79-101

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May 18, 1979

Honorable Gerard P. Conley
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Conley:

You have inquired as to the authority of a municipality to enact ordinances regulating certain aspects of the operation of abortion clinics located within the municipality. You have stated the subject matter of the ordinances to be

1) A requirement that a parent be notified prior to an abortion on a minor.

2) A requirement that fetal remains be disposed of in a humane way.

3) A requirement that a spouse be notified prior to an abortion taking place.

4) A requirement that counselling be done by a duly qualified person.

5) A requirement that a woman give informed consent prior to an abortion.

You have indicated a need for a prompt and brief response. As we understand your question, your concern is limited to the issue of whether a municipality may, under its home rule power, legislate in the areas covered by the proposed ordinances. Accordingly, this opinion will be confined to the question of municipal authority and will not address other, constitutional issues related to abortion. These latter questions, if they are to be pursued, are more properly addressed to municipal counsel.

The powers of a municipality, including its power to enact ordinances, are such as are delegated to it by the constitution or the Legislature. In Maine, one constitutional and two statutory provisions are relevant to a determination of the scope of the ordinance power delegated to municipalities. Art. VIII, pt. 2, § 1, Municipal Home Rule, approved at a special election in November, 1969, provides:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

Title 30 M.R.S.A. § 1917, enacted as part of c. 201-A "to implement the home rule powers granted to municipalities by the Constitution. . .," provides:

> Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law or charter. No change in the composition, mode of election or terms of office of the legislative body, the mayor or the manager of any municipality may be accomplished by bylaw or ordinance.

Title 30 § 2151, which pre-dates the home rule provisions of the Constitution and statutes, provides in relevant part:

> § 2151. Police power ordinances
>
> A municipality may enact police power ordinances for the following purposes:
>
> 1. General.
>
> A. Promoting the general welfare; preventing disease and promoting health; providing for the public safety.

The Maine Supreme Court has never construed the constitutional and statutory home rule provisions, nor has it ever construed § 2151 in the light of the later home rule enactments to resolve the rather obvious problems of the interaction of the three. Thus, there is no ready answer to your questions. The Court's view prior to, or apart from, the home rule provisions, is that:

> A municipality in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the Legislature or as are necessarily implied from those expressly so conferred. Town of Windham v. LaPointe, 308 A.2d 286, 290 (1973)1/

The addition of art. VIII, pt. 2, § 1 to the Constitution clearly appears to alter this rule, in that under the article municipalities derive at least some authority directly from the Constitution. Further, § 1917, enacted in the Legislature's view to carry out the directive of art. VIII, pt. 2, § 1 to "prescribe the procedure by which the municipality may so act," appears to fundamentally alter the nature of municipal authority. Whereas municipal authority previously depended on specifically expressed or necessarily implied grants of particular or general powers, § 1917 appears to give municipalities full power to enact ordinances except as limited by the terms of the section.2/ As we interpret § 1917, the language

> "Any municipality may, by the adoption, amendment or repeal of ordinances or by-laws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication."

constitutes a general grant of power to enact ordinances and general limitations thereon, and the language

> "Any municipality may, by the adoption, amendment or repeal of ordinances. . . exercise any power or function granted to the municipality by the Constitution, general law or charter

is an additional grant of authority to carry out "power(s) or function(s)" established in the Constitution, general law or charter.

1/ This case was decided several years after the enactment of the home rule provisions, but contains no mention of them.

2/ We do not mean to imply that the limits set out in § 1917 are clear or simple, but only to characterize the apparent difference in municipal authority prior to and after the enactment of this statute.

Assuming this is a correct statement of the nature of municipal ordinance power under § 1917, the next issue is whether any limitations on that power operate to prohibit municipal ordinances of the kind in question.

