be transferred or other miscellaneous stipulations of the agreement."
> Corthell v. Summit Thread Company, 132 Me. 94, 99, 167 A. 79 (1933).

Though the agreement gives Pittston the right to prevent the Bureau from leasing the property to others throughout its effective term, there is no time stated within which the Bureau must make a proposal of a lease to Pittston. No rental is specified, nor is any mechanism established by which the parties or a court might determine a rental, even after appraisal results are available.

The Corthell decision recognizes some inherent flexibility in the doctrine of definiteness: "If the contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable." 132 Me. at 99. But by its next sentence, the Court appears to preclude that course here:

> " If the terms of the agreement are uncertain as to prive, but exclude the supposition that a reasonable price was intended, no contract can arise. And a reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it, as it is termed, merely illussory." [Citations omitted.] 132 Me. at 99. (Emphasis in opinion).

Rather than reflecting any degree of present agreement on a rental figure or any of the other terms of a lease, Paragraph 2 has expressly reserved the powers of both parties to negotiate the terms at some time in the future. Discussing the possible differences between a "lease" and an "agreement to lease," one authority has said, "If the terms are indefinite, there is no lease, but it would seem also that there is no agreement." American Law of Property, Casner, ed. (1952).

Even if the document could be said to reflect an intention to lease the property at a price that third parties could determine to be reasonable (a doubtful proposition in view of the references throughout to the Submerged Lands Act, and the personal discretion conferred on the Director of the Bureau by that Act), a court could not compel the offering of a lease without reference to some contractual time obligation. Cf. Susan v. Dean, 151 Me. 359, 118 A.2d 890 (1955); Bragdon v. Shapiro, 146 Me. 83, 77 A.2d 598 (1951); Ross v. Mancini, 146 Me. 26, 76 A.2d 540 (1950).

A separate and sufficient gound for the unenforceability of the agreement is the power of termination retained by the Bureau in Paragraph 12. By its opening terms, the paragraph overrides any other provisions of the agreement. Though the intended meaning of the paragraph is less than obvious, the plain language of it retains for the Bureau the practically unlimited right to determine whether the issuance of "the lease" or "a lease" would be in compliance with the laws then governing the Bureau. The determination may be made at any time, apparently with respect to leases in general or a particular lease contemplated.

In this regard, it should be noted that the Director of the Bureau's obligated by the public lands laws to determine whether such a lease as is contemplated with Pittston is consistent with the management standards set forth in those laws. Attorney General's Opinion, September 9, 1976. If in fact the Bureau has not made such

a determination with respect to the lands here in issue, Paragraph 12 must be read as leaving to the Bureau the broad discretion to decide, at some point in the future, whether a lease contemplated by this agreement is consistent with the governing standards, and thus whether it is lawful.

In any case, the consequences of a determination of illegality is not merely a temporary impediment to the issuance of a different lease, one which would be legal, but rather it terminates the agreement upon the giving of notice. Paragraph 12 makes Pittston's rights readily defeasible by the other party to the agreement, and thus unenforceable by Pittston. Cf. Corthell v. Summit Threat Co., supra.

The immediate implications of this conclusion are twofold. First, it is abundantly clear from Walsh that an applicant without the requisite title, right or interest has no legal right to have his application considered by an administrative body.* He cannot compel them to act, as he could if title, right or interest made him a proper applicant. This conclusion is the very foundation of the Court's more obvious conclusion that Walsh had no right to invoke the authority of the courts:

> "Thus lacking 'standing' in the first instance to invoke, and have continuingly operative in his behalf, the administrative functioning to which it was calculated that regulatory licenses, permits, or certificates shall be issued, plaintiff must lack 'standing to sue' and call upon a Court to provide indirectly precisely those administrative processes to which he had been validly denied direct and original access. . . ." Walsh, supra at 208

To conclude however that an applicant has no legal right to consideration may not dispose of a second question, whether the Board is precluded from considering an application where title, right or interest has not been sufficiently demonstrated.

---

*The underlying Superior Court decision was found by the Law Court to have been based upon a recognition "that the plaintiff had at least a potential legal entitlement to the license and permission to which plaintiff claimed rights." Walsh, supra at 206 (emphasis by Court). The lower court decision is reversed and the case remanded because the Law Court answers in the negative the question "whether plaintiff had the kind of relationship to [the site under the governing ordinances] to confer status upon the plaintiff as a proper 'applicant' for a license, permit or certificate of occupancy." Walsh, at 207. See also Note 4 at 207. The inescapable conclusion is that without title, right or interest, Walsh had no legal entitlement "to invoke the administrative process."

Neither the Walsh opinion itself nor any of the subsequent Maine cases referring to it addresses this question directly. Walsh makes no clear statement establishing a rule of law that an agency is precluded from acting upon an application gratuitously, that is, when they could not be legally compelled to so act. In the absence of a clear statement about the discretion or lack of discretion that an agency has in these circumstances, we can not advise that the ordinary discretion of an agency to determine how best to allocate its limited resources is lacking.

The Board may have exercised that discretion in enacting its Processing Regulation 1.4(c).* Interpretation of the terms of the regulation is the proper province of the Board in the first instance. Judicial review of the Board's interpretation for consistency with the statutes and other governing law may of course ultimately be had. Department of Mental Health and Corrections v. Bowman, 308 A.2d 586 (Me.1973).

What is clear is that an agency could not issue a license or permit prior to a demonstration by the applicant that he holds title, right or interest sufficient under Walsh in the subject property. To do so would be to deprive Walsh of any legal effect.

JOSEPH E. BRENNAN
Attorney General

JEB/kp

---

* 1.4 Application Requirements

(c) The Department will consider an application only where the applicant has demonstrated that he/she has sufficient title, right and interest in all of the property which is proposed for development or use. The Department will consider that an applicant has demonstrated title, right and interest prima facie when an applicant presents a written statement that he/she owns or has binding options to purchase all of the property proposed for development or use and (1) where the property is owned, book and page number references to the applicant's deeds to the property (2) where the property is under option, copies of the option agreements, which agreements shall contain terms deemed sufficient by the Board to establish future title. Where the applicant's title, right and interest is based on a lease, such lease must be of sufficient duration, as determined by the Board, to permit construction and reasonable use of the development.