Title, Right & Interest in Property held in Common

STATE OF MAINE

Inter-Departmental Memorandum Date May 18. 1977

To Thomas Radsky Dept. Land Use Regulation Commission

From Jeff Pidot, Assistant Dept. Attorney General

Subject Title, Right or Interest in Real Property Held in Common

You have asked for an informal opinion on the question of whether an owner of a common and undivided interest in land has sufficient title, right or interest in the same for the purpose of obtaining from LURC a permit to develop all or part of the land held in common. The answer to this question is not susceptible to a simple synopsis, but rather depends upon the particular factual situation involved.

Walsh v. City of Brewer, 315 A.2d 200 (Me. 1974), firmly established in Maine the legal doctrine that, in order to obtain standing before an administrative land use regulation agency for the purpose of obtaining permits or similar approvals, the applicant must, in the ordinary case, demonstrate some legally cognizable interest in the affected real estate which allows such applicant "lawful power to use it, or control its use".

Where the applicant is a tenant in common, or co-owner, with others of the affected real estate, the applicable question becomes whether he has the legally enforceable rights in or to the land which are sufficient to support the proposed activity. Where a co-tenant obtains the binding written consent of all the other co-tenants to engage in the proposed activity upon the land held in common, the question is eliminated. However, as is the case in the two factual situations you pose, where such consent is lacking, LURC should inquire whether the applicant, acting alone as a mere co-tenant, has the "lawful power to use" the common land as he proposes. Although this inquiry does not require an in depth investigation into the legal property rights of the various interested parties 1/, LURC should, based upon the facts and documentary evidence presented by an applicant, determine whether the applicant has made at least a prima facie showing to support his standing

1/ It is recognized that LURC should not, in making such inquiry, attempt to, or be deemed to, act in a capacity similar to a land claims court which in fact is determining the rights in real estate of the various interested parties. Accordingly, it is inappropriate for any applicant, upon demonstrating to LURC's satisfaction sufficient rights in the land to be issued a permit, to consider such demonstration as confirming or supporting his legal rights as against other interested parties. Assuring that such rights are in fact adequate is, of course, the ultimate responsibility of the applicant.

before the Commission. 2/

In responding to this inquiry, the LURC staff should consider whether the development proposed by the applicant is an activity which exceeds the legal rights of a co-tenant by unlawfully impairing the rights of the other co-tenants to reasonably use the property held in common. Although each tenant in common has an undivided share in the whole of the property and may, to the extent consistent with the rights of others, occupy all or any part thereof, none is entitled, without the agreement of all the others, to appropriate to his sole use the whole or any particular part. 20 Am.Jur. 2d, Cotenacy and Joint Ownership §§33, 34; 86 CJS, Tenancy in Common §25. Thus, a structure erected by one co-tenant on the common land, having the effect of excluding the other co-tenants therefrom, constitutes an unlawful invasion of the others' rights to use the property in common with each other. Byam v. Bickford, 140 Mass. 31, 2 N.E. 687 (1885); See Hutchinson v. Chase, 39 Me. 508 (1885); See also Foisy v. Bishop, 232 A.2d. 797 (Me. 1967).

In Bank of Maine v. Giguere, 309 A.2d. 114 (Me. 1973), the above rule was applied to a case where a co-tenant of a parking lot sought to build on part of the lot a permanent structure for its exclusive use. The Court found that the construction of such building would constitute an unlawful exclusion of the other tenant in common from the affected area:

> "Neither [cotenant] has a right to appropriate any particular portion of the lot for a use which excludes the other from that portion without the other's consent." 309 A.2d at 119.

