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May 28, 1980

Commissioner Spencer Apollonio
Department of Marine Resources
State House
Hallowell Annex
Augusta, Maine 04333

Dear Commissioner Apollonio:

You have inquired as to the validity of the recently enacted West Bath ordinance requiring municipal licensing of marine worm diggers in light of the requirement of 12 M.R.S.A. § 6751 that all worm diggers possess state licenses issued by the Commissioner of Marine Resources. After review of the West Bath ordinance and relevant constitutional provisions, statutes and case law, this Office concludes that the West Bath ordinance is invalid, as it attempts to regulate a subject for which exclusive authority has been vested by the Legislature in the Commissioner.

West Bath's purported authority to pass a marine worm digging ordinance would be derived from the 1969 Municipal Home Rule Amendment to the Maine Constitution (Art. VIII, pt. 2, § 1) or the implementing statute (30 M.R.S.A. § 1917).[1/] The latter provides in relevant part:

> 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.

1/ As indicated in a recent opinion of the Maine Supreme Judicial Court, these provisions have "wrought" "many, and major, transformations . . . in the legal framework which has governed, for so long, the interrelations of State and municipal authority." Clardy v. Town of Livermore, 402 A.2d 779, 781 (Me. 1979). The result of this transformation is that before Home Rule municipalities could enact ordinances only if specifically authorized to do so by the Legislature whereas now, they may enact ordinances only if not prohibited by the Legislature.

The issue, therefore, is whether the Legislature has "expressly, or by clear implication," denied to municipalities the power to require marine worm digging licenses issued by the municipality.

The only state statute addressing the subject is 12 M.R.S.A. § 6751, which provides for State licensing of marine worm digging and describes the limits on worm digging activities. Specifically, that section provided in relevant part:

> 1. License required. It shall be unlawful for any person to engage in the activities authorized by this license under this section without a current marine worm digger's license or other license issued under this Part authorizing the activities.
>
> 2. Licensed activity. The holder of a marine worm digger's license may fish for or take marine worms or possess, ship, transport or sell within the State worms he has taken.

Section 6751 does not expressly address the question of municipal power to regulate marine worm digging. Thus, the question is whether the section denies the municipalities that power "by clear implication."

The Maine Supreme Judicial Court has had little opportunity to assist in this inquiry, in that only one case requiring an interpretation of 30 M.R.S.A. § 1917 has come before it. In Begin v. Inhabitants of Town of Sabattus, Me., 409 A.2d 1269, 1274-75 (1979), the Court noted the "very broad Home Rule powers" granted to municipalities and held that legislative repeal of a provision requiring municipalities to pass certain types of "slow growth" ordinances did not by itself clearly imply an intent to deny municipalities the power to pass such regulations. In arriving at this conclusion, the Law Court pointed out that there was no legislative history supporting denial "by clear implication."

Thus, in order to determine whether the licensing of marine worm activities has been denied to municipalities "by clear implication," a review of the legislative history surrounding 12 M.R.S.A. § 6751 must be undertaken. The legislative intent underlying the predecessor statutes will reveal whether the Legislature meant marine worm regulation to be the exclusive responsibility of the State.

Historically, the first approach to marine worm regulation adopted by the Legislature was to authorize certain towns to license marine worm digging within their boundaries by Private and Special Law. By 1945, ten towns had been empowered to license

municipal marine worm digging, which powers were invariably granted in conjunction with licensing powers over shellfish harvesting within the municipality.2/ Usually, this grant of licensing powers was accompanied by the restriction that municipal licenses could be granted only to residents of that municipality, thus excluding all nonresident commercial and recreational marine worm diggers from harvesting privileges within that town. In 1945, however, the Legislature varied this scheme by establishing concurrent state licensing authority. P.L. 1945, c. 200, "An Act Relating to The Digging or Taking of Clam-Worms," codified as R.S. ch. 34, § 80-A, provided, inter alia, "(i)n addition to any other provision of this chapter, no person shall dig or take clam-worms for resale unless a license has been granted to him by the commissioner of sea and shore fisheries."

