STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

residential purposes unless such lot or parcel of land is at least 20,000 square feet in size . . . ." (Italics supplied.)

The obvious intent of this law is to prohibit the disposal of sewage on lots considered by the Legislature to be inadequate in size for that purpose (to wit, lots of less than 20,000 square feet) when such lots are not served by public or private community sewers. When sewage is not disposed of on site, but rather is carried away from the site by a "public or private community[1] sewer"[2] for disposal at a second site, there is no reason to insist upon a minimum lot size of 20,000 square feet to insure adequate sewage disposal.

This opinion in no way relates to any other State or local minimum lot size requirements that may be applicable, nor does it relate to any requirements applicable to the site at which sewage is finally being disposed.

E. STEPHEN MURRAY
Assistant Attorney General

December 23, 1970
Cultural Building Authority

Niran C. Bates, Chairman

Authority of Electrician's Examining Board to Require Construction Changes

SYLLABUS:

Even though the electrical plan of the Cultural Building had been State approved, the Electrician's Examining Board could require changes to meet State standards. The contractor is entitled to additional payment for previously unspecified work. There is no basis for recovery from the architect since there is no indication of failure to exercise reasonable care nor as to extent the ultimate cost would have been less if the initial plan had incorporated the additional requirement.

FACTS:

On June 1, 1967, the Maine State Cultural Building Authority (hereinafter, Authority) entered into an agreement with Walker O. Cain & Associates (hereinafter, Architect) for the preparation of plans and specifications and supervision of the construction of the Maine State Cultural Building. The plans and specifications for such a building, including the electrical plan prepared for the architect by their consulting engineers, Jansen & Rogan, were submitted for final review on January 30, 1969, and were finally approved by the Authority, the Bureau of Public Improvements, (hereinafter, BPI), Insurance Department (signed by the person who was the Director of the Fire Prevention Division and Executive Secretary of the Electrician's Examining Board), and the Bureau of Health, on March 18, 1969. Thereafter, bids were solicited

1) Black's Law Dictionary (4th Ed. 1951), *Community,* "Neighborhood; vicinity, synonymous with locality. . . People who reside in a locality in more or less proximity. . ."

2) Black's Law Dictionary (4th Ed. 1951), *Sewer,* ". . . an artificial (usually underground or covered) channel used for the drainage of two or more separate buildings. . ."

and the contract upon these State approved plans and specifications was awarded to Stewart and Williams, Inc. (the general contractor) and the electrical work was subcontracted to Kerr Electrical Co. Some time after work had commenced on the building and while the electrical installation was in progress, the State Electrical Inspector reported that one aspect of the electrical work in progress failed to comply with the National Electrical Code as required by Maine law. Kerr Electrical Company was then advised of this reported deficiency by a letter from the Executive Secretary of the Electrician's Examining Board, requiring the following corrective action; "Distribution panels that derive there (sic) energy from dry type transformers shall have over-current protection on the load side of the transformers, article 384-16 and article 240-5." A dispute then ensued over the correct interpretation of the above-cited sections of the National Electrical Code (hereinafter, Code). Kerr Electrical Company, Jansen & Rogan and Mr. Crowley (Mechanical Engineer in BPI) contended that such secondary circuit protection was not required by the NEC. Their position is supported by an article in the May 1970 edition of the Electrical Construction and Maintenance magazine. The contra position of the State Electrical Inspector is supported by the opinion of the Chief Electrical Inspector of Chicago and the opinion of the Code Consultant of the International Association of Electrical Inspectors. On June 6, 1970, the dispute was presented to the Maine Electrician's Examining Board which then upheld the decision of the State Electrical Inspector. The architect's consulting engineers then submitted a revised electrical plan to carry out that decision, which plan was then approved by the State Electrical Inspector. On July 16, 1970, the general contractor submitted a proposal to accomplish this additional electrical work "on a time and materials basis with a TOTAL UPSET PRICE NOT TO EXCEED $8,268.00" which proposal was accepted by the Authority.

QUESTIONS:

1. Does the State of Maine Electrician's Examining Board have authority after approval of contract plans by the Department of Insurance and during the course of construction to require changes in the electrical system?
2. Is the Authority required to make the changes as indicated by the Electrician's Examining Board and to assume the costs incurred by the changes?
3. Does the Authority have any legal basis to collect this additional expense (See Item 16 attached, Pending Change Order No. 105C-$8,268.) from either the Architect or the General Contractor?

ANSWERS:

1. Yes.
2. Yes.
3. No.

REASONS:

32 M.R.S.A. Chapter 17 applies to all electrical installations within this State except those which are expressly exempted by §1102 of that chapter. Authority and BPI are not included within any of the exceptions listed in that §1102. The Legislature has directed that all nonexempted electrical installations –

"shall comply with the current edition of the National Electrical Code, pamphlet

No. 70, published by National Fire Protection Association and with applicable statutes of the State and all applicable ordinances, orders, rules and regulations of any city or town or the Electricians Examining Board." 32 M.R.S.A. §1153-A. (P.L. 1967, c. 69, §5, effective October 7, 1967.)

