Shoreland Zoning Guidelines changes
re 4813

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To: Rich Rothe, State Planning

From: Cabanne Howard, Assistant Attorney General

Subject: Shoreland Zoning Guidelines

You have asked whether the Board of Environmental Protection (the "Board") and Land Use Regulation Commission (the "Commission"), who jointly administer the Shoreland Zoning Program established by the Shoreland Zoning Act (the "Act"), 12 M.R.S.A. §§4811 et seq., may amend the Shoreland Zoning Guidelines which they were required by the Act to adopt by December 15, 1973. Our answer is that the Board and Commission may alter the guidelines although, since the guidelines themselves have no force of law, any alteration of them would likewise be of no legal effect. Beyond this, you also ask whether the Board and Commission would have power to amend ordinances which they have imposed on certain municipalities, pursuant to Section 4813 of the Act, to bring such ordinances into conformity with the amended guidelines. Our answer to this is that it would not appear illegal for the Board and Commission to so amend ordinances which they themselves have imposed. Such amendment must be accomplished, however, in conformity with the procedures of the Administrative Procedure Act, 5 M.R.S.A. §§8001 et seq.

Under the Act, which was originally passed in 1971, and amended in 1973, Laws of Maine of 1971, ch. 535 (1971), Laws of Maine of 1973, ch. 564 (1973), each municipality of the State was to adopt an ordinance zoning all upland within 250 feet of any body of water by July 1, 1974. To assist this endeavor, the Board and Commission were directed to prepare, by December 15, 1973, guidelines to indicate the minimum degree to which each municipal ordinance would be required to protect the shoreland area. If a municipality then failed to adopt an ordinance at all or adopted one which was "lax and permissive," in that, presumably, it failed to meet the minimum standards of the guidelines, the Board and Commission were authorized to impose a "suitable ordinance" on it. 12 M.R.S.A. §4813. Therefore, the

guidelines themselves are of no legal force. They were intended merely to "guide" muncipalities. There is no legal reason, therefore, why the Board and Commission might not vary their collective guidance after a number of years of experience with the program, by adopting amended guidelines.

You also ask, however, whether the Board and Commission may take the further step and amend particular ordinances which they have imposed on certain municipalities to bring them into conformity with the amended guidelines. There are apparently one hundred and eight ordinances in this category, and you indicate that in each ordinance, the Board and Commission has indicated to the municipality involved that the imposed ordinance may only be amended by the Board and Commission and not by the municipality. The statute itself is silent on this question, providing only that once an ordinance has been imposed, it shall be "administered and enforced" by the municipality, saying nothing about how it might be amended. We would think, however, that there is at least arguable support for the assertion by the Board and Commission that only they may amend an imposed ordinance. The Legislature might well be thought to have intended that a municipality not have the power to amend a shoreland zoning ordinance until it had shown itself capable of responsibly wielding this legislative power by passing a complete ordinance which meets the minimum standards established by the two state agencies. Accordingly, we cannot say that the agencies' position is clearly contrary to any legislative intent. In saying this, however, we do not wish to imply that we would reach the same result in the case of a proposed amendment to a non-imposed ordinance, but would suggest that the Board and Commission reinquire if they should contemplate attempting to amend ordinances in this category. In the meantime, we would further suggest that if extensive amendments of any kind are contemplated, the Board and Commission might consider the possibility of seeking an amendment to the Act in which the Legislature might express its intention clearly on this subject.

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In preparing this response to your request, one other question arose which we feel should be brought to the attention of the Board and Commission. On July 1, 1978, the Maine Administrative Procedure Act, 5 M.R.S.A. §§8001 et seq., went into effect, setting forth standardized procedures for the adoption of rules by state agencies. It is the view of our office that any ordinance or amended ordinance which the Board and Commission intends to impose on a municipality under the Act after that date would be a "rule" within the meaning of the APA. 5 M.R.S.A. §8002(9)(A). Consequently, the agencies must follow the minimum requirements for rulemaking set forth in Subchapter II of the APA, 5 M.R.S.A. §§8051-58. Since the guidelines have no force of law, however, their amendment need not be accomplished in conformity with the Act.

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