This concurrent licensing approach persisted until 1955, when P.L. 1955, c. 110, "An Act Regulating the Taking of Marine Worms" was enacted. The Act provided:

> Sec. I. R.S., C. 38 § 125-A, additional. Chapter 38 of the revised statutes is hereby amended by adding thereto a new section to be numbered 125-A, to read as follows:
>
> 'Sec. 125-A. Marine worms, taking. It shall be lawful for any person, firm or corporation, who legally possesses a commercial shellfish and marine worm license, to dig, take, buy or sell marine worms, clamworms, bloodworms, and sandworms in any tidewater area of the State, except those areas which are closed to all digging for the conservation of marine worms by the Department.
>
> No area shall be closed for the purpose of conservation to the digging or taking of marine worms, clam-worms, bloodworms and sandworms except as provided in Section 5.'
>
> Sec. II. Amendatory clause. All acts or parts of acts inconsistent herewith are hereby repealed or amended to conform thereto.

2/ Scarboro, R.S. 1944, Vol. I, ch. 34, § 56; Kennebunkport, R.S. 1944, Vol. I, ch. 34, § 60; Kennebunk, R.S. 1944, Vol. I, ch. 34, § 64; Cape Elizabeth, R.S. 1944, Vol. I, ch. 34, § 68; Yarmouth, R.S. 1944, Vol. I, ch. 34, § 71; North Yarmouth, ibid.; Falmouth, ibid.; Cumberland, ibid.; Georgetown, R.S. 1944, Vol. I, ch. 34, § 73; Woolwich, R.S. 1944, Vol. I, ch. 34, § 77.

Although there is no expression of legislative intent in the Legislative Record and no Statement of Fact following the Legislative Document[3] several factors reveal that the Act was designed to preempt municipal licensing activities in the marine worm industry.

First, in light of the prior dual State and municipal responsibility of marine worm licensing, the provision that the holder of a commercial shellfish and marine worm license could dig in any tidewater area of the State, except those areas closed for conservation by the Department of Sea and Shore Fisheries, clearly indicates that the State would henceforth be the sole licensing authority. In addition, Section II, the Amendatory Clause, provided for automatic repeal or amendment of inconsistent acts. Thus, the Private and Special Laws providing for municipal licensing of marine worm diggers must be deemed to have been effectively repealed by P.L. 1955, c. 110, thereby eliminating municipal licensing of marine worm digging after that date.[4]

Since 1955, the language of P.L. 1955, c. 110, was changed several times by minor amendments or statutory recodification.[5] In 1964, the statute, now codified at 12 M.R.S.A. § 4301(7), defined the marine worm licensee's authority to take worms in terms substantially similar to those of P.L. 1955, c. 110:

> The holder of a current commercial shellfish and marine worm license may dig or take shellfish, marine worms, clamworms, bloodworms or sandworms in any of the tidal waters or flats of the State, except in those areas which are closed to the digging or taking of same by regulation passed under sections 3503 or 3504, and except in those areas under municipal shellfish cultivation authorized in section 4303 . . . .

The language of § 4301(7), coupled with the absence of any statutory authority for municipalities to issue worm digging licenses, indicates the Legislature's intent to continue exclusive jurisdiction in the State. That intent becomes even clearer when compared to the Legislature's treatment of shellfish, for which there was a separate statute authorizing municipal regulation.

3/ Legislative Document 289, 97th Maine Legislature (1955).

4/ In fact, by 1959, all the Private and Special Laws authorizing municipal regulation, supra note 2, were either repealed or amended to delete that authorization. See R.S. 1954, ch. 38, §§ 53 et seq.; P.L. 1959, c. 331; P. & S.L. 1959, c. 154 and c. 155. By contrast, the municipalities retained their specific authority to license shellfish harvesting after that date. Id.