It has also provided that:

"Whenever any state electrical inspector shall find any electrical installation in any building or structure which does not comply with this chapter, he shall order the same to be removed or remedied and such order shall forthwith be complied with by the owner or occupant of such premises or buildings. Such owner or occupant may, within 24 hours, appeal to the Electricians Examining Board, which shall within 10 days review such order and file its decision thereon, and its decision shall be complied with within such times as may be fixed in said decision of the Electricians Examining Board." 32 M.R.S.A. §1104.

It is apparent that the legislature has prescribed certain standards for nonexempt electrical installations, that it has reposed the responsibility for insuring compliance with these standards in the Electrician's Examining Board, acting primarily through its appointed state electrical inspectors and finally as an appellate body. It is also clear that this responsibility is a continuing one, that it does not cease upon approval of contract plans, but that these officials are required to act in full accordance with the legislative mandate "whenever" they discover a noncompliance with the standards prescribed by the Legislature. *CJS, Municipal Corporations § 173.*

"It [a permit] may be revoked when it has been issued without authority or in violation of the regulations; * * * * " (Id.)

The safety of the public must be guarded according to the view of the legislature and not according to the initially mistaken view of the regulating agency. *Altschul v. Ludwig,* 166 N.Y.S. 529.

While such a power does authorize the state electrical inspectors and the Electrician's Examining Board to rectify oversights, implicit within the legislative mandate is the duty to exercise it diligently in order to avoid undue expense to the individual and to the State. Nevertheless, the first and second questions must be answered in the affirmative.

With regard to the third question, there is no perceivable basis for charging the cost of the additional electrical installation to the general contractor. After being presented a set of plans and specifications that had been approved by all the requisite agencies of this State, *including the agency regulating electrical work,* the contractor submitted an offer to perform the specified work at a certain price, which offer the State accepted.

In submitting its bid to the State, the contractor was entitled to rely upon the State's representation that the architect's electrical plan fulfilled Maine electrical standards. During the course of construction, which was being performed in compliance with the State approved electrical plan, the State electrical regulating agency announced that the initial plan was inadequate and that certain additional electrical installations were required in order to comply with Maine electrical standards. However, the State was bound contractually by its first representation of adequacy. Accordingly, the general contractor was fully justified in requesting additional payment for additional work which had not been specified in the State approved bid request.

With regard to the architect, it appears that he has fully complied with his contract. The question presented relates to whether or not the architect submitted "adequate" plans, including plans in full compliance with the laws of the State. The initial electrical plan was accepted by the State, after approval for adequacy by the agencies of this State responsible for such determination. Upon further reconsideration of the electrical plan, while construction was in progress, the State Electrical Inspector discovered, and the

Electrician's Examining Board agreed with him, that the initial electrical plan was inadequate. The initial approval of the electrical plan by the State did not relieve the architect from responsibility for submission of an adequate plan. See paragraph IV (a), Instructions to Architects and/or Engineers for the Development of Plans and Specifications for State Project, incorporated by reference in paragraph IV A of the contract between CBA and the architect. Upon notification of the subsequent determination of inadequacy of the initial plan, based upon a disputed interpretation of the NEC, the architect submitted a revised electrical plan which is now deemed adequate.

If the initial plan had incorporated all of the requisite work, the State would have had the benefit of competitive bidding; while this might have reduced somewhat the $8,268 figure for such additional work, the material presented contains no facts upon which to base a determination of the extent of any such reduction. But even if the extent of such a loss could be determined, the architect is only liable therefor if the loss resulted from a failure on his part to exercise reasonable care. *CJS, Architects §19.* The Code Consultant for the International Association of Electrical Inspectors concedes that the pertinent sections of the Code are ambiguous and that "an effort is now being made to clarify the rules in the Code for secondary overcurrent protection." The architect's consulting engineers still dispute, with some supporting authority, the correctness of that interpretation which was finally adopted by the Electrician's Examining Board. *Furthermore, the Secretary of that Board had previously approved the initial plan without comment.* Under these circumstances, no substantial basis exists for concluding that the architect had failed to exercise reasonable care in preparing the initial electrical plan. Accordingly, the third question must be answered in the negative.

CHARLES R. LAROUCHE
Assistant Attorney General

January 11, 1971
Parks and Recreation Commission

Lawrence Stuart, Director

Participation of the Maine State Parks and Recreation Commission in the Historic Preservation Program Established by 16 U.S.C. §§ 470-a – 470-m, Pub. L. 89-665 (1966).

SYLLABUS:

The Maine State Parks and Recreation Commission has no authority to participate in the "program for preservation of additional historic properties" established by Pub. L. 89-665 (1966) (16 U.S.C.§§470-a to 470-m).

FACTS:

16 U.S.C. §§470-a – 470-m (1966) (Pub. L. 89-665) entitled "An Act to establish a program for the preservation of additional historic properties throughout the Nation, and for other purposes." provides for financial aid grants to states for "the acquisition of title or interests in and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture . . . in order to assure the preservation for public benefit of any such historical properties." In