

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 29, 1988

Representative John M. Nutting
Maine House of Representatives
State House
Augusta, ME 04333

Dear Representative Nutting:

You have inquired whether there is any constitutional impediment to the enactment by the Legislature of a new draft of Legislative Document 1746, "AN ACT to Preserve Agriculture in Areas of Adjacent Land Development," of which you are a sponsor. A copy of the draft is attached hereto. For the reasons which follow, it is the opinion of this Department that this legislation is not likely to be found unconstitutional by the courts.

L.D. 1746 is intended to assist in the preservation of agricultural production in Maine by establishing a 150 foot setback requirement, subject to certain exceptions, around qualifying farmland on which agricultural chemicals are being used. Land is qualified for this treatment under criteria set out in the bill and pursuant to a procedure of registration. However, because the legislation would place some restrictions on the use of abutting land within the setback area, a question has arisen of whether it is constitutional.

Generally, the constitutionality of governmental restrictions on the uses to which land can be put is analyzed by the courts under the due process clauses of the Fourteenth

Amendment to the United States Constitution and Article I, section 6-A of the Maine Constitution in terms of whether the police power supporting such regulation has been validly employed.^{1/} The test by which such regulation is measured was set forth by the United States Supreme Court in the leading case on the constitutionality of setback restrictions, Gorieb v. Fox, 274 U.S. 603 (1927). There, the court stated that regulations which require a lot owner to leave open areas at the sides and rear of his building or require the building to be set at a reasonable distance from the street are not unconstitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Id. at 610, quoting Euclid v. Ambler Co., 272 U.S. 365, 395 (1926).

The essential question raised by your inquiry, therefore, is whether L.D. 1746 bears a substantial relation to the public health, safety and general welfare. As set forth in its Emergency Preamble and Statement of Fact, the bill seeks to promote agricultural production by preserving farmland, as well as to protect the public health by causing incompatible land

^{1/} Another possible analytical approach is to apply the taking clauses of the Fifth Amendment of the United States Constitution and Article I of Section 21 of the Maine Constitution. These clauses require that if the government regulates land use, (1) it must compensate owners if the regulation renders the property substantially useless, and (2) the regulation must be for a valid public purpose. Here, the restrictions imposed by the proposed legislation would not seem to diminish the value of the abutting land sufficiently to constitute a "taking" within the meaning of either clause, see Hall v. Board of Environmental Protection, 528 A.2d 453 (Me. 1987); Seven Island Land Company v. Maine Land Use Regulation Commission, 450 A.2d 475, 482-83 (Me. 1982). Nonetheless, it would appear that the "public use" requirement of the clauses must be satisfied. Nollan v. California Coastal Comm'n, ___ U.S. ___, ___, 107 S.Ct. 3141, 3146 (1987) quoting Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978) that it is implicit in Goldblatt v. Hempstead, 396 U.S. 590 (1964) that a use restriction, though not rendering the property valueless, may nevertheless be invalid if not reasonably necessary to the effectuation of a substantial government purpose. In any event, it does not appear to make much difference which clause is invoked, as the United States Supreme Court has stated that the "public use" requirement is coterminous with the scope of the sovereign's police power. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984).

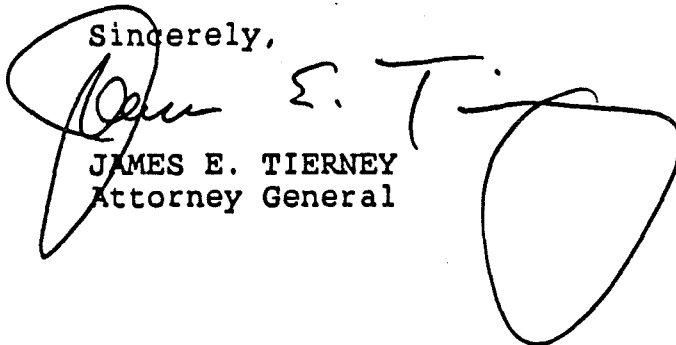
uses to be conducted at a distance from one another. Thus, the legislation seeks to assure full utilization of a limited resource.