The Court, in Bank of Maine, went on to express the corollary principle that a co-tenant is entitled, by nature of his legal interest in the land, to temporarily occupy part of the premises held in common where such use is reasonably related to the purpose of the co-tenancy. Thus, each co-tenant of the parking lot was said to be able to make use of the lot by parking thereon even though such use had the practical effect of temporarily excluding the other co-tenant from the particular space so occupied. Therefore,

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2/ Thus, where a landowner submits, as evidence of his interest in the land, a deed the express terms of which prohibit the very land use activity in which he proposes to engage, LURC may properly decline to hear such application since the facts that the owner himself presents clearly demonstrate that he lacks the right to deal with his land in the manner proposed. It is the opinion adopted here that a similar inquiry should be made where the landowner demonstrates rights only as a tenant in common with others, but is acting without satisfactory evidence of their consent.

in each instance, the question becomes whether, under the circumstances, one co-tenant proposes a use of all or any part of the property which results in a permanent or otherwise unreasonable exclusion of the other co-tenants so as to unduly impair or obstruct the latters' exercise of their rights to make use of the common property. See also Hultzen v. Witham, 146 Me. 118, 78 A.2d 342 (1951).

By employing the foregoing principles, LURC may evaluate the facts presented by a particular applicant in order to ascertain whether he demonstrates the necessary title, right or interest in the real estate to carry out the proposed project and thus to have standing before the Commission for purposes of obtaining a permit. However, it is recognized that the inquiry in particular cases may involve subtle and sometimes difficult legal questions. The two cases you pose are useful in demonstrating the application of these tests.

In the case of Gary Young, who proposes construction of a "trap shop" on lands in which he has less than a 1% interest, it is my opinion that the applicant appears not to have title, right or interest sufficient to support his development project. The construction of such a shop, like the construction of the bank facility in the Bank of Maine case, would appear to be an exclusive and permanent appropriation of a part of the commonly held lands by one of the co-tenants. Unless the applicant obtains (and demonstrates to LURC) the binding consent of the other co-tenants, there appears no basis for finding that he possesses a legal right to go forward with his project.

A more complicated case arises with respect to Ronald Forward's application to place a sewage pipeline under a roadway right of way owned and used in common with neighboring lot owners. This fact situation poses two separate questions. First, there is some doubt whether the ground which the pipeline would occupy is in fact part of an easement area belonging to the co-tenants of the right of way or is subject to the fee interests of the owners of the land covered by the right of way. Although the correspondence from Mr. Forward's attorney addresses his rights in the right of way as a co-owner thereof, it is quite possible that the right of way is in fact merely an easement for passage of the co-owners and does not include any rights to place pipes thereunder. If the latter be true, the rights of not only the co-tenants of the right of way

may be involved, but also those of the fee owner(s) of the land involved 3/. Since there are no facts available which would help to answer this legal question, I will not attempt to do so at this time. If Mr. Forward is interested in pursuing his application, it would be incumbent upon him or his attorney to explain exactly who owns what interests in the land involved before a final judgment may be made as to whether Mr. Forward has, or how he may obtain, title, right or interest to allow him to proceed with his development.

Assuming, as Mr. Forward's attorney has in his written submissions, that only the easement owners' rights are involved, the question is again whether Mr. Forward, as a single co-tenant, demonstrates the legal right to effectuate his project. As in the Young case, my opinion, based upon the limited facts available, is that he does not. Mr. Forward proposes a permanent use of part of the common property, which use is for the exclusive benefit of himself as a single co-tenant. His placement of a sewage line in the bed of the roadway prevents all of the co-tenants from using this same space for their joint purposes. Although it is recognized that here the applicant's proposed construction does not cause a significant impairment of the continued use of the roadway by other co-tenants for passage, the fact remains that, in this case like that in Bank of Maine, a single co-tenant proposes a permanent and exclusive use of the property held in common with others without obtaining their consent. 4/ See also Hultzen v. Witham, supra. Although this case is not entirely free from doubt, the more persuasive position appears to be that, even if only the rights of the other owners of the right of way are involved, Mr. Forward, acting alone, does not have adequate title, right or interest to have standing before the Commission for purposes of obtaining a permit.

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3/ If the rights of the fee owner(s) of the ground are involved, it may be necessary for Mr. Forward to obtain an easement from them which would vest in him the right to construct a sewer line in their land.

4/ It is noted, in this regard, that Mr. Forward's attorney appears to concede in his written submission of September 16, 1976 that the other co-tenants may have rights which could be violated were Mr. Forward to proceed with construction without their consent.