5/ P.L. 1957, c. 30, § 12; P.L. 1959, c. 331, § 1 (recodified to become 37-A M.R.S.A. § 61); P.L. 1963, c. 75, § 1, c. 277, § 4; P.L. 1965, c. 59, § 1; P.L. 1977, c. 661, § 5, c. 713, § 8.

However, P.L. 1965, c. 59 separated the marine worm and shellfish provisions of 12 M.R.S.A. § 4301, and created a separate set of provisions relating to marine worms in 12 M.R.S.A. §§ 4301-A - 4301-C. The licensing statute, § 4301-A, was somewhat abbreviated:

> 2. The license, designated as a marine worm digger's license entitles the holder to dig or take from the shores, flats or waters of the State any amount of marine worms where it is otherwise lawful to do so. . . .

In light of the history of the statute, we do not read the phrase "where it is otherwise lawful to do so" as meaning anything other than a shorthand version of the 1964 provisions limiting the scope of the marine worm digging license to areas other than those closed for conservation purposes by the Department of Marine Resources or areas reserved for municipal shellfish cultivation. Thus, we do not believe that the 1965 version indicates any intent to once again permit municipal licensing of marine worm activities.6/

The relevant provisions of 12 M.R.S.A. § 4301-A remained unchanged until the recodification of Title 12 in 1977. P.L. 1977, c. 661 repealed and replaced 12 M.R.S.A. §§ 4301-A - 4301-C with the present statutes controlling marine worm digging activities: 12 M.R.S.A. §§ 6751, 6752, 6771, 6772, 6791. As indicated above, the licensing statute, 12 M.R.S.A. § 6751, describes the activity authorized by the marine worm digger's license:

> The holder of a marine worm digger's license may fish for or take marine worms or possess, ship, transport or sell within the State worms he has taken.

Thus, these provisions contain a general authorization without reference to the limitations of prior law. Article 2 of Subchapter III, entitled "Limits on Fishing and Inspection" lists only one limit on the otherwise unrestricted digging authorization; 12 M.R.S.A. § 6671 provides that marine worms must be taken by hand-powered devices or instruments. Although the restrictions previously imposed on marine worm digging were partially deleted, in a minor modification to the statute, there is no indication that the Legislature intended to make major modifications in the scheme of marine worm industry regulation. The 1978 Legislative Record of the House of Representatives discussion of the recodification bill makes clear that no such major modification was intended. As indicated by Representative Greenlaw:

6/ Neither the Legislative Record of 1965 nor the Legislative Document (L.D. 1965, No. 370) provide any indication of legislative intent.

> The bill before the House today for final enactment is a complete revision of the statutes relating to Marine Resources. I have long believed it is a mistake for legislation of this magnitude and importance to be enacted without some debate or some statement in the record for future legislatures, the courts and, most importantly the citizens of this State to make reference to ---
>
> The intent was not to substantially change the content to the statutes, and although there have been some minor changes made, we believe that members of the fishing industry are aware of the changes we have made.
>
> 1978 Maine Legislative Record, 548 (1977)

Senator Chapman of the Marine Resources Committee also emphasized the lack of substantive changes in the marine resource law revision during Senate debate:

> --- I believe that I can fairly say that it is a good restatement of present law with changes to put a lot of things in more logical form, conciseness, makes uniform a lot of terms and definitions.
>
> What changes are incorporated are by and large non-controversial..
>
> 1978 Maine Legislative Record, 505 (1977)

Thus, the legislative record reveals no intent to alter the exclusive State licensing scheme in the marine worm industry.

We therefore conclude that marine worm regulation authority was expressly retracted from municipalities in 1955, before Home Rule, and there is no indication of any subsequent legislative intent to restore that authority. To the contrary, the language and history of 12 M.R.S.A. § 6751 reveal an intent to vest in the State the exclusive authority to license marine worm digging, and thus, the

section clearly implies the concomitant intent to deny that power to municipalities. For that reason, it is our opinion that the West Bath ordinance is invalid.

I hope this information is helpful. Please feel free to call on me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:mfe