Licensing: Compliance with other laws as precondition LD 1062

Administrative Law: Compliance with local law as precondition Re: State approval

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Honorable Barbara M. Trafton
House of Representatives
State House
Augusta, Maine

Re: L.D. 1062, relating to Licensure of Camping Areas and Eating Establishments.

Dear Representative Trafton:

This responds to your request for advice regarding the constitutionality of an amendment proposed to L.D. 1062. The amendment in question, which I understand is both Committee Amendment "B" and House Amendment "A", would, if enacted, read as follows:

> "22 MRSA § 2495, first sentence, as enacted by PL 1975, c. 496, § 3, is repealed and the following enacted in its place:
>
> "The department shall, within 30 days following receipt of application, issue a license to operate any eating establishment, eating and lodging place, lodging place, recreational camp, camping area or mobile home park which is found to comply with this chapter and any rules and regulations adopted by the department and has submitted documented proof of compliance with all local ordinances relating to the operation of the facility for which the license application has been made."

You have questioned constitutionality on the grounds that the local approvals which must be received prior to State action are not limited to public health related matters but may also include zoning and other such matters. You ask whether this would be a violation of the Due Process or Equal Protection Clauses of the Constitution. While the question is not entirely free from doubt, it would be my view that the provision in question would not be violative of the Maine or United States Constitutions.

The Legislature could reasonably conclude that compliance not only with local public health ordinances but also with local zoning and building ordinances was a necessary prerequisite to consideration of a restaurant license for several reasons:

1. The Legislature might reasonably conclude that facilities operated in violation of local zoning or building ordinances might pose a risk that was relevant to the State public health considerations because the facility might be subject to controversy and uncertainty which might detract from the care given public health matters by the operators of the facility.

2. The Legislature might also conclude that local approvals were a necessary pre-condition for State licenses to avoid premature and unnecessary commitments of State resources on matters which a locality could ultimately make a nullity by its refusal to grant required local permits.

Enclosed herewith is an opinion previously issued by this office on a related question. The opinion includes citations to cases which, while not directly on point with the matter at issue here, indicate that such restraint by a governmental agency pending approvals by other governmental agencies has been sustained in some cases.

I hope this information is helpful.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec
Enclosure
cc: Hon. Thomas Perkins
Hon. Harland Goodwin

STATE OF MAINE

Inter-Departmental Memorandum Date April 19, 1974

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

From Donald G. Alexander, Assistant Dept. Attorney General

Subject Relationship of Department of Environmental Protection Approvals to Local Approvals of the Same Activity

Your memorandum of April 4, 1974, contained two questions regarding the relationship of DEP considerations to local land use regulations.

QUESTION:

Can the Board consider applications involving property which has not yet been zoned for its proposed use or which has not yet received the required local subdivision approval?

ANSWER:

Yes.

DISCUSSION:

I could find no case holding that the State agency would not have jurisdiction of a matter simply because local approvals relating to that matter had not been received. In addition, adverse local zoning or other land use regulations do not compromise an owner's title, right or interest in a property as that term is defined in Walsh v. City of Brewer, Me., 315 A.2d 200 (1974), since zoning or other land use regulations in no way compromise a person's capacity to convey the affected property. There are a number of cases which have held that both a city and a state may regulate a particular activity as long as the regulations are not inconsistent. Vela v. People, Colo., 484 P.2d 1204 (1971); Town of Cicero v. Weilander, Ill., 183 N.E.2d 40 (1962); Stary v. City of Brooklyn, Ohio, 114 N.E.2d 633 (1953); McQuillin, Municipal Corporations, 26.23(a). The facts in some of these cases indicate that local and state approvals may have been considered concurrently. Where there is inconsistency, the local regulations will be preempted by state action. Rinzler v. Carson, Fla., 262 So.2d 661 (1972); McQuillin, Municipal Corporations, 15.21.

QUESTION:

Conversely, can the Board adopt a policy that it will not consider applications until required local zoning and subdivision approval has been received?

ANSWER:

The Board may, by regulation, adopt such a policy, and such a policy would be most appropriately applied in cases where an actual change in a zoning ordinance is required before a project can proceed.

AN INFORMAL OPINION

DISCUSSION:

The Maine Supreme Judicial Court has upheld a statutory provision whereby a local approval (in this case for liquor licenses) was required before the state agency would take action, though a local disapproval could be appealed to the state agency on the ground that it was arbitrary and capricious, Glovsky v. State Liquor Commission, 146 Me. 38 (1950). Another court has upheld one local agency's requiring that permits be obtained from other agencies before an approval could be given:

> "We see no reason why compliance with other ordinances of the town and pertinent state laws may not be made a precondition of the issuance or renewal of a license, or part of the regulation of the licensed business." Belleville Chamber of Commerce v. Belleville, N.J., 226 A.2d 23, 27 (1967).

Such a posture would, however, raise the danger of placing an applicant in a chicken-and-egg situation if several approval agencies adopted a similar policy.

Several state and local licenses are required for most developments. These permits must be acquired at varying stages of the development process. To avoid having to distinguish which local permits it determines are preconditions for an application and which are not, the Board may decide that it will consider applications even though a local subdivision permit, zoning variance or other permit may not have been granted. However, the Board may wish to make a distinction where a complete change in a local zoning ordinance is required in order for the project to proceed. The justification for this would be that permits and variances can be obtained within existing state laws and local ordinances, but a change in the zoning ordinance itself involves actual revision of local laws. Were the Board to approve a development which would be prohibited by a local zoning ordinance and for which a variance could not be obtained, it would be approving a development which was illegal at the local level and could not be made legal except by change in the law.

Further, the same policy reasons specified for the Walsh v. Brewer decision would apply in a situation where a zoning ordinance change was required. The Board's action in considering such an application could be rendered a nullity by factors entirely outside the control of the Board, and though it is not the same "right" as discussed in Walsh v. Brewer, certainly the applicant would have a similar lack of "right" to use the land for the desired purpose.

Donald G. Alexander

DONALD G. ALEXANDER
Assistant Attorney General

DGA/ec

AN INFORMAL OPINION