Putting aside the question of whether any legislative body may enact such regulations consistent with constitutional rights of privacy, it would appear that the Legislature has the "power to confer upon" a municipality the power to enact such ordinances, 3/ if that legislative power is not "denied either expressly or by clear implication." Such "denials" as are here important may exist in either constitutional provisions or in statutory law. 4/ Looking first to art. VIII, pt. 2, § 1, and assuming without deciding that the limitations therein to "local and municipal" matters with respect to municipal charters is applicable to ordinance powers under § 1917, the question becomes whether the potential ordinances in question deal with "local and municipal" matters.

Under present Maine case law, admittedly applicable only by analogy, one criterion for determining whether a matter is of "state-wide" as opposed to "local" concern is the existence of a comprehensive statutory scheme of general application on the same subject, the effectiveness or purpose of which would be undercut by local attempts to act in the same area. Such a scheme is deemed to reflect a legislative intent to preempt the area for state control. Lewiston Firefighters v. Lewiston, 354 A.2d 155, 162 (Me., 1976). While there are general laws pertaining to abortion presently in force, 22 M.R.S.A. §§ 1591-1596, they cover particular aspects of the subject and in our opinion do not comprise a comprehensive statutory scheme indicating an intention of state preemption, the operation of which would be interfered with by such ordinances as you describe.

3/ Assuming that § 2151 has not been impliedly repealed by the enactment of home rule, it specified at least some of the areas in which municipalities may enact ordinances. Section (1)(A), quoted supra, authorizes ordinances which promote the general welfare and would seem to authorize ordinances of the kind in question. Thus the Legislature may have in fact empowered municipalities to enact such ordinances. In addition, the provision of the home rule enactments which calls for their liberal construction, 30 M.R.S.A. § 1920, creates a kind of presumption in favor of the existence of such municipal powers and the validity of their exercise.

4/ Municipal powers are entirely created by statute or Constitution, having no source in common law. Thus the common law is in effect a general denial of such powers, negated by specific grants of power to municipalities and by the grant of "home rule" status and its accompanying powers.

It is unclear whether mere entry into a particular field of legislation is sufficient to indicate a legislative intention to occupy that field to the exclusion of municipal action. It is our view, however, that the constitutional base of home rule powers, the presumption of the validity of those powers and their exercise, and the language of § 1917 which requires that ordinance power in particular must be denied "either expressly or by clear implication" (emphasis supplied) appear to indicate that more than the existence of a statute is required to negate municipal power to enact nonconflicting ordinances. We emphasize that the issues inherent in the co-existence of similar statutes and ordinances under home rule have not been addressed by the Maine Court. While decisions exist in other jurisdictions which address at least some of these issues, time strictures prevent extensive research and analysis; in any event, we note that such decisions depend heavily on the particular language of the constitutional and statutory provisions involved.

Our guarded conclusion is that municipal authority to enact ordinances appears very broad under § 1917 and that the limitations in that section do not presently operate to preclude ordinances of the kind in question. The absence of Maine case law on the subject of home rule prevents greater confidence in this conclusion, but until the Court indicates that § 1917 should be read narrowly, it is our view that municipalities may rely on the breadth of language employed in the section.

We note that two other factors necessarily must weigh heavily in any municipal decision to take action in this area. One factor is the current activity of the state Legislature in the general area of abortion, and in particular on two of the topics you have specified.[5/] The other factor is the consistency of at least some of these enactments, whether instituted at the state or the municipal level, with rights of privacy under other constitutional provisions.[6/]

5/ L.D. 604 deals with notification of a minor's parent or guardian. L.D. 1482 addresses the subject of informed consent. Three other abortion bills are pending at the time of writing. (L.D.'s 676, 1410, 1612). Enactment of legislation might change the result of this opinion with respect to some or all of the ordinances.

6/ With respect to issues of parental and spousal notification and informed consent, see Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Belotti v. Baird, 428 U.S. 132 (1976); Belotti v. Baird, 450 F. Supp. 979 (U.S.D.C. Mass., 1978), prob. juris. noted 47 U.S.L.W. 3301, argued February 27, 1979 (47 U.S.L.W. 3585).

It is our hope that this opinion has been helpful to you. If we can be of further assistance, please call on us.

Very truly yours,

RICHARD S. COHEN
Attorney General

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