STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

adjustment in the taxable base must be made.

In further support of the conclusion that the entire sum paid by the insured corporation to the insurance company is a gross direct premium, we understand that the corporate insureds are to be advised that the entire sum paid in annually by them to the insurance company is deductible as an insurance premium expense for federal income tax purposes which enables them to build funds on a pre-tax basis and when any of the funds on deposit in the Loss Fund are returned to the corporate insured the returned funds will be treated as taxable income.

In addition reference is made to the July 28, 1971 letter of Keith Brown, Esquire of LeBoeuf, Lamb, Leiby & MacRae (see attached material), when in writing about the proposed insurance company at the suggestion of Mr. Michael Clement, Vice President of North Star Reinsurance Corporation, he states in pertinent part:

> "All *premiums* received by that company less 5% will immediately be paid over to a provisional bank or trust company and held by it for the benefit of the insured making any premium payment pursuant to a Loss Fund Agreement." (Emphasis supplied)

Certainly such language is consistent with the position that the sums received by the insurance company from an insured corporation would be deductible as a premium expense, we also believe such language to be consistent with the conclusion that such premiums are gross premiums and are taxable at the rate of 1% after the necessary adjustment for return of premiums.

JEROME S. MATUS

August 19, 1971
E.I.C.

William R. Adams, Director

Questions concerning Me. Public Laws 1971, c. 535

SYLLABUS:

The mandatory shoreland areas zoning requirements of Me. Public Laws 1971, c. 535, apply within 250 feet of the normal high water mark of all navigable flowing bodies of water in the State.

Whether a body of water is "navigable" is a question of fact for administrative determination in the first instance.

FACTS:

By memo you have asked the following questions regarding interpretation of Me. Public Laws 1971, c. 535.

QUESTION NO. 1:

The subject law defines the term "shoreland areas" as "those land areas any part of which are within 250 feet of the normal high water mark of any navigable pond, lake, river or salt water body . . . " can the word "river" be construed to include brooks and streams?

ANSWER NO. 1:

Yes, if such flowing bodies of water are navigable.

OPINION NO. 1:

The word "river" as used in the subject law should, in our view, be read in conjunction with the term "navigable" which modifies it. Read together, these words evince a legislative intent that the subject law apply to flowing bodies of water which are navigable.

QUESTION NO. 2:

What constitutes a "navigable" body of water for purposes of the subject law?

ANSWER NO. 2:

See opinion.

OPINION NO. 2:

Whether a body of water is navigable is a question of fact for administrative determination, and not a question of law. *See Flood v. Earle,* 145 Me. 24, 71 A.2d 55 (1950). Maine case law indicates that the capability of use for transportation is the criterion of whether or not a stream is navigable. *Smart v. Aroostook Lumber Co.* 103 Me. 37, 68 Atl. 527 (1907). All bodies of water which in their natural condition are capable of floating boats, rafts and logs are under Maine law "navigable". *Ibid.; see also Wilson & Son v. Harrisburg,* 107 Me. 207, 77 Atl. 787 (1910). Some specific waters have had their navigability adjudicated, *e.g., State v. Plant,* 130 Me. 261, 155 Atl. 35 (1931) (Kennebec River); *Smart v. Aroostook Lumber Co., supra* (Presque Isle stream); *Veazie v. Moor,* 55 U.S. 568 (1852) (Penobscot River).

QUESTION NO. 3:

The subject law uses the term "municipal units of government". What is the meaning of this term?

ANSWER NO. 3:

The term "municipal units of government" should be considered to have the same meaning as the term "municipality" as defined in 1 M.R.S.A. § 72, sub-§13.

QUESTION NO. 4:

The subject law empowers the commission, in conjunction with another State agency, to adopt a shoreland zoning ordinance for any municipality who fails to do so by June 1, 1973, or for any municipality whose shoreland zoning ordinance is, in the judgment of these agencies, lax and permissive. You inquire how the Commission is to determine whether local ordinances are adequate.

ANSWER NO. 4:

Not answered.

OPINION NO. 4:

The subject law places the burden of determining adequacy of local shoreland zoning ordinances upon the two named state agencies. Accordingly, these agencies must internally develop their own methods for determining such adequacy. After such methods have been developed, we will be pleased to review them if you wish.

QUESTION NO. 5:

Is the question of laxity and permissiveness of a local shoreland areas zoning ordinances to be judged by reference to the letter of the ordinance alone, or may the commission consider the record of the municipality's administration and enforcement of the ordinance as well?

ANSWER NO. 5:

Not answered.

OPINION NO. 5:

We again direct your attention to the fact that the subject law leaves the determination of adequacy of local shoreland zoning ordinances upon the named state agencies. The agencies must develop their own criteria for determining adequacy. The municipality's record of administration and enforcement of the ordinance may well be a factor which the Commission might wish to consider in making its determination.

ROBERT G. FULLER, JR.
Assistant Attorney General

August 18, 1971
Bureau of Public Improvements

Richard Batchelder, Supervising Engineer

Construction of Swimming Pool at the Pineland Hospital and Training Center

SYLLABUS:

Absent Special Legislation, the construction of the swimming pool at the Pineland Hospital and Training Center is entirely a State matter controlled by Title 5, M.R.S.A. 1964, Chapter 153; the funds appropriated by the Legislature can not be turned over to the control of any individual or group for the private contracting of pool construction. There is no authority for restricting bidders to contractors having all union employees; the Governor and Council can not accept a gift of funds for construction of the Pineland pool subject to such condition.