

# MAINE STATE LEGISLATURE

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JAMES E. TIERNEY  
ATTORNEY GENERAL



STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

April 23, 1981

Richard Rothe  
Shoreland Zoning Coordinator  
State Planning Office  
Augusta, Maine 04333

Dear Mr. Rothe:

You have inquired on behalf of the State Planning Office as to whether the land use ordinance of the Town of China conflicts with State law. In particular, you have asked whether planning board members may be elected, and whether the power to grant variances must be exclusively vested in a board of appeals. For the reasons which follow, we conclude that planning board members may be elected, and that only a board of appeals may grant variances.

The Town of China has adopted a zoning ordinance which establishes a Planning Board whose members are elected, with the authority, *inter alia*, to grant variances. Land Use Ordinance of China, §§ 2.1(B), 2.4(B). The ordinance further provides for appeal of the Planning Board's variance decisions to a Board of Appeals whose members are appointed. *Id.*, §§ 2.1(C), 2.4(C). The constitutional authority for China's ordinance, as recited in its initial section, is the town's home rule powers, which were granted to it by Article VIII-A of the Maine Constitution. Under Home Rule, a municipality may adopt an ordinance on any subject constitutionally within the power of government generally which is not denied to it "expressly or by clear implication" by the Legislature. 30 M.R.S.A. § 1917. Thus, the question presented is whether the Legislature has enacted any statute prohibiting planning boards from being elected or prohibiting planning boards from issuing variances.

At the time of the enactment of Home Rule, the Legislature had provided that the planning board shall consist of appointments made by municipal officers. 30 M.R.S.A. § 4952, originally enacted as Revised Statutes of 1954, c. 90-A, § 61 by P.L. 1957, c. 405, § 1. In 1971 however, this provision was repealed, P.L. 1971, c. 455, § 3, and the

Richard Rothe

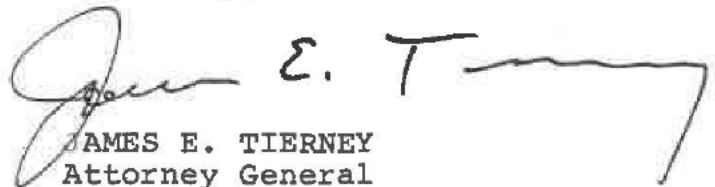
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statute governing municipal land use regulation is now silent as to whether the members of a planning board are to be appointed or elected. 30 M.R.S.A. §§ 4961 et seq. It thus appears that the Legislature, far from prohibiting the elections of planning board members, has tacitly sanctioned such a method of selection.

On the second question, the Legislature has provided that "a board of appeals is established in any municipality which adopts a zoning ordinance." 30 M.R.S.A. § 4963(1). The Legislature has therefore actually established a board of appeals, rather than merely authorizing a municipality to establish one. This unusually strong mandate evinces an intent that such a board must be established in order to deal with certain zoning matters. The Legislature has vested in these boards of appeal the authority to grant variances under certain strict conditions. 30 M.R.S.A. § 4963(3). These conditions reflect the apparent intent of the Legislature that limitations be imposed on granting exceptions to a general zoning scheme. These restrictions are consistent with the Legislature's decision not to vest the power to grant variances in any other administrative bodies. To conclude otherwise would appear to defeat the Legislature's evident intention to control how and when variances may be granted. Thus, we are obliged to conclude that the Legislature has, by clear implication, prohibited municipalities from vesting this authority in administrative bodies other than boards of appeal. As a result, those provisions of the zoning ordinance of the Town of China which permit the Town's planning board to grant variances are void.

I hope this answers your questions. Please feel free to re-inquire if you need further assistance.

Sincerely,

  
JAMES E. TIERNEY  
Attorney General

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