The usual governmental purposes supporting setback restrictions, such as those required by the proposed legislation, are that they are necessary to insure adequate light and air for the property in question and to aid in controlling the spread of fire. Gorieb v. Fox, 274 U.S. at 608. In this case, however, the governmental objective is different: the promotion of agricultural production through the preservation of farmland. Generally, this purpose has been found to be a valid governmental objective for purposes of the exercise of the police power. 2 R. Anderson, American Law of Zoning, § 9.46 at 245-46 (3d ed. 1986). See also Common Cause v. State, 455 A.2d 1 (Me. 1983) (economic development a valid public purpose under Article IV, part 3, section 1 of the Maine Constitution). However, this Department is not aware of any case in which the constitutionality of a governmental regulation establishing a setback requirement for the purpose of limiting the effects of agricultural activity on abutting land has been decided.^{2/} Nonetheless, in view of the strong presumption of validity to which regulation of this kind is entitled, and in view of the clear constitutionality of the governmental purpose of the promotion of agricultural production through preservation of farmland, it does not appear likely that a court would invalidate the legislation because of the restrictions which it places on abutting landowners.

^{2/} In one case, a governmental entity attempted to deny an application for a subdivision on land next to an agricultural area because, among other things, "agriculture odors, dust and pesticides would be spread to the proposed plat . . . which might be harmful to residential lot owners and pets . . ." This action was invalidated by the courts, but not for any constitutional reason, but because the record of the governmental entity's decision did not provide a sufficient factual basis for the decision. Nagatani Bros., Inc. v. Skagit County Board of Commissioners, 739 P.2d 696 (Wash. 1987).

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

Sincerely,



JAMES E. TIERNEY
Attorney General

JET:mfe

cc: Senator Zachary E. Matthews
Representative Robert J. Tardy,
Chairman, Joint Standing Committee on Agriculture
Senator Thomas R. Perkins
Representative John Lisnik
Representative Vinton T. Ridley
Co-sponsors Legislative Document 1746

3/ It has also been suggested that the bill might be constitutionally infirm because its registration provisions would constitute an invalid delegation of legislative power to private persons, in violation of Article III, section 1 and Article IV, section 1 of the Maine Constitution. In the view of this Department, however, the statute cannot be viewed as delegating legislative authority. Rather, it simply empowers citizens of the State to register land which meets certain legislatively determined requirements. The fact that such registration results in certain consequences to abutting owners does not make the statute different from other registration statutes, such as those concerning security interests, under which the act of registration accords to one citizen rights against another. The bill therefore vests no discretion in a private person. Consequently, it cannot be said to be delegating legislative authority. See generally Lucas v. Maine Commission of Pharmacy, 472 A.2d 904 (Me. 1984).

(EMERGENCY)

SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY SEVEN

AN ACT to Preserve Agriculture in Areas of
Adjacent Land Development

Emergency preamble Whereas, Acts of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, with the rapid pace of land development in the State it is desirable to take action as soon as possible to deal with the use of farmland and the development of adjacent areas; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

7 MRSA c. 2-A is enacted to read:

CHAPTER 2-A

AGRICULTURAL LAND AND ADJACENT DEVELOPMENT

§41. Purpose

The Legislature finds that the public health, safety and welfare is threatened when land adjacent to farmland is developed for human habitation. Such development and the uses incident to it are inconsistent with various activities commonly engaged in on farmland, such as the application of agricultural chemicals and the maintenance of other conditions not commonly encountered in residential settings. The Legislature declares that the purpose of this statute is:

1. Health impacts. To minimize any health or other adverse impacts which common agricultural activities may have on the occupants of land adjacent to farmland;

2. Agricultural activities. To protect the ability of farmers to engage in common agricultural activities with minimal potential for causing harm to their neighbors;

3. Full land use. To permit the owners of both farmland and adjacent land to maintain to the highest degree possible the full use and enjoyment of their land;

4. Production capacity. To conserve agricultural production capacity for present needs and for the future;

5. Harmony. To promote harmony between agriculture and adjacent nonfarm development;

6. Responsibility. To recognize the mutual responsibility of agricultural operators and persons siting nonfarm development adjacent to farmland to take steps to accommodate each others' concerns and the public interest;

7. Information. To institute a program whereby owners of agricultural land may voluntarily ensure that purchaser of adjacent property will be informed in advance of purchase of the existence of an adjacent farm operation; and

8. Distance. Where farmland is registered for the application of agricultural chemicals, to provide some accommodation both for that activity and for adjacent nonfarm development by distancing them from each other.

§42. Definitions

As used in this chapter unless the context otherwise indicates the following terms have the following meanings.

1. Abutting land. "Abutting land" means real estate which shares a common boundary, or portion of a boundary, with registered farmland.

If a road forms a common boundary with registered farmland, the road shall be considered part of the land adjoining the road opposite the registered farmland in question and the land opposite the registered farmland will be considered abutting land.

2. Agricultural chemicals. "Agricultural chemicals" mean fungicides, insecticides, herbicides, pesticides, and organic and inorganic soil amendments, including, without limitation, fertilizers and manure.

3. Commercial Farming. "Commercial farming" means the production of any "farm product," as defined by Title 17, section 2805, which is accomplished with the intent that such farm product be sold or otherwise disposed of to generate income.

4. Farmland. "Farmland" means any tract or tracts of land, the use of which is commercial farming and which meets either of the following criteria:

- A. it consists of 10 or more contiguous acres, or
- B. it has produced a gross income of at least \$500 per acre for at least 3 of the previous 5 calendar years.

5. Inconsistent Development or Use. "Inconsistent development or use" means development or use of land which:

- A. Is initiated after the registration of the abutting farmland under this chapter;
- B. Takes place upon abutting land within 150 feet of registered farmland to which agricultural chemicals are applied or intended to be applied, as stated in the registration; and
- C. Is of any of the following kinds or is used for any of the following purposes:
 - (1) Residential buildings;
 - (2) Public and private wells, drinking water springs and water supply intake points;
 - (3) School buildings and any playgrounds, athletic fields or other school facilities designed for use by children in the vicinity of school buildings;
 - (4) Commercial establishments dispensing or selling food;

(5) Public and commercial campgrounds and picnic areas.

D. "Inconsistent development or use" shall not include any expansion of an existing use; provided that, where the existing use is a building, the expansion does not increase the total floor area of the building by more than 100% and the expansion is no closer to the registered farmland than is the existing building.

§43. Registration

1. Filing. An owner of farmland may register all or any designated portion of his farmland upon which the owner intends to apply agricultural chemicals, in the office of the municipality or municipalities in which the farmland is located between April 15, and May 1, 1988 or January 15 and February 1 of any year thereafter. In the event there is no official municipal office, the registration shall take place with the town assessor. In case the farmland is located in the unorganized territory, the registration shall take place in the office of the county in which the farmland is located. A registration made under this chapter remains effective until withdrawn in accordance with subsection 4.

2. Contents. A registration shall clearly identify the registered farmland both by written description and by designation on a copy of the municipal tax map, or, if no tax maps are available, on such other records as the municipality keeps for the purpose of assessing taxes on real estate. It shall describe the nature of the farming activity and shall state the owner's intention to use or apply or permit the use or application of agricultural chemicals upon the registered farmland. The Department shall prepare registration forms for use by municipalities and registrants.

3. Notice. The owner registering farmland shall notify all abutting landowners, as indicated on municipal or state tax records, of the registration by sending by registered mail to abutting land owners a copy of the registration information filed pursuant to Section 1 of this section.

4. Withdrawal from registry. An owner of farmland must withdraw the farmland from registration if it no longer qualifies for registration under this chapter. An owner of registered farmland may withdraw the farmland from registration by filing a written notice of withdrawal in the municipal office or other office in which the farmland was registered. Any abutments shall be notified as provided in subsection 3.

5. Amendment of registration. Amendments, additions or withdrawals from land registered may be made during the periods April 15th to May 1st 1988 or January 15th to February 1st of each year thereafter. Any abutments shall be notified as provided in subsection 3.

6. Municipal registry. Each municipality shall establish and maintain a registry of farmland which is updated by June 15th, 1988 and annually by March 15th thereafter, to include registrations, amendments and withdrawals. The registry shall be operated in a manner that makes the information reasonably accessible to interested persons and effective to inform them as to the existence in the registry of particular farmland.

7. Fees. A municipality may charge a fee for the filing of registrations which shall not exceed \$50 for each document. The municipality may refuse to file a registration until the fee is paid.

§44. Proceedings

An abutting landowner or the municipality may institute any of the following proceedings with the zoning board of appeals, or, if none, with the municipal body which hears zoning appeals:

1. A proceeding to determine eligibility of farmland for registration. If such a proceeding is initiated, the owner of farmland shall have the burden of proving to the municipal body that the farmland in question meets the requirements for registration under this chapter. The proceeding shall be commenced within 15 days after receipt of notice of registration. Farmland registration shall not be effective until the expiration of 15 days after receipt of notice by the municipality and abutting owners as required in this chapter, or, if review proceedings are initiated under this paragraph as required in this chapter, upon the decision of the municipality upholding the registration.

2. Proceedings to determine the continued eligibility of registered farmland. Upon petition of any abutting owner or of the municipality, the owner of registered farmland shall have the burden of proving to the municipal body that the registered farmland continues to meet the requirements for registration under this chapter. Such proceedings may be initiated only once in any two year period.

3. Appeals. A decision made by a municipal body under this section may be appealed by any aggrieved party as allowed by law for appeals of decisions made by a zoning board of appeals.

§45. Disclosure required

Provided proper notification was given at the time the farmland was first registered, every seller of real estate and every agent of a seller shall disclose in writing, in a purchase and sale agreement for the real estate, or, if there is no such agreement, prior to the sales transaction, the existence of registered farmland abutting any boundary or portion of a boundary of the real estate offered for sale.

§46. Prohibited Acts

1. Inconsistent development. No owner of abutting land may undertake or allow any inconsistent development upon or use of land within 150 feet of properly registered farmland.

2. Building permit. Except as provided in Section 47, no municipality may issue a building or use permit allowing any development which is prohibited under subsection 1.

§47. Variance

An owner of real estate may apply to the municipal Zoning Board of Appeals or other municipal body hearing zoning appeals, or, in the case of areas within its jurisdiction, the Land Use Regulation Commission, for a variance permitting an inconsistent development upon or use of land which is otherwise prohibited under section 46. Such a variance shall be issued only upon the finding that the criteria set forth in Title 30, MRSA §4963 (3) for variances are satisfied.

§48. Enforcement and Penalties

1. Enforcement. Proceedings to enforce any provision of this chapter may be brought by a municipality, county or any aggrieved person. Such proceedings may be initiated in accordance with the provisions of Rule 80K of the Maine Rules of Civil Procedure, as applicable.

2. Remedies. Any violation of this chapter shall be punishable as follows:

A. In the case of failure or refusal to disclose the existence of registered farmland as provided by Section 45, the contract for sale of the real estate and any transfer of title may be declared void by the buyer within three months following the closing, and any money deposited or paid by the buyer to the seller or the agent of the seller shall be returned to the buyer.

B. Any inconsistent development upon or use of land in violation of this chapter may be removed or discontinued by order of the court in a proceeding to enforce this chapter, and the court may fashion any other appropriate equitable remedy consistent with the purposes of this chapter.

C. Any person who violates any provisions of this chapter shall, in addition to the provision of this section, be subject to the civil penalties and enforcement procedures for land use laws and ordinances in Title 30, Section 4966.

§49. Other Laws Not Affected

Nothing in this chapter shall affect the legal rights, remedies or liabilities of persons arising out of negligence or other wrongful acts or omissions involving the use of pesticides or other agricultural chemicals.

Emergency clause. In view of the emergency cited in the preamble, this Act shall take effect when approved.

STATEMENT OF FACT

This bill is a new draft of LD 1749, which was held over from the First Regular Session. It was prepared by the Department of Agriculture, Food and Rural Resources together with a member of the Joint Standing Committee on Agriculture and interested parties.

The purpose of this bill is to protect public health and to promote harmony between commercial agriculture and adjacent non farm development. By registering his land at the municipal office, the farmer creates notice for any future neighboring landowner that agricultural chemicals, including fertilizers, pesticides and manure, will be applied to the registered farmland. Real estate agents will be required to disclose the existence of the registered farmland. Real estate agents will be required to disclose the existence of the registered farmland to buyers of abutting property.

Land within 150 feet of registered farmland could not be developed in a manner which would be inconsistent with public health or would be otherwise incompatible with agricultural uses in the immediate vicinity. Other uses of abutting land are not being restricted. This bill does not affect grandfathered, pre-existing uses of abutting land and does not affect the rights of farmers to engage in generally accepted agricultural practices.