83-35

JAMES E. TIERNEY
ATTORNEY GENERAL

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

July 26, 1983

Leighton Cooney, Director
Bureau of Public Improvements
State House Station No. 77
Augusta, Maine 04333

Dear Mr. Cooney:

Your office has requested the Opinion of this Department as to whether the State of Maine is required by law to comply with municipal ordinances governing the construction of buildings. For the reasons which follow, it is the Opinion of this Department that, although cooperation is to be encouraged between the State and its municipalities as to the manner of construction of state buildings, compliance with local building ordinances is not legally required for such buildings.

The Bureau of Public Improvements is charged by statute with the responsibility for supervising the construction, maintenance, and operation of all buildings owned or leased by the State of Maine. 5 M.R.S.A. § 1742. More particularly, the Bureau is authorized to adopt one of five building codes, which code, when adopted, shall govern the construction or alteration of any State-owned or leased building. 5 M.R.S.A. § 1742(6-A). It is the understanding of this Department that the Bureau has adopted the Code of the Building Officials and Code Administrators (the "BOCA" Code). Thus, the Legislature and Bureau have provided a scheme to insure that State-owned or leased buildings are properly constructed.

The authority of municipalities to regulate the construction of buildings derived, prior to 1970, from 30 M.R.S.A. § 2151(4)(A), which authorized them generally to regulate the design and construction of new buildings and

alterations of existing buildings. The question of whether an ordinance enacted pursuant to such authorizing legislation would apply to State buildings has not arisen in the courts in Maine, but has recently been discussed by the Supreme Court of Kentucky in City of Bowling Green v. T & E Electrical Contractors, 602 S.W.2d 434 (Ky. 1980). In that case, the court stated, quoting an earlier Kentucky decision, that since municipalities are creatures of state government, "the state, when creating municipal governments, does not cede to them any control over the state's property situated within them." Id. at 435. Thus, in order for a municipality to assert such control, it must show that the power to do so has been expressly delegated to it by the State Legislature. The Kentucky Court further held that such a delegation will not be implied from a statute generally delegating authority to municipalities to regulate building, such as 30 M.R.S.A. § 2151(4)(A); the Legislature must specifically delegate such power. Thus, prior to 1970, it appears quite clear that the municipalities in Maine had no authority to regulate the construction of State buildings.

In that year, however, the Legislature, acting pursuant to a recently enacted constitutional amendment, Me. Const., art. VIII, pt. 2, § 1, wrought a major revolution in State-local relations by enacting a series of statutes granting so-called "home rule" powers to the municipalities. Prominent among these was 30 M.R.S.A. § 1917, which provided that "[a]ny municipality may, by the adoption . . . of ordinances . . . exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication. . . ." The question thus arises as to whether Section 1917 provides the necessary authority to a municipality to regulate the construction of State buildings, or whether local regulation is denied "expressly or by clear implications" by 5 M.R.S.A. § 1742. Compare Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153, 159-60 (Me. 1983); James v. Inhabitants of West Bath, 437 A.2d 863, 865-66 (Me. 1981); Schwanda v. Bonney, 418 A.2d 163 (Me. 1980) (municipal ordinance preempted); with Begin v. Inhabitants of Sabattus, 409 A.2d 1269, 1274-75 (Me. 1979) (municipal ordinance not preempted).

This question has also not been addressed by the courts in Maine, but it was the subject of a recent extensive opinion of the Supreme Court of Kansas, a state with a strong home-rule constitutional structure similar to that in Maine. Compare Kansas Constitution Art. 12, § 5 with 30 M.R.S.A. § 1917. In State ex rel. Schneider v. City of Kansas City, 612 P.2d 578, (Kan. 1980), the Court held, among other things, that even the

granting of strong home-rule powers to the municipalities of the state will not subject the state itself to the exercise of those powers, particularly when the state legislature has made specific provision for the regulation of the state activity. Thus, since the Kansas Legislature, like the Maine Legislature, had adopted a statutory scheme for the regulation of the construction, maintenance and operation of State buildings, the municipalities of the state were found not to have the authority, pursuant to their home-rule powers, to regulate in the same area.

In other jurisdictions, no case can be found in which a municipal building code was held on any theory to apply to a state building. See, e.g., Caeser v. State, 610 P.2d 517, 520-21 (Idaho 1980); Paulus v. City of St. Louis, 446 S.W.2d 144, 150-52 (Mo. 1969); Board of Regents v. City of Tempe, 356 P.2d 339 (Ariz. 1960); Hall v. City of Taft, 302 P.2d 574, 579-80 (Cal. 1956); City of Charleston v. Southeastern Construction Co., 64 S.E.2d 676 (W. Va. 1951). See generally Note: Governmental Immunity from Local Zoning Ordinances, 84 Harv. L. Rev. 869 (1971). It thus appears that, regardless of whether the municipalities would assert regulatory authority over the construction of State buildings pursuant to 30 M.R.S.A. § 2151(4)(A) or 30 M.R.S.A. § 1917, the State would be found not to be subject to such regulation, particularly in view of its having made specific provision for the regulation of the construction, maintenance or alteration of State buildings in 5 M.R.S.A. § 1742.

In rendering this opinion, this Department does not mean to encourage the Bureau of Public Improvements to ignore local officials in planning the construction, maintenance or alteration of state buildings. Rather, it is to be hoped that the Bureau will follow a policy, similar to that employed by the federal government with regard to compliance with state law as to federal buildings, of soliciting local opinion as to its activities and complying therewith to the maximum extent possible.

I hope this answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec